

Courting Faith:
**An empirical study of lawyers' perceptions of the
relationship between religion and judicial decision-making**

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Abstract

The traditional view of judicial behaviour posits that only the evidence and the law form the basis of a judicial decision. However, research shows that judging is influenced by a variety of legal and non-legal factors, particularly in cases involving judicial discretion. Whilst there is a wealth of empirical research that explores the interplay between religion and judging in other jurisdictions, particularly in the US where judges' faith has been found to affect judicial decisions in certain legal areas, much less scholarly attention has been paid to this relationship in the context of the British courts. This socio-legal study uses semi-structured interviews with barristers and an online questionnaire completed by solicitors, both predominantly practising in employment or family law, to explore whether the religious beliefs of judges are perceived by lawyers to influence individual judicial decision-making in the English courts and, if so, how.

The study finds that judges' faith is perceived to potentially influence the decisional process in cases which, directly or indirectly, involve religious issues. However, the effect of such influence is considered to be marginal, being generally confined to that which is unconsciously manifested and not determinative of case outcomes.

Constraints on judging are thought to be central in ensuring that judicial decision-making remains within the limits of the law. Whilst lawyers are largely confident that the influence of religious beliefs is not a cause of concern in judicial decision-making in the English courts, the evolving religious and legal landscapes in Britain means that there is no room for complacency. Judicial training, both in relation to understanding religiously sensitive issues and the role played by unconscious biases, is vital to ensure that judgments are reached on the basis of sound legal reasoning and not on the basis of judges' personal proclivities.

Table of Contents

| | |
|--|-----|
| Abstract..... | 2 |
| List of figures | 6 |
| List of tables | 7 |
| Table of Cases..... | 8 |
| Table of Statutes and Legislation | 12 |
| Acknowledgements | 13 |
| CHAPTER 1 INTRODUCTION | 15 |
| 1.1 Introducing the research issue..... | 15 |
| 1.2 Background: Changing landscapes | 18 |
| 1.3 Explaining the focus on religion | 25 |
| 1.4 Lawyers' perceptions..... | 29 |
| 1.5 Researcher perspective | 36 |
| 1.6 Summary and structure of thesis..... | 37 |
| CHAPTER 2 RELIGION AND JUDICIAL DECISION-MAKING: THEORETICAL PERSPECTIVES | 38 |
| 2.1 Introduction | 38 |
| 2.2 Defining religion..... | 38 |
| 2.2.1 Religion as a research concept..... | 39 |
| 2.2.2 'Religion' in the UK courts | 42 |
| 2.3 Theories and models of adjudication | 63 |
| 2.3.1 Conceptions of the judicial role in the English Courts | 63 |
| 2.3.2 Constraints on judging..... | 65 |
| 2.3.3 Theories of adjudication | 67 |
| 2.3.4 Models of judicial behaviour..... | 69 |
| 2.4 Judging through a judicial lens | 73 |
| 2.5 Impartiality in an adjudicative context | 77 |
| 2.6 Conclusion..... | 89 |
| CHAPTER 3 UNDERSTANDING JUDICIAL DECISION-MAKING: RESEARCH LANDSCAPE | 91 |
| 3.1 Current research landscape in the UK..... | 91 |
| 3.2 Explaining the paucity of empirical research | 103 |
| 3.3 Empirical findings from other jurisdictions | 108 |

| | |
|---|-----|
| 3.3.1 Evidence from the US | 108 |
| 3.3.2 Evidence from Commonwealth countries..... | 119 |
| 3.4 Using US studies to conduct similar research in the UK..... | 121 |
| 3.5 Conclusion..... | 126 |
| CHAPTER 4 RESEARCH METHODOLOGY AND METHODS | 128 |
| 4.1 Using empirical legal research | 128 |
| 4.2 Research design | 129 |
| 4.3 Research paradigm: pragmatic worldview | 129 |
| 4.4 Research strategy: exploratory sequential design..... | 130 |
| 4.5 The missing dimension: perspectives from the bench..... | 133 |
| 4.6 Research Method Study I: Qualitative Interviews with Barristers | 134 |
| 4.6.1 Barristers: a purposive sample | 134 |
| 4.6.2 Sample selection..... | 136 |
| 4.6.3 Sample characteristics | 138 |
| 4.6.4 Data collection: semi-structured interviews..... | 139 |
| 4.6.5 Data Preparation..... | 140 |
| 4.6.6 Data management and analysis..... | 141 |
| 4.7 Research Method Study II: Solicitor Perceptions Questionnaire..... | 144 |
| 4.7.1 Identifying the sample: Solicitors | 144 |
| 4.7.2 Sample criteria..... | 145 |
| 4.7.3 Data Collection: Solicitor Perceptions Questionnaire | 145 |
| 4.7.4 Sample selection..... | 149 |
| 4.7.5 Sample characteristics | 150 |
| 4.7.6 Data preparation..... | 154 |
| 4.7.7 Data analysis..... | 155 |
| 4.8 Limitations of research methods..... | 156 |
| 4.9 Ethical considerations..... | 157 |
| 4.10 Conclusion | 157 |
| CHAPTER 5 KEEPING AN OPEN MIND | 158 |
| 5.1 Introduction | 158 |
| 5.2 Preliminary matters | 158 |
| 5.2.1 Defining terms | 158 |
| 5.2.2 Respondent unique identifiers | 159 |
| 5.2.3 Use of data..... | 159 |

| | |
|--|-----|
| 5.3 The nexus between personal factors and judging..... | 159 |
| 5.3.1 The majority view: the inevitability of subjectivity | 159 |
| 5.3.2 Solicitors: a dissenting minority | 166 |
| 5.3.3 What personal factors influence judicial decision-making? | 171 |
| 5.3.4 A challenge to orthodoxy?..... | 177 |
| 5.4 Do judges' religious beliefs affect judicial decision-making? | 182 |
| 5.4.1 The view from the Bar..... | 182 |
| 5.4.2 Solicitor views | 192 |
| 5.4.3 Drilling down deeper: frequency, nature of influence and extent of impact..... | 200 |
| 5.4.4 Discussion..... | 222 |
| 5.5 Concluding remarks | 223 |
| CHAPTER 6 DEPERSONALISATION AND OPEN JUSTICE | 226 |
| 6.1 Criticism of judicial reasoning in religious rights cases..... | 226 |
| 6.2 An alternative approach: Specialist panels for religious issues?..... | 235 |
| 6.3 Exploring lawyers' views about religious diversity in the judiciary | 245 |
| 6.4 Remaining blind to judges' faith | 252 |
| 6.5 Conclusion..... | 261 |
| CHAPTER 7 CONCLUSION: FAITH IN JUSTICE | 262 |
| 7.1 Revisiting the research issue | 262 |
| 7.2 Key findings | 264 |
| 7.3 Implications of findings..... | 267 |
| 7.4 Study limitations | 269 |
| 7.5 Future directions | 271 |
| APPENDICES..... | 274 |
| BIBLIOGRAPHY | 375 |

List of figures

| | |
|--|-----|
| Figure 4.1 Overview of the exploratory sequential design used in this study | 131 |
| Figure 4.2 Barristers by year of call | 138 |
| Figure 4.3 Barristers by religion | 138 |
| Figure 4.4 Solicitor profiles according to main area of legal practice | 150 |
| Figure 4.5 Solicitor profiles according to PQE | 151 |
| Figure 4.6 Solicitor profiles according to frequency of attendance at court | 152 |
| Figure 4.7 Solicitor profiles according to religious beliefs | 153 |
| Figure 5.1 Lawyer perceptions of whether judges' personal factors influence judicial decision-making | 160 |
| Figure 5.2 Solicitor perceptions of the main judicial personal factors that affect judicial decision-making | 176 |
| Figure 5.3 Solicitor perceptions as to the influence of judges' personal factors and religious beliefs on judicial decision-making. | 193 |
| Figure 5.4 Perception of the frequency with which judges' religious beliefs influence judicial decision-making | 201 |
| Figure 5.5 Solicitors' perceptions of how judges' religious beliefs influence judicial decision-making | 206 |
| Figure 6.1 Lawyer responses as to whether they support or oppose the idea of a specialist panel of judges to hear cases involving religious rights | 236 |
| Figure 6.2 Solicitors' views about judicial diversity | 248 |
| Figure 6.3 Solicitors' views about extending the focus of judicial diversity initiatives | 251 |
| Figure 6.4 Views about knowing more about judicial personal factors | 255 |

List of tables

| | |
|--|-----|
| Table 3.1 Senior judiciary by education | 94 |
| Table 3.2 Senior judiciary by gender and ethnicity..... | 94 |
| Table 5.1 Religion and judging by area of practice..... | 196 |
| Table 5.2 Religion and judging by PQE | 197 |
| Table 5.3 Religion and judging by frequency of court attendance..... | 197 |
| Table 5.4 Religion and judging according to respondents' religious beliefs | 199 |
| Table 5.5 Frequency with which judges' religious beliefs influences judging by area of practice..... | 202 |
| Table 5.6 Frequency with which judges' religious beliefs influence judging by PQE... | 203 |
| Table 5.7 Frequency with which judges' religious beliefs influence judging by frequency of attendance at court | 203 |
| Table 5.8 Frequency with which judges' religious beliefs influence judging by religious beliefs | 204 |
| Table 5.9 Ways in which judges' religious beliefs influence judging by area of practice | 207 |
| Table 5.10 Ways in which judges' religious beliefs influence judging by PQE..... | 207 |
| Table 5.11 Ways in which judges' religious beliefs influence judging by frequency of attendance..... | 208 |
| Table 5.12 Ways in which judges' religious beliefs influence judging by religion..... | 208 |
| Table 5.13 Extent of impact of judges' personal factors on judging..... | 220 |

Table of Cases

A, Re (Children) (Conjoined Twins: Surgical Separation) [2001] 2 WLR 480

Airedale NHS Trust v Bland [1993] AC 789 (HL)

Al-Saffar v Al-Saffar [2012] EWCA Civ 1103 (CA)

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Grainger plc v Nicholson [2010] IRLR 4 (EAT)

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Habib v Elkington & Co Ltd [1981] ICR

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J A T, Re Lindham, 138 F 2d 650 (2d Cir 1943)

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Kimyani v Sandhu [2017] EWHC 151(Ch)

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Lee v Ashers Bakery Co Ltd and others [2015] NICty 2

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451

Maistry v BBC (ET 1313142/10) (14 February 2011)

Mandla v Dowell-Lee [1983] 1 ALL ER 1062

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Porter v Magill [2002] 2 AC 537

R (Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15

R (E) v Governing Body of the Jewish Free School [2009] UKSC 15

R (Ghai) v Newcastle City Council [2010] EWHC 978 (Admin)

R (Hodkin) v Registrar General of Births, Deaths and Marriages) [2013] UKSC 77

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Table of Statutes and Legislation

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Data Protection Act 1998

Equality Act 2010

Human Rights Act 1998

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Race Relations Act 1976

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European

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International

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...if the judge is not a machine, however ingeniously constructed, that is to work a mechanical system, it does very much matter what personal quality he brings to his work, because it is not going to be only his command of the reasoning process or his knowledge and learning that will determine his interpretation, but in the end, his experience of life and the structure of thought and belief that he has built upon it.

Lord Radcliffe¹

¹ Lord Radcliffe, *Not in Feather Beds* (1st edn, Hamish Hamilton Ltd 1968).

CHAPTER 1

INTRODUCTION

1.1 Introducing the research issue

*'Christian BA worker loses appeal over cross'*¹

*'Christian B & B owners lose Supreme Court battle over gay discrimination'*²

*'Muslim woman must remove burka in court, judge insists'*³

*'Judge rules Jehovah's Witness boy can receive blood transfusion'*⁴

Baroness Butler-Sloss recently wrote: '...it is rare for a day to pass in which religion does not feature in one way or another in the news headlines'.⁵ One of the key areas in which it does so concerns matters involving the interface between law and religion. The headlines above offer a snapshot of the sorts of religious issues that the courts have been required to adjudicate in the twenty-first century. The first relates to the high profile case of *Eweida v. British Airways plc*,⁶ in which the domestic courts held that the claimant, a practising Coptic Christian, had not been discriminated against because of her religion when her employer refused to allow her to wear a small, but visible cross whilst at work.⁷ In *Bull v Hall*,⁸ the 'Christian B & B owners' case, the court held that Christian hoteliers who had refused to let out a double room to a homosexual couple on the basis that to do so was contrary to their religious

¹'Christian BA worker loses appeal over cross' *The Guardian* (London 12 February 2010) <<www.theguardian.com/uk/2010/feb/12/christian-british-airways-worker-cross> accessed 12 June 2017.

²'Christian B & B owners lose Supreme Court battle over gay discrimination' *The Telegraph* (London 27 November 2013) <www.telegraph.co.uk/news/religion/10477636/Christian-BandB-owners-lose-Supreme-Court-battle-over-gay-discrimination.html> accessed 12 June 2017.

³Rosa Silverman, 'Muslim woman must remove burkas in court, judge insists' *The Telegraph* (London 23 August 2013) www.telegraph.co.uk/news/uknews/law-and-order/10261550/Muslim-woman-must-remove-burka-in-court-judge-insists.html accessed 12 June 2017..

⁴Judge rules Jehovah's Witness boy can receive blood transfusion' *The Guardian* (London 8 December 2014) www.theguardian.com/world/2014/dec/08/judge-rules-jehovahs-witness-boy-blood-transfusion accessed 12 June 2017.

⁵Javier Garcia Oliva and Helen Hall, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (Routledge 2017).

⁶[2010] EWCA Civ 80.

⁷cf the subsequent decision of the ECtHR in *Eweida v UK* (2013) ECHR 37.

⁸[2013] UKSC 73.

beliefs had unlawfully discriminated against on grounds of sexual orientation. In *R v D(R)*,⁹ the court considered whether a female defendant was entitled to wear the niqaab during criminal proceedings against her. In this much publicised case, the court directed that the defendant could wear the niqaab during her trial, except for when she gave evidence, and that she could give evidence from behind a screen or by live TV link, so long as she was visible to the judge, the jury and counsel. The final headline relates to the case of *NHS Trust v B*,¹⁰ in which Moylan J ordered that a blood transfusion could be administered to a child who needed a skin graft having suffered severe burns, despite the objections of the parents who opposed this treatment on grounds of their religious beliefs as Jehovah's Witnesses.

Whilst these examples relate to cases expressly involving the manifestation of religious beliefs, there are many other situations in which religiously sensitive issues may arise in court: right to life or right to die disputes,¹¹ matters relating to education,¹² and disputes in relation to marriage or divorce,¹³ to name but a few.

Given the importance of religion in many people's lives and on-going debate about the role played by religion in the public fora, such headlines, together with cases involving religious issues which do not attract media attention, raise a simple question: Does a judge's faith ever affect his or her judicial decision-making? With the principle of judicial impartiality forming part of the foundation of a democratic civil society, to claim that there is a personal dimension to judicial decision-making which sometimes influences how cases are reasoned is controversial; as Rackley asserts, 'the merest whiff that an outcome of any case rests – to any extent – on the personality, preferences or characteristics of the judge that hears it causes

⁹ [2013] Eq LR 1034.

¹⁰ [2014] EWHC 3486 (Fam).

¹¹ Eg *R (on the application of Pretty) v DPP* [2001] UKHL 61 in which the question was whether the husband of a terminally ill patient would be given immunity from prosecution from the DPP if he assisted her suicide and, if not, whether s2(1) of the Suicide Act 1961 was incompatible with, inter alia, ECHR art 9; also the controversial case of *Great Ormond Street Hospital v Yates* [2017] EWCA Civ 410 (CA) in which the court had to determine whether it was in a baby's best interests to have life support withdrawn or if his parents' wish for the baby to receive experimental treatment in the US should be granted.

¹² Eg *R(R) v Leeds City Council* [2005] EWHC 2495 in which the question was whether the local authority should be required to provide free transport to Orthodox Jewish Children based in Leeds who wanted to attend a Jewish school in Manchester.

¹³ Eg in *Al-Saffar v Al-Saffar* [2012] EWCA Civ 1103 (CA) the court ruled that, contrary to the Muslim tradition where maintenance is not usually paid to the ex-wife irrespective of whether there are children involved, a Muslim married under Sharia Law would have to pay his ex-wife maintenance in accordance with English law.

considerable consternation and upset among litigants and the general public'.¹⁴ Yet, is it realistic to suppose that judges are always able to dissociate personal factors, including their religious beliefs, from their legal analysis and other aspects of their decision-making, particularly in cases involving religiously sensitive issues such as those above? If not, how can this be reconciled with the need for judicial impartiality? These questions drive the central claim underpinning this thesis: Judges' religious beliefs, like other personal factors, inevitably play a role in judging, particularly in cases involving religiously sensitive issues. Crucially, however, a judge's professional role commitments, together with other legal and non-legal constraints, are sufficiently robust to curb the influence that religious beliefs (and other judicial personal factors) may otherwise have on the process of judicial decision-making.

There is an existing body of empirical research that explores how judges' religion and other personal factors affect how decisions are reached, most of which emanates from studies of judging in the US appellate courts (this will be discussed further in Chapter 3). Although this research is generally inconclusive in relation to many legal areas, when the focus is more narrowly drawn to cases involving religiously sensitive issues, the evidence suggests that judges' faith may sometimes be a salient factor in how judicial decisions are reached. In contrast, there is a dearth of extant empirical research that explores how religion and other non-legal factors affect the judicial decision-making process in relation to the British courts.

This thesis fills an important gap in the literature by undertaking an empirical investigation into whether the religious beliefs of judges are perceived to influence judicial decision-making in the English courts. The relationship is explored from the unique perspective of lawyers who appear before judges, specifically barristers and solicitors.¹⁵

¹⁴ Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Taylor and Francis 2012) 134.

¹⁵ Throughout the thesis, 'lawyers' is used to refer to barristers and solicitors only.

The overarching research question is simply stated:

Do lawyers perceive that a judge's religious beliefs influence his or her individual judicial decision-making, and if so how?

In exploring this question directly, the following questions are also considered:

- Whether, and if so how, judges' personal factors are perceived by lawyers to impinge on the process of judging?
- How do judges alleviate the influence of such factors i.e. how do they demonstrate professionalism?
- Do lawyers think that judges understand and are sensitive to religious issues?
- Would increasing religious diversity in the judiciary make a difference to lawyers' perceptions of how judges adjudicate religious issues?
- If judges' religious beliefs are perceived to affect how decisions are reached, should there be a general requirement for judges to disclose their religious beliefs?

1.2 Background: Changing landscapes

Rise of judicial power and the 'juridification' of religion¹⁶

In the last few decades there has been an unprecedented expansion in the power and reach of the judiciary in the UK, especially compared to the other branches of government.¹⁷ A rise in the political significance of the judiciary in particular, what Bogdanor has described as a 'quiet but profound revolution',¹⁸ can be traced to a number of factors. These include, but are not limited to: the UK's accession to the European Union (which means that the UK courts may have to disapply UK law when inconsistent with EU law); the vigorous growth of judicial review which requires the courts to review the propriety of action taken by a public body in exercising a public function; the growth of the welfare state; the effects of

¹⁶ Russell Sandberg, *Law and Religion* (CUP 2011).

¹⁷ Alan Paterson and Chris Paterson, 'Guarding the guardians? Towards an independent, accountable and diverse senior judiciary' (2012) CentreForum < www.centreforum.org/assets/pubs/guarding-the-guardians.pdf > accessed 10 December 2016.

¹⁸ Vernon Bogdanor, 'Parliament and the judiciary: the problem of accountability', Lecture to the UK Public Administration Consortium, February 9 2006.

devolution; the introduction of the Human Rights Act 1998 (HRA) which incorporates the European Convention on Human Rights (ECHR) into domestic law (and gives the courts the power to uphold specific rights under the ECHR and to make declarations as to the compatibility of domestic law with Convention rights, whilst crucially preserving the sovereignty of Parliament by not permitting the courts to strike down incompatible legislation); changes brought about by the Constitutional Reform Act 2005, including increased leadership and administrative responsibilities for judges (such tasks were previously undertaken by the Lord Chancellor and his officials), and the establishment of the UK Supreme Court (UKSC), which contributes to the strengthening of the judiciary, at least symbolically, by providing a physical and functional separation of the UKSC from the legislature (even though, arguably, the powers of the court are not radically different to those enjoyed previously by the Law Lords).¹⁹

One consequence of this growth in the judicial remit is that the courts are increasingly called upon to adjudicate disputes which involve novel, controversial or sensitive issues. As Lady Hale acknowledges, one such area concerns cases that, directly or indirectly, involve the interface between law and religion.²⁰ Indeed, since the beginning of the twenty-first century, there has been a proliferation of cases with a religious dimension. Such cases arise in a variety of legal contexts, examples of which are legion: race and religious discrimination disputes in the workplace,²¹ the provision of goods or services,²² or in education;²³ asylum claims on religious freedom grounds;²⁴ religious upbringing disputes in family law;²⁵ medical cases involving life-sustaining medical treatment,²⁶ religiously motivated crimes;²⁷ and

¹⁹ Erin Delaney, 'Judiciary Rising: Constitutional Change in the United Kingdom' (2014) 108 NW U L Rev 572.

²⁰ Lady Hale, 'Secular judges and Christian Law' (2015) 17 Ecc LJ 170.

²¹ Eg *Eweida* (n6).

²² Eg *Bull* (n8).

²³ Eg *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL15 concerning religious dress at school.

²⁴ Eg *MT v Secretary of State for the Home Department* [2011] UKUT 00277(IAC) in which fear of religious persecution was held to be a ground for claiming asylum.

²⁵ Eg *Re G* [2012] All ER (D) 50 in which the court had to determine whether the best interests of children from an ultra-orthodox Jewish family could be served by being educated at their mother's choice of orthodox school or their father's choice of an ultra-orthodox school, contrary to their mother's wishes.

²⁶ Eg *NHS Trust* (n10).

questions about funerary rites.²⁸ The growth in the number of cases involving religious issues has largely been precipitated by significant developments in both the quantity and ambit of laws which regulate or affect religion, particularly, but not exclusively, in relation to human rights and discrimination law. Sandberg describes this phenomenon as the ‘juridification of religion’.²⁹ It might be expected that judges are more likely to consciously or unconsciously reflect upon and/or be influenced by their own religious values when dealing with religiously sensitive cases compared to those without a religious dimension.

Decline in religious affiliation

Contemporaneously, the religious landscape in Britain is in flux. Whilst still officially regarded as a Christian state, Woodhead observes that the cultural monopoly once enjoyed by the institutionalised forms of Christianity in the UK has waned.³⁰ Dawkins goes further; he suggests that ‘religion under the aegis of the established Church has become little more than a social pastime’.³¹ Such views are supported by evidence that indicates that the proportion of people who describe themselves as having no religion in England and Wales now exceeds that of those who define themselves as Christian – 48.5% as compared to 43.8%.³² Moreover, it is unclear whether those who do align themselves with a particular faith are: (1) active members of the religious group; (2) those who ‘believe without belonging’, what Voas describes as ‘a fuzzy intermediate’;³³ or (3) those who essentially belong without believing, most typically by reason of family tradition or cultural expectation, and whose religiosity is nominal at best. Concomitant to this decline, there has been an increase in people who identify with minority religious groups,

²⁷ Relevant legislation includes Crime and Disorder Act 1998 amended by Anti-Terrorism, Crime and Security Act 2001 and Protection of Freedoms Act 2012, Incitement to religious hatred under the Public Order Act 1986.

²⁸ Eg *R (Ghai) v Newcastle City Council* [2010] EWHC 978 (Admin) concerning whether domestic laws accommodated the wishes of a Hindu to have an open-air cremation.

²⁹ Sandberg (n16).

³⁰ Linda Woodhead and Rebecca Catto, *‘Religion or belief’: Identifying Issues and Priorities* (Equality and Human Rights Commission Research Report 48, 2010).

³¹ Richard Dawkins, *The God Delusion* (Black Swan Publishers 2007).

³² Harriet Sherwood, ‘People of no religion outnumber Christians in England and Wales – study’ *The Guardian* (London, 23 May 2016).

³³ David Voas and Alasdair Crockett, ‘Religion in Britain: Neither Believing nor Belonging’ [2005] 39 *Sociology* 11.

both Christian and non-Christian.³⁴ Principally attributed to immigration following the aftermath of the Second World War, other causes include a growth in break-away religions based on, but different to, traditional faith groups, and a steady rise in new religious movements.³⁵

Together, these changes have led Freedland and Vickers to argue that the UK is in a theoretical state of transition from one of tolerance in which Christianity enjoys primacy over other religions (but recognises that other faiths must not be disadvantaged through their own beliefs) to a diverse and multi-cultural climate in which all faiths are equal before the law.³⁶ This trend is unlikely to abate given the current ‘unsettled and unsettling context of the international environment’,³⁷ such as the recent surge of migrants entering Europe as a result of the current state of turmoil and unrest in areas such as the Middle East and East Africa. In fact, some research suggests that active adherents of minority faiths or those with no religion will continue to increase in the UK and are forecast to outnumber the Christian community by 2050.³⁸

New Challenges

It is widely acknowledged that many of the fundamental values which undergird the British legal system are founded in a Judaeo-Christian heritage. When national life was still essentially Christian-centric (when, it is suggested, those sitting in judgment and those involved in lawsuits were very likely to have a similar Christian outlook) there was limited scope for religion-induced tension in the courtroom, be it based on religious differences between the parties or as a result of faith issues clashing with the law. As Munby LJ observes, a little over a century ago, ‘the purpose of the law

³⁴ ONS Digital, ‘How religion has changed in England and Wales’ (4 June 2015) < www.visual.ons.gov.uk/2011-census-religion/> accessed 27 October 2015.

³⁵ Woodhead and Catto (n30).

³⁶ Mark Freedland and Lucy Vickers, ‘Religious Expression in the Workplace in the United Kingdom’ (2009) 30 Com Lab L& Pol’y J 597.

³⁷ Baroness Elizabeth Butler-Sloss, ‘Living with Difference: community, diversity and the common good’ Report of the Commission on Religion and Belief in British Public Life (7 December 2015) Woolf Institute.

³⁸ Pew Research Center, ‘The Future of World Religions: Population Growth Projections 2010-2050’ (2 April 2015) < www.pewforum.org/2015/04/02/religious-projections-2010-2050/> accessed 11 August 2016.

was the enforcement of morals. And that morality was of course, Christian'.³⁹ This is clearly exemplified in the legal approach relating to sexual issues and the common law offence of blasphemy and blasphemous libel.⁴⁰

However, shifting contours in both the judicio-legal and religious landscapes have given rise to a new climate. Whilst once Christian beliefs were central, the courts now have a very different approach. In *R (Johns) v Derby City Council*, the Divisional Court explained that today:

The laws and usages of the realm do not include Christianity, in whatever form. The aphorism that 'Christianity is part of the common law of England' is mere rhetoric; at least since the decision of the House of Lords in *Bowman v Secular Society Limited* [1917] AC 406 it has been impossible to contend that it is law.⁴¹

In the landmark case of *Bowman v Secular Society Limited*,⁴² the relatives of the testator, Bowman, sought to invalidate a pecuniary legacy bequeathed by him to the Secular Society. They argued that as Christianity was part of the law of the land, and the objects of the Secular Society illegal in that they constituted blasphemous libel (because they involved a denial of Christianity), the bequest was invalid. Overruling *Cowan v Milbourn*,⁴³ the Lords found that as the memorandum and articles of the Secular Society were not morally subversive or contrary to the law, the bequest was valid. As Lord Parker stated, to find otherwise would wrongly preclude courts from giving effect to trusts for the purposes of religions which did not accept the fundamental doctrines of Christianity.⁴⁴

It was further observed in *R(Johns) v Derby City Council* that:

³⁹ Lord Munby, 'Law, Morality and Religion in the Family Courts' Keynote address at the Law Society's Family Law Annual Conference 'The sacred and the secular: religion, culture and the family courts', (London, 30 October 2013) <www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/law-morality-religion-munby-2013.pdf> accessed 15 December 2013.

⁴⁰ For example, the decriminalisation of certain homosexual offences was introduced by the Sexual Offences Act 1967. The offences of blasphemy and blasphemous libel against Christianity were abolished in 2008 following the coming into effect of the Criminal Justice and Immigration Act 2008.

⁴¹ [2011] EWHC 375 (Admin) [39] (Munby LJ).

⁴² [1917] AC 406.

⁴³ (1867) LR 2 Ex 230.

⁴⁴ [1917] AC 406, 452.

Although historically this country is part of the Christian west, and although it has an established church which is Christian, there have been enormous changes in the social and religious life of our country over the last century. Our society is now pluralistic and largely secular. But one aspect of its pluralism is that we also now live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which has at one and the same time become both increasingly secular but also increasingly diverse in religious affiliation.⁴⁵

Thus, unlike their forebears, judges today sit in secular courts serving a religiously plural society.⁴⁶ The approach of the common law is respect for, and an essentially neutral view of, an individual's religious beliefs, together with 'a benevolent tolerance of cultural and religious diversity'.⁴⁷ The courts do not recognise religious distinctions and are reluctant to pass judgment on religious beliefs or the tenets, doctrines or rules of any particular section of society.⁴⁸

This approach has been reinforced by the coming into effect of the HRA, section 3 of which has placed an obligation on judges, so far as it is possible to do so, to read and give effect to domestic primary and subordinate legislation in a way which is compatible with the rights and freedoms protected under the ECHR. These changes present new challenges for the judiciary, both at a collective and individual level. For example, the growth in cultural and religious pluralism means that the religious beliefs of those appearing in court are often different from, and unfamiliar to, the judges hearing the cases. The court may have to decide what constitutes 'religion' and consider whether specific religious beliefs and practices qualify for legal protection. This in itself is no easy task; as McCrudden observes, it 'involves the difficult epistemological question of how courts can truly understand a normative system other than a legal system'.⁴⁹ Moreover, as Mnookin has argued in relation to family law cases involving issues such as what is in the best interests of a child, a plurality of values in society makes it more difficult for the courts to determine what

⁴⁵ *Johns* (n 41) 38.

⁴⁶ *ibid* 39.

⁴⁷ *ibid*.

⁴⁸ *ibid*.

⁴⁹ Christopher McCrudden, 'Religion, human rights, equality and the public sphere' [2011] 13 *Ecc LJ* 26, 30.

values should be used in judicial determinations.⁵⁰ A similar argument can be advanced in relation to other areas of law.

Most importantly, the cases coming before the courts now often involve religiously sensitive issues about which there is often no legal precedent. As Singh LJ reflects, in cases where the rules are not clear-cut or run out, the question is ‘Where are values to be found if not in the subjective views of the individual judge?’⁵¹ Plainly, these previously unexplored issues challenge judicial preconceptions and the expectations that others have of judges.⁵²

Whilst judges are increasingly tasked with deciding cases involving religious issues, the junction between judges’ religion and judging, like many other aspects of judicial decision-making, remains largely unexplored in relation to the British judiciary.⁵³ This exploratory study aims to add a new and important dimension to a small but growing body of academic literature which seeks to further the understanding of how judges judge in the UK, with a view to helping plug what Genn describes as the ‘information black hole’ that exists in our current understanding of judicial decision-making.⁵⁴ Moreover, it seeks to contribute to judicial diversity debate; if religion is considered to play a role in how judges decide cases, is there a case for religion to be considered in future judicial diversity initiatives?

At the same time, it is important to note that the researcher is not suggesting that religion is the only or most important factor that affects how judges reach decisions; the researcher agrees with Genn who posits that the complexities of decision-making, particularly in a juridical context, are far too great to draw firm conclusions as to the impact of factors such as religion on case outcomes.⁵⁵ Rather, the central objective of this doctoral study is to serve as an entry point from which the hitherto unexplored relationship between judges’ religion and judicial decision-making in the British courts can be examined.

⁵⁰ Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy* (1975) 39 LCP 226, 229.

⁵¹ Rabinder Singh, *Law as a system of values*, The Jan Grodecki lecture at the University of Leicester (24 October 2013) <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/singh-law-as-system-of-values20131031.pdf> accessed 6 November 2016.

⁵² Beverley McLachlin, ‘Judging: the challenges of Diversity’ (Judicial Studies Committee Inaugural Annual Lecture, Edinburgh, 7 June 2012).

⁵³ Hazel Genn, *Judging Civil Justice* (CUP 2010) 130.

⁵⁴ *ibid* 129.

⁵⁵ Genn (n53) 161.

1.3 Explaining the focus on religion

Above, it was explained that the judiciary's sphere of influence has grown considerably over the last few decades. Until recently, this expanding judicial remit has not been met with a commensurate growth in academic enquiry leading Thomas to describe the lack of in-depth knowledge about the UK judiciary as 'unacceptable and dangerous'.⁵⁶ Despite a now burgeoning interest in judicial studies and judgecraft in relation to the British courts, difficulties in, and the sensitive nature of, conducting research relating to judges' religious beliefs mean that scholars continue to be reticent to engage in theoretical or empirical studies that explore the role of judges' faith in judging.⁵⁷ Indeed, the claim that using empirical legal studies to understand judging is 'practically impossible' has particular resonance in this context.⁵⁸ Nevertheless, there are three main reasons why this topic merits further investigation.

Allay concerns about bias

The extent to which religion should permeate the public realm is one of the most hotly debated issues of the present day.⁵⁹ Although in a juridical context, religion is said not to be the business of government or the secular courts,⁶⁰ the judiciary are increasingly called upon to determine cases with overt or underlying religious dimensions. Judges, as professional decision-makers, are expected to decide these cases, as all others, solely on the facts and the law. However, where a judge has particularly strong religious beliefs on a matter concerning religious issues about which they must adjudicate, questions may be asked as to whether the judge is able to, or has determined the case before them without their own religious views affecting the judicial decision-making process.

Where there is a lack of knowledge or understanding as to what factors affect judicial decisions makes it impossible to support or refute allegations that

⁵⁶ Cheryl Thomas, *Purple Haze: The Danger of Being in the Dark about Judges* (Inaugural Lecture UCL Faculty of Laws, London 20 June 2012) <<https://www.youtube.com/watch?v=oQahSDTvFvA>> accessed 1 November 2012.

⁵⁷ The UCL launched the UK's first and only Judicial Institute in 2010.

⁵⁸ Thomas (n56).

⁵⁹ For a comprehensive account of the issues arising from such debate see Adam Dinham, Robert Furbey and Vivien Lowndes, *Faith in the public realm: Controversies, policies and practices* (Policy Press at the University of Bristol 2009).

⁶⁰ *Khaira & Ors v Shergill & Ors* [2010] EWCA Civ 893 [5] (Mummery LJ).

judgments may have been improperly influenced by personal factors such as religion. A recent case illustrates these points well. In *R v. Sarah Louise Catt*,⁶¹ the defendant was found guilty of administering drugs to procure her own miscarriage, 39 weeks into her pregnancy, contrary to the Offences against the Persons Act 1861. The presiding judge, Cooke J, a former vice-president of the Lawyers' Christian Fellowship, was heavily criticised by the media for the length of sentence handed down to the defendant.⁶² Moreover, concerns were expressed about his sentencing remarks, particularly the following:

There is no mitigation available by reference to the Abortion Act, whatever view one takes of its provisions which are, wrongly, liberally construed in practice so as to make abortion available essentially on demand prior to 24 weeks with the approval of registered medical practitioners.⁶³

Some commentators interpreted Cooke J's remarks as indicating his tacit disapproval of abortion in line with his conservative Christian beliefs. An alternative interpretation may simply be that Cooke J considered the Abortion Act 1967 to have been construed in a way not intended by Parliament. What is clear, however, is that in the absence of a better understanding of how judges reach decisions, criticism about the sentence and sentencing remarks cannot be supported or discredited.⁶⁴ Whilst empirical data exploring religion and judging would not provide unequivocal evidence as to whether individual judgments were subject to proper or improper

⁶¹ [2013] EWCA Crim 1187.

⁶² Eg Simon Jenkins, 'It's judicial machismo that jails women like Sarah Catt' *The Guardian* (London, 18 September 2012) <www.theguardian.com/commentisfree/2012/sep/18/judicial-machismo-sarah-catt-britain-medieval> accessed 26 September 2012; Owen Bowcott, 'Judge in late abortion case linked to conservative Christian charity' *The Guardian* (London, 21 September 2012) <www.guardian.co.uk/law/2012/sep/21/judge-jailed-abortion-woman-christian> accessed 26 September 2012; Amanda Bancroft, 'Does God fit in to the punishment of Sarah Catt' *The Guardian* (London, 20 September 2012) <www.theguardian.com/commentisfree/2012/sep/20/sarah-catt-punishment-god> accessed 26 September 2012; Francis Phillips, 'Sarah Catt needs psychiatric help more than punishment' *Catholic Herald* (21 September 2012) <www.catholicherald.co.uk/commentandblogs/2012/09/21/sarah-catt-needs-psychiatric-help-more-than-punishment/> accessed 26 September 2012; cf 'Attempt to smear judge in late abortion case' *The Christian Institute* (28 September 2012) <<http://www.christian.org.uk/news/bid-to-smear-judge-in-late-abortion-case-2/>> accessed 28 December 2012.

⁶³ *R v Sarah Louise Catt* (n61) Sentencing remarks at para 17. <www.judiciary.gov.uk/judgments/r-v-sarah-catt-sentencing/> accessed 23 July 2015.

⁶⁴ *R v. Miah* (2010) in which Miss Cherie Booth QC, sitting as a Recorder in Inner London Crown Court (24 January 2010) was criticised for suspending a two-year custodial sentence imposed on a defendant who had pleaded guilty to assault occasioning actual bodily harm, on the basis that he was 'a religious man' who knew that his behaviour was unacceptable. See Allen Green, 'A 'legitimate question' for Cherie Booth?' *The Lawyer* (15 February 2010) <www.thelawyer.com/issues/15-february-2010/a-legitimate-question-for-cherie-booth/> accessed 26 September 2012.

influences, it could be used to indicate consistency (or indeed inconsistency) in judging, and support or dampen claims that judges' decisions may occasionally be inappropriately influenced by non-legal factors.

As explained above, judges do not generally decide religious matters where the tenets of religious belief or faith are disputed, or the correctness of religious practices is in question. However, where religious issues do fall within the justiciability of the courts and they must determine whether the religious rights of an individual or religious organisation have or have not been breached, the judiciary may once again find itself subject to criticism. On these cases, rather than questioning the impartiality of a judge with particular religious beliefs (or non-religious beliefs), it may be argued that the religiously neutral approach of the courts is itself a form of partiality – the favouring of a secular view.

This can be seen in *McFarlane v. Relate Avon Ltd*,⁶⁵ in which Lord Carey, former Archbishop of Canterbury, launched a scathing attack on senior judges for having what he regarded as an anti-religious (anti-Christian) stance. *McFarlane*, a devout Christian and relationship counsellor, brought an unsuccessful claim against his employer for discrimination contrary to the Employment Equality (Religion or Belief) Regulations 2003 (EERBR). He was dismissed after refusing to provide psycho-sexual therapy for same-sex couples on the grounds that to provide such would be contrary to his Christian faith. In a strongly worded witness statement lodged in support of McFarlane's application for leave to appeal against the decision of the EAT, Lord Carey criticised the judiciary for recent 'disturbing judgments', such as in *Eweida*⁶⁶ and *Ladele*.⁶⁷ He claimed that Christian faith was increasingly being undermined by legal reasoning which threatened 'future civil unrest',⁶⁸ and demonstrated a 'worrying lack of awareness of Christian religious and cultural manifestations'.⁶⁹ He further asserted that, because judges were unaware of basic issues relating to Christian faith, it was difficult to see how the judiciary could appropriately adjudicate cases involving minority religions where practices were

⁶⁵ [2010] EWCA Civ 771.

⁶⁶ *Eweida* (n6).

⁶⁷ *Ladele v. London Borough of Islington and Liberty* [2010] EWCA Civ 1357 similarly involving a registrar who refused to carry out civil partnerships by reason of her religious beliefs. The case is discussed in Chapter 2.

⁶⁸ *McFarlane* (n65) 7.

⁶⁹ Lord Carey, 1st Witness Statement 9 April 2009.

even further removed from more familiar Christian traditions.⁷⁰ Clearly, such claims that judges are theological illiterate are unsubstantiated in the absence of further evidence or understanding of how judges decide religiously sensitive cases.

Judicial diversity

A second justification for this research is rooted in judicial diversity debate. A central argument in support of diversity in the judiciary is that if the judiciary is to successfully earn the public's trust and respect, a heterogeneous bench which fairly reflects contemporary society is required.⁷¹ The problem with religious diversity in this respect is that, unlike visible characteristics such as gender, individuals' religious beliefs are often hidden (sometimes through choice). As such, it is difficult to determine whether the judiciary are representative of an increasingly religiously pluralistic society. Even if the judiciary is religiously heterogeneous, the fact that it is not immediately obvious may render it of little symbolic significance to the wider public. Here, it is suggested that a greater understanding of the nexus between judges' religion and judicial decision-making can serve as an alternative means by which to foster public confidence in the judiciary. That said, at the same time there is a risk that digging deeper could have the opposite effect.

An additional argument emanating from the judicial diversity debate is that based on the notion of difference (this theme is touched upon in Chapter 3).⁷² The standard application of difference-based theory to judging posits female judges have certain perspectives and life experiences which means they adjudicate differently from their male counterparts. In the same way that female or feminist judges may bring a new dimension to decision-making, so it can be argued that other judicial characteristics such as religion may positively affect judging.⁷³ In particular, at an appellate level where collegiate decisions are common, it has been suggested an amalgam of

⁷⁰ *McFarlane* (n65) 17.

⁷¹ Erika Rackley, 'In conversation with Lord Justice Etherton: revisiting the case for more judicial diversity [2010] PL 655.

⁷² Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Reissue edn, Harvard University Press 1990).

⁷³ HL Select Committee on the Constitution, 25th Report of 2010-12 'Judicial Appointments' HL Paper 272 Chapter 3 at [70] in which it was said: Judging is a complex activity: it is necessary for judges to understand the wide array of concerns and experiences of those appearing before them. A more diverse judiciary can bring different perspectives to bear on the development of the law and to the concept of justice itself.'

www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27206.htm accessed 12 April 2013.

different personal values and experiences may be more likely to result in a just decision.⁷⁴ On this basis, excluding judges' religious affiliations from studies that investigate the ways in which non-legal factors influence judicial decision-making fails to capture a complete picture of how judges judge.

Raising awareness and improving judging

Finally, perhaps a less obvious reason for conducting such research is that it may improve how judges judge. As Hallett LJ, chairman of the Judicial College acknowledges, even though judicial decision-making is at the core of the judicial role, judges know very little about the judicial decision-making process itself.⁷⁵ Accordingly, as Sisk has argued, evidence which sheds light on whether, *inter alia*, judges' religious beliefs influence judgments, or are perceived to affect judging, may be useful in raising judicial self-awareness as to how personal preferences inform judicial decisions which could help improve judging.⁷⁶

1.4 Lawyers' perceptions

Part one of this study involved qualitative interviews with barristers to gain insight into the relationship between judges' religious beliefs and judicial decision-making. In part two, solicitors were invited to complete an online questionnaire (SPQ) in which they were asked for their views about the same. The resulting data was integrated at the interpreting and reporting stages of the study. This section sets out the justification for this approach.

⁷⁴ Eg Terence Etherton, 'Liberty, the Archetype and Diversity: a philosophy of judging' [2010] PL 727 in which Lord Etherton, referring to examples of empirical research and work by social psychologists, suggests that because appellate panels of judges will have a wider range of personal experiences and judicial philosophies, 'They will thereby make it more likely that the decision, and the reasoning which underpins it, will reflect the evolving valued and institutions of the community, and that relevant arguments are not overlooked or brushed aside, and that insupportable preconceptions are challenged'.

⁷⁵ Thomas (n56).

⁷⁶ Gregory Sisk, 'The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making (Book Review) (2007) 93 Cornell L Rev 873, 894 in which the author opines: 'Indeed, greater awareness of the influences of judicial attitudes and preferences may encourage greater self-conscious objectivity and heightened attention to legal rules and norms among judges' <www.ssrn.com/abstract=1131793> accessed 11 January 2013.

Lack of judicial co-operation

It is well known that researchers, especially early stage researchers, are faced with a number of challenges when attempting to conduct empirical research involving the judiciary.⁷⁷ The first, and arguably most difficult, obstacle to overcome is securing access to members of the judiciary. If the researcher is granted access, the next major challenge is how to obtain a sufficiently large and representative number of willing participants, particularly if involvement from those at the most senior levels is sought.⁷⁸ Even if these challenges are overcome, there may be certain questions that judges cannot be asked or they refuse to answer. For example, Darbyshire explains how a question about judges' political backgrounds was censored from her interview schedule when carrying out observational research of judges in the lower and higher courts.⁷⁹

Notwithstanding these potential difficulties, the most obvious starting point for this enquiry was to ask judges directly whether, and if so how, their own faith affects their judicial reasoning.⁸⁰ In fact, the original research plan was to explore the nexus between judges' faith and judging from a dual perspective, that of judges and barristers. However, disappointingly, the researcher's application for judicial participation was refused (Appendix 1). The Judicial Office advised as follows:

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.

That the judiciary, at least at an institutional level, are reluctant to enter into conversations that touch upon sensitive topics such as religion, judicial impartiality and objectivity brings into sharp focus the sensitivities of, and problems associated

⁷⁷ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2011) 3.

⁷⁸ Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Bloomsbury 2013).

⁷⁹ Darbyshire (n77)15.

⁸⁰ It is acknowledged that this approach is not without limitations.

with, any investigation into the personal dimension to judging. The reply above, made on behalf of the Lord Chief Justice and Senior President of Tribunals, is all the more interesting given that many senior judges readily acknowledge that personal values *do* play a part in their adjudication (discussed in Chapter 2.4). Clearly there are legitimate questions to be asked about the role of personal factors in the process of judging, even though these may be questions which members of the judiciary find difficult to discuss.

Which lawyers?

Notwithstanding the unsuccessful request for judicial participation, it was decided that the objectives of this study could instead be fulfilled by exploring religion and judging by an alternative means; through the lens of barristers and solicitors. The pragmatic approach taken in this study is consistent with the view of Baldwin and Davis who point out that where obstacles prevent legal researchers from examining certain subjects in the way that they wish, studies of sensitive subjects must often proceed on the basis of ‘second-best approaches’.⁸¹ Here, in the absence of a judicial perspective, it is suggested that an empirical examination of lawyers’ perceptions of the religion-judging relationship, at the very least, provides the ‘second-best’ option.

As specialist legal advisers and courtroom advocates, barristers appear before and interact with judges on a regular, often daily basis in the lower and higher courts. Paterson identifies the dialogue between judges and counsel as a key factor in understanding judicial decision-making in the Supreme Court.⁸² As such, barristers are well placed to offer an informed perspective on the research topic. Their views are given slight priority over the solicitors who participated in this study due to the method used to collect their data (which provided a more in-depth insight than the SPQ allowed). Solicitors were identified as an alternative source from which to investigate the relationship between judges’ religious beliefs and judging. Like barristers, they are expert legal advisers. Working directly with clients, solicitors often negotiate on behalf of their clients and will, if necessary, represent them in the lower courts. Solicitors with higher rights of audience can represent clients in the

⁸¹ John Baldwin and Gwynn Davis, ‘Empirical Research in Law’ in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (2005).

⁸² Alan Paterson, *Final Judgment; The Last Law Lords and the Supreme Court* (Hart Publishing 2013).

higher courts (Crown Court, High Court and Court of Appeal).⁸³ If they do not carry out their own advocacy and counsel is instructed, a solicitor may still attend court and provide assistance to the barrister as required. Thus, like those at the Bar, solicitors who attend court on a regular basis have relevant first-hand knowledge of how judges reach decisions. Of course, both barristers and solicitors may also be aware of judges' personal factors from social relationships with judges outside of the courtroom (for example, if a judge has acted as pupil Master to a barrister or from social events).⁸⁴

It is acknowledged that exploring the relationship between judges' religion and judging through a lawyers' lens is open to criticism for representing lawyers' perceptions of reality, rather than the reality of judicial decision-making itself.⁸⁵ Notwithstanding this criticism, it is contended that lawyers' perceptions of judges, the courts and the justice system are a useful means by which to understand how judges judge. First, as Murray Gleeson, former Chief Justice of the High Court of Australia observes, lawyers, particularly those whose work regularly takes them into the courts, can exert a strong influence on the way in which the public sees the courts;⁸⁶ it is often lawyers who tell litigants what to expect in terms of court procedure and process, likely outcomes and what the presiding judge is like. For many members of the public who have limited or no courtroom experience, and whose knowledge of the law and judging is probably driven by media representations of the justice system, lawyers' perceptions offer an insight into judging from those who are at the coalface, but more accessible to the public than the judges themselves. Second, the study may be useful to the judiciary in so far as it sheds light on how their work is perceived by other professional legal actors; in this

⁸³ Solicitors are granted rights of audience in all courts when they are admitted to the roll. However rights of audience in the higher courts cannot be exercised until a solicitor has passed an advocacy assessment based on the Solicitors Regulation Authority's higher rights of audience competence standards. See <www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page> accessed 3 July 2015.

⁸⁴ Michael Beloff QC observes, the balance of power between barristers and solicitors has shifted so that 'solicitors are no longer prohibited guests...' Michael Beloff, 'A View from the Bar' (Sir David Williams Lecture, Centre for Public Law Cambridge, 21 May 2010).

⁸⁵ Relying on judicial introspection as a means by which to understand how judges judge may also fail to reveal the actuality of the factors that influence judicial decision-making. Lee Epstein and Gary King, 'The Rules of Inference', [2002] 69 *Uni Chi L Rev* 1.

⁸⁶ Murray Gleeson, 'Public Confidence in the Courts' (National Judicial College of Australia, 9 February 2007 <www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_9feb07.pdf> accessed 30 August 2016.

respect, it could be seen as an elementary form of peer review. Academics may also be interested in this study to see whether research that explores the relationship between judges' faith and adjudication is a viable area of further enquiry. The study may also be of interest to a generalist legal audience. In conclusion, the views of lawyers who come into contact with judges in the course of their work offer a novel, but valuable, distinct and informed insight into the process of judicial decision-making for a variety of audiences. In this regard, despite the absence of a judicial perspective, this study makes an original contribution to the existing literature on judicial behaviour.

Which courts?

Most of the studies that examine judging in practice, particularly those relating to the US, focus on adjudication in the appellate courts, most usually the final court of appeal. The main justification for this is that it is in these courts where judges are most likely to exercise judicial discretion, therefore creating an environment in which judicial personal factors may, consciously or unconsciously, enter the adjudication process. This study takes a different approach wherein judging is explored from the perspective of lawyers who appear in both higher and lower courts rather than spotlighting a specific court. This approach is driven by several considerations. First, from a practical perspective, cases involving overtly religiously sensitive issues are relatively few and far between in the UKSC. Limiting the survey only to those lawyers who are involved in these cases is unduly restrictive and unlikely to yield meaningful results. Whilst it is agreed that the scope for judicial discretion is at its greatest in disputes heard by the appellate courts, it is not only in these courts in which discretion is exercised. Judges up and down the land must exercise their value-judgment on a daily basis. In trying to get some sense of what practitioners think about the relationship between judges' religious beliefs and judging, at least in an exploratory study, it makes sense to look at the issue wherever it arises in the court hierarchy, rather than limiting the study to a single court. In any case, as Cowan et al. point out, a focus on the higher courts rests on challengeable assumptions about the 'radiating effects' of the law';⁸⁷ or in Galanter's words, 'that the authoritative pronouncements of the highest courts penetrate automatically –

⁸⁷ Dave Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 J Law & Soc 548.

swiftly, costlessly, without distortion – to all corners of the legal world’.⁸⁸ Here, by concentrating on the *issue* horizontally across courts, rather than the decision-making of a particular court, spotlights judges as individuals, rather than within the broader institutional context.

Which areas of law?

The lawyers involved in the study are primarily employment law or family law specialists. Lawyers with expertise in these fields were specifically chosen because employment and family cases were identified by the researcher as being two areas of law where religious issues may be central to the disputes in question (such as religious discrimination in employment claims and issues concerning the religious upbringing of children).⁸⁹

Many of those who took part have extensive experience of representing litigants in the employment tribunals and County Courts. The barristers, together with a small number of the solicitors who said that they have civil higher rights of audience, also appear in civil proceedings in the higher courts. The family law barristers and solicitors who attend court on a regular basis typically appear at first instance in the Family Court, usually in front of District Judges in the County Court or in the Family Proceedings Court.⁹⁰ Several barristers and a small number of the solicitors indicated that they have experience of High Court and appellate work.

The views of solicitors who, at the time of the study, attended court infrequently are included in this study. It is acknowledged that this data is of limited value, not least because these solicitors’ perceptions of how judges judge may be based on little more than supposition rather than actual courtroom experience. Despite this limitation, the views of these practitioners are included for three reasons. Firstly, many of these solicitors indicated that whilst they do not attend court on a regular

⁸⁸ Marc Galanter, ‘The Radiating Effects of Courts’ in Keith Boyum and Lynn Mather (eds.) *Empirical Theories About Courts* (Quid Pro, LLC 2015)

⁸⁹ Although as previously noted, it is acknowledged that there are other areas of law in which religious issues may arise,

⁹⁰ The Family Court was created in 2014. It took over the work from the old three-tier family court structure consisting of the Family Proceedings Court (Magistrates), the County Court and the High Court (Family Division). Solicitors have full rights of audience in the Family Court although higher rights of audience are needed to appear in court in relation to reserved areas which are dealt with exclusively by the High Court (Family Division).

basis (more than once a month, see Chapter 4) they attended court on a more frequent basis shortly before their participation in this study. Secondly, these solicitors are acculturated in, and part of the same legal system as the other lawyers who participated in the study. Thirdly, it provides the researcher with an opportunity to consider whether lawyers' perceptions of how judges reach decisions differ according to whether they are based on judging in practice (views of the regular attendees at court) or views about how judges ought to judge (views of non-frequent attendees). Where the views of solicitors who attend court less frequently have been included in the research results, these are distinguished from the regular attendees.

Alternative approaches considered and rejected

Consideration was given to alternative approaches by which to explore the relationship between judges' religious beliefs and judging.

First, given the unsuccessful request for judicial participation in the study, the idea of asking retired judges to reflect upon how their religious beliefs influenced their judicial approach to the law was explored. However, this line of enquiry was quickly rejected on the basis that an application for permission to approach retired judges was unlikely to prove fruitful for the same reasons as that encountered in relation to current members of the judiciary.

Second, the possibility of conducting a content-analysis of some of the seminal cases on the freedom of religion heard in the UK courts (including issues such as religious dress in the workplace and opting out of work duties) was considered. However this approach was rejected on three grounds: (1) there is no reliable data about judges' religious convictions so connecting judges' faith with actual judgments would be impossible, (2) in any case, written judgments are unlikely to contain overt references to the decision-maker's own religious beliefs, even if such factors were at play, and (3) the researcher was keen to focus on the influence of faith on decision-making *process*, not solely on case *outcomes*. That said, in the light of interesting work carried out by scholars such as Cahill-O'Callaghan and Hanretty (discussed further in Chapter 3),⁹¹ it is acknowledged

⁹¹ Rachel Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 J Law & Soc 596; Rachel Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity' (2015) 35 LS 1; Chris Hanretty, 'Judges' written language reveals divergent moral

that adopting values-based approaches to look for evidence of the impact of religious values may be a viable approach in future.

Third, the idea of inviting senior barristers, effectively serving as a proxy for current judges, to respond to vignettes constructed on hypothetical legal cases involving religiously sensitive issues was explored. However, this option was dismissed because it would have been too time-prohibitive for participants.

Fourth, the possibility of an approach akin to that in the Feminist Judging Project was considered whereby individuals from different religious backgrounds would have been invited to provide alternative judgments to actual cases involving religious issues already determined in the English courts.⁹² It was decided that successfully attracting a sufficient range of individuals from different religious backgrounds who would be prepared to commit time to writing alternative judgments was not viable.

Finally, consideration was given as to the feasibility of asking the general public for their views on whether judges' religious beliefs affect the process of judging. This approach was rejected on two grounds: (1) many members of the public have little or no first-hand experience of appearing in the courts; and, (2) even if the target population could be narrowed to a subset of the general public who had appeared at court, trying to further identify those involved in cases with a religiously sensitive dimension would prove problematic given the lack of time and resources available to the researcher.

1.5 Researcher perspective

The researcher's perspective with respect to this study is best described as that of an 'outsider', in the sense that the researcher is not a legal practitioner and has little courtroom experience. For the purpose of openness and transparency, given that the focus of this study is on how religion is perceived to affect judicial decision-making behaviour, the researcher declares their own religious identity as Agnostic.

foundations' < www.ecpr.eu/Filestore/PaperProposal/366bd822-6baf-4c38-91ad-1aaa61389dea.pdf > accessed 27 July 2016.

⁹² Rosemary Hunter, 'An Account of Feminist Judging' in Clare McGlynn, Erika Rackley and Rosemary Hunter (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010).

1.6 Summary and structure of thesis

This introductory chapter has explained the background to, and the motivation for, conducting this study. It argues that coincident changes in the legal and religious landscapes of Britain have precipitated a climate in which the law and religion increasingly converge. It has also set out the backdrop against which the current study has evolved and stated the research aims and design of this thesis.

The remainder of the thesis is organised into 6 chapters.

Chapter 2 discusses the key concepts underpinning this thesis including religion, theories of adjudication and impartiality. Chapter 3 provides a critical review of the existing literature on non-legal factors that affect judicial decision-making, both in relation to the courts in the UK and other jurisdictions. The feasibility of conducting research similar to that conducted extensively in other legal jurisdictions is discussed.

Chapter 4 outlines the research methodology for the study as a whole. It describes the mixed methods design and justifies the reasons for its use. The focus then shifts to the methods used for, and the issues relating to, data collection, data management and data analysis in each of the qualitative (interviews) and predominantly quantitative (SPQ) phases of the research.

Chapters 5 and 6 present and discuss the empirical data that was generated from parts one and two of this study. In Chapter 5, lawyers' responses to the central research question are addressed by looking at how they perceive the nature, frequency and impact of judges' religion on judging. Chapter 6 considers lawyers' views about calls for specialist courts to hear religious liberty claims, the depersonalisation of justice and religious diversity in the judiciary. The thesis concludes in Chapter 7 with a summary of the main findings, limitations and implications of the study, along with suggestions for future research.

In the next chapter, the focus turns to the theoretical frameworks upon which this study is based.

CHAPTER 2

RELIGION AND JUDICIAL DECISION-MAKING: THEORETICAL PERSPECTIVES

2.1 Introduction

In the introductory chapter it was argued that given the increasing significance of the judiciary, a changing religiously pluralistic society, and an evolving legal landscape, an investigation as to whether a judge's religion is perceived to affect judicial behaviour in the English courts is both relevant and timely. This chapter sets out the definitional and conceptual frameworks which serve as the backdrop to and guide the empirical part of this study. More specifically, it explores four key components which are integral to understanding the relationship between judges' religion and judging in this study: (1) definitions of religion, (2) theories and models of adjudication, (3) judging from a judicial perspective, and (4) impartiality in an adjudicative context.

2.2 Defining religion

The starting point is to consider how religion is defined, both in a research and legal context, the purpose of which is three-fold. First, it provides evidence of the 'juridification' of religion (discussed in Chapter 1.2).¹ Second, it illustrates the sorts of cases in which judges' religious beliefs may influence judging. Third, it is helpful in so far as the lawyers who participated in this study may have had a legal understanding of religion in mind when responding to survey questions in the interviews or the Solicitor Perceptions Questionnaire (SPQ). Indeed, the researcher's use of 'religion' and associated terms was intended to broadly align with legal definitions of these terms as understood in human rights and discrimination law.

¹ Russell Sandberg, *Law and Religion* (CUP 2011).

2.2.1 Religion as a research concept

Religion is a hugely complex social phenomenon; it covers a variety of meanings and is multidimensional in construct, being cultural, organisational, personal and behavioural.² It therefore comes as no surprise to find that no universal definition of religion exists. Furthermore, as Greil states, ‘It seems safe to assert that...that no consensus is likely to be reached in the foreseeable future’.³

In recent years it has become conventional to focus on three facets of religious involvement when conducting research into religion: belief, practice and affiliation.⁴ Religion as belief relates to the convictions that people have in respect of matters such as God or Gods, a transcendent order, codes of religious morality and doctrines of faith. This aspect of religion typically denotes a basic religious commitment, either as an individual or as part of a group, which emphasises the truth claims of the religion in question.⁵ Religion as practice concerns the way that religious beliefs are actively expressed by a religious adherent, for example, through behaviour such as attendance at religious services, the wearing of religious clothing or observance of dietary restrictions or religious holidays. These customs and rituals often distinguish the religious adherent from followers of other religions.⁶ Religion as practice varies considerably, often according to the strength of an individual’s religious convictions. For example, those with strongly held religious beliefs may assiduously observe the rituals and practices of their faith, whilst those with less strong religious commitment may choose to engage in limited activities or none at all. As will be shown below, these two facets of religious involvement loosely align with the two aspects of religious freedom protected under Article 9 of the European Convention on Human Rights (ECHR).

The third facet, ‘affiliation’, is typically used to denote an individual’s identity (as distinct from members of other faith groups).⁷ In this regard, McAndrew and Voas

² Siobhan McAndrew and David Voas, *Measuring Religiosity Using Surveys: Survey Bank Question Topic Overview 4 Survey Resources Network Question Bank* (February 2011) 1.

³ Arthur Greil, ‘Defining Religion’ in Peter Clark and Peter Beyer (eds) *The World’s Religions* (Routledge 2009).

⁴ *ibid* 3.

⁵ T Jeremy Gunn, ‘The Complexity of Religion and the Definition of “Religion” in International law’ (2003) 16 *Harv Hum RTs J*, 189.

⁶ *ibid*.

⁷ *McAndrew and Voas* (n2).

suggest that religious affiliation is more like ethnicity because it is often linked to factors such as family, language, and cultural heritage, rather than, or as well as, shared theological beliefs.⁸ This is problematic because, for example, someone who self-identifies (or is identified by others) as, say, ‘Jewish’ or ‘Christian’ may use what facially appears to be a religious descriptor to denote either: (1) an adherence to the tenets of Judaism or Christianity, ie a religious identity, or (2) an ethnic, cultural or national identifier, in which case it may be that an individual who describes themselves as Jewish or Christian may nevertheless have different religious beliefs (e.g. they may be an Atheist Jew or Christian), ie a cultural identity, or (3) a combination of both. Indeed this overlap between ethnicity and religion has proved problematic in the legal sphere. For example, prior to the introduction of laws prohibiting discrimination on grounds of religion or belief in 2003, the principal means of domestic legal redress for those suffering religious discrimination was found under the Race Relations Act 1976 (RRA) based on grounds of race or ethnicity, rather than religion.⁹ Importantly, however, this avenue was available only to those falling within a particular racial or ethnic group; faith was effectively rendered irrelevant other than as a shared religion being indicative of ethnicity.¹⁰ This approach led to the unsatisfactory situation where unequal treatment existed as between different ‘religious’ groups so, for example, Sikhs and Jews could rely on the race provisions,¹¹ whilst no protection was afforded to Muslims unable to identify with a recognised racial or ethnic group.¹²

More recently, the close relationship between religion and ethnicity was considered by the UKSC in the case of *R(E) v Governing Body of JFS*,¹³ in which the court had to determine whether a faith school’s (JFS) admission policy constituted direct racial discrimination under the RRA. The admission policy gave preference to children whose Jewish status was recognised by the Office of the Chief Rabbi (OCR); that is, to children whose mothers satisfied the matrilineal test or were Jews by conversion to Orthodox standards. However, the child seeking entry to JFS did not meet the

⁸ *ibid.*

⁹ Race Relations Act 1976, s3(1).

¹⁰ *Mandla v Dowell-Lee* [1983] 1 ALL ER 1062.

¹¹ *ibid.* Also *Seide v Gillette Industries Ltd* [1980] IRLR 427 (EAT).

¹² *cf. J H Walker Ltd v Hussain and Others* [1996] IRLR 11 (EAT) In this case, Muslim workers taking time off to celebrate Eid, a religious holiday, successfully brought a claim for indirect race discrimination by virtue of their being Asian and not their Islamic faith.

¹³ [2009] UKSC 15.

OCR status requirements. The majority of the UKSC (5:4) held that JFS had unlawfully discriminated against the child on ground of ethnic origin. In contrast, the minority considered that the admission requirement was exclusively a religious requirement which did not depend on ethnic origins and so was not discriminatory under the RRA.

Understanding religion as identity is further complicated by the fact that, unlike other fixed characteristics such as ethnicity, an individual can convert from one set of religious beliefs to another. In fact the right to change one's religion or belief is itself recognised as a fundamental human right under ECHR, Article 9. In addition, of course, unlike many other characteristics, religious identity is often a latent characteristic. Therefore, unless the religious (or non-religious) adherent discloses his or her religion, the researcher must look to other (arguably less reliable) sources to obtain such information.

Given the difficulty in trying to distil the influence of religious identity from other ethnic or cultural factors, it is helpful to articulate in what sense a religious identifier is intended to be applied. Here, it is suggested that the lawyers' views about judges' religious beliefs are predominantly based on perceptions of judicial religious or ethno-religious practice and affiliation, as opposed to judges' cultural (non-religious) identities.

A further distinction: Religious or moral values?

In addition to the definitional matters discussed above it should be borne in mind that when discussing religion it is difficult to ignore the complex philosophical enquiries about the relationship between religion and morality, particularly the question of whether moral values are independent from what are often religious values or religion provides the foundation from which moral values are developed. If, as argued in Section 2.5 below, judges cannot approach cases in a moral value-free vacuum, the way that an individual perceives the relationship between a judge's religious convictions and decision-making is likely to depend on how they understand the association between religion and morality. Where religious beliefs are not deemed to be qualitatively different from other beliefs such as moral convictions, it follows that, in some cases, a judge's religious views, being inextricably linked to

one's moral outlook, have the potential to influence legal reasoning.¹⁴ In addition, it should be noted that, like moral values, many religious values cut across different religions. In a general research context then, trying to define 'religion' presents a challenge because religion, by its very nature, means different things to different people in different contexts and cultures.

Having considered how religion is defined in a research environment, the discussion now turns to the legal approach to matters of faith and definitions of 'religion'.

2.2.2 'Religion' in the UK courts

Approach towards religion

As a general principle, the courts have been reluctant to adjudicate upon legal disputes involving religious doctrine and practice, these matters being generally regarded as outside the competence and authority of the secular courts. The basic principle is summarised by Munby LJ in *R (Johns) v Derby City Council*:

Religion – whatever the particular believer's faith – is not the business of government or of the secular courts, though the courts will, of course, pay every respect to the individual's or family's religious principles... The court recognises no religious distinctions and generally speaking passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect. And the civil courts are not concerned to adjudicate on purely religious issues, whether religious controversies within a religious community or between different religious communities.¹⁵

McCrudden argues that this conventional non-interventionist approach is increasingly being supplanted with a more self-confident judiciary who are willing to intervene in cases touching upon religiously sensitive issues.¹⁶ He attributes this change in approach to two factors. First, judges may feel more qualified to decide cases involving issues with which they are familiar through their own experiences. Second, judges may be more religiously agnostic than in

¹⁴ Kent Greenawalt, *Private Consciences and Public Reasons* (OUP 1995) 145.

¹⁵ [2011] EWHC 375 (Admin) [39].

¹⁶ Christopher McCrudden, 'Religion, human rights, equality and the public sphere' (2011) *Ecc LJ* 30.

the past. What McCrudden means here is not clear - are judges more familiar with religious issues by reason of their own experiences as religious (or non-religious) adherents or as judges having to deal with such issues? Furthermore, why would a religiously agnostic judge be more willing to intervene in religiously sensitive cases compared to a judge with different beliefs when adjudicating a similar case? Putting such questions aside, it is nonetheless agreed that the courts appear more willing to intervene on matters of religious doctrine than in the past. Here it is suggested that the adoption of a more interventionist approach is in response to three related factors: (1) multiculturalism (in this context being associated with cultural diversity), (2) the consequent rise of religious-ethnic plurality in the UK, and (3) the juridification of religion.¹⁷ Evidence can be found in *Shergill v Khaira*,¹⁸ a case concerning a dispute between Sikh groups and the trusteeship of two Gurdwaras. The Court of Appeal held that the issues were non-justiciable because the court was being asked to pronounce on matters of religious doctrine and practice. On appeal to the UKSC, a key consideration for the court was to what extent a court can refuse to determine issues of religion or religious beliefs in legal proceedings. In reversing the decision of the Court of Appeal, the UKSC said:

The courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.¹⁹

Put simply, unless the litigants could resolve their differences, it would be necessary for the court to adjudicate on matters of religious doctrine and practice in order to determine who were the trustees entitled to administer the trusts. Clearly this judgment does not give judges the green light to intervene in all cases

¹⁷ Sandberg (n1).

¹⁸ [2014] UKSC 33 on appeal from [2012] EWCA Civ 983.

¹⁹ *ibid* 45.

with a religious aspect. It does, however, mean that, in some instances, the courts will have to adjudicate religious claims which, hitherto, have been considered to be outside of their jurisdiction. Particularly in cases where the law is unclear or is under-developed, it may be necessary for judicial intervention in disputes involving difficult religious issues in order for the law to operate effectively. As judges become increasingly involved in resolving such disputes, it is argued, so might the chances of a judge's personal religious views, consciously or unconsciously, entering the decision-making process.

However, in the next section it will be shown that the increased involvement of the courts in religiously sensitive cases is not matched by a willingness to define religion.

Legal definitions of religion

Gunn explains that, although international and regional human rights guarantees protect freedom of religion, none of the instruments actually define 'religion'.²⁰ Similarly, there is no single definition of what constitutes 'religion' in the British legal system, variations of the term being applied according to legal context.²¹ Rather, it is left to the courts to determine what constitutes 'religion' for the purposes of the relevant legislation using guiding principles developed in case law. This approach takes account of the many different areas and ways in which the law interacts with religion; as Edge explains, there is no reason why a law which aims to protect an individual's religious freedom should be interpreted in the same way as a statute intended to provide financial benefits from the State for religious organisations engaged in charitable work.²² Moreover, it acknowledges the difficulty in applying a single definition which adequately captures the diversity of world religions (including the emergence of new religions), changes to existing religious practices, and developments in the common understanding of 'religion' in response to cultural changes and shifts in societal attitudes.²³ The problems with definitions of religion in legal fora are clear. Too restrictive and newly established religious groups

²⁰ Gunn (n5).

²¹ A discussion of the advantages and disadvantages of defining religion is beyond the scope of this thesis. However, for a useful discussion see Peter Edge, *Religion and Law: An Introduction* (Ashgate 2006) 27.

²² *ibid.*

²³ Gunn (n5)189. Russell Sandberg *Religion, Law and Society*, (CUP 2014).

and their adherents and other minority groups might be excluded; in Ahdar and Leigh words, there is ‘a temptation to cling to the familiar, conventional, or popular concepts of religion’.²⁴ However, too wide a definition and the available protection becomes meaningless. Nonetheless, definitions are important because they determine the legal protection that is, or is not, afforded to religious individuals or organisations.

So how do the courts define religion?

Ahdar and Leigh suggest that, methodologically, judicial efforts to define religion fall into two categories: the subjective-functional approach and the substantive-content approach.²⁵ The first, the subjective-functional approach, considers religion from the subjective view of the individual. More specifically, it considers the sincerity with which an individual holds their beliefs and the function of these beliefs in their life. The authors identify three weaknesses in this approach. First, it is difficult to prove or disprove the sincerity of an individual’s religious belief. Second, there is a risk that defining religion in this way is too inclusive; after all, almost any set of beliefs that are sincerely held and are central in an individual’s life may qualify. Finally, the approach is tautological because in order to know whether religion plays a central role in an individual’s life, it is necessary to know what religion is. Whilst understanding religion from this internal perspective is favoured by some critics,²⁶ this approach is not that typically adopted by the domestic courts.

Instead, the English courts tend to follow a substantive-content approach which attempts to identify the core characteristics of religion, rather than to assess the sincerity with which an individual holds their religious beliefs. Lady Hale has acknowledged extra-judicially that the courts are generally reluctant to assess the importance of a belief which a believer holds or the extent to which it is in fact required by the religion to which he or she belongs:²⁷ ‘We [the courts] take as a given that religious (and other beliefs) are genuinely held (at least if they reach a

²⁴ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (OUP 2013) 141.

²⁵ *ibid* 145.

²⁶ McCrudden (n16) 31.

²⁷ Lady Hale, Religion and Sexual Orientation, Comparative and Administrative Law Conference Yale Law School 7 March 2014.

certain threshold of seriousness and coherence)...²⁸ This approach avoids the secular courts having to get involved in questions of religious doctrine which may be non-justiciable or beyond the courts competence. There are numerous examples of cases in which the courts state that the sincerity of the claimant is not in question. In relation to religious dress for instance, in *R (Begum) v Denbigh High School*,²⁹ a case in which the court had to consider whether the refusal by a school to allow a pupil to wear a jilbab interfered with her right to manifest her religious beliefs under Article 9 of the ECHR,³⁰ the court said that it was generally accepted that the Muslim student sincerely held the religious belief which she professed to hold, ie, that her Muslim beliefs required her to wear the jilbab. Lord Bingham stated:

The House is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country. That would be a most inappropriate question for the House in its judicial capacity...³¹

Similarly, in *R v Secretary of State for Education and Employment, ex parte Williamson*,³² in which teachers at Christian schools claimed that a blanket ban on corporal punishment contravened their right to religious freedom under Article 9 of the ECHR because their fundamental Christian beliefs included a belief that part of the duty of education was to physically punish children guilty of indiscipline, Lord Nicholls explained that:

The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice'... But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual....Each

²⁸ *ibid.*

²⁹ [2006] UKHL 15.

³⁰ The court also had to consider whether to deny the pupil access to education contravened Article 2 of the First Protocol of the ECHR.

³¹ *Begum* (n29).

³² [2005] UKHL 15.

individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.

And in *R (Swami Surayanda) v The Welsh Ministers*,³³ in which the issue in question was whether the slaughtering of a sacred bullock cared for by a Hindu community contravened the community's right to manifest their religion as protected under Article 9(2), it was accepted by the court that the community's beliefs in relation to the religious significance of the temple bullock were 'patently sincere and most deeply held'.³⁴

Applying the substantive-content approach, it has been suggested that, when looking at the core contents of a religion, the aim is to identify criteria analogous to those found in established world religions.³⁵ This approach can be seen in *R v Registrar General, ex parte Segerdal*,³⁶ in which the Court of Appeal had to determine whether a building used by the Church of Scientology could be recorded as a place of religious worship under the Places of Worship Registration Act 1855 (PWRA). In finding that Scientology did not involve religious worship, Lord Denning MR explained that 'Religious worship means reverence or veneration of God or of a Supreme Being.'³⁷ Scientology was not a religion but 'more a philosophy of the existence of man or life'.³⁸ Similarly, in *Re South Place Ethical Society*,³⁹ in denying the humanist organisation charitable status, Dillon J stated: 'It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god'.⁴⁰ A more recent example of this essentialist approach to defining religion is found in the UKSC's high profile decision in *R (Hodkin) v Registrar General of Births, Deaths and Marriages*.⁴¹ Again, the issue for the UKSC was whether or not Scientology is a 'religion' for the purposes of the PWRA. However, overruling the decision in *Segerdal*, the UKSC departed from the traditional theistic

³³ [2007] EWHC 1736 (Admin) revd [2007] EWCA Civ 893.

³⁴ *ibid* 17.

³⁵ Celia Kenny, 'Law and the art of defining religion' (2014) 16 *Ecc LJ* 23.

³⁶ [1970] 2 QB 697, CA.

³⁷ *ibid* 707.

³⁸ *ibid* (Denning MR)

³⁹ [1980] 1 WLR 1565.

⁴⁰ *ibid* 1572.

⁴¹ [2013] UKSC 77.

definition of religious worship in ruling that scientology could be classified as a religion. Significantly, Lord Toulson stated:

There has never been a universal legal definition of religion in English law, and experience across the common law world over many years has shown the pitfalls of attempting to attach a narrowly circumscribed meaning to the word.⁴²

However, having considered the reasoning applied by the Australian High Court in *The Church of the New Faith v The Commission of Pay-roll Tax (Victoria)*,⁴³ he went on to offer a useful description (as opposed to a definitive formula) of what constituted religion for the purposes of the PWRA:

I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the Belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. ..Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science.⁴⁴

Again, it is important to bear in mind that Lord Toulson's statement is context-specific. Notably, his description of religion (particularly the 'spiritual or non-secular belief system' element) is inconsistent with the partial, more expansive definitions of 'religion or belief' found in human rights and equality legislation which extend to include secular belief systems. This was not an issue in relation to the PWRA because separate provisions exist in relation to secular premises for marriages and formation of civil partnerships. However, it is relevant to this discussion because the

⁴² *ibid* 34.

⁴³ (1982-83) 154 CLR 120.

⁴⁴ *Hodkin* (n41)57.

judgment in *Hodkin* has since been referred to in other legal contexts.⁴⁵ In fact Sandberg suggests that a growing tendency for laws which affect religion to cross-refer to one another, together with the increasing use of language derived from human rights jurisprudence relating to freedom of religion and discrimination law means that the legal definitions of religion are becoming increasingly similar.⁴⁶

Approach in human rights and discrimination cases

Most relevant to the present study is how the courts define religion in cases in two key areas, religious rights under human rights law and in discrimination law. These areas often interact with those in which the lawyers who took part in this research practice (employment and/or family law) and may have possibly informed their understanding of the terms ‘religion’ and ‘religious beliefs’ as used in this study.⁴⁷ They also illustrate the sorts of cases in which a judge’s own religious beliefs may potentially affect judicial approach.

Definition under Article 9

Prior to the incorporation of the ECHR into UK law, with limited exceptions,⁴⁸ an individual’s religious rights in the UK largely existed as a negative set of freedoms. Individuals were free to do as they wished in relation to religious matters unless prohibited by law; the approach was that of ‘passive toleration’ rather than ‘prescriptive regulation’.⁴⁹ The HRA marked a turning point in the relationship between the law and religion in the UK. Following the coming into effect of the HRA, the fundamental rights set out in the ECHR, including the positive right to freedom of religion under Article 9, are directly enforceable in the national courts. Moreover, so far as is possible, domestic legislation must now be read and given effect in a way which is compatible with the Convention rights.⁵⁰

⁴⁵ Such as by the first tier tribunal tax chamber in *United Grand Lodge of England v Commissioners of HM Revenue and Customs* [2014] UKFTT 164 (TC) [119].

⁴⁶ Sandberg (n1)58.

⁴⁷ It should be noted that there is considerable overlap between human rights and equality law frameworks, both at national and regional level.

⁴⁸ Example include the statutory exemption granted to Sikh motorcyclists allowing the wearing of turbans instead of crash helmets Road Traffic Act, s16(2).

⁴⁹ Sandberg (n1)36.

⁵⁰ HRA 1998, s3.

Article 9 of the ECHR provides:

- (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

It can be seen that Article 9 contains two strands of protection. Article 9(1) provides an absolute right to hold a particular religion or belief (the *forum internum*); any State interference with an individual's 'psychic freedom' is prohibited.⁵¹ Consistent with other international human rights instruments, there is no legal definition of what constitutes 'religion or belief' under Article 9(1).⁵² The European Court of Human Rights (ECtHR) has adopted a broad approach to what constitutes religion and offers little by way of case-law on this subject other than that a religion must have a 'clear structure and belief system'.⁵³ Religious beliefs founded in a religion, but which go further than a belief about adherence to a religion or its central articles of faith, will be protected if they 'denote a certain level of cogency, seriousness, cohesion and importance'.⁵⁴

Article 9 has been acknowledged to apply to a range of 'major' or 'ancient' world religions including Judaism, Islam, various forms of Christianity and Hinduism, Sikhism, and Buddhism to newer religions such as Mormonism,⁵⁵ Scientology,⁵⁶ and Neo-Paganism.⁵⁷ Non-religious beliefs are also protected under Article 9 provided that the belief in question has attained a certain level of cogency, seriousness, cohesion and importance, and relates to a weighty and substantial aspect of human life and behaviour, be worthy of respect in a democratic society and be

⁵¹ Aileen McColgan, 'Class wars? Religion and (In)equality in the Workplace', (2009) ILJ 38(1).

⁵² Eg the absence of a clear legal definition is consistent with the UDHR, ICCPR and ECHR.

⁵³ *X v. United Kingdom* 11 DR 55 (1977).

⁵⁴ *Campbell and Cosans v UK* (1982) 4 EHRR 293 [304].

⁵⁵ *The Church of Jesus Christ of Latter-day Saints v UK* App 7552/09.

⁵⁶ *X v Church of Scientology v Sweden* (1978) 16 DR 6 8.

⁵⁷ *Asatruarfelagid v Iceland* App 22897/08.

compatible with human dignity and the fundamental rights of others.⁵⁸ Examples falling under the protection of Article 9 include pacifism,⁵⁹ druidism⁶⁰ and atheism.⁶¹ That said, a sincerely held ‘belief’ does not guarantee protection. Thus, in *Pretty v UK*,⁶² a belief in assisted suicide was held not to have the sufficient degree of coherence to constitute a belief under Article 9.

Rather than use the definition of religion or belief to filter out claims alleging interference with Article 9, the preferred approach of the Strasbourg court has been to rely on other Convention rights or use the limitations under Article 9(2). The British courts have adopted a similar approach, wherein it is essentially taken as a given that, from a definitional perspective, so long as a religion or belief system reaches sufficient degree of seriousness and coherence, it will qualify for protection under Article 9(1). Thus, in *Williamson*, Lord Walker asserted:

I doubt whether it is right for the court, except in extreme cases ... to impose an evaluative [definitional] filter at the first stage, especially where religious beliefs are involved ... Only in clear and extreme cases can a claim to religious belief be disregarded entirely, as in *X v UK*, App No 7921/75, Admissibility decision 4 Oct 1977 (no evidence of the existence of the “Wicca” religion).⁶³

Sandberg argues that the ECtHR and UK courts reluctance to use definitions of religion as a filtering device can be attributed to four factors.⁶⁴ First, the religion in question and the litigant’s adherence to it will rarely be in dispute, particularly where a well-established faith is concerned.⁶⁵ This can be seen in cases such as *Begum*, *Williamson* and *Surayanda*. Second, as discussed above, the courts are keen to avoid engaging into enquiries about religious doctrine so as to not become embroiled in difficult theological questions outside of the court’s competence. Third, the protection afforded under Article 9 extends beyond religion to also cover other (non-

⁵⁸ *Campbell* (n54).

⁵⁹ *Arrowsmith v UK* (1978) 19 D & R 5.

⁶⁰ *Chappell v UK* (1987) 53 DR 421.

⁶¹ *Angeleni v Sweden* (1986) 51 D & R 41.

⁶² (2002) 35 EHRR1.

⁶³ *Williamson* (n32)57.

⁶⁴ *Sandberg*(n1)47.

⁶⁵ *Williamson* (n32)56 (Nicholl LJ).

religious, secular) beliefs.⁶⁶ Accordingly, minority religious beliefs are likely to be protected as ‘beliefs’ if not ‘religion’. Finally, there are other means by which claims of interference with freedom of religion can be filtered, most obviously by recourse to analysis based on manifestation of religion or belief under ECHR, Article 9(2).

This last point is made clear by Baroness Hale in *Williamson*:

Convention jurisprudence suggests that beliefs must have certain qualities before they qualify for protection. I suspect that this only arises when the belief begins to have an impact upon other people, in article 9 terms, when it is manifested or put into practice. Otherwise people are free to believe what they like.⁶⁷

The right to manifest religion or belief in worship, teaching, practice and observance (the ‘*forum externum*’), is a qualified right subject to the limitations as set out in Article 9(2). It occurs where the *forum internum* transforms from beliefs which are essentially private, and perhaps impalpable in nature to all but the believer, to the actual external expression of those beliefs. Obviously, by the time the courts have to consider if there has been interference with the right to manifest religion or belief under the HRA and, if so, whether it is justifiable, it is already accepted that the claimant’s religion or belief meets the requisite definitional criteria under Article 9.

Discrimination because of religion or belief

Laws prohibiting discrimination on grounds of religion or belief were introduced into UK law in 2003⁶⁸. Specifically, the Employment Equality (Religion or Belief) Regulations 2003 (EERBR) made it unlawful to discriminate against someone directly or indirectly, or to harass or victimise someone on grounds of religion or belief in the workplace. The Equality Act 2006 prohibited discrimination and victimisation on grounds of religion or belief in the provision of goods, facilities and services. These provisions, along with existing laws relating to other discrimination strands, were consolidated under the Equality Act 2010 which protects against discrimination because of religion or belief, in addition to the following ‘protected

⁶⁶ cf. the description of religion in *Hodkin* (n41).

⁶⁷ *Williamson* (n32) 76.

⁶⁸ In compliance with European Directive 2000/78 EC.

characteristics': age; disability; gender re-assignment; marriage or civil partnership (employment only); pregnancy and maternity; race, sex and sexual orientation.

Under section 10 of the Equality Act 2010, 'religion' is partially defined as follows:

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion;
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

The explanatory notes to the Act explain that this broad definition corresponds with Article 9.⁶⁹ Accordingly, the threshold on qualifying as a religion is low; it must have a clear structure and belief system.⁷⁰ Denominations or sects within a religion may themselves be a 'religion' for the purposes of the Equality Act. Clearly, 'religion' and 'belief' are defined broadly to expressly include a lack of religion or religious belief. Thus, Atheists, Agnostics and Humanists are afforded the same protection as adherents of theistic religions under the Act. Generally, defining 'religion' for the purpose of protection under the Equality Act 2010 has proved uncontroversial. 'Religious belief' has also been interpreted broadly. Consistent with case-law under Article 9, it extends beyond belief about adherence to a religion or its central articles of faith to include beliefs founded in a religion provided they attain a certain level of cogency, seriousness, cohesion and importance, are worthy of respect in a democratic society and are compatible with human dignity and the fundamental rights of others.⁷¹ Such belief is subjective and need not be shared by others so, as Simler J asserts: 'beliefs can be individualised and highly subjective'.⁷² That said, discrimination based on a collective religious belief are likely to be easier to prove than a personally held religious belief in indirect discrimination claims. In contrast, the interpretative boundaries of "philosophical belief" are less certain. Whilst a discussion of what constitutes philosophical belief is not of direct relevance to the present research, the case-law indicates a wide application. Based on the qualifying criteria listed in *Grainger plc v Nicholson*,⁷³ and in line with the substantive-content approach, the following have been afforded protected on the

⁶⁹ Equality Act 2010, Explanatory Notes, [51].

⁷⁰ *ibid.*

⁷¹ *Campbell* (n54).

⁷² *Gareddu v London Underground* UKEAT/0086/16/DM [6] (Simler J).

⁷³ [2010] IRLR 4, EAT [24].

basis of being ‘philosophical beliefs’ under religion or belief discrimination legislation: a belief in anti-fox hunting;⁷⁴ spiritualism;⁷⁵ and a belief in the ‘higher purpose of public service broadcasting.’⁷⁶ In contrast, a conspiracy theory about a global elite seeking to form a New World Order,⁷⁷ and homophobic beliefs and Holocaust denial have failed to meet the criteria under *Grainger*.⁷⁸ The position as regards political beliefs is less clear. The ET has indicated that political views based on Marxism/Trotskyism may not qualify,⁷⁹ whilst ‘left wing democratic socialist beliefs’ may be protected.⁸⁰

It is clear that religion is defined broadly under the human rights and discrimination frameworks. On this basis it is reasonable to suppose that the lawyers who took part in the present study are likely to have similarly interpreted references to judges’ religious beliefs expansively so as to encompass major world religions, minority religions and non-religious religious beliefs (as distinct from other philosophical beliefs). However, there is a risk that some lawyers may have mistakenly assumed an individual judge’s cultural identity (e.g. Jewish) to be an indicator of their religious beliefs.

The above discussion demonstrates that, generally, definitional issues as to what constitutes ‘religion’ have not proved problematic in a judicial context. It is suggested that where matters relating to religion become more challenging for the secular courts is when they involve issues such as whether there has been an interference with a claimant’s right to manifest their religion or belief and, if so, whether it can be objectively justified or, in the context of discrimination law, questions such as who is an appropriate comparator,⁸¹ or whether a particular policy,

⁷⁴ *Hashman v Milton Park (Dorset)Ltd t/a Orchard Park* ET 310555/2009 cf. *Whaley v Lord Advocate* [2007] UKHL 53 in which the a belief to engage in fox-hunting was not classed as a protected belief.

⁷⁵ *Greater Manchester Police v Power* UKEAT/0434/09 (12 November 2009).

⁷⁶ *Maistry v BBC* UKET/1313142/10 (14 February 2011).

⁷⁷ *Farrell v South Yorkshire Police Authority* [2011] EqLR 935.

⁷⁸ *Ellis v Parmagon Ltd* [2014] EqLR 343.

⁷⁹ ET/2203854-57/08 (28 January 2010) cf. Burton J’s comments in *Grainger* (n73) where he said that a philosophical belief founded in political ideology such as socialism, Marxism, communism, or free-market capitalism, might qualify.

⁸⁰ [2015] IRLR 451.

⁸¹ Eg *Azmi v. Kirklees* [2007] IRLR 484 (EAT), a Muslim teaching assistant was dismissed for refusing to remove her veil on grounds of it being a requirement of her faith. She brought a claim in which the comparator was identified as a non-Muslim who covered their face. Somewhat

criterion or practice (PCP) which indirectly discriminates because of religion or belief can be objectively justified. It is in such cases that judges are most likely to encounter difficult questions about religion and, it is suggested, are those cases in which judges' own views could potentially have a bearing on how judicial decisions are reached.

The next section provides an overview of some of the recent high profile cases in which religiously sensitive issues have been spotlighted. An exploration of these cases furthers the investigation of the research questions at the heart of this thesis in three main ways by illustrating: (1) the kinds of case where a judge with strong religious beliefs may find it difficult to adopt a position which runs counter to his or her own, (2) cases which are particularly controversial to, or resonate with the public, and (2) the sorts of cases that lawyers may have had in mind when responding to interview questions or the SPQ as to whether, and if so how, judges' faith affects judging.

Some examples from case law

As the lawyers who participated in the empirical part of this study predominantly work in employment and family law, it is religion-sensitive cases in these areas that are considered.

Employment

The first two employment cases involve so-called clash of equality rights cases, specifically those in which the right to religious freedom locks horns with the right not to be discriminated against because of sexual orientation. The next two cases look at the difficult issue of religious dress in the workplace. This quartet of employment cases is particularly interesting because each religious discrimination claim failed in the domestic courts and was subsequently heard by the ECtHR.

unsatisfactorily, comparison was drawn with someone wearing a balaclava or whose face was covered with bandages due to injury.

In *Ladele v. London Borough of Islington*,⁸² Ladele, a Christian registrar, refused to undertake civil partnership ceremonies between same-sex couples because to do so was contrary to her Christian faith. Her employer, London Borough of Islington Council, tried to accommodate her religious beliefs by confining her involvement to the signing process only, but Ladele still refused to officiate at civil partnership ceremonies. For a time, she managed to avoid such duties by changing rosters with other registrars. However, two colleagues complained that her refusal to register civil partnerships was a breach of the Council's Dignity for All equal opportunities policy and constituted discrimination on grounds of sexual orientation under the Equality Act (Sexual Orientation) Regulations 2007.⁸³ The council subsequently instigated disciplinary proceedings whereby it was decided that Ladele's religious beliefs would no longer be accommodated at work. In response, Ladele brought a claim against her employer alleging religious discrimination and harassment under the EERBR, s.3.

The ET found that Ladele had been discriminated against, directly and indirectly, on grounds her religious beliefs. However, on appeal, the EAT found that the ET had erred in law.⁸⁴ As regards the claim for direct discrimination, the ET had confused the council's reasons for treating Ladele as it did (her refusal to officiate at civil partnerships - the correct approach), with Ladele's reasons for acting as she did (that is, because of her religious beliefs - the incorrect approach). In respect of her claim for indirect discrimination, the EAT acknowledged that a refusal to accommodate Ladele's religious beliefs could amount to indirect discrimination.⁸⁵ However, the Council's aim of providing a service based on non-discrimination principles was held to serve a legitimate aim. Moreover, the employer was a public authority wholly committed to equal opportunities; it was a proportionate response to require staff to act in a way which complied with that aim. Accordingly, the Council's refusal to accommodate Ladele's religious beliefs was justified. On appeal, the CA upheld the EAT's decision. It was Ladele's refusal to officiate at civil partnership ceremonies and not her religious beliefs which were the cause of the Council's conduct. To have allowed Ladele to be exempted from performing these duties in contravention of the

⁸² [2009] EWCA Civ 1357 (CA).

⁸³ SI 2007/1263.

⁸⁴ [2009] IRLR 514 (EAT).

⁸⁵ *ibid* 95.

Dignity for All policy would have amounted to discrimination on grounds of sexual orientation.

The next case is that of *McFarlane v. Relate Avon Limited*.⁸⁶ It will be recalled from Chapter 1.3 that McFarlane brought a claim against his employer, Relate, for direct and indirect discrimination contrary to the EERBR based on his employer's refusal to exempt him from working with same-sex couples where sexual issues were involved. On joining the organisation, McFarlane had expressly agreed to adhere to Relate's equal opportunities policy in his contract of employment and had counselled same-sex couples where no sexual issues arose. However, on completion of a psycho-sexual therapy course, McFarlane sought exemption from any obligation to do work involving psycho-sexual issues with same-sex couples. When it became clear that he had no intention of doing such work, he was dismissed for gross misconduct based on his failure to comply with the equal opportunities policy and a professional ethics policy.

On bringing a claim to the ET, McFarlane's claim for direct religious discrimination was rejected on the ground that his dismissal was due to his refusal to comply with the equal opportunities policy and not by reason of his faith. This echoes the decision in *Ladele*.⁸⁷ With regard to the indirect discrimination claim, the ET accepted Relate's PCP requiring counsellors' to comply with the equal opportunities policy would put persons of the same religious belief as McFarlane at a disadvantage compared to others who did not hold similar beliefs as part of their religious faith.⁸⁸ However, the ET accepted the employer's submission that McFarlane's dismissal was objectively justified; the provision of the non-discriminatory counselling service for all was a legitimate aim and it was proportionate to require employees to comply with it.⁸⁹ On appeal, the EAT upheld the ET's decision citing the reasoning in *Ladele*. There was no direct discrimination because Relate would have treated an employee who refused to provide psycho-sexual therapy to gay couples for reasons other than his or her faith, in the same way. In refusing McFarlane leave to appeal the EAT decision, the Court of Appeal flatly rejected the submission that *Ladele* had

⁸⁶ [2010] EWCA Civ 771 (CA).

⁸⁷ *McFarlane* ET/1401179/08, 40.

⁸⁸ *ibid* 41.

⁸⁹ *ibid* 46.

been decided *per incuriam* and was ‘unconstitutional and contrary to the rule of law’.⁹⁰

The next two cases involve the wearing of religious jewellery in the workplace. In *Eweida v. British Airways plc*,⁹¹ the claimant brought unsuccessful claims alleging religious discrimination under the EERBR, after her employer, BA, introduced a new uniform policy which only permitted the wearing of visible jewellery and other items if it was a mandatory requirement of the employee's faith and prior authorisation had been given by management. In breach of this policy, Eweida, a Coptic Christian, wore a small visible cross to work. She accepted this was not a requirement of her Christian faith but refused to conceal or remove the necklace. Her employer sent her home on unpaid leave. BA subsequently changed its uniform policy so as to allow staff to wear such jewellery. Having returned to work, Eweida brought unsuccessful claims alleging discrimination on grounds of her religion or belief. Her direct discrimination claim failed as she could not show that she had suffered less favourable treatment compared to the comparator (identified as a Sikh employee who wore a kara bangle which was visible when a short sleeve shirt was worn). Whilst the wearing of the kara was said to be mandatory for Sikhs, the wearing of a cross was not a mandatory requirement for Christians. The indirect discrimination claim failed because there was no evidence that the BA uniform policy put Christians as a group, or Eweida herself, at a particular disadvantage. Had this criterion been met, BA's justification would have failed because although the aim of the policy was found to be legitimate (band and corporate consistency), a blanket ban on jewellery was not deemed to be proportionate since it failed to find the right balance between corporate consistency, individual need and the accommodation of diversity.

In a similar case, *Chaplin v Royal Devon & Exeter Hospital Foundation Trust*,⁹² Chaplin, a nurse working in an NHS hospital, was asked by her employer to remove her crucifix necklace because it contravened the employer's new uniform policy which forbade the wearing of jewellery on the grounds of health and safety. Chaplin argued that the wearing of the crucifix (which she had done since her confirmation)

⁹⁰ *McFarlane* (n86)14.

⁹¹ [2010] EWCA Civ 80.

⁹² [2010] ET 1702886/2009.

was a manifestation of her religious beliefs. Having been unable to reach a compromise as to how she could wear the crucifix without falling foul of the uniform policy, Chaplin was removed from her nursing duties and re-deployed to a new post where the uniform policy was not applicable. On bringing her claim to the ET, the ET found no evidence that Chaplin had been treated less favourably than an appropriate comparator – an employee who wished to wear a necklace or chain with a pendant, whether or not for religious, cultural or decorative purposes. In relation to the indirect discrimination claim, the majority held that the uniform policy did not put persons of the same Christian faith at a disadvantage. However, distinguishing this case from *Eweida*, it was said that even if the PCP had put such persons at a disadvantage, there was no indirect discrimination because the policy had a legitimate aim – the most important of which was the maintenance and provision of health and safety.

It is noteworthy that having failed in domestic proceedings, these cases were taken to the ECtHR.⁹³ The ECtHR upheld *Eweida*'s claim ruling that the domestic court had given too much weight to the aim of BA's uniform policy. In particular, the ECtHR compared *Eweida*'s situation to other religious employees who were permitted to wear religious dress or jewellery and also took into account the fact that BA had subsequently amended its uniform policy to allow religious jewellery to be worn visibly. In comparison, Chaplin's treatment was found not to violate Article 9 (or Article 14) because removing her cross was not a disproportionate means of achieving a legitimate aim, and was 'necessary in a democratic society'. In *Ladele* and *McFarlane*, the employers' policies (to promote equal opportunities and prevent discrimination) were held to have the legitimate aim of securing the rights of others. The ECtHR found that the domestic courts had struck the right balance between the rights of the claimants to manifest their religion and the employers' rights to secure the rights of others.

Family

Turning to a family law context, judges have had to grapple with a variety of complex issues involving religion, many of which focus on judicial determinations

⁹³ *Eweida and Ors v UK* [2013] ECHR 37.

of what is in the best interests of a child. Under the Children Act 1989, Section 1(1), when a court determines a question relating to the upbringing of a child, or the administration of a child's property or an application concerning income arising from it, the court's paramount consideration is the welfare of the child. This was the issue in *Re G*,⁹⁴ which concerned a dispute between parents who, because of their religious differences, disagreed about where their children should be educated. The parents were part of the Chassidic community of ultra-Orthodox Jews. After their marriage broke up, the mother remained part of the Orthodox Jewish community but no longer adhered to the strict observances of the Chareidi community. Contrary to the father's wishes, the mother wanted her children to attend an Orthodox, rather than ultra-Orthodox, school where she argued their education and career opportunities would be greater. The court had to conduct a balancing exercise to determine what was in the best interests of the children. The court found that the children should live with their mother and attend schools of her choosing. The reasoning of the judge at first instance was based on four main strands: (1) the narrower educational opportunities available under the Chareidi system, particularly for girls, (2) concerns about the emotional impact on the children, both in adjusting to the father's choice of school and the effect that this may have on the relationship that they had with their mother, (3) concerns about the children being able to embrace their mother's lifestyle when they were older as opposed to them being able to change their religious beliefs and practices later on, and (4) that the interests of the children were best served by what the mother was proposing.

On dismissing an appeal, Munby LJ described the issues in this case as being 'of transcendental importance' to the parents, the children, the Chareidi community and to society at large.⁹⁵ As the following extract indicates, the court clearly had a sound understanding of the religious sensitivities involved in this case:

For the nominal Anglican, whose sporadic attendances at church may be as much a matter of social convention as religious belief, religion may in large part be something left behind at the church door. Even for the devout Christian attempting to live their life in accordance with Christ's teaching there is likely to be some degree of distinction between the secular and the divine, between

⁹⁴ [2012] EWCA Civ 1233.

⁹⁵ *ibid* 16.

matters quotidian and matters religious. But there are other communities, and we are here concerned with such a community, for whom the distinction is, at root, meaningless, for whom every aspect of their lives, every aspect of their being, of who and what they are, is governed by a body of what the outsider might characterise as purely religious law. That is so of the devout Muslim, every aspect of whose being and existence is governed by the Quran and the Sharia. It is so also of the ultra-Orthodox Jew, every aspect of whose being and existence is governed by the Torah and the Talmud.⁹⁶

Significantly, the court made it very clear that where religious practices were contrary to what was in the best interests of a child, it would have no compunction in prioritising the welfare of the child, although the child's religious welfare was a consideration.⁹⁷

A more recent example is the difficult case of *J v B (Ultra-Orthodox Judaism: Transgender)*⁹⁸ which also involved a dispute amongst an ultra-Orthodox Charedi Jewish family relating to contact between a father and her five children. Again, this case touches upon issues where competing rights are at play. The father, a transgender woman, had not seen her children since she had left the Charedi community to become a transgender woman. She did not object to the continued religious upbringing of the children within the Charedi community, although the traditional view of the ultra-Orthodox community was that transgenderism is a sin. The mother argued that if the father was allowed direct contact with the children, there was a danger that she and her children would be ostracised by the Charedi community. This, she argued, would cause considerable harm to the children. In determining the key issue, ie, what was in the best interests of the children, Jackson J ruled that the possibility that the mother and children would be rejected by their community outweighed the benefits to the children of direct contact with their father. As such, the direct contact application was refused. Instead, Jackson J made an order for indirect contact, four times a year for each child. As an aside, it is also worth noting that the judge declined to intervene on the issue of the *get* (under Jewish law, governed by the Beth Din, a Jewish marriage contract can only be terminated by the

⁹⁶ *ibid* 18 (Munby LJ).

⁹⁷ *ibid* 43.

⁹⁸ [2017] EWFC 4.

issue of a get, a divorce document, that must be granted by the husband and formally accepted by the wife).

In another recent case, *L & B (Children: Specific Issues: temporary leave to remove from the jurisdictional circumcision)*,⁹⁹ Roberts J had to consider whether it was in the best interests of two children to be circumcised in accordance with their father's Muslim faith.¹⁰⁰ The issue not only touches upon religious and cultural sensitivities but also concerns questions as to a child's right to autonomy and physical integrity.¹⁰¹ After the parents of the children separated, the father, a practising Muslim, sought the court's permission to allow the children to be circumcised. The mother of the children, who had since abandoned her Muslim faith, opposed the father's wishes stating that it would impose a medically unnecessary procedure upon the children. Expert evidence was provided as to the Islamic religious basis for circumcision and the medical risks associated with the procedure. Finding in the mother's favour, Roberts J accepted that the father's motives were 'driven by his deep seated religious convictions and his perceptions of his obligations as a devout Muslim father'. Interestingly, the father's freedom to practice his religion was said to be protected under Article 8 of the ECHR (right to private and family life), Article 9 was not referred to. However, the judge decided that as there was a possibility that (1) the children may not wish to continue to observe the Muslim faith when they were older and (2) there were risks, albeit small, associated with surgery, it was not in the best interests of the children to be circumcised until such a time as they could make the decision for themselves.

It is not difficult to conceive of a situation in which a judge or tribunal panel member with similar devout religious beliefs to the employees in *Ladele*, *McFarlane* and *Chaplin* might feel sympathetic towards the claimants' claims, particularly if a judge held similar entrenched views about homosexuality by reason of his or her own faith, or similarly chose, or felt obliged, to express their own religious beliefs through the wearing of a religious symbol, for example. Similarly, it is not difficult to see how an individual's personal religious outlook might, at least unconsciously, affect the

⁹⁹ [2016] EWHC 849 (Fam).

¹⁰⁰ It was explained in the case that under Islamic law, a father has responsibility for deciding when a child is circumcised; it is not a decision for the child to make himself.

¹⁰¹ Terence Etherton, 'Religion in a World Clamouring for Human Rights: A Devils' Brew (2015) 38 DULJ 1, 12.

weight that was accorded to the religious welfare of the children in each family case. For example, it is conceivable that a male Jewish or Muslim judge who deems circumcision to be compulsory for religious reasons may be more sympathetic to the father's arguments in *L & B* than, say, a Catholic judge who is morally and religiously opposed to this practice. The key question is whether, in such circumstances, the judge's own views impinge upon, or are perceived to impinge upon, the decisional process so as to give rise to allegations of religious bias.

This section has looked at definitions of religion within a research and legal context, the principal aim of which has been to determine how the lawyers who took part in this study may have understood and discussed 'religion' during the interviews and when responding to the SPQ. Furthermore it has showcased the types of cases in which judges' religious beliefs potentially play a role in the decisional process. The following section will discuss the second key elements which are vital to understanding the relationship between judges' religion and judging: conceptions of judicial decision-making within the context of the English judiciary, and theories and models that seek to explain how judges decide cases.

2.3 Theories and models of adjudication

2.3.1 Conceptions of the judicial role in the English Courts

The traditional conception of the judicial role is that judges decide cases by applying the law, understood as a body of rules and principles promulgated by the legislature, to the facts of a given case.¹⁰² For a long time, this classical understanding denied the law-making nature of the judicial role and the so-called 'declaratory theory' of common law prevailed. Thus, as Lord Esher MR stated in *Willis & Co v Baddeley*:¹⁰³

There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not authoritatively laid down that such law is applicable.

¹⁰² One of the earliest proponents of this view, Blackstone, opined that the law was not man-made but that pre-ordained by God. William Blackstone, *Commentaries on the Laws of England*.

¹⁰³ [1892] 2 QB 324 (CA). Although Beever observes that the declaratory theory was not an unquestioned dogma before the rise of its more vociferous critics such as Austin. Allan Beever, 'The Declaratory Theory of Law' (2013) 33 OJLS 421, 424.

This conventional conception of how judges decide cases has plenty of appeal.¹⁰⁴ As Rackley contends, based on a ‘separation of powers’ argument, confining the judicial role to that of declaring law, rather than to law-making, means that judges as non-elected officials avoid undermining the theory of democratic accountability which applies to those tasked with law-making.¹⁰⁵ Moreover, for the purposes of consistency, what is here described as the ‘certainty’ argument, it is argued that if the judicial role is confined to the seemingly neutral interpretation and application of pre-existing legal rules and principles, litigants are more likely to have confidence in judicial decisions as a judgment should not turn on who the judge is.¹⁰⁶ At the same time, it has been argued that laying the responsibility for a judicial decision at the door of the law rather than the judge serves to shield the decision-maker from criticism.¹⁰⁷ This might be labelled the ‘protection’ argument.

Whilst the declaratory theory may have served as a useful protective device in the past,¹⁰⁸ it is recognised that the boundaries of the judicial role are not so easy to delimit in practice. By producing authoritative determinations of common law rules, particularly in cases where the law is uncertain, it is correctly said that the courts ‘operate as mini-legislators’, which shape and develop the law in response to novel situations and the changing needs of society.¹⁰⁹ Of course, this is not to say that judges have carte blanche authority to decide cases as they wish; the judicial function remains subject to significant institutional and individual factors that restrict the nature and scope of the judicial role – factors such as the principle of stare decisis and judicial self-restraint. However, given the oft-blurred boundary in the judicial role, it is unsurprising that the idea that judges do not make the common law is now widely rejected.¹¹⁰ Most famously, in the 1970s Lord Reid dismissed the declaratory

¹⁰⁴ Erika Rackley *Women, Judging and the Judiciary: From Difference to Diversity* (Taylor and Francis 2012)130.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ Patrick Atiyah, ‘Judges and Policy’ (1980) 15 Israel L Rev 346, 362.

¹⁰⁸ Lord Mance, ‘The Role of Judges in a Representative Democracy’(Lecture during the Judicial Committee of the Privy Council’s Fourth Sitting in the Bahamas, 24 February 2017) <https://www.supremecourt.uk/docs/speech-170224.pdf> accessed 13 July 2017.

¹⁰⁹ Lord Sales, ‘Judges and Legislature: Values into Law’ (2012) 71 CLJ 287, 288.

¹¹⁰ However, as Paterson and Paterson note, some members of the judiciary still hold on to the idea of mechanical jurisprudence. Alan Paterson and Chris Paterson, ‘Guarding the Guardians? Towards an independent, accountable and diverse senior judiciary’ (2012) <<http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>> accessed 6 April 2016, 21.

theory as a ‘fairy tale’.¹¹¹ More recently, Lord Goff described the traditional theory of judicial decision-making as a ‘fiction’ and acknowledged that judicial involvement in the development of the common law, which he described as ‘a living system of law’, was inevitable.¹¹² Lord Bingham has also explained why the declaratory theory no longer garners judicial support: ‘[It] is radically inconsistent with the subjective experience of Judges, particularly appellate Judges, of the role which they fulfil day by day’.¹¹³ Lord Bingham suggests that judges know from experience that, in many instances, the cases they deal with do not turn on clear and unambiguous legal rules. Rather, cases often raise points which have not previously been the considered, or are the subject of conflicting decisions, or raise issues of statutory interpretation which may involve genuine lacunae or ambiguities.¹¹⁴ It is suggested that it is in these ‘hard cases’ in particular, defined by Dworkin as those ‘in which the result is not clearly dictated by statute or precedent’,¹¹⁵ and in other cases requiring judicial discretion, that judges can be said to develop and change the law.

It is also where it is entirely possible that there is more than one conclusion to a legal problem, and where an individual judge must make a choice between two or more legally valid alternatives, that a judge’s individual personal factors (such as religious views) may have some bearing on the reasoning process. However, as previously indicated, it is important to acknowledge that the influence of such factors is subject to significant constraints such as those outlined below.

2.3.2 Constraints on judging

All judges are constrained by the judicial oath by which they undertake to decide cases ‘without fear or favour, affection or ill will’ (discussed further in Section 2.5). However, whilst the Oath creates a presumption of impartiality and is identified as a powerful constraint on judges, Lord Mance explains in *Helow v Secretary of State for the Home Department*, that it is no guarantor of impartiality:

¹¹¹ Lord Reid, ‘The Judge as Lawmaker’ (1972) 22 JSPTL.

¹¹² *Kleinwort Benson v Lincoln City Council* [1998] UKHL 38.

¹¹³ Lord Bingham, ‘The Judge as Lawmaker: An English Perspective’ in Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 28.

¹¹⁴ *ibid.*

¹¹⁵ Ronald Dworkin, *Hard Cases* (1975) 88 Harv L Rev 6, 1057.

The judicial oath appears to me more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display.¹¹⁶

Of course, the law also acts as a fundamental limit on the judicial function. Decisions must be reasoned in accordance with legal rules, principles, and procedures, many of which are laid down in statutes, regulations and by precedent, others of which are not formalistic as such but are nevertheless well-established.¹¹⁷ Clearly judges should not go on a frolic of their own by making arbitrary decisions based on personal preferences; even where judicial discretion is exercised, the law limits the choice of outcome available to the courts. Relatedly, the court structure constrains judging. Most notably, that appellate courts can reverse decisions of the lower courts ‘provides an important enforcement mechanism’ to ensure that judges sitting in the lower courts follow the existing legal rules and principles.¹¹⁸ The composition of the court can also play a role in curtailing the influence of an individual judge’s personal factors on judging. For example, where a judge sits on a panel, the collegiate environment may act as a check on an individual’s judgment because, as Edwards states, the judge is ‘quite literally constrained by the consensus imperative’.¹¹⁹

Alternatively, Pickerell and Brough base the understanding of law as a constraint on judging as a theory of socialisation wherein it is suggested that judicial behaviour is limited because judges are socialised to believe their role is to follow the law, and the expectation from others that they will do so.¹²⁰ In this sense, reflecting Lord Mance’s comment above, judicial training and professionalism, including compliance with ethical standards and codes of conduct play a vital role in limiting the influence of personal factors in judging. Guidance suggests the way that judges can demonstrate professionalism include: freedom from bias or prejudice, objective reasoning (based solely on the evidence and law), independence of mind,

¹¹⁶ [2008] 1 WLR 2416, 1050.

¹¹⁷ Christopher Peters, ‘Legal Formalism, Procedural Principles and Judicial Constraint in American Adjudication’ in Laura Pineschi (ed), *General Principles of Law- The Role of the Judiciary* (Springer 2015)

¹¹⁸ John Drobak and Douglass North, ‘Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations’ (2008) 26 Wash UJL & Pol’y 131.

¹¹⁹ Harry Edwards, ‘The Effects of Collegiality on Judicial Decision Making’ (2003) 151 U Pa L Rev 1639, 1651.

¹²⁰ J Mitchell Pickerell and Christopher Brough, Law and Politics in Judicial and Supreme Court Decision Making in Robert Howard and Kirk Randazzo (eds) *Routledge Handbook of Judicial Behavior* (Routledge 2017).

recognising and dealing with potential conflicts of interest, and treating people sensitively, non-discriminatorily and fairly.¹²¹ Other powerful constraints that serve to limit the effects of non-doctrinal factors such as a judge's religious beliefs in the process of adjudication include, but are not limited to, the law on bias which is considered in detail in Section 2.5, public opinion, media influences and political factors.

Having provided an overview of how the English courts understand the judicial role and some of the ways in which judges' decision-making is constrained, the main theories of adjudication upon which empirical studies of judicial decision-making have traditionally been based are now considered.

2.3.3 Theories of adjudication

The contrasting views of the judicial role outlined above broadly chime with the two dominant theories of adjudication which have historically provided the framework on which judicial decision-making studies have been understood - legal formalism and legal realism. A classical formalist conception of adjudication is underpinned by two central claims. Firstly, the law is rationally determinate;¹²² in other words, every legal question has a correct legal answer which can be deduced by correctly and consistently applying legal rules and principles to the facts of a case. Secondly, judging is autonomous insofar as the adjudicator has to look no further than the law to find the right answer; ergo, non-legal considerations play no role in the process of judging.¹²³ At its most extreme, the formalist conception of judging understands judicial decision-making as an exercise in mechanical jurisprudence in which judges simply declare rather than make law, or what Leiter calls 'vulgar formalism'.¹²⁴ However, contemporary formalists, now generally accept that (a) judging is not wholly syllogistic or mechanical in the way that the pure formalists of yore envisioned, and (b) a degree of judicial discretion in decision-making is unavoidable.

¹²¹ Judicial Skills and Abilities Framework 2014 < www.judiciary.gov.uk/wp-content/uploads/2010/05/judicial-skills-and-abilities-framework-2014.pdf > accessed 12 November 2017.

¹²² Brian Leiter, 'Legal Formalism and Legal Realism: What is the Issue?' (2010) 16 Legal Theory 111.

¹²³ *ibid.*

¹²⁴ *ibid.*

Seen as the antipode to legal formalism, a realist conception of adjudication considers what judges actually do when deciding cases rather than what the judges claim they do; in other words the realist focus is on the law in action. Whilst there is no ‘one size fits all’ version of legal realism, Leiter suggests that the core claim of early legal realists was that judges are primarily facts- rather than rule-responsive.¹²⁵ The most sceptical realists such as Frank,¹²⁶ denied the formalist claim that judging was mechanical and that legal rules and principles were the prime determinants in how judges decide cases.¹²⁷ Instead, it was argued that judges, particularly those in the appellate courts, principally base their decisions on subjective preferences before reasoning backwards and ‘manipulating legal rules to support these predetermined ends’.¹²⁸ However, contemporary realists accept that there is a rational element to law and that, in addition to the role played by non-legal factors, legal rules and principles are key in the process of judicial decision-making.

Because the more moderate versions of legal formalism and realism are barely indistinguishable, some critics argue that it is not appropriate to conceptualise judicial decision-making within a formalist-realist narrative.¹²⁹ In particular, Tamanaha advances the notion of ‘balanced realism’ or equally ‘balanced formalism’.¹³⁰ This theory posits that the differences that are said to divide formalists and realists are exaggerated, and are neither as clear-cut nor profound as portrayed. He suggests that the loose contrast that can be made between the two views of the judicial role is that formalists tend to emphasize the reasons why and ways in which legal rules, texts, and precedents can and should control; whilst realists tend to emphasise the limitations of those rules.¹³¹ It is this balanced realist/formalist view of judging upon which this study most closely aligns and which, it is suggested, marks a positive departure from the out-dated, and arguably flawed grand theories of judging outlined above.

¹²⁵ Brian Leiter, ‘Positivism, Formalism, Realism’ (1999) 99 Colum L Rev.

¹²⁶ Jerome Frank, *Courts on Trial* (PUP 1951) 57.

¹²⁷ *ibid.*

¹²⁸ Brian Tamanaha, *Law as a Means to an End* (CUP 2006).

¹²⁹ Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (PUP 2009).

¹³⁰ *ibid.*

¹³¹ Brian Tamanaha, ‘Balanced Realism on Judging’ (2010) 44 Val U L Rev 1269.

2.3.4 Models of judicial behaviour

A number of models of judicial behaviour have been developed in order to explain how judges reach their decisions. The three most common models discussed in the literature are the ‘legal’, ‘attitudinal’ and ‘strategic’ models of judicial decision-making.¹³² These models build on pioneering quantitative work by US political scientists such as Pritchett and Schubert, whose primary interest was the relationship between judges’ ideological and, to a lesser extent, other personal preferences and judicial decision-making.¹³³ That the main focus of the US studies originally centred on how judges’ ideology affects judging, particularly in relation to decisions of the Justices of the US Supreme Court, is unsurprising given the politicised nature of the judicial appointments process in the US in which confirmation hearings and elections are used (see Chapter 3). However, these models have been further developed so as to provide the conceptual base from which a range of other models have emerged, including those which consider how a range of non-legal factors affect adjudication. An overview of the main models of judicial behaviour upon which empirical studies of judicial decision-making are traditionally based is now provided.

Legal model

Synonymous with a formalist theory of adjudication, in its simplest form the ‘legal’ model holds that judges’ decisions are principally determined according to, and constrained by, legal doctrine and the facts of the case. Representing the traditional theory of how judges judge, the legal model is aligned with the concept of mechanical jurisprudence in which legalist judges act as automatons and apply the law ‘uninfluenced by emotion, unperturbed by personal preferences and unaffected by consequentialist anxieties’.¹³⁴ In this way, the judge is seen as a neutral and impartial arbiter whose primary concern is to interpret the law as well as possible rather than to create the law (for a distinction between these two similar concepts see

¹³² Hazel Genn, *Judging Civil Justice* (CUP 2010) 157.

¹³³ C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (1948); Glendon Schubert, *The Judicial Mind* (Northwestern University Press 1965).

¹³⁴ Genn (n132)158.

Section 2.5).¹³⁵ With little room for discretion, the risk of judicial subjectivity is effectively expunged from the decision-making process.

It is easy to see how a strict legalist explanation of how judges decide cases serves to promote and maintain public confidence in, and the legitimacy of the judiciary and the rule of law. Moreover, it is unsurprising to find that the legal model provides the broad principled framework for judicial decision-making, as the following extract taken from the Judiciary's official website indicates:

It is vital that each judge is able to decide cases solely on the evidence presented in court by the parties and in accordance with the law. Only relevant facts and law should form the basis of a judge's decision. Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice...¹³⁶

However, as already suggested, there are few contemporary scholars who would agree that legal factors are the sole determinants of the majority of legal judgments in the courts today, particularly in cases where judges exercise their discretion.¹³⁷

Attitudinal model

The attitudinal model is the antithetical paradigm to the legal model. The leading proponents of this model argue that legal disputes are decided 'in light of the facts of the case vis-à-vis the ideological attitudes and values of the judges'.¹³⁸ In other words, judicial decisions are explained by reference to a judge's personal policy preferences rather than the law.¹³⁹ Given that a purely attitudinal model envisages the judge as being unconstrained by legal rules and precedent and uninterested in

¹³⁵ Lawrence Baum, 'Motivation and Judicial Behavior: Expanding the Scope of Inquiry' in David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision-making* (OUP 2010).

¹³⁶ <www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> last accessed 10 November 2016.

¹³⁷ TT Arvind and Lindsay Stirton, 'Lawyers and the Legal Model: Judicial Ideology, Judicial Professionalism and Institutional Strategy Among the Law Lords' (14 May 2012) <https://extranet.sioe.org/uploads/isnie2012/arvind_stirton.pdf> accessed 6 February 2015.

¹³⁸ Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP 2002) 86.

¹³⁹ Genn (n132)159.

strategic or institutional factors means that attitudinalists assume that ‘judges’ political attitudes are the *exclusive* determinants of judicial behaviour’.¹⁴⁰

Insofar as the attitudinal model looks to explain judicial behaviour by reference to judges’ personal factors, it might be assumed to be the model to which the present study is most closely orientated. However, according to Heise, there is a slight but critical difference in the way that judges’ ideological preferences influence judicial decisions compared to the role played by judicial personal background characteristics and attributes. He states that ‘attitudinal models generally ascribe the consequences of a judge’s background as formative on his or her political ideology (which he suggests is typically reflected in a judge’s political party affiliation)’. According to Heise a judge’s ideology (which is not dictated by socio-economic background) can be distinguished from judicial background and characteristics because it involves the deliberate adoption of values or attitudes.¹⁴¹

Moreover, whilst the attitudinal model serves as a useful theoretical backdrop to studies involving the role of political ideology, it is not consistent with the rationale underpinning this research. The argument advanced in this thesis is not that judges’ religious beliefs are a major determinant in judicial decisions. Rather, the contention is that judges’ religious beliefs are one of many non-legal factors that (unconsciously) inform how judges approach cases, but fall short of threatening judicial impartiality (Section 2.5 below).

Strategic model

Like the attitudinal model, the strategic theory posits that judges are influenced by their own policy preferences. However, it is distinct from the attitudinal model in that in choosing the course that does most to advance their long term aims and secure the best outcome generally, strategic judges will take into consideration the reaction of others and, where necessary, will depart from their preferred position.¹⁴² As Epstein and Knight suggest, the strategic model envisages judges not as ‘unsophisticated characters who make choices based merely on their own political preferences’, but as ‘strategic actors who realize that their ability to achieve their

¹⁴⁰ Chris Hanretty, *The Decisions and Ideal Points of British Law Lords* (2012) 43 BJ PolS 00, 4.

¹⁴¹ Michael Heise, ‘The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism’ (2002) 4 U Ill L Rev 819.

¹⁴² Baum (n135).

goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.’¹⁴³

Development of the predominant models

The models above are by no means the only models of judicial behaviour. US scholars have proposed an array of new or adapted models by which to assess how judges judge. For example, Cross identifies a fourth model – the litigant-driven model. As the name indicates, this model suggests that it is the litigants rather than the judges who drive case outcomes.¹⁴⁴ Alternatively, Guthrie et al. have developed what they call the ‘Intuitive Override model of judging’.¹⁴⁵ Drawing upon contemporary psychological research, particularly the work of Kahneman and Frederick on heuristics and biases, this model recognises that all decision-making is the result of a dual-process in which individuals first make intuitive judgments (System 1) which may or may not then be overridden by ‘complex, deliberative thoughts’ (System 2) (which essentially serve as a self-imposed check on decision-making). This model is described as ‘less idealistic than the deductive model embraced by the formalists, but also less cynical than the intuitive model embraced by the realists’.¹⁴⁶

Posner identifies a further six models in addition to those outlined above: the sociological, the psychological, the economic, the organizational, the pragmatic and the phenomenological theories of judicial behaviour.¹⁴⁷ These models are indicative of how the study of judicial decision-making has become of interest to scholars from a variety of disciplines outside of political science – psychologists, sociologists and economists to name but a few. Whilst variants of these different models abound, Posner argues that they all share one thing in common – they each fail to present a complete account of what judges do.¹⁴⁸ In response, Epstein, Landes and Posner advance a further alternative – the ‘labor-market model of judicial behaviour’.¹⁴⁹

¹⁴³ Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998).

¹⁴⁴ Frank Cross, Decision-making in the US Circuit Court of Appeals (2003) 91 Cal L R 1457, 1490.

¹⁴⁵ Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, Blinking on the Bench: How Judges Decide Cases (2007) 93 Cornell L Rev 101, 108-109.

¹⁴⁶ *ibid* 128.

¹⁴⁷ Richard Posner, *How Judges Think* (Reprint edn, Harvard University Press 2010).

¹⁴⁸ *ibid*.

¹⁴⁹ Lee Epstein, William Landes and Richard Posner, *The Behavior of Federal Judges* (Harvard University Press 2013).

Drawing on existing models and concepts from labour economic concepts such as cost-benefit analysis, this model situates judges as participants in a judicial labour market in which they, like other workers, are motivated and constrained by predominantly non-pecuniary costs and benefits.¹⁵⁰ It is noteworthy that judicial ‘personal-identity’ characteristics are also recognised as influencing how judges decide cases.¹⁵¹ Findings from the empirical testing of the ‘labor-market model’ supports the authors claim that judges are influenced by a combination of legal and non-legal considerations.¹⁵²

In the section above, it is clear that contemporary theories of judicial decision-making suppose that judges’ personal factors do, at least occasionally, play a role in the process of judging. The next section moves on from theories about adjudication to explore judging from a judicial perspective.

2.4 Judging through a judicial lens

Significantly, evidence that judges’ personal factors play a role in judicial decision-making can be gleaned from numerous comments made by former and current judges themselves, both in the UK and other jurisdictions, in judicial speeches, cases and interviews. To illustrate, Lord Radcliffe once said: ‘More and more I am impressed by the inescapable personal element in the judicial decision’.¹⁵³ Similarly, in *Piglowka v Piglowski*,¹⁵⁴ Lord Hoffman asserted: ‘Since judges are also people, this means that some degree of diversity in their application of values is inevitable’. More recently, Lord Justice Etherton has talked about the critical role that a judge’s ‘personal outlook and judicial philosophy’ can play in the outcome of hard cases and the defining of society’s values, even if the judge is unaware of the way in which their ‘worldview’ influences their decision-making.¹⁵⁵ Likewise, talking about the role of the judge in a representative democracy, Lord Mance has stated that ‘Loyal though we are by inclination and training to the law, we are each of us different in our make-up and individual personalities, and in difficult cases this may evidence

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ Lord Radcliffe, *Not in Feather Beds* (1st edn, Hamish Hamilton Ltd 1968).

¹⁵⁴ [1999] UKHL 27.

¹⁵⁵ Terence Etherton, ‘Liberty, the Archetype and Diversity: a philosophy of judging’ [2010] PL 727.

itself'.¹⁵⁶ This view is also echoed in the following comment by Lady Hale who recently opined:

We like to think that the outcome of any particular case is determined by the law and the evidence and not by the predilection of the individual judge. We like to think that we are not predictable in the way in which we will decide the hard cases where the outcome is not clear. But we cannot have it both ways – we have already accepted that it matters who the judge is.¹⁵⁷

Specifically in relation to family law and mental capacity cases, Hedley J, a retired High court judge and former President of the Lawyers' Christian Fellowship, asserts that: 'The areas under consideration are value-laden and every outcome will involve a value-judgment made by the decision-maker...' ¹⁵⁸ It is perhaps significant then that Hedley also opines that '...judges tend to have quite strong personal values systems'.¹⁵⁹ It might tenably be argued that the stronger an individual's value system, the more difficult it will be to make decisions that are not, at the very least, unconsciously influenced by those deeply entrenched values, of which religious beliefs may be part. On the other hand, talking about the recent Brexit ruling, whilst recognising the personal dimension to judging, Lord Kerr emphasises the rule-bound nature of judicial decision-making:

We are not involved in reaching decisions based on anything other than the legal principles as they are presented to us and the legal analysis which we conduct as to these extremely difficult and complicated questions... That's not to say that we don't have personal views but we are all extremely conscious of the need to set aside our personal views and to apply the law as we conceive it to be.¹⁶⁰

¹⁵⁶ Lord Mance, 'The Role of Judges in a Representative Democracy' Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas (24 February 2017) <www.supremecourt.uk/docs/speech-170224.pdf> accessed 18 June 2017.

¹⁵⁷ Lady Hale, 'Constitutional Implications of Judicial Selection' (Constitutional Law Summer School, Belfast 11 August 2017) < <https://www.supremecourt.uk/docs/speech-170811.pdf> > accessed 31 October 2017.

¹⁵⁸ Mark Hedley, *The Modern Judge: Power, Responsibility and Society's Expectations* (LexisNexis 2016).

¹⁵⁹ *ibid* 6.

¹⁶⁰ Andrew Hosken, 'UK's Supreme Court faces Brexit limelight' (BBC Radio 4, 15 November 2016) <www.bbc.co.uk/news/uk-politics-37979406> accessed 25 June 2017.

More recently, in a speech about judicial ethics, Lord Neuberger recalled a case that he had been involved in which clearly demonstrates how easy it can be for personal factors to enter the judicial decision-making process. Of course, there is no suggestion that the actual judgment was inappropriately influenced by such factors:

Early on in my judicial career, I was listening to an oldish man who was giving evidence which was inherently unconvincing, and I noticed I was trying to justify or explain away his inconsistencies and evasions to myself. I pulled myself up and tried to examine why I was doing this, and then I realised that, through his physical and vocal mannerisms, he reminded me of my own father who had recently died, and that caused me to want to believe him.¹⁶¹

Looking to religion more specifically, Cooke J has commented that his Christian values would not influence his professional judgements ‘to a very significant extent’, from which we might reasonably infer his religious beliefs nevertheless exert some influence on decision-making, particularly given he admits that human rights cases may be approached from ‘a slightly Christian perspective’.¹⁶²

Similarly, Hedley J has said that in family cases in which the life or death of a child is at stake, whilst the best interests of the child is the principal consideration, faith will inevitably influence decisions ‘as it will influence any other discretionary decision that you might make’.¹⁶³ On the other hand, when asked whether her Christian beliefs had any effect on work as a judge, former Lord Justice of Appeal, Dame Butler-Sloss acknowledged the indirect role played by personal factors but did not consider her religious beliefs to be a factor in her decision-making:

The place of God in one’s daily life is obviously personal, and for most people a private matter. I cannot speak for other judges but I do not consider that I am

¹⁶¹ Lord Neuberger, ‘The Role of the Judge: Umpire in a Contest, Seeker of Truth or Something in Between?’ *Singapore Panel on Judicial Ethics and Dilemmas on the Bench: Opening Remarks* delivered on 19 August 2016 < www.supremecourt.uk/docs/speech-160819-04.pdf > accessed 27 September 2016.

¹⁶² Michael Allen, ‘Law and Justice from a Christian Viewpoint’ (17 January 2012) <http://theboar.org/news/2012/jan/17/law-and-justice-christian-viewpoint/> > accessed 1 November 2012.

¹⁶³ Hannah Clifton, ‘A matter of faith’ *The Law Society Gazette* (4 November 2004) < www.lawgazette.co.uk/analysis/a-matter-of-faith/1650.fullarticle > accessed 14 December 2012.

directly affected in my judicial role by my beliefs. It is obvious however, that my standards and views, like everyone else's, are conditioned by my background and experience.¹⁶⁴

On this view, it might well be questioned what are an individual's standards and views, if not a reflection, at least in part, of their beliefs.

Looking outside of the UK, Richard Chisholm, a former justice of the Family court in Australia, acknowledges that there is a risk that judicial decisions may be affected by the personal values of individual judges where open-ended principles are applied (although not specifically in relation to religious values). He describes this as the 'values problem'.¹⁶⁵ Arguing that the influence of values are largely neutralised by legal constraints, agreed case-specific values and judicial professionalism,¹⁶⁶ he accepts that a judge's underlying values can often play an unconscious role in judicial decision-making. Former justice of the High Court of Australia, Michael Kirby, similarly agrees that judges draw on their personal values in legal reasoning, whether consciously or unconsciously. He suggests that it is a given that judges' personal values affect judicial reasoning, not least because of ambiguities in the English language which mean 'almost always there are at least two or maybe more answers' to a constitutional case.¹⁶⁷ And former Australian Federal Court judge Ray Finkelstein QC has painted a similar picture of the factors that affect how judges judge:

Every human being is the product of their social experience, background, education and heritage. A judge is no different. Judges (sic) views of morality

¹⁶⁴ Dame Elizabeth Butler-Sloss, 'Who is to judge? The role of the judiciary in ethical issues' *The Fourteenth Eric Symes Abbott Memorial Lecture* (Westminster Abbey, Thursday 6th May 1999) <www.kcl.ac.uk/aboutkings/principal/dean/thedean/14th%20ESA%20lecture%201999.pdf> accessed 30 July 2013.

¹⁶⁵ Richard Chisholm, 'Values and Assumptions in Judicial Decisions' Judicial Reasoning: Art or Science Conference (Canberra, 7 & 8 February 2009) <www.njca.com.au/wp-content/uploads/2013/07/Values-and-Assumptions-in-Judicial-Decisions-Chisholm.pdf> accessed 28 November 2012.

¹⁶⁶ Chisholm argues that legal constraints consist of five interlocking aspects: legal principles; evidence; argument; reasons and the risk of appeal. Non-controversial case-specific values relate to values that emerge in response to evidence. Judicial professionalism is self-explanatory.

¹⁶⁷ Michael Kirby with Professor Bernhard Schlink and others, 'Judicial Values: should judges apply the law, or should they bring their own values to the task? ABC 27 August 2009 <www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2390.Transcript_Of_Form_With_Bernard_Schlink_Aug_2009.pdf> accessed 26 November 2012. cf. Dworkin's Right Answer Thesis in which Dworkin argued that there is a unique answer to every legal question, even in hard cases.

as well as their background and beliefs, sympathies and antipathies cannot help but underline at least some aspects of the decision-making process and, in some cases, all aspects. This is so whether or not the particular judge acknowledges it. There are some self-proclaimed formalists who believe it is possible to divorce their personal views and values from their decisions. Although they may genuinely believe this, I doubt its truth.¹⁶⁸

In considering the arguments relating to the appropriateness of personal convictions in judging as part of a wider debate regarding the doctrine of church and state, Hammond J, a serving judge in the Court of Appeal in New Zealand and President of the Law Commission goes so far as to advocate allowing judges to rely on their own religious beliefs in hard cases, on the basis that such beliefs help provide ‘a vital and inexhaustible source of the energy we need for human renewal and spirit’.¹⁶⁹

What is clear from the discussion above is that many judges make no secret about the fact that personal factors colour their personal outlook and that such factors may play a part in their judicial decision-making in some way. Crucially however, it will be seen in the next section that proponents of this view defend claims that this doesn’t threaten impartiality by arguing that judges’ decisions remain ‘subordinate to judicial norms’.¹⁷⁰

2.5 Impartiality in an adjudicative context

In the foregoing sections, contemporary theories and models of adjudication, together with recent comments from judges suggest that judicial decision-making cannot be understood without considering the impact of non-legal factors. This clearly presents a dilemma – how can the presence of a personal dimension to judging be squared with the requirement for judges to administer the law impartially? To address this question, this section considers how impartiality can be understood within an adjudicative context.

¹⁶⁸ Justice Raymond Finkelstein, ‘Decision-making in a Vacuum?’ (2003) 29 Mon ULR.

¹⁶⁹ Grant Hammond, ‘The judiciary and religion in society’ 2005 Address to the 12th Annual International Law and Religion Symposium, Brigham Young University, Utah <www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-2005> accessed 26 November 2012.

¹⁷⁰ Rosemary Hunter, ‘An Account of Feminist Judging’ in Clare McGlynn, Erika Rackley and Rosemary Hunter (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 32.

Judicial impartiality is widely recognised as a fundamental requirement for procedural fairness and natural justice. Moreover, it is essential in maintaining public confidence in, and the legitimacy of, the legal process. As Lord Denning MR stated: ‘Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The Judge was biased’’.¹⁷¹ Judicial impartiality can be defined as the absence of personal prejudice or bias in a case so as to ensure that litigants are treated fairly by the court. Thus, to be impartial, a judge must absent any personal interest or bias from the decision-making process so as to ensure that his or her reasoning is based only on the evidence presented and the relevant guiding legal principles and precedent.

Together with the closely related concept of judicial independence, the principle of judicial impartiality is embodied in the judicial oath which requires a judge to act ‘without fear or favour, affection or ill will’. Shetreet and Turenne explain that ‘fear or favour’ undermines the collective aspect of judicial independence, whilst affection or ill will threatens the independence of the individual judge – the latter being that about which this thesis is concerned.¹⁷² Sedley LJ makes a further distinction; he links ‘fear or favour’ to independence (both collective and personal) which he described as a ‘state of being’, whilst ‘affection or ill will’ is said to be related to impartiality which he describes as the ‘state of mind’ of a judge or tribunal towards a case and the parties to it.¹⁷³ In any case, the collective and individual dimensions of independence are underpinned by the notion of impartiality. In turn, impartiality is rooted in the notion of equality, specifically equality before the law, widely recognised as a fundamental right protected under international, regional and national human rights law. For example, Article 7 of the Universal Declaration of Human Rights provides that: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law’,¹⁷⁴ whilst Article 20 of the EU

¹⁷¹ *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon* [1969] 1 QB 577, 599.

¹⁷² Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013) 179.

¹⁷³ Stephen Sedley in the Foreword to Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing 2009).

¹⁷⁴ This commitment to equality is also reflected in conceptions of impartiality in other contexts such as in political and moral philosophical discourse. For a comprehensive discussion of the definition of impartiality in moral and political philosophy see Susan Mendus, *Impartiality in Moral and Political Philosophy* (OUP 2002).

Charter of Fundamental Rights simply states: ‘Everyone is equal before the law’.¹⁷⁵ In so far as it provides a level playing field for all parties, Geyh opines that impartiality is therefore ‘a feel good term, like “puppies” and “pie” that no decent soul would denigrate’.¹⁷⁶

Despite its importance in a judicial context, the concept of impartiality has received little attention among legal scholars. Lucy argues that this is particularly surprising because whilst impartiality is recognised as central to understanding the judicial role, at the same time, the concept is frequently criticised for being incoherent or impossible to attain.¹⁷⁷ One possible explanation for this is that judicial impartiality is often conflated with the notion of judicial neutrality. Notably, in defending the possibility of impartiality in a juridical context, Lucy himself chooses not to distinguish between these two terms reasoning that, as ordinarily conceived, impartiality and neutrality are more or less synonyms.¹⁷⁸ Lucy is not alone; Ipp states that many judges regard these two concepts as synonymous.¹⁷⁹ Nonetheless, in understanding judicial impartiality, it is helpful to distinguish these two closely related, but distinct, terms.

Impartial or neutral?

According to Montefiore, ‘to be neutral is always to be neutral between two or more actual policies or parties’.¹⁸⁰ In a judicial setting, neutrality requires that judges are politically neutral; they are neutral in their stance to the law and their decisions must be untainted by bias. However, here it is posited that the idea of the wholly detached, value-neutral judge is a fiction. All individuals, professional judges or otherwise, have preconceptions, opinions and prejudices that shape their understanding of society. These views are likely to be informed by, amongst other things, an individual’s moral, religious, ethical and/or political values. The process of judging, by its very nature, necessarily involves a judge having to identify the limits of, and

¹⁷⁵ The Charter became legal binding on EU institutions and National governments on 1 December 2009. The aim of the Charter is to strengthen the protection of fundamental rights by making them more visible and more explicit for citizens of the EU.

¹⁷⁶ Charles Geyh, ‘The Dimensions of Judicial Impartiality’ (2013) 65 Fla L Rev 493.

¹⁷⁷ William Lucy, ‘The Possibility of Impartiality’ (2003) 25 OJLS 13.

¹⁷⁸ *ibid.*

¹⁷⁹ David Ipp, Judicial impartiality and judicial neutrality: Is there a difference? (2000) 19 ABR 212.

¹⁸⁰ Alan Montefiore, ‘Neutrality, indifference and detachment’ in Andrew Graham (ed.) *Neutrality and Impartiality: The University and Political Commitment* (CUP 1975) 4.

interpret the applicable rules, contrast behaviours and make determinations; these are tasks which necessarily involve an element of value-judgment which is often (if not always) contingent on the way in which the judge understands and responds to the current social context in a given case, particularly when judicial discretion is exercised; accordingly, as Hedley J states: ‘The value-free judge does not and should not exist’.¹⁸¹

For the above reasons, the argument herein advanced is that whilst judges strive to be and be seen to be impartial (and, as will be seen in later chapters, often succeed), judicial neutrality is impossible to achieve, nor is it desirable.¹⁸² As Lucy contends, to expect judges to adjudicate having divorced themselves from their personal commitments and experiences (to which can be added other factors such as their prior understanding of prevailing societal value) is ‘to expect them to live debased lives’.¹⁸³ Surely, it is preferable that those making decisions about matters that often affect society at large draw upon their knowledge, experiences and understanding of the world when passing judgment. On this view it is easy to see why Lucy says that impartiality (and, on Lucy’s argument, neutrality) can only be understood against a backdrop of partiality.¹⁸⁴ On the other hand, the claim that judicial neutrality is illusory clearly threatens what Lucy describes as ‘attitudinal impartiality’, particularly if a judge’s life experiences are so limited or of such a nature that the judge fails to attain what Lucy identifies as the basic requirement of impartiality, namely, ‘an attitude of openness to and lack of pre-judgment upon the claims of the disputants’. However, this argument fails to take into account the ways in which judging is constrained. For example, judges have a duty to comply with legal rules, values of the law and standards of judicial behaviour (whether by convention or codified). Evidence of the limiting effect of the law can be found in cases where a judge says that the law compels him or her to reach a particular decision, even though it is not an outcome with which the judge personally agrees.¹⁸⁵ Of course, such constraints do not prevent a judge from entering the courtroom without preconceptions but they can play an important role in alleviating the effects that

¹⁸¹ Hedley (n158) 8.

¹⁸² Sophie Turenne, *We Never Needed to Define the Convention of Non-Political Speech by Judges – Just to Police It*. Comments on Patrick O’Brien, ‘Judges and Politics: The Parliamentary Contributions of the Law Lords 1876-2009’ (2016) 79 (5) *MLR* 786-812’ [2017] *MLRForum* 007.

¹⁸³ Lucy (n177).

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

judicial personal factors have on the decisional process. In any case, as Lucy argues, a requirement to be impartial does not require a judge ‘to do the impossible’ and set aside all of their commitments, experiences and values, only those that are relevant to the parties and the dispute.¹⁸⁶ As such, it is perfectly plausible to argue that a judge may lack neutrality but may nevertheless be impartial or, at least it is suggested, impartial enough to ensure justice is done and seen to be done.

The law

In English law, judicial impartiality is an enduring precept at common law, and is also enshrined into statute under the Human Rights Act 1998 which incorporates Article 6 of the European Convention on Human Rights. Article 6(1) provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and *impartial* [emphasis added] tribunal established by law....

Lord Neuberger asserts that the law on bias creates a form of judicial self-scrutiny, in other words it acts as a constraint on judging.¹⁸⁷ In addition to the law, the Guide to Judicial Conduct (revised in 2018) (‘the Guide’) sets out the standards expected of judges in relation to impartiality.¹⁸⁸ Together with guidance on the five other core ‘values’ found in the Bangalore Principles of Judicial Conduct (judicial independence, integrity, propriety, equality and competence and diligence), the Guide sets out a written code for regulating judicial behaviour. As regards the principle of impartiality, the Guide makes clear that it is essential to the proper discharge of the judicial office and, significantly, that the requirement for a judge to be impartial applies not only to the case outcome but also to the decisional process. Although the Guide is not binding per se (for example, it

¹⁸⁶ *ibid.*

¹⁸⁷ Lord Neuberger, ‘Judge not, that ye be not judged’: judging judicial decision-making’ FA Mann Lecture (2015) www.supremecourt.uk/docs/speech-150129.pdf accessed 2 February 2015.

¹⁸⁸ The first Guide to Judicial Conduct for England and Wales was introduced in 2002 in response to the adoption of written codes of conduct in national and international jurisdictions and the endorsement of the Bangalore Principles by the UN Human Rights Commission in 2003. The Guide is principally aimed at professional full time and part time judges. However, Lord Judge states that it will also be of assistance to other members of the judiciary, including lay magistrates and tribunal members. Guide to Judicial Conduct 2013 (revised March 2018). The Supreme Court has its own written code which draws upon the principles contained in the 2013 Guide.

states that deference is to be given to the overall interests of justice), it has been convincingly argued that, to the extent that much of the Guide simply reiterates already obligatory standards of conduct such as a commitment to impartiality under the judicial oath, the Guide is more than simply persuasive.¹⁸⁹

Common law rule against bias

As indicated above, judicial impartiality requires that a judge is free from bias. At common law, the courts recognise two forms of bias which potentially threaten judicial impartiality: actual and apparent. As the name suggests, actual bias occurs where it is established that a judge is biased against one of the parties. Successful claims will automatically disqualify the judge. In practice, challenges on this ground are rare and, unsurprisingly, are not encouraged by the courts.¹⁹⁰ A key justification for the judiciary's reluctance to readily entertain claims of actual bias is that they erode public confidence and trust in the judiciary, and damage the reputation of the legal profession and justice system.¹⁹¹ A recent example of an unsuccessful claim on grounds of actual bias is *Red River UK Ltd v Sheikh*.¹⁹² In this case, the judge was accused of incompetence and of being consciously and deliberately racially biased against the defendant, Miss Sheikh. Having said that these were 'very serious allegations to level against any serving judge...', the judge said that he had done his best to deal with the matters relating to the case in accordance with the law and his judicial affirmation and that therefore he would not recuse himself.¹⁹³ Of course, given that applications for recusal are often decided by the judge against whom an allegation of bias is made means it is hardly surprising that a litigant may be reluctant to pursue a claim of bias. In *Locabail (UK) Ltd v Bayfield Properties Ltd*,¹⁹⁴ the Court of Appeal advance several other reasons why claims under this head are uncommon. Firstly, instances of actual judicial bias are unlikely. Returning to the

¹⁸⁹ Shetreet and Turenne (n172) 186.

¹⁹⁰ *R v Liverpool City Justices Ex p Topping* [1983] 1 WLR 119, 122-123; *R v Gough* [1993] AC 646, 672-673.

¹⁹¹ *Rackley*, (n104)134. cf. Goudkamp who argues that the judiciary's policy of turning a blind eye to the possibility of actual bias could be criticised in so far as this safeguard against judicial partiality may be perceived to be ineffective or non-existent and, perhaps more damaging, may lead to claims of a cover up for dishonest reasons. James Goudkamp, 'Facing up to actual bias' (2008) 27 CJK 32, 38.

¹⁹² [2009] EWHC 3257 (Ch). Also the recent case of *Kimyani v Sandhu* [2017] EWHC 151(Ch).

¹⁹³ *ibid*[19]. Henderson J also considered apparent bias but, in dismissing the defendant's claim, concluded that the test for apparent bias was not satisfied and dismissed her application.

¹⁹⁴ [2000] 1 QB 451, 472.

neutrality/impartiality distinction, it is accepted that a judge, like anyone else, may have a personal view about an aspect of a case, the law or indeed the parties involved. But wherever his or her personal sympathies lay, the judicial oath (which creates an assumption of impartiality), along with a judge's professional training, experience and commitment to the judicial role enables him or her to set aside those views and decide the case solely on the facts and in accordance with the law. Secondly, actual bias is very difficult to prove because 'the law does not countenance the questioning of a judge about extraneous influences affecting his mind'.¹⁹⁵ As Lord Woolf suggests in *R v Gough*,¹⁹⁶ such an approach is undesirable because of the confidential nature of the judicial decision-making process and unhelpful 'because the person alleged to be biased may be quite unconscious of its effect'.¹⁹⁷ Critically, on this argument, it seems that enforcing the rule against actual bias will only ever be successful where conscious bias is suspected. Thirdly, the burden of proof is very high; there must be clear evidence of judicial partiality. Therefore, from a practical perspective, as the Court of Appeal indicate, those who allege judicial bias will find it easier to discharge the lesser burden of showing that there is a real possibility of bias under the test for apparent bias.¹⁹⁸ What constitutes apparent bias is now considered.

The concept of apparent bias is encapsulated in Lord Hewart CJ's extempore judgment in *R v Sussex Justices, Ex p McCarthy*,¹⁹⁹ in which he states: '...it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. This important principle was reiterated in *In Pinochet* in which Lord Nolan makes it clear that it is not enough for a judge to *actually be* free from bias in favour of, or against, a party to a case; he or she must also *appear* to act without partiality or prejudice.²⁰⁰

The modern rule relating to apparent bias is that laid down in *Porter v Magill*²⁰¹ in which Lord Hope explained that the 'question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real

¹⁹⁵ *ibid.*

¹⁹⁶ [1993] AC 646.

¹⁹⁷ *ibid* 672.

¹⁹⁸ *Locabail* (n194).

¹⁹⁹ *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256.

²⁰⁰ *R v Bow Street Stipendiary Magistrates, ex parte Pinochet Ugarte (No. 2)* [2001] 1 AC 119, 140.

²⁰¹ [2002] UKHL 67.

possibility that the tribunal was biased'.²⁰² The original test was formulated in *R v Gough*,²⁰³ in which the House of Lords held that a judge (or juror) should be automatically disqualified for hearing a case where he or she had a proprietary or pecuniary interest in subject matter of the proceedings. In all other cases, the test to be applied was whether the court, having regard to those circumstances, considered that there was a real danger of bias. Of particular note, Lord Goff explained that it was unnecessary to require the court 'to look at the matter through the eyes of a reasonable man', because in such cases the court personified the reasonable man. In any event, Lord Goff explained, the court has first to ascertain the relevant circumstances from the available evidence, 'knowledge of which would not necessarily be available to an observer in court at the relevant time'. The approach in *R v Gough* was criticised on the basis that it failed to give due regard to the need to promote public confidence in the justice system. Thus, in *In re Medicaments and Related Classes of Goods (No.2)*,²⁰⁴ the test for apparent bias was modified so that the appearance of bias was to be considered from the perspective of the 'fair-minded and informed observer' (rather than that of the court) and the test was whether there was 'a real possibility, or a real danger' that the tribunal was biased. The effect of this change was to bring the common law test into line with the approach in Scotland, Commonwealth countries including Australia, New Zealand and Canada and the requirement for objective impartiality contained in ECHR Article 6(1).²⁰⁵

The test for apparent bias was subject to a further 'modest adjustment' in *Porter v Magill*,²⁰⁶ in which the 'real danger' element was dropped. It is suggested that the current test slightly lowers the threshold insofar as a 'real possibility' may be construed as being less difficult to prove than a 'real danger'.

The question of who constitutes a 'fair-minded and informed observer' was addressed in *Helow v Secretary of State for the Home Department*.²⁰⁷ In this case, the appellant, a Palestinian asylum seeker, alleged that there was a real possibility that the Court of Session judge who had dismissed the appellants appeal, Lady Cosgrove,

²⁰² *ibid* 103.

²⁰³ [1993] AC 646.

²⁰⁴ [2001] EWCA Civ. 350.

²⁰⁵ *Lawal v Northern Spirit Ltd* [2003] UKHL 35 [14].

²⁰⁶ *Locabail*(n194).

²⁰⁷ *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416.

would be deemed biased by a ‘fair-minded and informed observer’ because of her membership with the International Association of Jewish Lawyers and Jurists (IAJLJ) – an organisation which had published pro-Israeli and anti-Palestinian articles. Setting out the ideal characteristics of the observer, Lord Hope conceded that expectations were rather unrealistic.²⁰⁸ A fair-minded observer was ‘the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument’ and was neither complacent nor unduly sensitive or suspicious’.²⁰⁹ Furthermore, he opined that whilst the fair-minded observer was cognisant of the requirement for a judge to be impartial, they would also know ‘that judges, like anybody else, have their weaknesses’. To be ‘informed’, Lord Hope explained that the observer took a balanced approach to any information given, read beyond the headlines and appreciated the importance of context.²¹⁰ In dismissing the appeal, the House of Lords held that a fair-minded and informed observer would not conclude that there was a real possibility of unconscious bias on the part of the judge by reason of her mere membership with the IAJLJ. The suggestion that Lady Cosgrove may have been unconsciously influenced by reading the IAJLJ material, including that with anti-Palestinian sentiments, was rejected on the basis that it was ‘a blanket proposition’, the scope of which was too wide. On the other hand, if Lady Cosgrove had expressed, or was President of an association which had expressed a view, or endorsed a Pro-Israeli/anti-Palestinian stance, she would not have been allowed to sit because, as Mance LJ opined, ‘A fair-minded observer would regard such a judge as too closely and overtly committed to supporting the cause of Israel generally and of Mr Sharon in relation to the Sabra/Shatila massacre’.²¹¹

What is clear is that a claim of bias must be decided on the facts and circumstances of the individual case. Case-law and the Guide to Judicial Conduct give a further indication of the sorts of factors that are acknowledged as potentially giving rise to a real possibility of bias. Examples include: if a judge or members of the judge’s family has a significant pecuniary interest in the case outcome;²¹² if the judge has a

²⁰⁸ *ibid*[1033].

²⁰⁹ *Helow* (n207).

²¹⁰ *Lawal* (n205).

²¹¹ *Helow* (n207)53.

²¹² Guide to Judicial Conduct 2013,3.8.

personal or business relationship with a party,²¹³ or animosity exists between the judge and one of the parties in a case the judge is hearing;²¹⁴ if a judge is known to have strong views on topics relevant to issues in the case, and/or has commented extra-judicially on such topics;²¹⁵ or, if a judge is an active member of a pressure group.²¹⁶

Most significantly, the court has made it clear that there is very little prospect that a claim of apparent bias based on the religious beliefs of a professional judge will be successful. Specifically, in *Locabail*,²¹⁷ the Court of Appeal provides a non-exhaustive list of factors that are unlikely to give rise to a successful claim of apparent bias. Of particular relevance to the current discussion is the following statement:

We cannot, however, conceive of circumstances in which an objection could be soundly based on the *religion* [emphasis added], ethnic or national origin, gender, age, class, means or sexual orientation of the judge.²¹⁸

The mere reference to religion, then, is not sufficient to constitute bias. However, in some cases, it will be very difficult, if not impossible, for those with strongly held religious convictions to put aside those beliefs (at least unconsciously) in a way that allows them to approach the case with the requisite attitude of openness and lack of pre-judgment. Imagine a case such as *R (Nicklinson) v. Ministry of Justice*,²¹⁹ in which the UKSC considered the compatibility of the present law on assisted suicide with Article 8 of the European Convention on Human Rights and the lawfulness of the DPP's policy on assisted suicide. As has been argued elsewhere,²²⁰ it is surely within the realm of possibility that say, a Catholic judge with strong religious views against euthanasia would, at least unconsciously, be influenced by those same beliefs when considering such a case, even if his or her final decision was reasoned in accordance with the law.²²¹ Indeed, in arguing why *Nicklinson* was a matter for the

²¹³ Guide to Judicial Conduct 2013, 7.2; *Lawal* (n205).

²¹⁴ *Howell v Lees Millais* [2007] EWCA Civ 720.

²¹⁵ *R v S* [2010] 1 WLR 2511.

²¹⁶ Guide to Judicial Conduct 2013, 5. cf. *Helow* (n207) in which the HL held that there was no apparent bias by reason of membership.

²¹⁷ [2000] 1 QB 451.

²¹⁸ *ibid* 25.

²¹⁹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

²²⁰ Kate Malleson, 'Safeguarding judicial impartiality' (2002) 22 LS 53, 59.

²²¹ It is acknowledged that not all Catholics share the same view.

legislature and not for the courts to determine, Lord Sumption said that such a decision was one that could not fail ‘to be strongly influenced by the decision-makers’ personal opinions about the moral case for assisted suicide’ (discussed further in Chapter 5).²²²

Malleson argues that the assertion that there is no possibility of bias on grounds of, *inter alia*, a judge’s religion is inconsistent with one of the factors which the Court later suggests might give rise to a danger of bias - that is if, ‘for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him’.²²³ In agreement with Malleson, the position taken here is that it is reasonable to suppose that ‘extraneous considerations, prejudices and predilections’ may be partly or wholly shaped by personal factors relating to the decision-maker. For all of that, there is a straightforward and sound policy-based justification for saying that a judge’s religion in itself cannot conceivably give rise to a possibility of bias. If such challenges were seen as anything other than exceptional (for example where there was indisputable evidence as to an element of conscious or unconscious religious bias) the floodgates could be opened to claims of bias, the judicial process would be frustrated and public confidence in the judiciary undermined. This is because, in theory at least, every litigant would have a ground on which to question the impartiality of the judge – man against woman, young against old and so on.

What is clear is that based on the court’s reasoning in *Locabail* considered above, it is very unlikely that a judge would countenance recusing himself or herself grounds of actual or apparent religious bias, save for in very rare circumstances.

Addressing allegations of bias

Where concerns are expressed about a judge’s ability to disengage subjective beliefs or preferences from the decision-making process (such concerns being raised by the judge him- or herself, or by the parties involved in a case) judicial recusal or

²²² Nicklinson (n219).

²²³ Malleson (n220).

disqualification may be required.²²⁴ If a judge is shown to have an interest in the outcome of a case which he or she has determined so that he or she has acted, or will otherwise act improperly as a judge in his or her own cause, automatic disqualification is required.²²⁵ That said, a party may waive the right to object to the judge hearing the case if any such waiver is made with full knowledge of the relevant facts. In other cases of alleged actual or apparent bias, often it is the judge who determines whether they are sufficiently impartial to sit. This procedure is in itself controversial given that it, as Mummery LJ points out, it essentially means that a judge sits in judgment on his or her own behaviour.²²⁶ Indeed, it raises a number of legitimate questions, for example: Can a judge properly assess their own propensity for conscious or unconscious bias? Should there be greater disclosure requirements before proceedings commence? Does the fact that a judge is the adjudicator of his or her own conduct deter litigants from alleging bias for fear that the judge's failure to recuse may itself be perceived to adversely affect the way the litigant is treated? Whilst a discussion of arguments for and against judicial recusal reform is outside the scope of this thesis, a number of alternatives may be considered. For example, Mummery LJ cautions against judges yielding too readily to allegations of bias, but clearly thinks there may be occasions where it would be appropriate for a judge to informally arrange for the case to be re-allocated to a colleague²²⁷. His argument is underpinned by the need for a judge to be seen to be impartial. Another controversial option is to have the allegation considered by an independent adjudicator although this would be undoubtedly delay proceedings and potentially be resource-prohibitive.²²⁸ It has further been proposed that practice directions would be useful to direct judges as to the points they should take into consideration when deciding

²²⁴ Judiciary of England and Wales, 'Guide to Judicial Conduct March 2018 Part 3: 'If a judge is known to hold strong views on topics relevant to a case, by reason of public statements or other expression of opinion, he or she should consider whether it would be appropriate to hear the case irrespective of whether the matter is raised by the parties'. It should be noted that statistics as to the number of recusal applications made on the basis of apparent or actual bias are not currently collected. < <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf>> accessed 22 May 2018.

²²⁵ *Dimes v Grand Union Canal* (1852) 3 HLC 759, 793.

²²⁶ *El Faragy v El Faragy* [2007] EWCA Civ 1149, postscript. a case concerning a matrimonial dispute in which the judge refused to recuse himself having been accused of apparent bias by a third party.

²²⁷ *ibid.*

²²⁸ Charles Geyh, *Why Judicial Disqualification Matters* (2011) Articles by Maurer Faculty, Paper 826

whether to recuse.²²⁹ This more conservative approach has the benefit of not being so administratively burdensome but does not address the problem of whether litigants who have made an application for recusal will have trust and confidence in a judge who has refused to stand down. On balance, it is suggested that should allegations of judicial bias on grounds of religion or any other factor be made, it would be appropriate to combine the first and third of these options –practice directions being the first port of call with an option to informally pass the case to a colleague if the judge has any doubts about their ability to decide the case in an impartial manner. Of course, if a case has already been decided and a judge is found to be biased, the case must be set aside.²³⁰

2.6 Conclusion

The overarching research question considers whether lawyers perceive judges' religious beliefs affect judicial decision-making. In unpicking this question, four main concepts have been identified: (1) definitions of religion (2) judicial decision-making (3) judicial reflections and (4) judicial impartiality.

This chapter began by describing what religion means, both in a research and legal context, for the purpose of understanding how the lawyers who took part in this study may have understood the researcher's references to religion and related terms in the interviews and SPQ that form the empirical part of this research. In looking at examples of cases from employment and family contexts, the sorts of complex religious issues the courts are increasingly required to adjudicate were highlighted.

Next, it went on to consider traditional and modern conceptions of judicial decision-making in the English courts and the different theories and models of adjudication to situate the present thesis within its theoretical foundations. Against this backdrop, it was argued that the present study most closely aligns with Tamanaha's 'balanced

²²⁹ *Shetreet and Turenne* (n172)242.

²³⁰ Eg in *R v Bow Street Stipendiary Magistrates, ex parte Pinochet Ugarte (No. 2)* [2001] 1 AC 119, Lord Hoffman's failure to disclose his involvement in a charitable company linked with Amnesty International (an organisation that had been given leave to intervene in the case) led to the original judgment, in which the House of Lords ruled that the former Chilean dictator had no immunity from prosecution, being set aside and Lord Hoffman's automatic disqualification from hearing the case on grounds of bias. This also extended the rule relating to bias giving rise to automatic disqualification beyond that of pecuniary interests. Kate Malleon, *Judicial Bias and Disqualification after Pinochet (No. 2)* (2000) 63 MLR 119.

realist' (or 'balanced formalist') conception of judging,²³³ and loosely with an attitudinal model of judicial behaviour. Although, of course, as Posner suggests, whether any of the theoretical models can ever wholly capture the full extent to which legal and non-legal factors shape judicial behaviour is subject to debate.²³⁴

Shifting from the theoretical to the practical, judicial perspectives on the judicial role were then explored, wherein it was shown that, contrary to the traditional view of how judges judge based on a formalist conception of adjudication, the judges themselves readily acknowledge that who they are, their backgrounds and experience, inevitably affects their judicial decision-making. Notwithstanding that the presence of a personal dimension in judging is, *prima facie*, discordant with the concept of judicial impartiality, it was explained that it is possible for judicial personal factors such as religion to be reconciled with the requirement for impartial decision-making in both theory and in practice.

The next chapter explains why there is a paucity of research that considers the relationship between judges' religious beliefs and judging in the UK, and presents a review of existing judicial studies literature (in relation to the UK and further afield) that explores the nexus between judges' personal factors and judging and, more specifically, the relationship between judges' religion and judicial decision-making.

²³³ Tamanaha (n131).

²³⁴ Posner (n147).

CHAPTER 3

UNDERSTANDING JUDICIAL DECISION-MAKING: RESEARCH LANDSCAPE

The preceding chapter set out the conceptual framework upon which this thesis is based. Chapter 3 situates the present study within the existing empirical research that explores how judges reach decisions in practice. Having identified a gap in the understanding of the non-legal factors that influence judicial decision-making in the English courts, the first part of this chapter examines the reasons for the scarcity of research in this area. The bulk of the chapter explores evidence emanating from other jurisdictions, particularly the US, which indicates that judges' religion (and other personal factors) can influence the legal decisional process in certain cases. Mindful of the pitfalls in extrapolating the findings from the US studies to judicial behaviour in the English courts (some of which are considered in Section 3.3.1), it might be expected that if the religious convictions and other personal factors relating to judges in other jurisdictions (where judges are similarly bound by Oath or Affirmation to administer justice fairly and impartially) are found to play a role in judging, a similar phenomenon may be expected to be found in relation to the way judges judge in the domestic courts. In light of the dearth of empirical literature in relation to how judges make decisions in the domestic courts, Chapter 3 concludes by considering whether the conceptual and methodological studies of judicial behaviour conducted in the US could be replicated in a UK context.

3.1 Current research landscape in the UK

Deciding cases constitutes the core business of judges today.¹ However, over the last seventy years, there has been a significant expansion in the power and reach of the judiciary. As discussed in Chapter 1, factors contributing to this broader judicial

¹ Justice Hickinbottom, 'What Makes A Good Judge?' in Jeffrey Jowell and others, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Judicial Appointments Commission 2010).

remit include, but are not limited to, constitutional reform, the growth of the welfare state, the rise of judicial review, increasingly complex issues brought before the courts, and the enactment of the Human rights Act 1998.² One consequence of what Genn has described as the ‘increasing legalization of the social world’³ is that, in contemporary Britain, judges are increasingly required to adjudicate a gamut of cases engaging novel, often divisive, issues of profound political, social, moral, ethical and/or religious importance.⁴ It is hardly surprising, therefore, that the opinions and decisions of the judiciary are now subject to unprecedented levels of media and public scrutiny.⁵ Given the rise in the significance of the judiciary vis-à-vis the other arms of government,⁶ and greater scrutiny of the judicial role, the practice of judging might reasonably be expected to have captured the interest of the academic community in the UK. However, whilst there have been a few notable studies of how and what judges do,⁷ it is only recently that judicial decision-making (as a sub-discipline of judicial studies) has begun to attract the critical attention of legal scholars in the UK who, as Thomas observes, have traditionally confined research of the judiciary to a more legalistic analysis of cases rather than exploring judicial decisions in terms of judges’ own preferences.⁸

² For a comprehensive review of key drivers for this change see Alan Paterson and Chris Paterson, ‘Guarding the Guardians? Towards an independent, accountable and diverse senior judiciary’ (2012) <www.centreforum.org/assets/pubs/guarding-the-guardians.pdf> accessed 6 April 2016.

³ Hazel Genn, *Judging Civil Justice* (CUP 2010).

⁴ Cheryl Thomas, ‘From Purple Haze: The Danger of Being in the Dark About Judges’ (Inaugural lecture, UCL London June 2012) < www.youtube.com/watch?v=oQahSDTvFvA> accessed 1 November 2012, in which Thomas states: ‘...the reality is that today, there is not a single important social issue in our society that judges, at some point, are not asked to adjudicate’.

⁵ Eg hearings of cases before the UKSC can now be watched live on television or on the internet. Griffith has suggested criticism of the judiciary has been fuelled by a number of miscarriages of justice that have not been properly investigated by the courts, see JAG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press London 1997) 56. Some judges have also called for greater public scrutiny, eg see Sir Nicholas Wall’s call for greater public scrutiny of the Court of Protection in Amelia Hill, ‘Court of Protection should be open to public scrutiny, says leading judge’ *The Guardian* (6 November 2011) <www.theguardian.com/law/2011/nov/06/court-of-protection-public-scrutiny> accessed 3 March 2013.

⁶ Paterson and Paterson (n2)8.

⁷ Eg Griffith (n5); Alan Paterson, *The Law Lords* (Palgrave MacMillan London 1983); Kate Maleson, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing Company 1999), and more recently, Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2011) and Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013); Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013).

⁸ Cheryl Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* (2005) Commissioned by HM Commissioners for Judicial Appointments in which the author reviews policies and practices for increasing diversity in other jurisdictions including: US, Canada, Australia, New Zealand, The Netherlands, Italy, France, Spain and Germany.

Of the few studies that have explored the influence of non-legal factors on judging in the UK to date, the focus has been on a narrow range of judicial characteristics – social class, political ideology and, more recently, gender and personal values. Following the US tradition, the early research into judicial decision-making was conducted by political scientists interested in the relationship between ideological preferences and case outcomes. For example, in his seminal text on the UK judiciary first published in 1977, Griffith controversially argued that, by virtue of their similar privileged backgrounds (white, male, Oxbridge educated and upper-middle class), judges had ‘a unifying attitude of mind, a political position... primarily concerned to protect and conserve certain values and institutions’.⁹ For Griffith, this meant that particularly when deciding ‘political cases’ (defined as those that arise out of ‘controversial legislation or controversial action initiated by public authorities, or which touch upon moral or social issues’ and therefore call for judicial discretion),¹⁰ judges as a group were incapable of political neutrality. Instead, he argued that judicial interpretations of what constituted the public interest were informed by a corporate view. Whilst absolving judges ‘of a conscious and deliberate intention to pursue their own interests or interests of their class’,¹¹ the corporate view (itself the product of an elite class) was principally concerned with: (a) upholding the interests of the state; (b) maintaining the status quo; and, (c) unconsciously favouring conservatism.¹² Because of this inherent bias towards the ‘established authority’, Griffith argued that judges were ineffective as custodians of individual rights against the state,¹³ particularly in relation to the claims of minority groups or those who might threaten the established order.

Forty years after Griffith’s original work, it is therefore striking that there has been relatively little change in the social make-up of the judiciary, particularly in the higher ranks. As displayed below (Tables 3.1 and 3.2), judges remain overwhelmingly male, white, and typically educated at private school and

⁹ *Griffith* (n5)7. In his original work, Griffith argued that the judges political values were those normally associated with the Conservative party. However, later he suggested that judicial conservatism did not necessarily follow partisan lines but was nonetheless a political philosophy. *Griffith* (n5)341.

¹⁰ *ibid* 7.

¹¹ *ibid* 334.

¹² *ibid* 341

¹³ Griffith argued that human rights were no more and no less than political claims made by individuals on those in authority’, JAG Griffith, *The Political Constitution* (1979) 42 MLR 1.

Oxbridge.¹⁴ On Griffith's thesis, it would follow that the decisions of judges today are likely to reflect similar personal and corporate biases as their forebears.

| | Public School | | | Oxbridge | | |
|-----------------------------|---------------|-----------|------|----------|-----------|------|
| | 1987 | 1994 % | 2015 | 1987 | 1994 % | 2015 |
| All senior judiciary | 70 | 80 | 74 | 80 | 87 | 74 |

Table 3.1 Senior judiciary by education¹⁵

| | Total number | Women | | Ethnicity | |
|-----------------------------------|-----------------|-------|------|-----------|------|
| | | 1994 | 2017 | 1994 | 2017 |
| Law Lords or Supreme Court | 12 | 0 | 1 | 0 | - |
| Heads of Division | 5 | 0 | 0 | 0 | - |
| Lord Justices of Appeal | 38 | 1 | 9 | 0 | - |
| High Court judges | 97 | 6 | 21 | 0 | 5 |

Table 3.2 Senior judiciary by gender and ethnicity¹⁶

That said, there are several reasons why Griffith's thesis does not stand up to scrutiny today.¹⁷ First, it rests on a rather simplistic assumption that, because of their shared backgrounds, all judges think in the same way. However, now, as when Griffith's work was published, a common social background does not mean that judges share a common judicial philosophy or follow the same class interests when deciding cases.¹⁸ Second, treating the judiciary as a homogenous group overlooks the important role played by individual judges in the decision-making process,

¹⁴ At the time of writing Lady Hale succeeded Lord Neuberger to become the first woman President of the UKSC (October 2017). At the same time, Black LJ became only the second woman to sit in the UKSC since its creation in 2009 whilst Singh LJ became the first non-white judge to sit in the CA.

¹⁵ Data for the years 1987 and 1994 is taken from Griffith (n5)20. The data source for 2015 is based on the figures from the Sutton Trust's analysis of the educational background of leading lawyers < www.suttontrust.com/newsarchive/the-sutton-trust-and-prime-call-for-better-engagement-in-social-mobility-initiatives/#_ftn1 > accessed 15 October 2017.

¹⁶ Data for the year 1994 is taken from Griffith (n5)21. The 2017 data is taken from the Judicial Diversity Statistics 2017 < www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf > accessed 29 November 2017. As regards ethnicity, it should be noted that not all of the judges declare their ethnicity as the collection of this data is not mandatory.

¹⁷ Simon Lee, *Judging Judges*, (Faber and Faber 1988) 33.

¹⁸ Hedley J observes that 'judges do have one view in common: their own fallibility'. However, this is not by reason of their shared background but by their being human. Mark Hedley, *The Modern Judge* (Lexis Nexis 2016) 8.

particularly in split decision cases.¹⁹ Third, it is important to note that Griffith's work pre-dates the coming into effect of the Human Rights Act 1998 (HRA) into UK law. The HRA has provided a more systematic basis on which existing procedural values and substantive values such as equality, dignity and fairness are protected. Furthermore, the courts now play a greater role in protecting the fundamental rights of individuals against violations by the state. This and other constitutional changes have fuelled debate as to whether the balance is shifting from a 'political constitution', specifically the idea that those who exercise political power should be held to account through political rather than legal processes and institutions, to a 'legal constitution' in which the courts have greater authority to hold the Executive to account.²⁰ In criticising the judiciary, Griffith was defending the political constitution, no doubt having been heavily influenced by his own left wing bias and the political and economic malaise of the time. Fourth, from a methodological perspective, Lee has questioned whether the cases that Griffith used to support his thesis actually show a definitive association between judges' backgrounds and the politics of their decision-making. As Lee correctly argues, it is not always obvious as to which side of the political spectrum a decision falls.²¹ Finally, it is also worth noting that Griffith's research predates the transfer of the judicial appointments process to the new independent Judicial Appointments Commission (JAC) created in 2006 under the terms of the Constitutional Reform Act 2005.

That said, Griffith's thesis has some resonance today. As discussed in the preceding chapters, it is now widely accepted that judges' personal factors play a role in the decision-making process. What Griffith failed to highlight is that such influence is limited by the imposition of legal and non-legal checks and balances. There is also support for Griffith's claim as to the impossibility of judicial neutrality, at both an individual judge and institutional level. As discussed in Chapter 2, by its very nature, judging requires the decision-maker to exercise his or her value-judgment,

¹⁹ Rachel Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity' (2015) 35 LS 1,29.

²⁰ For example: Vernon Bogdanor, *The Judges and the Constitution*, Lecture at Gresham College 30 May 2006; Colm O'Cinneide, 'The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'', Institute for Human Rights Working Paper No 01, Graham Gee and Gregoire Webber, 'What is a political constitution?' (2010) 30 OJLS 273; Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 Int'l J Const L86.

²¹ *Lee* (n17).

particularly in hard cases.²² Moreover, the value-judgments that judges make are shaped by legal values such as fairness and equality. Ergo, neutrality is neither necessary, nor desirable.²³ But what is vital is that when deciding a case, the decision-maker adopts an open-mind and complies with his or her constitutional responsibility to be impartial; that is, to ensure that any preconceptions and predilections are abstracted from the decision-making process so as to ensure that judicial reasoning is based on the evidence and relevant guiding legal principles and precedent, rather than on personal preferences and prejudices.

In the 1980's, although not focused specifically on judicial attitudes or values, Paterson also departed from the traditional doctrinal approach to explore decision-making in the House of Lords through the prism of the Law Lords and the Bar.²⁴ To support his thesis that judicial decision-making in the House of Lords should be viewed as a social process, Paterson first observed the interaction between the Law Lords and counsel in a range of appeals heard between 1972 and 1973 and conducted interviews with a variety of individuals within the legal sphere with knowledge about the Law Lords and their role. In the main phase of his fieldwork, he conducted in-depth interviews with Law Lords and the advocates who most frequently appeared before them, in an effort to shed light on how judges perceived their role inside the final court of appeal. Paterson's early empirical work using role analysis found that that the process of judging was an interactive process. Judicial personalities could not be ignored, nor could the impact of judges' dialogue with counsel, particularly in acting as a powerful constraint on adjudication. Almost forty years after his first study, Paterson has recently returned to explore decision-making in the highest court.²⁵ Once again he predominantly uses elite interviews to support his view that the nature and content of dialogue amongst and between judges and others (Counsel, Academics, courts in other jurisdictions, judicial assistants, and other branches of government) is pivotal to a better understanding of judicial decision-making.

²² Chapter 2.5.

²³ Sophie Turenne, We Never Needed to Define the Convention of Non-Political Speech by Judges—Just to Police It. Comments on Patrick O'Brien, 'Judges and Politics: The Parliamentary Contributions of the Law Lords 1876–2009' (2016) 79 MLR Forum 786 -812.

²⁴ Paterson, *The Law Lords* (n7).

²⁵ Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (n7).

In one of the first quantitative analyses of judicial decision-making conducted in respect of the UK judiciary, and emulating studies conducted in the US, Robertson used multidimensional scaling to test his premise that an individual judge's personal beliefs and attitudes, notably those 'inside a legal and 'professional' ideology' influenced judicial decisions.²⁶ Analysing decisions of judges in nonunanimous cases decided in the House of Lords between 1965 and 1978, he concluded that, in criminal and public law dimensions at least, a discernible 'judicial ideology' (defined by Robertson as 'reflexive positions on issues of a politico-legal nature – echoing or leading to a (perhaps only marginal) preference for supporting a particular type of cause or litigant')²⁷ could be detected. In a later study, Robertson used a combination of logistic regression, factor analysis and multi discriminant analysis methodologies to analyse both unanimous and nonunanimous decisions of the law lords between 1986 and 1995 across a variety of legal areas, for evidence to support his central thesis that 'the law in almost any case that comes before the Lords turns out to be whatever their Lordships feel it ought to be'.²⁸ Having shown that case outcomes were strongly correlated with which Law Lord decided an appeal, he concluded that judges' decisions were highly predictable in certain types of cases.

A decade later, in an empirical study of 1,592 nonunanimous opinions in 318 cases heard by the law lords between 1969 and 2009, Hanretty used a hierarchical item response model to determine whether dissent by judges could be attributed to ideological preferences.²⁹ He concluded that political affiliation did not have a statistically significant effect on case outcomes, although he did not preclude the possibility that judges' decisions reflected other personal characteristics.

The representation of women in the judiciary and the question of whether gender has any effect on judging is increasingly subject to investigation in the UK.³⁰ Research has been precipitated by a combination of factors including: the common perception

²⁶ David Robertson, 'Judicial Ideology in the House of Lords: A Jurimetric Analysis' (1982) 123 BJ Pol 1.

²⁷ *ibid* 12.

²⁸ David Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998).

²⁹ Chris Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2012) 43 BJ Pol S 703.

³⁰ Erika Rackley, 'Representation of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22 LS 602; Kate Malleson, 'Justifying Equality on the Bench: Why Differences Won't Do' (2003) 11 Fem LS 1; Lady Hale, 'Making a Difference? Why We Need a More Diverse Judiciary' (2005) 56 NILQ 281; Erika Rackley, 'What a difference difference makes: gendered harms and judicial diversity' (2008) 15 IJLP 37; Erika Rackley, 'Detailing Judicial Difference' (2009) 17 Fem LS 11.

of the judiciary as largely ‘pale, male and stale’; the appointment of Lady Hale as the first woman law lord and only woman justice of the UK Supreme court and the appointments of Lady Justice Arden and Lady Justice Hallett to the Court of Appeal;³¹ and the wider drive to increase judicial diversity. The theoretical basis for the proposition that a judge’s gender affects judicial decisions is found in one of two constructs.³² Emanating from the US, Gilligan’s ‘different voice’ theory suggests there is a distinction between the nature of moral reasoning employed by women and men; women reason from an ‘ethic of care’, whilst men reason from an ‘ethic of justice’.³³ Applied to the courtroom context, this theory posits that female judges display a greater depth of understanding and compassion and are less adversarial than their more combative male colleagues. Contrastingly, Boyd, Epstein and Martin’s ‘informational theory’ contends that it is the different experiences and perspectives of female judges that inform judicial decisions and, in some instances, may do so in a way that impacts upon their judging.³⁴ This second theory is favoured by Lady Hale who remarks:

I think that we can play the game as well as and in the same way as any man, but that we bring a different set of life experiences to the game which in a particular sort of case can colour what we think about it. This is not the same as having an “agenda” about what the outcome of any given case should be.³⁵

Moreover, this is a view with which at least one of Lady Hale’s male colleagues would appear to agree.³⁶

Whilst remaining sceptical about whether being a man or woman affects judicial decision-making, some feminist scholars argue that feminist judges are more likely to judge differently to non-feminist judges because they have a more

³¹ Lady Hale was appointed as the first woman Lord of Appeal in Ordinary in 2004. She became the first woman Justice of the Supreme Court following its establishment in 2009. Lady Justice Arden was appointed in 2000 and Lady Justice Hallett was appointed in 2005.

³² Lady Hale, ‘It’s a Man’s World: Redressing the Balance’ University of East Anglia Norfolk Law Lecture (16 February 2012) <www.supremecourt.uk/docs/speech-120216.pdf> accessed 22 November 2012.

³³ Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Reissue edn, Harvard University Press 1990).

³⁴ Christina Boyd, Lee Epstein and Andrew Martin, ‘Untangling the Causal Effects of Sex on Judging’ (2010) 54 AJPS 389 <<http://ssrn.com/abstract=1001748>> accessed 27 October 2012.

³⁵ Hale (n31)19.

³⁶ Eg Cathryn Hopkins and Ryan Dolby-Stevens, ‘UKSC Blog Interviews Lord Mance’ (5 October 2015) <www.ukscblog.com/uksc-blog-interviews-lord-mance/> accessed 13 March 2016.

clearly defined set of values and beliefs which will inform their decision making.³⁷ One of the most interesting works in this field to date has been that of the Feminist Judging Project. In this study, feminist scholars were asked to write alternative judgments from 23 significant legal cases heard in appellate courts to determine whether, in addition to the law, a ‘feminist consciousness or philosophy’ could be detected in the alternative judgments.³⁸ In some cases, the feminist scholars reversed the original judgments. In others, the feminist ‘judges’ reached the same legal outcomes, albeit using different legal reasoning. The results suggest that a feminist perspective can make a difference to judicial reasoning. Might an individual’s religious outlook similarly affect how judges think in cases involving religiously sensitive issues? In any case, empirical research that examines the impact of gender on judicial decision-making in the UK courts remains limited. This is largely attributed to a lack of gender diversity within the senior judiciary.³⁹

More recently, Cahill-O’Callaghan has conducted some interesting work using Schwartz’s theory of basic values to explore whether the personal values of individual UKSC justices affect their judicial decision-making in cases heard in the apex Court.⁴⁰ Schwartz’s theory identifies ten culturally universal, but motivationally distinct values which inform an individual’s behaviour and attitudes: self-direction; stimulation; hedonism; achievement; power; security; conformity; tradition; benevolence and universalism.⁴¹ Religion is not included as a standalone value in the

³⁷ Erika Rackley, ‘How feminism could improve judicial decision-making’ *The Guardian* (London, 11 November 2010) < www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making > accessed 12 March 2013 cf. the view of Plumstead J, Circuit Judge, Cambridge County Court who states: ‘Every judge has to make his or her own decision but we really have to try and be consistent, one with another. You don’t want to go along to court and say, ‘Oh Lord, it’s going to be Judge x, who is grumpy, or Judge y, who is female, and I’ll get a different decision from one or another’. Woman’s Hour 16 May 2011) Plumstead J, ‘Is Justice Influenced by Gender?’ (Radio 4 Woman’s Hour 16 May 2011) <www.bbc.co.uk/programmes/p00gz6tq> accessed 12 March 2013.

³⁸ Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010). This project was inspired by a similar project conducted in 2004 in relation to the Canadian Supreme Court, ‘the Women’s Court of Canada’ see < www.womenscourt.ca/home/ > accessed 20 April 2013.

³⁹ Thomas (n8). A similar situation exists in relation to ethnicity.

⁴⁰ Rachel Cahill-O’Callaghan, ‘The Influence of Personal Values on Legal Judgments’ (2013) 40 J Law & Soc 596.

⁴¹ Shalom 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’s values theory identifies 10 motivationally distinct value orientations that all individuals across cultures recognise. Interestingly Schwartz does not include religion in his model due to the lack of consistency and clarity in spirituality. The Schwartz model is used in the European Social Survey

model.⁴² However, Schwartz and others have recognised that values such as tradition, conformity and benevolence are partly shaped by an individual's religious beliefs.⁴³

Cahill-O'Callaghan applies this model in a content analysis of the UKSC decision in *R(E) v. Governing Body of JFS*.⁴⁴ At issue in this split decision case was whether the criterion for admission to JFS (formerly the Jewish Free School) constituted direct racial discrimination under section 1 of the Race Relations Act 1976 (RRA). The school admissions policy gave preference to children whose Jewish status was recognised by the Office of the Chief Rabbi (OCR); that is, to children whose mothers satisfied the matrilineal test or were Jews by conversion to Orthodox standards. However, the child seeking admission to JFS did not meet the OCR status requirements. The majority of the UKSC (5:4) held that JFS had directly discriminated against the child on ground of ethnic origin.

Cahill-O'Callaghan found the presence of two competing values in her analysis of the judges' written opinions in *JFS*. Those supporting the majority opinion were found to favour 'universalism' whilst those who reached the minority decision favoured 'tradition'. A quantitative context analysis was then applied to see whether there was a significant difference in the expression of these values within the competing judicial opinions. Cahill-O'Callaghan found a clear association between the values expressed and the decisions reached by judges in the *JFS* case. The values 'Universalism' and 'self-direction' were most evident in the majority opinions. 'Tradition' and 'self-direction' dominated in the opinions of the minority. A further analysis revealed that whilst 'self-direction' was evident in majority and minority legal opinions, the majority espoused values focused on individual freedom compared to the minority who espoused values focused on judicial freedom. A small experimental study was also conducted in which legal academics were asked to rate the factors that influenced how they decided a vignette based on *JFS*. Consistent

that measures the attitudes, beliefs and behaviour patterns of populations in over 30 nations. <www.europeansocialsurvey.org/about/index.html> accessed 25 November 2014.

⁴² The inclusion of 'spirituality' as a distinct value was considered when Schwartz developed the original value theory but it was rejected on the basis that it was not possible to define spirituality in a way that was consistent across cultures.

⁴³ Vassilis Saroglou, Vanessa Dalpierre and Rebecca Denelle, 'Values and religiosity: a meta-analysis of study's using Schwartz's model' (2004) 37 *Personality and Individual Differences* 721.

⁴⁴ Cahill-O'Callaghan (n40).

with the main study, the findings demonstrated an association between personal values and the legal decisions. Cahill-O'Callaghan's findings support her claim that, in cases which divide judicial opinion, the personal values of an individual judge can subconsciously influence their judicial decision-making.⁴⁵ She goes on to argue that the presence of a 'value: decision paradigm' highlights the need for a greater diversity of tacit personal values to be represented in the UKSC.

Cahill-O'Callaghan has also conducted a value-based agreement analysis of other cases heard in the UKSC.⁴⁶ Specifically, she conducted a content analysis of 18 cases that divided judicial opinion in the final court of appeal between 2009 and 2011 to determine whether value related statements could be identified within judgments. She identified eight of Schwartz's values in these judgments, the exceptions being hedonism and stimulation which is unsurprising given the judicial setting. Applying the same value profiles for UKSC justices as used in her analysis of judicial opinions in *JFS*, Cahill-O'Callaghan again found evidence of 'value diversity' in the decisions of judges sitting in the final court of appeal. In addition, her analysis revealed that judges with similar value profiles were more likely to demonstrate high levels of agreement in their judicial decision-making, whilst the decisions of those espousing conflicting values (such as tradition v. universalism) reflected a lower degree of overall agreement which decreased significantly in nonunanimous cases. Cahill-O'Callaghan uses her empirical findings to argue that current judicial diversity debates focus too narrowly on explicit diversity (on overt characteristics such as gender and ethnicity), and advances the case for the inclusion of innate tacit influences such as personal values in studies of judicial decision-making behaviour. Notwithstanding the potential for coding errors and researcher subjectivity in using a content analysis based approach, Cahill-O'Callaghan's work is of particular relevance to the current study in so far as an individual's religious beliefs are part of a wider gamut of personal values.

⁴⁵ Cahill-O'Callaghan uses the term 'sub-conscious'. The psychological literature recognises three separate areas of the mind: the conscious, unconscious and sub-conscious. The conscious mind consists of the mental processes of which one is aware such as perceptions, thoughts, emotions and wishes. In contrast, the unconscious mind lacks consciousness or awareness of these mental experiences. The sub-conscious mind contains information outside of consciousness but which can be easily retrieved at will, Andrew Colman, *A Dictionary of Psychology* (4th edn, OUP 2015). However, for the purposes of this study the terms sub-conscious and unconscious are used interchangeably.

⁴⁶ Cahill-O'Callaghan (n40).

Inspired by this work, and drawing upon moral foundations theory,⁴⁷ Hanretty has conducted statistical analysis for the purposes of determining whether the language used in judicial opinions provides an insight into judges' different moral foundations and policy preferences.⁴⁸ Hanretty analysed all opinions of all judges in 310 cases heard in the UKSC between 2009 and 2014 to look for words relating to specific moral foundations such as harm, fairness, in-group, authority and purity. Using logistic and multilevel linear regression, Hanretty found that differences in judicial 'value-talk' could be linked to judicial disagreement over case outcomes.

Despite such studies, the paucity of research about judicial decision-making in the UK becomes all the more evident when looking at studies conducted in other jurisdictions, particularly the US, which has a rich history of empirical legal scholarship examining the influence of a wide range of non-legal factors upon judicial decisions. The impact of political ideology on decision-making has been central to the US studies, but other variables including social, educational and professional background, the effects of panel composition and demographic factors, such as gender and age, have also been subject to extensive analysis. Of relevance to the present study, a rich body of US literature also explores key themes relating to the judiciary and religious beliefs: Can a religiously devout judge really make a religiously-neutral judgment?⁴⁹ Do particular faith groups fare better in court than other religious groups?⁵⁰ Are there some legal areas in which a judge's own religious beliefs may exert a greater influence in case outcomes than in other areas?⁵¹ Should a

⁴⁷ Moral Foundations Theory posits that there are innate and universally available foundations upon which each culture constructs virtues, narratives and institutions, which creates the unique moralities seen across the globe. The five foundations are: care/harm; fairness/cheating; loyalty/betrayal; authority/subversion; and sanctity/degradation. Jonathan Haidt and Jesse Graham, 'When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals may not Recognize' (2007) Social Justice Research.

⁴⁸ Chris Hanretty, Judges' written language reveals divergent moral foundations <www.ecpr.eu/Filestore/PaperProposal/366bd822-6baf-4c38-91ad-1aaa61389dea.pdf> accessed 27 July 2016.

⁴⁹ Teresa Collett, '"The King's Good Servant, But God's First"' The Role of Religion in Judicial Decisionmaking' (2000) 41 S Tex LR 1277; Scott C. Idleman, 'The Concealment of Religious Values in Judicial Decisionmaking' 91 Va L Rev 515.

⁵⁰ Gregory Sisk, 'How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases' 76 U Colo L Rev 1021; Gregory Sisk and Michael Heise, 'Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts' Cornell Law Faculty Publications Paper 430.

⁵¹ Donald Songer and Susan Tabrizi, 'The Religious Right in Court: the Decision Making of Christian Evangelicals in State Supreme Courts' (1999) [1999] 61 J Pol 507 507; W. Blake, 'God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences' [2011] XX(X) Pol Res Q 1.

judge's religious beliefs be allowed to influence his or her decision-making?⁵² The findings from some of the studies exploring these issues are discussed further in Section 3.3.

As indicated above, the academic community in the UK is becoming increasingly interested in the practice of judicial decision-making, and the part played by both legal and non-legal factors in this process.⁵³ However, judges' religious beliefs have not yet been subject to comprehensive analysis. To the researcher's knowledge, only one study has considered the influence of judges' religious beliefs on judicial decision-making in the UK to date.⁵⁴ Specifically, Genn and Thomas have used case simulation to look at Disability Living Allowance tribunal decision-making appeals in the Social Entitlement Chamber. No correlation was found between the religion of the decision-maker and the outcome of the case although this is perhaps unsurprising given the nature of the decisions being made.⁵⁵

It is contended that a lack of knowledge about how judges' faith intersects with judicial decision-making in the UK can be attributed to a number of general and variable-specific reasons which are explored in the next section.

3.2 Explaining the paucity of empirical research

Thomas suggests that a reluctance to deviate from the conventional doctrinal approach to law when looking at judicial decision-making in the UK derives from academics believing that empirical studies which explore judicial roles are 'illegal or practically impossible'.⁵⁶ This stems from the view that judges are unwilling to co-

⁵² Daniel Conkle, 'Religiously Devout Judges: Issues of Personal Integrity and Public Benefit' (1998) 81 Marq L Rev 523; Wendell Griffen, 'The Case for Religious Values in Judicial Decision-making' (81) Marq L Rev 513; *Collett* (n48). In respect of Canadian jurisprudence see: Diana Ginn and David Blaikie, 'Judges and Religious-based Reasoning' [2011] 19 Constitutional Forum 53.2

⁵³ Jessica Hambly, 'Gender and Judging in the UK Asylum Tribunal', (Law and Society Association, Hawai'i 2012).

⁵⁴ Cheryl Thomas and Hazel Genn, *Understanding tribunal decision-making: A foundational empirical study* (Nuffield Foundation 2013). [www.nuffieldfoundation.org/sites/default/files/files/NUFJ0000_Tribunal\)decision_making_27_03_14.pdf](http://www.nuffieldfoundation.org/sites/default/files/files/NUFJ0000_Tribunal%20decision_making_27_03_14.pdf) accessed 18 April 2013.

⁵⁵ *ibid.* Thomas and Genn explain that the tribunals review decisions by the Department of Work and Pensions as to whether a claimant is entitled to an allowance by reason of disability.

⁵⁶ Cheryl Thomas, 'Lack of Understanding about the Judiciary is Unacceptable and Dangerous' *The Guardian* (London, 6 July 2012) < www.theguardian.com/law/2012/jul/06/understanding-judiciary-dangerous> accessed 10 February 2013.

operate in research that sheds light on how they judge for fear that their shortcomings will be exposed or their views misrepresented in a way that threatens public confidence in the judiciary. The counter view, and that underpinning this thesis, is that developing an understanding of the factors that affect how judges reach decisions serves to enhance, rather than undermine, public trust in the judiciary and the justice system. Despite the judicial refusal to participate in this research, there is evidence that the judiciary recognise that in order to maintain their reputation as ‘one of the best and most independent in the world’, greater openness and transparency (including involvement in research) is vital.⁵⁷ Malleson suggests that a further reason for the lack of research in relation to judging in the UK courts is that there is deeply entrenched reluctance in Britain to acknowledge the political significance of the judiciary.⁵⁸ As a result, there has been little call for legal scholars to acquire the requisite skills to conduct empirical legal research or for any meaningful engagement between academics and judges with a view to better understand the way judges work.⁵⁹ However, as previously discussed, in the twenty years following Malleson’s useful work on the modernisation of the judiciary, a number of drivers including a series of important constitutional changes and the bedding down of the HRA have precipitated a sea-change. The rising significance of the judiciary (particularly the UKSC) has spawned a burgeoning interest in the functioning of the judiciary, both within the legal sphere and in relation to its role as an arm of government. In spite of this, studies that explore the impact of extraneous factors on judicial decision-making in the UK remain conspicuous by their absence.⁶⁰

Looking at the reasons why the relationship between judges’ religious beliefs and judging have been overlooked to date, it is contended that similar obstacles to those preventing more comprehensive studies of gender and ethnic diversity within the judiciary arise. Thomas identifies three major structural and policy reasons for the

⁵⁷ Judicial Office, *The Judicial System of England and Wales: A Visitor’s guide* <www.judiciary.gov.uk/wp-content/uploads/2016/05/international-visitors-guide-12.pdf> accessed 1 October 2017.

⁵⁸ Kate Malleson, *The New Judiciary: the effects of expansion and activism* (Dartmouth Publishing Company 1999).

⁵⁹ Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works Final Report and Recommendations* (2006) Nuffield Inquiry on Empirical Legal Research <www.nuffieldfoundation.org/sites/default/files/Law%20in%20the%20Real%20World%20full%20report.pdf> 7 November 2013.

⁶⁰ Thomas (n4).

lack of more substantive inquiries in relation to these characteristics in the UK: a scarcity of women and minority judges; the ‘culture of secrecy’ in the judicial appointments process; and the fact that judicial diversity has only recently become a matter of policy debate in the UK.⁶¹ Applied to the current context, it is suggested that, in the same way that a lack of gender and ethnic diversity within the judiciary has made it difficult to assess the impact of these characteristics on judicial behaviour, a perceived lack of religious diversity on the bench may yield insufficient data from which any meaningful conclusions can be made.⁶² Indeed, Bornstein and Miller suggest it is only because of the diverse range of religious beliefs held by members of the US judiciary that research in this field remains largely Americo-centric.⁶³

Whilst changes introduced under the Constitutional Reform Act 2005 (such as the traditional ‘secret soundings’ and tap on the shoulder’ method of appointment being scrapped and the establishment of an independent Judicial Appointments Commission) have encouraged greater transparency in relation to the judicial appointments process, it is argued that a lack of understanding about how judges judge in British courts reinforces the public’s perception of the judiciary as an ‘old boys’ network’ operating within a culture of secrecy.⁶⁴ Posner argues that the ‘professional mystification’ of the judicial role has, for centuries, been deliberately promulgated by judges in the US to help them maintain a privileged status, and to exaggerate their professional skills and their disinterest.⁶⁵ Other commentators have suggested that a similar artifice has traditionally been adopted by the judiciary here. For example, Atiyah observes that the judiciary’s obfuscation of the craft of judging is an old tradition dating from at least the eighteenth century, the purpose of which has been to ‘keep the lower orders in their place’.⁶⁶ Pannick has gone so far as to

⁶¹ Thomas (n8).

⁶² This problem may become magnified if studies are drawn too narrowly and categorise different denominations under a common faith individually.

⁶³ Brian Bornstein and Monica Miller, *God in the Courtroom* (OUP 2009). cf. Voas and Ling who argue that the question of whether the US is more religiously diverse is subject to debate. Whilst there is more denominational variety within Christian groups in the US than in the UK, the spread between what are described as top level headings – no religion, Christianity and other faiths – is more evenly distributed in the UK than in the US. David Voas and Rodney Ling, ‘Religion in Britain and the United States’ in Alison Park and others (eds), *British Social Attitudes: the 26th Report* (2010).

⁶⁴ Michael Blackwell, ‘Old boys’ networks, family connections and the English legal profession’ [2012] PL 426.

⁶⁵ Richard Posner, *How Judges Think* (Reprint edn. Harvard University Press 2010).3

⁶⁶ Patrick Atiyah, ‘Judges and Policy’ (1980) 15 *Israel L Rev* 346.

liken judges ‘eager to protect the mysteries of their craft’ with ‘members of the Magic Circle who face expulsion if they explain how their tricks are done’.⁶⁷ That said, it is worth noting that these criticisms pre-date significant changes such as the abandonment of the Kilmuir Rules and the reforms introduced under the CRA 2005 (such as the removal of judges from the legislature through the establishment of the UKSC and the establishment of the JAC).⁶⁸ More recently, there has been a marked shift towards greater openness in the judiciary, a consequence of which is that judges, particularly those at the top of the judicial hierarchy, appear more willing to talk about what they do and how they do it.⁶⁹ Evidence of this can be found in the extra-curial speeches of judges (although some areas, such as judicial engagement with politics, rightly remain subject to tight controls). However, this change has not necessarily come about because judges are eager to lift the veil of secrecy that has surrounded their role; rather, it is suggested, this is a positive response to the judiciary’s increasingly significant constitutional role and the need for public engagement to maintain and enhance public trust and confidence in the courts.

Another reason for the paucity of research is simply that even if religion is acknowledged to be one of several non-legal factors to affect judgments, it may be impossible to untangle ‘religious’ influence from other judicial characteristics or to delineate the degree of influence, if any, that each of several independent variables has on a judge’s decision making. Similarly, and most typically within a collegiate environment, whilst a judge’s faith may have informed their approach, the likelihood is that in the majority of cases, the same outcome will be reached by the bench regardless of religious composition because of (1) judges being constrained by legal norms and (2) panel effects. In addition to these reasons, it has been suggested

⁶⁷ David Pannick, *Judges* (OUP 1987).

⁶⁸ The Kilmuir Rules were established by Lord Kilmuir in the 1950s. They forbade judges from participating in public debates on policy matters, the purpose being to insulate judges from ‘the controversies of the day’. Lord Kilmuir explained that “So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable”. Letter from Lord Kilmuir to Sir Ian Jacob K.B.E 12 December 1955, reprinted in A W Barnett, ‘Judges and the media – the Kilmuir Rules’ (1986) Public Law 383.

⁶⁹ Hallett LJ observes that judicial cultural change means there has been a shift in the accessibility to the judiciary in recent years, see Lady Hallett, ‘How the Judiciary is Changing’ in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Judicial Appointments Commission 2010). However, whilst Hallett says the judiciary is ‘more accessible than ever before’, it remains the case that judges should not comment on matters which may in any way compromise the principle of impartiality – House of Lords Select Committee on the Constitution, 6th Report of 2006-07, ‘Relations between the executive, the judiciary and Parliament’ HL Paper 151. For more general guidelines see Judiciary of England Wales, Guide to Judicial Conduct 2018 (March 2018).

that an individual's religious beliefs are quintessentially 'a private matter' and 'a taboo subject in legal analysis', which is irrelevant and inappropriate for academic study.⁷⁰

From a practical perspective, the unavailability of data is problematical. There is no requirement for the disclosure of judges' religious convictions and where information is collected, it is classified as 'sensitive personal data'.⁷¹ The collection of statistics regarding a judge's 'religion or belief' is only a recent addition in diversity monitoring in relation to judicial appointments and is therefore of limited use.⁷² Thus, except where judges are open about their religious affiliation (which is not that often),⁷³ or where reliable data can be gathered from alternative sources, attempts to discern the religious background of specific judges are likely to prove unproductive or inaccurate. It is further contended that, even where such information can be obtained, empirical studies that examine whether judges' religious beliefs (or indeed other personal factors) affect decision-making may be met with judicial resistance. This lack of cooperation may arise because of an innate fear that research findings may be used to challenge the impartiality of the judiciary or as evidence that the judiciary had overstepped constitutional boundaries. However, it is argued that a failure to explore how judicial decisions are reached presents no lesser threat to the reputation of the judiciary than does lifting the lid on how and why judges judge as they do. Indeed, critics might argue that it is more damaging for judges to conceal their personal views on matters about which they are required to adjudicate.

In light of these problems, the lack of academic interest in the relationship between judges' faith and judicial decision-making in the UK is understandable. However, this does not mean that the relationship between judges' faith and judging should continue to remain off-limits.

⁷⁰ Thomas Berg and William Ross, 'Some Religiously Devout Justices: Historical Notes and Comments' (1998) 81 Marq L Rev 383 in which the authors quote US Judge Noonan Jr, Senior Circuit Judge, US Court of Appeal for the 9th Circuit: "[t]he religious views of the Justices are a taboo subject in legal analysis."

⁷¹ In accordance with Data Protection Act 1998, s.2(c).

⁷² Such data has only been collected by the Judicial Appointments Commission (JAC) in selection exercises since August 2011.

⁷³ There are some exceptions. For example, when asked about her personal beliefs in a recent interview, Lady Hale advised that she is 'a not very observant member of the Church of England'. University of Manchester, Religion, law and the constitution Balancing beliefs in Britain project 2017 www.projects.law.manchester.ac.uk/religion-law-and-the-constitution/brenda-hale/ accessed 15 October 2017.

3.3 Empirical findings from other jurisdictions

3.3.1 Evidence from the US

The US literature is acknowledged as offering the most developed conceptual and methodological models upon which to base studies of judicial behaviour.⁷⁴ This is attributable to the fact that most of these studies have been conducted by political scientists interested in how ideological preferences of Justices influence judicial decision-making in the US courts, particularly the US Supreme Court. However, whilst the review of US literature below serves as a useful reference point for the current thesis, it is important to add some caveats at this point due to significant differences between the UK and US constitutional and judicial structures, philosophical approaches and attitudes to religion.

The first point concerns differences in the constitutional role of the judiciary. Unlike the UK, the US has a written constitution in which the Constitution itself and the law are entrenched. Adopted after the founding of the American Republic, the codified US constitution is regarded as the ‘the supreme law’ of the US.⁷⁵ It sets out the powers of government (including a system of checks and balances between the three government branches), it adopts a federal government system, and provides protection for basic individual rights. Crucially, the US courts interpret ‘the higher law’ under the written Constitution and have strong powers of judicial review which allows the US Supreme Court to strike down Legislative or Executive actions that violate the Constitution.⁷⁶ Inevitably this means that the courts become mired in political controversies.⁷⁷ Given that judges have a wide discretion in interpreting the Constitution means that there is more opportunity for judicial activism; in other words, judges may incorporate their own partisan views into judicial decision-making. The idea that the US Supreme Court has the final say in constitutional matters, the notion of ‘judicial supremacy’ (also referred to as ‘legal constitutionalism’), stands in stark contrast to the UK model where the courts have

⁷⁴ Thomas (n8).

⁷⁵ See Articles III and VI of the US Constitution.

⁷⁶ This doctrine was established in *Marbury v Madison* 5 US 137 (1803) in which the Court had to determine whether it was an Act of Congress or the US Constitution that was supreme.

⁷⁷ A prime example is the US Supreme Court’s controversial landmark decision in *Roe v Wade* 410 US 113 (1973) in which the court recognised that a woman’s right to an abortion was encompassed under the right to privacy protected by the Fourteenth Amendment to the Constitution.

wide statutory interpretative powers, but Parliament remains sovereign. This is evidenced most clearly in relation to the HRA; where the UKSC considers that legislation is incompatible with human rights protected under the Act, the court can make a declaration of incompatibility but, unlike the US Supreme Court, it cannot strike the law down.

The second point is that, compared to the UK, the judicial appointments process in the US is highly political. For instance, all federal judges are nominated by the President, and confirmed by the Senate, whilst most State judges are elected (either in non-partisan or partisan elections),⁷⁸ or are appointed following evaluation by a nominating Committee (also known as ‘merit selection’) or through direct appointment by the Governor (also known as a Gubernatorial appointment). When considered in conjunction with the first point, the way that a judicial nominee’s faith shapes their views on policy issues with a possible religious dimension such as abortion, gay rights or the death penalty, often generates much interest. A search of media reports relating to the most recent judicial appointments to the US Supreme Court (i.e. Justices Sotomayor, Kagan and Gorsuch) and the religious make-up of the court are illustrative.

This contrasts to the UK system in which judges are appointed strictly on merit, with very little political involvement in the appointments process.⁷⁹ That said, the changing constitutional role of the judiciary in the UK and the ‘judicialisation of politics’, described by Hirschl as ‘the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’,⁸⁰ has sparked debate as to whether an element of political involvement in senior judicial appointments should be introduced in the UK for the purpose of democratic accountability. Somewhat controversially, Lady Hale has recently suggested that one senior Government and one senior Opposition party politician could sit on the appointments commission for senior judicial posts for the

⁷⁸ The contested election can be non-partisan in which case the judicial candidate’s party is not listed on the ballot or partisan in which case the candidate’s party affiliation is listed on the ballot and the candidate has the official support of a political party.

⁷⁹ Prior to the changes introduced by the Constitutional Reform Act 2005, judicial appointments were made on the recommendation of the Lord Chancellor in his or her capacity as the head of the judiciary, usually on the advice of the senior judiciary.

⁸⁰ Ran Hirschl, ‘The Judicialization of Politics’ in Gregory Caldeira, Daniel Kelemen and d Keith Whittington (eds) *The Oxford Handbook of Law and Politics* (Oxford Handbooks Online 2009).

purpose of ‘introducing an element of democratic involvement while preserving party political neutrality’.⁸¹ Others are not so enamoured with this idea; for example, Lord Neuberger has opined: “I think intruding into somebody’s political views, religious views, social views is not going to help and will end up, I fear, politicising the judiciary in a way which, mercifully, has not happened at all in this country”.⁸² Whether or not this would enhance public trust and confidence in the judiciary is a moot point but it would clearly blur the boundaries between the law and politics.

Finally, attitudes toward religion are markedly different in the UK and the US.⁸³ To illustrate, a recent global survey shows that 30% of UK citizens regard themselves to be religious. This compares to 56% of Americans.⁸⁴ In addition, it is generally said that faith has a much lower public profile in the UK than in the US; as Voas and Ling put it: ‘God seems more at home in the United States’⁸⁵ and, as such, religion is often at the centre of both political and public debates in the US. Therefore, whilst the presence of religion in the UK has been described as subdued,⁸⁶ in the US there is a widespread expectation that public figures will be religious.⁸⁷ Evidence of this can be seen in the judicial context; in stark contrast to what is known about members of the UK Supreme Court, as noted above, the religious backgrounds of the US Supreme Court Justices are often discussed following their nomination for appointment or when a judgment which touches upon religiously sensitive issues is given.⁸⁸

⁸¹ Lady Hale, ‘Judges, Power and Accountability Constitutional Implications of Judicial Selection’ Constitutional Law Summer School Belfast (11 August 2017).

⁸² Rob Merrick, ‘Supreme Court president warns judges vetted by MPs would be picked for ‘political and religious beliefs’ *Independent* (London, 16 February 2017).

⁸³ It should be noted that there is also considerable variance within the UK itself. For example, religious observance is much higher in Northern Ireland than it is in England. . Grace Davie, *Religion in Britain Since 1945* (Blackwell, 1994), 14.

⁸⁴ Win Gallup International, *Losing our Religion? Two thirds of people still claim to be religious, 13 April 2015* <www.wingia.com/web/files/news/290/file/290.pdf> accessed 25 September 2016.

⁸⁵ Voas and Ling (n63).

⁸⁶ Julie Ray, ‘Worlds Apart: Religion in Canada, Britain, U.S. (12 August 2003) <www.gallup.com/poll/9016/worlds-apart-religion-canada-britain-us.aspx> accessed 24 September 2016.

⁸⁷ Voas and Ling (n63).

⁸⁸ For example, Daniel Burke, ‘What is Neil Gorsuch’s religion? It’s complicated’ (CNN 22 March 2017) www.edition.cnn.com/2017/03/18/politics/neil-gorsuch-religion/index.html accessed 20 November 2017.

Empirical evidence

Due to the politicalised judicial appointments process in the US, it is unsurprising to find that the effect of political ideology has traditionally formed the backbone of studies investigating influences on judicial decision-making,⁸⁹ the primary purpose being to determine whether a judge's party political affiliation serves as a predictor of judicial decisions. A myriad of other factors such as gender, race, age, social and educational background, prior employment and, significantly religion, have also been comprehensively analysed. Whilst findings suggest some correlation between judges' political ideology and judicial determinations, the results in relation to other background factors are inconsistent, raising doubts as to their general value in explaining judgments.

The US studies conducted to date have predominantly used empirical research methods to explore judging and draw on data from a broad range of legal areas. On the basis that dissenting judgments enable comparisons between judges' reasoning to be made, the majority of studies conducted look to nonunanimous decisions of the higher appellate courts, usually the US Supreme Court, for evidence as to whether judicial determinations are influenced by non-legal factors.

Early Empirical Studies in the US

Early US empirical studies exploring the relationship between justices' characteristics and judging focused on a number of different personal characteristic variables, across a number of different legal areas, so that religion was generally considered as an adjunct to, rather than the primary focus of, the research. Nevertheless, these early analyses yielded interesting results often supporting a hypothesis that judicial behaviour can be influenced by, *inter alia*, judges' personal religious beliefs.

Using a quantitative behavioural methodology and determining justices' religious affiliations from sources such as the Directory of American Judges and Who's Who in America?, Nagel analysed decisions in nonunanimous cases decided by 313 State and federal Supreme Court justices within 15 fields of law heard in 1955, to test the

⁸⁹ C. Herman Pritchett, *the Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (1948); Glendon Schubert, *The Judicial Mind* (Northwestern University Press 1965).

relationship between ethnicity and case decisions.⁹⁰ Religious affiliation was considered as a distinct component of ethnic identity. Using the term ‘liberal’ to mean a stance sympathetic to ‘the interests of the lower or less privileged economic or social groups in society and to a lesser extent with the acceptance of long run social change’,⁹¹ Nagel discovered Catholic justices were more likely to adopt a liberal approach compared to their Protestant colleagues. They were significantly more likely to do so in criminal cases,⁹² business regulation cases, divorce settlements and employee injury cases.⁹³ It is suggested that the fact that Nagel speculated that this phenomenon was indicative of class differences between the two faiths leads to some uncertainty as to whether it was social class or religious affiliation which better explained the differences in judging in the cases considered. Interestingly, Nagel also compared decisions of judges from different Protestant denominations hypothesising that judges of high economic status denominations (such as Congregationalist, Presbyterian, Episcopalian and Unitarian, for example) would most likely be more conservative than judges of lower status denominations (such as Baptist, Lutheran and Methodist). He found in 9 types of case, judges of a lower status denomination voted more liberally than their colleagues affiliated to higher status denominations. Notably, there were too few Jewish judges for any useful comparison to be drawn.⁹⁴

Consistent with Nagel’s findings, Goldman’s quantitative analysis of nonunanimous appellate court decisions between 1965 and 1971, in which religious affiliation was again one of several variables,⁹⁵ also found Catholic judges voting more liberally than Protestants, specifically in cases involving injured persons or economic liberalism.⁹⁶ It is suggested that ‘liberal’, although not expressly defined, has the

⁹⁰ Stuart Nagel, ‘Ethnic Affiliations and Judicial Propensities’ (1962) 24 J Pol 92, 97. Religion was considered in addition to race and ancestral nationality.

⁹¹ *ibid.*

⁹² Nagel’s findings that Catholic judges are more likely to vote liberally in criminal cases are consistent with findings in Sidney Ulmer, ‘Social Background as an Indicator to the Votes of the Supreme Court Justices in Criminal Cases: 1947-1956 Terms’ (1973) 17 AJPS 622, 627.

⁹³ In these contexts, ‘liberal’ is used to mean deciding in favour of the criminal defendant, administration agency, the wife and the employee, respectively.

⁹⁴ Jewish judges accounted for just 2% of those studied compared with Protestant (as a conglomerate) at 87% and Catholics at 11% respectively. 1% of judges gave no religion.

⁹⁵ Others included eg political party, affiliation and age.

⁹⁶ Sheldon Goldman, ‘Voting Behavior on the United States Courts of Appeals Revisited’ (1975) 69 APSR 491. More ‘liberal’ in Goldman’s analysis is defined as voting ‘for the economic underdog’. The common assumption is that judges from minority faiths are more likely to be ‘socialised to favour

same meaning as in Nagel's study to refer to a viewpoint which favours the social or economic underdog.⁹⁷ Whilst Goldman observed that the effects of religious affiliation on case outcomes became noticeably diluted when political affiliation was introduced as a control (which he suggested was indicative of an association between religion with other issues), it was shown minority faith judges (identified as Catholic and Jewish) adopted a more liberal approach, contrary to the hypothesis that religious difference would not affect judicial decisions in any case.

In a very different qualitative exploration into the role of personal values in judicial ethics, Newman observed and interviewed four state district trial judges over a period of weeks to gauge whether personal values, including religious affiliation, had any connection with the exercise of judicial discretion.⁹⁸ Newman chose judges with a reputation for self-reflection, a strong sense of fairness and who had shown a previous interest in judicial ethics. Furthermore, he deliberately sought those with sufficiently diverse backgrounds from one another to draw some tentative conclusions about the way their personal lives impacted upon their judicial decisions. From the findings, the judges generally acknowledged morality as forming the bedrock of perceptions and judgments, both in a private and professional dimension. However, the majority were reluctant to link their religious beliefs with judicial conduct. As Newman rightly observes, this is hardly surprising given the 'cultural taboo against subjectivity in judicial decisions'.⁹⁹ However, given that moral convictions may be enmeshed with religious values, it is not fanciful to surmise that judicial decisions may be religiously influenced in some way, even if filtered through a guise of moral value-judgments. Notwithstanding this study's obvious limitations i.e. the narrow scope and risk of overtly subjective interpretation, the findings are insightful,¹⁰⁰ albeit not conclusive.

Focusing on a much narrower field of case types in which to explore the specific interrelation between religious affiliation and judicial decision-making, Songer and

the underdog' because of their own experience of life on the periphery of social, economic and political acceptability.

⁹⁷ *ibid.*

⁹⁸ Louis Newman, 'Beneath the Robe: The Role of Personal Values in Judicial Ethics' (1995-1996) 12 *JL & Religion* 507.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.* Perhaps unsurprisingly, Newman goes so far as to suggest that despite its small scale, the judges' reflection 'provide an accurate window into the world of judging'.

Tabrizi have found further evidence indicating religion is an influencing factor.¹⁰¹

Looking specifically at the judicial attitudes of Evangelical Protestant bench members, the authors reviewed all published obscenity and gender discrimination cases decided by State Supreme Court judges between 1970 and 1993, and a random sample of 30 death penalty cases selected from the same period. The findings revealed Evangelical judges to be significantly more conservative than judges of different religious affiliations across all three case types. Whilst the authors did not define 'conservative', the term would appear to have strong connections with political ideology; the approach of Evangelical justices is readily identified with the Religious Right.

More specifically, in the three areas examined, 'conservative' judges were those more likely to: support the death penalty; reject claims of discrimination; and adopt a more restrictive approach to obscenity than their liberal colleagues. Reflecting Goldman's findings, Jewish judges were found to be most liberal.¹⁰² Protestant judges were found to be more liberal than their Evangelical colleagues but less so than their Jewish counterparts. Catholic judges' behaviour was most variant upon the case type, with a strong conservative stance in obscenity issues, less so in death penalty cases, and a liberal approach to cases involving gender discrimination. The authors concluded that, even taking all other variables into consideration, the data supported the proposition that religious affiliation influences judicial decisions in gender discrimination, obscenity and death penalty cases. In contrast to earlier studies, the authors did not limit their study to nonunanimous cases. However, when nonunanimous cases were examined separately, the correlation between religious affiliation and judging was even stronger. Whilst this may suggest the significance of religious background has been exaggerated in earlier studies (in which only nonunanimous cases were examined), the authors suggest their analysis probably underestimates the effects of religion on judges' decisions because of the difficulties in determining the denominational affiliation of justices.

Further evidence to support the theory on the relationship between religion and decision-making is found in Pinello's examination of published appellate court

¹⁰¹ Songer and Tabrizi (n51).

¹⁰² A liberal vote is defined as one striking down the death penalty or overturning a sentence of death in a death penalty case; or that narrows the gender gap in a gender discrimination case; or is less restrictive of material that is alleged to be obscene in obscenity cases.

decisions where gay rights issues are raised.¹⁰³ Testing the impact of a number of variables in 468 cases between 1981 and 2000, Pinello again found Jewish judges to be more liberal than Protestant judges whilst, perhaps unsurprisingly given the context of case analysed, Catholic judges were more conservative in approach, being less likely to vote positively on cases advancing gay rights.

More recently, Blake has sought to show the effect of religion on US Supreme Court decisions with a particular emphasis on Catholic judges' preferences.¹⁰⁴ Applying logistic regression analysis and semi-parametric matching to verify results, Blake drew upon formally decided and orally argued cases decided between 1953 and 2007 across legal areas in which religious issues were thought to be relevant. These areas included abortion, racial and gender discrimination, crime, the death penalty, religious liberty and Establishment clauses, immigration, obscenity, poverty law and federalism. Where the law is clear, Blake hypothesised that judges were unlikely to adopt anything other than a legalist approach. It was the extent to which decisions are motivated by religious affiliation in cases involving legal uncertainty that formed the primary focus of his analysis and explains why he looked at nonunanimous cases only.

Using Catholic affiliation as the key independent variable to discern the influence religious affiliation may have independent of judicial ideology,¹⁰⁵ Blake tested 12 hypotheses to predict the voting behaviour of Catholic justices (as more liberal or more conservative than other judges across the chosen legal areas). The results from his analysis support the theory regarding the role of religion in judicial decision-making and reflect some previous findings. For example, like Nagel and Ulmer, Blake found Catholic judges more likely to vote liberally in criminal cases and, as in Songer and Tabrizi's study, Catholic judges were found to be more likely to vote liberally on gender discrimination cases, conservatively in obscenity cases. There was no statistical significance in voting behaviour of Catholic judges compared to

¹⁰³ Daniel Pinello, *Gay Rights and American Law* (CUP 2003).

¹⁰⁴ William Blake, 'God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences' (2011) XX(X) Pol Res Q 1.

¹⁰⁵ Blake does not define 'judicial ideology'. However, as Fischman and Law observe, scholars of judicial behaviour tend to equate judicial ideology with political orientation. For a further discussion see: Joshua Fischman and David Law, 'What Is Judicial Ideology and How Should We Measure It?' (2009) 133 Wash UJL & Pol'y <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1121228> accessed 15 June 2016.

other judges in death penalty cases. Blake concluded that, whilst religion is not necessarily considered consciously by judges when deciding cases, it has a transformative power capable of shaping the adherent's world view. This means it cannot be excluded as a factor in explaining judicial behaviour. If a judge's ideology is in part linked to his or her religious values, then it follows that those same values will influence judicial decision-making.

Impact of Judges' Faith on Cases Involving Religious Freedom

An area of increasing interest in the US is that which specifically focuses on the influence of judges' religious affiliation in religious freedom cases. In the first major on-going empirical study of federal and circuit judges deciding religious liberty cases,¹⁰⁶ Sisk, Heise and Morriss's findings corroborate earlier academic research in which religious affiliation is found to be significant as an influencing factor in judicial decisions. The authors consider religious liberties cases derived from the lower federal courts, as opposed those in the higher appellate courts which have traditionally been investigated. Because the lower federal courts are 'not shackled by the chains of determinate precedent from the high court',¹⁰⁷ Sisk and his colleagues contend there is more scope for exercising judicial discretion and correspondingly, there is greater likelihood of discovering a correlation between judges' religious beliefs and adjudication.

In their analysis of all published decisions involving religious freedom cases between 1986 and 1995,¹⁰⁸ the authors use religious affiliation as a key variable with other judge specific variables including: religious demographics of the judge's community; sex and race; educational background; political ideology; seniority; and prior employment. Judges' religious affiliations were determined using a variety of different online databases, standard biographies and earlier surveys. Using four theoretical models of religious freedom,¹⁰⁹ and applying logistic regression analysis,

¹⁰⁶ Gregory Sisk, Michael Heise and Andrew Morriss, 'Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions (2004) 65 Ohio St LJ 491.

¹⁰⁷ *ibid.*

¹⁰⁸ In this study unpublished cases were excluded for reasons of practicality and in the unlikelihood of their exclusion proving erroneous results.

¹⁰⁹ The four theoretical models of religious freedom developed by the authors are: "pro-religion", "anti-political", "judicial-restraint" and "pro-secular". A 'pro-religion' model is defined as 'one that combines a favorable view of claims by religious adherents under the Free Exercise Clause with an accepting view of efforts by government to acknowledge or affirmatively interact with religion in public life as compatible with the Establishment Clause'. An 'anti-political measure' measures a

the authors concluded ‘the single most prominent salient, and consistent influence on judicial decision-making was religion’.¹¹⁰

Reflecting earlier studies, Sisk, Heise and Morriss found Jewish judges and those of non-mainstream Christian denominations significantly more likely to decide in favour of claimants seeking religious accommodation, independent of other variables. Jewish judges were significantly more likely than all other judges to uphold Establishment clause challenges to government action. The authors speculate that the minority status and societal discrimination of Jews in the US accounts for a more sympathetic approach by Jewish and other religious minority judges to claims for religious exemptions. Catholic judges’ decision-making was less consistent, except within the context of education. When religious exemptions were sought by parents or pupils, Catholic judges were significantly more likely to favour the religious claimant. In contrast, in claims challenging government funding to private religious schools, or challenging the acknowledgement of religion in an educational setting, Catholic judges were significantly less likely to uphold the challenges.

Interestingly, the authors included an additional ‘religious correlation’ variable, the religious affiliation of the claimant, to see if there was any evidence to suggest religious partisanship, in which judges might favour claims by those claimants who shared the same religious affiliation.¹¹¹ Whilst the authors found no evidence of religious nepotism (that is, where a judge sharing the same religious beliefs as that of a claimant treats the claim more favourably than they would treat the claim from someone with a different religious background or with no faith), it prompts the question as to whether judges may, wittingly or unwittingly, decide cases differently where claimants with the same religious background as the presiding judge are involved.

particular robust view about the propriety of religion in public life, without insisting that opponents of public accommodation of religion harbor antipathy toward faith or religious believers outside of this peculiar legal context’. The ‘judicial restraint’ model supposes ‘advocates of judicial restraint tend to disfavor judicial intervention against the decisions of the political branches of government on either Free Exercise Clause or Establishment Clause grounds’. The ‘pro-secular model’ comes from a ‘perspective that is skeptical toward religion in public life, whether in terms of judicially-decreed accommodation for religious exercise or governmental acceptance of religiously-influenced elements in public law and participation of religious institutions in public programs’.

¹¹⁰ Sisk (n106).

¹¹¹ *ibid.*

Inconsistent Findings in Recent Empirical Studies

Whilst the studies above suggest an incontrovertible link between religion and judicial behaviour, other research indicates the relationship is less clear. In Tate's study of nonunanimous Supreme court decisions between 1946 and 1978, in which civil rights and liberties cases and economics cases were considered, religion as a constituent of an independent attribute variable of 'birth, upbringing and education' was found not to be of significance in explaining judicial decisions.¹¹² Prior to the study Tate had marked religion as the variable most likely to have the greatest impact on civil liberties cases, this stance being founded upon the earlier findings of Nagel, Ulmer and Goldman. A later study by Tate and Handberg, replicating Tate's previous study but over a longer period (1916-1988), produced similar results.¹¹³ Whilst Ashenfelter, Eisenberg and Schwab's examination of 2258 published civil rights case decisions arising in the federal trial courts filed between 1980 and 1981 led the authors to conclude that religion (along with gender) affected judicial outcomes more than the political party preference of a judge, the effect was described as 'modest'.¹¹⁴ In a later critical review of existing evidence on the importance of individual factors on judges including religion, George similarly concluded: 'In the end, religion is not a meaningful explanation for judicial behaviour...'¹¹⁵ However, it is the most recent empirical research by Sisk and Heise which casts doubt on the nature of the relationship between judges' religious affiliations and judicial decision-making.

In a more recent study by Sisk and Heise, in which the influence of extra-judicial factors on judicial outcomes are analysed in 1631 judicial participations decided by the lower federal courts between 1996 to 2005, the authors found no discernible evidence to indicate religious affiliation played a significant role in influencing judicial decisions contrary to their previous study.¹¹⁶ Extending the scope of the research to include all digested Free Exercise Clause and accommodation decisions

¹¹² C. Neal Tate, 'Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1946-1978' (1981) 75 APSR 355.

¹¹³ C. Neal Tate and Roger Handberg, 'Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior 1916-88 (1991) 35 APSR 460.

¹¹⁴ Orley Ashenfelter, Theodore Eisenberg and Stewart Scwab, 'Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes' (1995) 24 JLS 257.

¹¹⁵ Tracey George, 'Court Fixing' (2001) 43 Ariz L Rev 9.

¹¹⁶ Michael Heise and Gregory Sisk, 'Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts' (2013) Cornell Law Faculty Publications, Paper 915, 1371.

by the federal court of appeals and district judges brought by religious individuals or organisations, but otherwise using the same variables and logistic regression methodology, a swing from religious affiliation being the most consistent influence on judicial decision-making in the preceding decade to having reached no significance in the follow up study is surprising and raises a number of further questions: Are there discrepancies between the studies which distort the findings? Have judges' attitudes changed or do the findings reflect more general shifts in societal attitudes toward religion for example? The inconsistent findings also extend to the issue of religious nepotism. In the latest study, Sisk found the religious correlation variable to be negatively statistically significant. As such, it was found a claimant of the same faith as the presiding judge may be less likely to win their case than a claimant of different religious background. The authors surmise this may be evidence of judges consciously trying to avoid favouritism toward claimants sharing the same religious beliefs as themselves. Alternatively, it has been speculated that judges' sharing the same faith may be more willing to make inquiries as to the claimant's understanding of their religious obligations than they might otherwise do for claimants of a different faith or no religion.¹¹⁷

That the findings in this recent study are at odds with those in Sisk, Heise and Morriss's previous research does not render the earlier results invalid. Rather, it emphasises the need for further empirical research from which it may be possible to draw inferences as to the influence or otherwise that a judges' religious affiliation may have on judicial decision-making in cases involving religious freedom.

3.3.2 Evidence from Commonwealth countries

This wealth of empirical data emanating from the US has inevitably prompted scholars to initiate similar research in other common law jurisdictions, most notably Canada. For example, in Canadian studies which have included religious affiliation as a variable, evidence reflects that from the US which indicates religion cannot be excluded as one of several factors impacting upon judicial outcomes. To illustrate, in Tate and Sittiwong's quantitative analysis of 804 nonunanimous decisions made in

¹¹⁷ *ibid.*

the Canadian Supreme Court from 1949 to 1985,¹¹⁸ it was hypothesised that Canadian Catholic judges would vote more liberally than fellow non-Catholic justices.¹¹⁹ Looking at civil rights and liberties cases and those raising economic issues and using a variable of Non-Quebec/Catholic (reflecting regional idiosyncrasies), in a regression analysis, the authors concluded religious affiliation was an influencing factor in judicial decisions. In a later study, Songer and Johnson replicated the earlier study of Tate and Sittiwong and found Catholic judges were more liberal than Protestants in civil liberties cases whilst in economic cases, the influence of religion was statistically insignificant.¹²⁰ In the latest empirical study by Songer, Johnson, Ostberg and Wetstein, in which mixed qualitative and quantitative methods were used, Canadian Supreme Court justices were interviewed and their decisions for the period 1970 to 2005 were analysed.¹²¹ Whilst the judicial perception was that religious affiliation no longer exerted any influence on decision-making, the findings revealed otherwise; non-Catholic justices were found more likely to support criminal defendants and those seeking to exercise their civil liberties than their Catholic counterparts.

In contrast, studies investigating judicial decision-making in countries such as Australia and New Zealand have not considered religion to any significant extent and where religious denomination has been included in a dataset, the results have proved negligible. To illustrate, in Smyth's 2005 study which considers the role of attitudinal, institutional and environmental factors in explaining the dissent rate in the High Court of Australia between 1904-2001, there was found to be no support for the hypothesis that Catholic judges would have a higher dissent rate than Protestant judges nor that there was a positive relationship between a judge's Catholic faith and voting patterns in relation to divorce cases.¹²²

¹¹⁸ C. Neal Tate and Panu Sittiwong, 'Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations (1989) 4 J Pol 900.

¹¹⁹ Being more liberal means voting in favour of claimants civil rights and liberties.

¹²⁰ Donald Songer and Susan Johnson, Judicial Decision making in the Supreme Court of Canada: Updating the Personal Attribute Model, (2007) 40 CJPS 911.

¹²¹ Donald Songer, Susan Johnson, C.L. Ostberg and Matthew Wetstein, *Law Ideology and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (McGill Queens University Press 2012).

¹²² Russell Smyth, 'The role of attitudinal, institutional and environmental factors in explaining the variations in the dissent rates of the High Court of Australia (2005) 3 Aust J Political Sci 519.

3.4 Using US studies to conduct similar research in the UK

Whilst non-exhaustive, the review of literature above suggests that empirical legal research, particularly of a quantitative nature such as much of that discussed in 3.3, is currently at the vanguard of studies that explore the impact of non-legal factors such as religious beliefs on judicial decision-making; arguably, the US models offer the most sophisticated research designs for such inquiries, largely because it is in the context of the US judiciary that most studies have been conducted.¹²³ This has led Sisk to describe the current state of scholarship in relation to studies of the US judiciary as the ‘quantitative moment’.¹²⁴ Importantly, such a view does not undermine the value of existing or further theoretical work in this area which Sisk acknowledges continues to provide a vital frame of reference for empirical research, both in terms of determining what to study and interpreting what has been observed.¹²⁵ Given the empirical methodology used by US scholars has been described as reaching ‘healthy maturity’, it would seem reasonable to suggest a similar research template could be used for analogous studies in the UK.¹²⁶ However, there are a number of conceptual, methodological and contextual concerns that cast doubt as to the appropriateness of applying US models to studies that aim to explore the relationship between judges’ religious beliefs and judicial determinations in the UK courts (in addition to the difficulties and dangers of comparing jurisdictions with different judicial structures, legal philosophies and religious landscapes).

Conceptual issues

As discussed above, existing studies that explore the impact of non-legal factors on judicial decision-making are chiefly predicated on a theoretical framework in which the attitudinal and legal models of judicial behaviour are diametrically opposed. This gives rise to the basic question: Is it the doctrine of precedent or judges’ personal factors that motivate judicial decisions?¹²⁷ Whilst this has provided a useful platform

¹²³ This view is shared with scholars such as Jack Knight, ‘Are Empiricists Asking the Right Questions about Judicial Decisionmaking?’ (2009) 58 Duke LJ 1531.

¹²⁴ Gregory Sisk, ‘The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making (Book Review) (2007) 93 Cornell L R 873, 894 in which the author opines: ‘Indeed, greater awareness of the influences of judicial attitudes and preferences may encourage greater self-conscious objectivity and heightened attention to legal rules and norms among judges’ <www.ssrn.com/abstract=1131793> accessed 11 January 2013.

¹²⁵ *ibid* 891.

¹²⁶ *ibid* 886.

¹²⁷ Knight (n123).

from which to examine how judges judge in the US, some commentators argue that the conceptual foundation upon which the US studies are based is fundamentally flawed.¹²⁸ In particular, it is argued that attempts to identify a correlation between judges' personal preferences and case outcomes are pointless because judges already acknowledge that, on occasions where the law is obscure, judicial reasoning may be consciously or unconsciously informed by factors outside of the legal framework. Thus, empirical research that has the primary objective of showing a causal relationship between non-legal factors and judicial determinations fails to add anything new to existing knowledge about the practice of judging. Given that a number of judges in the UK similarly acknowledge the presence of a personal dimension to judging means that studies based on the same theoretical construct is likely to be subject to similar criticism. As such, a more fruitful investigation is to explore whether, and if so, the *extent* to which a judge's religious beliefs affect how he or she decides a case? Of course, the problem here shifts to whether it is possible to discern, and if so, how best to measure, the extent of such influence.

It has further been opined that empiricists' specific use of the attitudinal model, which it is suggested essentially functions as the 'default position' from which to analyse judicial decision-making, is problematic. For example, Tamanaha suggests that because the prime purpose of scholars' research is to prove that judges' personal preferences affect judging to the exclusion of legal factors, quantitative assessments inevitably have a 'distorting slant'.¹²⁹ This distortion potentially renders research findings unreliable and misrepresentative of judging. Tamanaha goes so far as to describe scholars' assumptions about the impact that non-legal factors have on decisions as 'corrosive'.¹³⁰ Only by giving weight to all the factors that might influence judicial decision-making can a more accurate assessment of the impact of non-legal factors on judicial decisions be made.¹³¹ Moran has identified a similar

¹²⁸ Eg Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *Uni Chi L Rev* 1; Brian Tamanaha, 'The distorting slant in quantitative studies of judging' (2009) 50 *BCL Rev* 685; Harry Edwards and Michael Livermore, 'Pitfalls of Empirical Studies That Attempt To Understand The Factors Affecting Appellate Decisionmaking' (2009) 58 *Duke LJ* 8.

¹²⁹ Tamanaha (n128). Tamanaha suggests the 'distorting slant' is 'a product of a misdirected effort to dispel belief in mechanical jurisprudence and a misperception of the realists'.

¹³⁰ *ibid* 758.

¹³¹ Frank Cross attempts to include a legal dimension to his empirical study of the US Courts of Appeal, see Frank Cross, *Decision Making in the US Courts of Appeals* (Stanford University Press 2007).

issue in relation to his studies regarding sexual diversity in the judiciary.¹³² In the same way that the attitudinal model of judicial behaviour encourages scholars to focus on non-legal factors (rather than using a more holistic approach in which the impact of legal factors on case outcomes are also considered), Moran suggests the focus on specific judicial characteristics such as sexuality inevitably places an emphasis on the ‘different judge’. Consequently, decision-making by judges falling into what Moran refers to as the ‘norm’ are ignored, resulting in a ‘distorting slant’ akin to that identified by Tamanaha.

It is perhaps inevitable that investigations that explore the relationship between judges’ religious beliefs and judicial decision-making in the UK courts will be subject to similar criticisms as those directed at the US studies. However, it is contended that the potential for a distorting bias in an approach which focuses on one aspect of judicial decision-making such as religion is problematical only if the study is conducted without acknowledging the role played by other factors. Moreover, it is argued that the simple attitudinal-legal binary provides a useful conceptual starting point from which to base initial observations about faith and the influence religious beliefs have on judicial decision-making. Likewise, that the spotlight may be on the ‘different judge’ does not negate the value of the research.¹³³

Methodological issues

Despite being recognised by Thomas as the most advanced research on judicial decision-making processes,¹³⁴ the quantitative work in the US can be criticised for being methodologically weak. For example, these studies have been subject to accusations of selection bias because they only include published decisions in assessments.¹³⁵ That the bulk of research has been conducted in higher appellate courts has also attracted criticism on the basis that decision making in these courts, particularly in the Supreme Court, is very different to the nature of work conducted in the lower courts. Indeed, it will be recalled from Chapter 1 that Cowan et al.

¹³² Emily Grabham, *Sexuality and Judicial Diversity: An interview with Leslie Moran*, Interview conducted by Email 2007 <www.kent.ac.uk/clgs/documents/word-files/events/les-moran-interview-march-2007.doc> accessed 7 May 2013.

¹³³ For the purpose of this study the ‘different judge’ is a judge with particular religious beliefs.

¹³⁴ Thomas (n8).

¹³⁵ Pauline Kim and others, ‘How Should We Study District Judge Decision-Making?’ (2009) 29 *Wash U J L & Pol’y* 83; Michael Heise, ‘The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism’ (2002) 4 *U Ill L Rev* 819.

questioned the ‘radiating effects of law’ through the court hierarchy.¹³⁶ As such, making generalizations about whether judicial decision-making is affected by non-legal factors such as religion is inappropriate or misleading.¹³⁷

A further concern relates to the effectiveness of translating rich textual data in the form of judgments into mathematical data suitable for statistical analysis. As seen in the studies considered above, in assessing whether religious beliefs affect judicial decisions, the quantitative approach typically requires the researcher to review judges’ decisions within a selected data sample and code judgments usually according to whether outcomes are ‘liberal’ or ‘conservative’. However, the coding process is itself problematic. For example, it has been suggested that coding decisions simply into binary outcomes fails to represent an accurate reflection of judgments because the range of issues contained in a case will rarely represent a uniform ‘liberal’ or ‘conservative’ position. In any case, it may be unclear which positions represent a ‘liberal’ or ‘conservative’ outcome; for example, in a clash of rights case in which an individual’s right to manifest their religious beliefs conflicts with an individual’s right not to be discriminated against because of sexual orientation, should a decision in favour of the religious claimant be deemed liberal or conservative? Moreover, that the focus is on case outcomes means the substance of judgments is ignored.¹³⁸ Likewise, knowledge of other factors such as which judges held majority or dissenting positions in a given judgment may lead to biased coding.¹³⁹

Furthermore, where quantitative studies reveal a statistically *significant* correlation between judges’ faith and judicial decisions, it has been suggested that non-empiricists and others unfamiliar with statistics terminology, may mistakenly conclude that judges’ religious beliefs exert a strong influence on judicial decision-making.¹⁴⁰ However, as Ziliak and McCloskey state, ‘a finding of “statistical significance”, or the lack of it, statistical insignificance, is on its own valueless, a

¹³⁶ Chapter 1.4.

¹³⁷ Edwards and Livermore (n128).

¹³⁸ *ibid.*

¹³⁹ Eg Anna Harvey, ‘What Makes a Judgment “Liberal”? Coding Bias in the United States Supreme Court Judicial Database’ 3rd Annual Conference on Empirical Legal Studies Papers (New York University 15 June 2008) .<www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1120970>accessed 7 May 2013.

¹⁴⁰ Sisk (n124).

meaningless parlor game’,¹⁴¹ in so far as it only shows no more than a 5% probability that the correlation is coincidental – it reveals nothing substantive about the relationship itself.

Thus, whilst suggesting the study of judicial decision-making in the US is in the ‘quantitative moment’, the conceptual and methodological difficulties considered above lead Sisk to conclude that statistical analysis cannot capture the full dimension of the ‘unique and important human enterprise known as judging’.¹⁴² Rather, he contends that the shortcomings of such quantitative methods gives rise to a ‘qualitative opportunity’,¹⁴³ in which theoretical, doctrinal and empirical research are all vital components in furthering the understanding of how judges decide cases. The position taken in this study follows that of Sisk. Understanding the factors that influence judicial decision-making cannot be solely determined by quantitative studies that are limited to finding a connection between a given variable and case outcome. Such findings *may* be indicative of the legal areas in which religion is or is not a salient factor. However, the value of a qualitative and/or mixed method analysis is that it allows the researcher to gain insight into the decisional process (rather than outcome only) so as to explore decision-making from a more holistic perspective; the qualitative ‘meat’ to the quantitative ‘bones’. In conclusion, it is a meld of methods that is likely to yield the most useful results.

Contextual issues

In any case, it is apparent that in the present context, an attempt to replicate US studies using the same highly developed conceptual and methodological models is immediately beset with difficulty. A major hurdle concerns how to ascertain the religious beliefs of current members of the judiciary. In the studies conducted by Sisk et al. discussed in section 3.3, the author advises that judges’ religious background data was obtained by reference to existing work by judicial biographers and other researchers. As explained above, in contrast to the US, judges in the UK are rarely asked about or discuss such matters publicly and therefore such information is rarely available. If a judge was asked about their faith and its

¹⁴¹ Stephen Ziliak and Deidre McCloskey, ‘The Cult of Statistical Significance’ (2009) Section on Statistical Education JSM < www.deirdremccloskey.com/articles/stats/preface_ziliak.php > accessed 9 April 2013.

¹⁴² Sisk (n124).

¹⁴³ *ibid.*

influence on judging, it is questionable whether such information would be disclosed; remember Lord Neuberger's response to the suggestion that judges could be vetted by MPs.¹⁴⁴ Evidence of judges' reticence to talk candidly about sensitive issues is also reflected in Darbyshire's experience of dealing with members of the judiciary (discussed in Chapter 1).¹⁴⁵ In the same way that a judge's political beliefs are considered to be especially sensitive, the same can be said of an individual's religious beliefs; ergo, there would appear to be little prospect of a researcher being granted permission to speak to judges about their faith. Indeed, this was found to be the case when judicial participation was sought in relation to this study.

3.5 Conclusion

This chapter has provided an overview of the judicial decision-making literature in relation to the judiciary in the UK and beyond. In doing so, it finds that very little attention has been paid to whether non-legal factors influence how judges judge in the UK, particularly religion. There is, to use Genn's words, an 'information black hole'.¹⁴⁶ Studies of judicial decision-making from other jurisdictions, particularly the US, provide mixed evidence that judges' religious beliefs influence case outcomes in certain cases. This lends weight to the hypothesis that judges' religious beliefs may influence judicial decision making in cases involving religious issues in the UK. However, what the North American studies fail to consider is how judges mitigate for the effects of the personal dimension to their judging.

Having highlighted the difficulties of replicating the advanced methods used to examine judicial decision-making in the US, it is clear that the methodological options available to the researcher in exploring judging in the UK courts are limited. However, it is argued that insight into the relationship between judges' religious beliefs (and indeed other personal factors) and judging may be gleaned from adopting a mixed method approach which extends beyond a cause-effect/variable-outcome relationship so as to encompass the *process* of judging.

¹⁴⁴ Merrick (n82).

¹⁴⁵ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Publishing 2011) 3.

¹⁴⁶ Genn (n3)129.

In the next chapter, the methodology and mixed methods used to explore lawyers' perceptions of the nexus between judges' faith and judging in relation to the UK courts are articulated.

CHAPTER 4

RESEARCH METHODOLOGY AND METHODS

This chapter examines the methodology and methods used in this study. Section 4.1 presents an overview of the use of empirical methods in legal research. Sections 4.2 to 4.4 explain the methodological aspects of the study: the research design, paradigm and strategy. Section 4.5 outlines the application procedure for judicial participation in this research, the outcome of which redefined the research approach taken in the present study. The focus then turns to the procedures used to generate, manage and analyse the data used in this study. Sections 4.6 and 4.7 provide an overview of the research methods used in relation to part one involving the qualitative interviews with barristers and part two relating to the Solicitor Perceptions Questionnaire (SPQ) respectively. A discussion of the limitations of the methods chosen is provided in section 4.8. Ethical considerations relevant to all aspects of the research design are acknowledged in section 4.9.

4.1 Using empirical legal research

Legal scholarship is traditionally dominated by a doctrinal approach in which the focus is on legal theory and expository research.¹ However, this study uses empirical legal research methods to investigate the relationship between judges' personal factors and judging. Empirical legal research is broadly defined as 'the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have'.² In other words, it examines how the law works in practice.

¹ Paul Chynoweth. 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (John Wiley & Sons 2009) 31.

² John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford Handbooks Online 2015) <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199248179.001.0001/oxfordhb-9780199248179-e-039> accessed 23 September 2015.

An empirical legal approach was considered most appropriate for this study on two grounds. Firstly, it is consistent with the social-legal dimension of the study in which the focus is on legal actors' perceptions of judging in action rather than 'textbook accounts' of how judges ought to judge.³ Secondly, as seen in the review of existing literature in Chapter 3, an empirical approach is commonly used in studies of judicial decision-making.

4.2 Research design

A research design provides the framework that guides the choice of research method and analysis in a study.⁴ According to Creswell, an overall research design consists of three synergistic components:

- the researcher's philosophical worldview (also known as the research paradigm);
- the strategy of inquiry related to that worldview; and,
- the specific research methods used in carrying out the research.⁵

This study used an exploratory sequential mixed methods research (MMR) design underpinned by a pragmatic worldview. Research methods involved qualitative interviews with barristers and the use of a questionnaire for completion by solicitors (SPQ) for the purpose of eliciting lawyers' views about the relationship between judges' personal factors, particularly religious beliefs and judging.

4.3 Research paradigm: pragmatic worldview

Articulating the researcher's philosophical orientation is important because it provides the theoretical framework in which the intent, motivation and expectations for research are set.⁶ There are a number of competing philosophical worldviews that a researcher can bring to a research study which are shaped by various factors such as discipline orientations, researcher inclinations and previous research experiences.

³ *ibid.*

⁴ Alan Bryman, *Social Research Methods* (3rd edn, OUP 2008) 30.

⁵ John Creswell, *Research Design* (4th edn, SAGE 2014) 5.

⁶ Noella Mackenzie and Sally Knipe, 'Research dilemmas: Paradigms, methods and methodology' (2006) 16 *Issues in Educational Research*.

Traditionally, the philosophical research paradigms that have dominated methodological debates in social research are positivism and interpretivism (summarised in Appendix 2).⁷ However, a pragmatic worldview is generally held to be a philosophical bedfellow for MMR and is the direction to which this study is oriented.

For pragmatists, the primary focus is on how best to answer research questions rather than on theoretical and methodological concerns.⁸ In Feilzer's words, pragmatism 'sidesteps the contentious issues of truth and reality...and orients itself toward solving practical problems in the "real world"'.⁹ To illustrate, a pragmatic worldview accepts the existence of both singular and multiple realities of the social world. This means that the pragmatic researcher is not committed to any one system of philosophy and reality.¹⁰ Whilst this freedom of choice means that pragmatists are not confined to a philosophical straightjacket, Denscombe cautions that a pragmatic worldview is not an approach in which 'anything goes';¹¹ mixed methodologists guided by pragmatism must still explicate their motivations for combining quantitative and qualitative data.¹²

4.4 Research strategy: exploratory sequential design

There are a number of MMR design strategies that can be used to address a research problem. Creswell advances three major types: convergent parallel; explanatory sequential and exploratory sequential.¹³ As the interplay between judges' religious beliefs and decision-making in the UK courts has not been the topic of a focused

⁷ These philosophical worldviews are distinct from the legal philosophies of legal positivism and legal interpretivism.

⁸ John Creswell and Vicki Plano Clark, *Designing and Conducting Mixed Methods Research* (2nd edn, SAGE 2011).

⁹ Martina Feilzer, 'Doing mixed methods research paradigmatically: Implications for the rediscovery of pragmatism as a research paradigm' (2010) 4 J Mix Methods Res 1.

¹⁰ Creswell (n5).

¹¹ Martyn Denscombe, 'A Research Paradigm for the Mixed Methods Approach' (2008) 2 J Mix Methods Res 270, 274.

¹² Creswell (n5).

¹³ *ibid* 16. These designs can be used for more advanced research strategies eg transformative mixed methods, embedded mixed methods and multiphase mixed methods.

enquiry before, this study is guided by an exploratory sequential mixed methods design.¹⁴

Usually when using this two-phase exploratory design, a researcher first conducts a qualitative inquiry relating to the topic of interest before moving to a second, quantitative phase using a larger sample.¹⁵ Part one of the fieldwork involved qualitative interviews with barristers, the data from which captured interviewee perceptions of the relationship between judges' religious beliefs and judging. Themes identified in part one informed the second part of the study which involved the administering of an online survey – the SPQ. This yielded a mix of quantitative and qualitative data which expanded on, rather than took precedence over, the qualitative study in the first phase.

The results from the two studies were brought together with the aim of gaining an insight into lawyers' perceptions of the relationship between judges' religious beliefs and judicial decision-making. Figure 4.1 provides an outline of the overall research design.

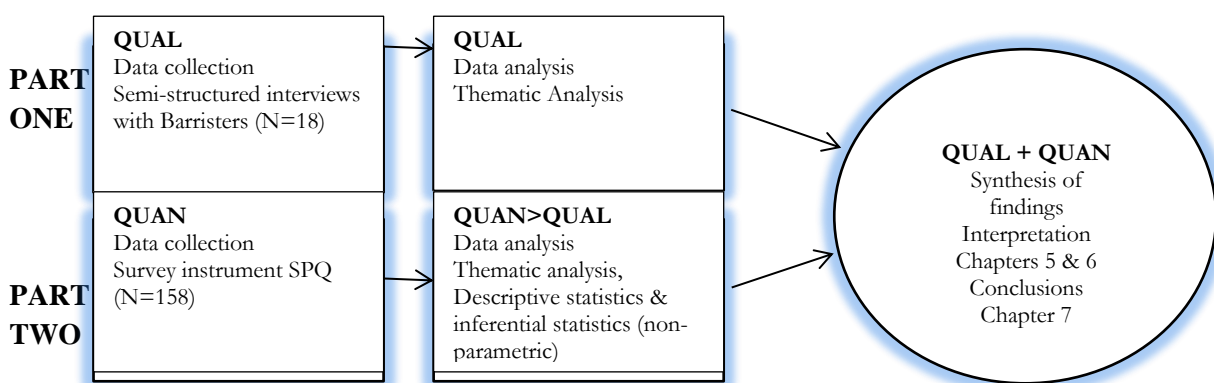


Figure 4.1 Overview of the exploratory sequential design used in this study

Rationale for mixed methods research in this study

The decision to use different methods in relation to each of the respective sample groups (barristers and solicitors) rather than a mono-method design was principally driven by practical considerations.

¹⁴ Creswell and Plano Clark (n8) 86.

¹⁵ *ibid.*

Part one of the research involving barristers was fixed at the start of this enquiry. Qualitative interviews are widely regarded as an effective means by which to gain an initial insight into a research topic about which little or no research has been conducted as was the case here. Thereafter, a pragmatic approach allowed for considerable flexibility as to how the research design evolved in response to the data. For example, during the interviews phase, the researcher considered whether it would be useful to also conduct an online questionnaire with a larger sample of barristers for the purpose of triangulation. In light of the rich and varied data generated in the interviews, and given practical considerations (especially time constraints), it was concluded that acquiring additional data from a wider sample of barristers at this stage would be of limited value. However, this would be a useful additional source of data in the event of this foundational study being scaled up.

In Part two, consideration was given as to the appropriateness of using the same qualitative approach to elicit solicitors' thoughts on, and experiences of, the factors that were perceived to influence judging. However, based on the experience of conducting interviews in part one, there were concerns that it might be difficult to attract a sufficient number of participants with the requisite courtroom experience and expertise in the legal areas of interest in the time available. With the qualitative data allowing for the development of a quantitative research tool, it was decided that an online survey, designed to acquire both quantitative and qualitative data, would provide the most efficient means by which to capture solicitors' perceptions about how judges' religious beliefs influence judging. The responses from solicitors were used to reinforce the qualitative findings from the interviews with barristers. Applying Bryman's scheme listing different rationales for mixing methods in research, the main reasons for combining methods in this study include: diversity of views; instrument development (that is, the designing and revising of the SPQ), and enhancement.¹⁶

The research methods used in relation to each sample group are outlined in the sections 4.6 and 4.7.

¹⁶ Alan Bryman, 'Integrating quantitative and qualitative research: how is it done?' (2006) 6 Qual Res 97.

4.5 The missing dimension: perspectives from the bench

As explained in Chapter 1, the researcher originally intended to explore the relationship between religion and judicial decision-making through the lens of judges and barristers using a mixed methods approach similar to that adopted in the present study. It was hoped that this dual perspective would provide a more rounded understanding of how judges judge. After having successfully recruited barristers to participate in the study, attention turned to members of the judiciary.

To gain access to members of the judiciary, the Judicial Office advises that researchers must first obtain approval for judicial participation in research projects from the relevant Head of Division or the relevant Senior President of the tribunals' judiciary.¹⁷ The procedure to be followed is outlined in the Judicial Office's guidance for researchers relating to requests for judicial participation in research.¹⁸ In particular, researchers who want to conduct research involving any member of the judiciary must submit a formal application which must satisfy the criteria stipulated in the guidance. Accordingly, a formal application for judicial participation in this research was submitted to the Ministry of Justice in April 2014 (Appendix 11). Permission was sought to interview senior members of the judiciary about how their faith affects their work, and invite judges from both the higher and lower courts to take part in a survey about the same. However, at the end of June 2014, the researcher received notification that the application for judicial participation had been rejected (Appendix 1).

The unsuccessful application for judicial assistance prompted a revision of the original research plan. As explained in Chapter 1.4, solicitors were immediately identified as an alternative source from which to address the research questions.

¹⁷ Judicial Office, *Judicial Participation in Research Projects Guidance for Researchers January 2013* This has since been updated and can now be found at < www.judiciary.gov.uk/publications/judicial-participation-in-research-projects/ > accessed 13 May 2016.

¹⁸ *ibid.*

4.6 Research Method Study I: Qualitative Interviews with Barristers

This section explains the methods used to gather and analyse data in relation to Part one of this mixed methods study.

4.6.1 Barristers: a purposive sample

A purposive sampling method was adopted to recruit the participants, barristers in practice in England and Wales, to this part of the study.¹⁹ Purposive sampling involves choosing participants or data on the basis that they have particular features, characteristics or knowledge which allow for an in-depth exploration and understanding of the topic of interest.²⁰ This approach is particularly useful for conducting exploratory studies in which the researcher seeks to determine whether the topic at issue warrants further investigation as is the case here. It is important to note that because potential participants are not randomly selected, the sample cannot be said to be representative of the population and findings are not generalizable.²¹ Rather, the strength of this sampling technique lies in the selection of ‘information-rich cases’ for analysis.²²

As specialist legal advisers and courtroom advocates, barristers appear before and interact with judges on a regular, often daily, basis. Significantly, Paterson has identified the dialogue between judges and counsel as a key factor in understanding judicial decision-making in the UK Supreme Court.²³ Accordingly, the researcher considered barristers to be well-placed to offer a perspective as to what factors, if any, appear to play a role in judges’ decision-making. Moreover, that most judges in the higher courts have practiced at the Bar prior to their appointment to the bench

¹⁹ Purposive sample is a form of nonprobability sampling in which samples are not chosen at random but for a specific purpose. This contrasts with probability sampling in which random selection is used and where findings are more likely to be generalizable.

²⁰ Jane Ritchie, Jane Lewis and Gillian Elam, ‘Designing and Selecting Samples’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE 2003) 78.

²¹ This contrasts with probability sampling in which participants are selected at random and findings are more likely to be generalizable.

²² Michael Patton, *Qualitative Research & Evaluation Methods* (3rd edn, SAGE 2002) 228.

²³ Alan Paterson, *Final Judgment; The Last Law Lords and the Supreme Court* (Hart Publishing 2013).

suggests that the barristers who participated in this study can offer an interesting insight into how today's judges might perceive the business of judging.²⁴

Barristers: professional 'elites'

It should be noted that barristers are classed as professional 'elites'. This term has been variously defined by social scientists.²⁵ Odendahl and Shaw suggest that this is because deciding who is classed as 'elite' varies according to the area of inquiry...'.²⁶ Typically, elites are those in powerful political or social positions by virtue of their professional background, social status and/or economic wealth.²⁷ Pirie and Rogers define elites as being part of a relatively small but exclusive group within society that 'claims and/or is accorded power, prestige, or command over others on the basis of a number of publicly recognised criteria, and aims to preserve and entrench its status thus preserved'.²⁸ A hierarchical structure may also exist within an elite group, in which the highest stratum consists of an 'ultra-elite' represented by a 'thin layer of people who exhibit especially greatest influence, authority, or power'.²⁹

It has been suggested that barristers acquire their elite status on call to the Bar by virtue of being in a position to have control over, and expertise in, important aspects of legal knowledge and practice and can play an important social role in the system of justice.³⁰ They are 'highly skilled, professionally competent, and class-specific'.³¹ There is a definite hierarchical structure at the Bar - Queen's Counsel (QC's), senior barristers who receive 'silk' for excellence in advocacy in the higher courts, have the

²⁴ 34% of court judges are not from a barrister background cf. 65% of tribunal judges who are from non-barrister backgrounds. Courts and Tribunals Judiciary Judicial Diversity Statistics 2016 < www.judiciary.gov.uk/publications/judicial-statistics-2016/> accessed 14 October 2016.

²⁵ William Harvey, 'Strategies for conducting elite interviews' (2011) 11 Qual Res 431.

²⁶ Teresa Odendahl and Aileen Shaw, 'Interviewing Elites' in Jaber Gubrium and James Holstein (eds) *Handbook of Interview Research: Context and Methods* (SAGE 2002) 301.

²⁷ In a recent BBC Great British Class Survey, economic wealth was identified as setting 'elites' apart from the majority of the UK population. Typical professions falling into the 'elite' social class included barristers, company directors and dentists. Elites were described as 'the most advantaged and privileged group in the UK', having the lowest proportion of ethnic minorities and the highest proportion of graduates compared to other social classes. Mike Savage and others, 'A New Model of Social Class? Findings from the BBC's Great British Class Survey Experiment' (2013) 47 *Sociology* 219.

²⁸ Fernanda Pirie and Justine Rogers, 'Pupillage: The Shaping of a Professional Elite' in Jon Abbink and Tijo Salverda (eds), *The Anthropology of Elites: Power, Culture and Complexities of Distinction* (Palgrave MacMillan 2012).

²⁹ Harriet Zuckerman, 'Interviewing an Ultra-Elite' (1972) 36 *Public Opinion Quarterly* 2.

³⁰ Pirie and Rogers (n28).

³¹ Linda McDowell, 'Elites in the City of London: Some Methodological Considerations' (1998) 30 *Environment and Planning* 2133.

highest prestige within the profession and it is from this rank that most senior judges will have started their judicial careers.

4.6.2 Sample selection

Barristers who practise primarily in the areas of employment and family law were targeted. Arguably, these are areas of law in which religious or religiously sensitive issues are most likely to be at play (although it is acknowledged that religion may be relevant in a variety of different legal contexts), even if it is not immediately apparent at the outset of a case.

Recruitment of participants took place between October 2013 and February 2014. A variety of strategies were employed to recruit participants to the study.

In the first instance, an invitation to take part in the research project was sent to participants through contact persons (law school contacts) via email. The email included a brief outline of the project aims and objectives and asked those who were interested in taking part to register their interest by return email (Appendix 3). The first two invitees agreed to participate in a pilot study.³² The pilot study was used to:

- reflect upon and improve the sequence, clarity and nature of the questions contained in the preliminary interview schedule;
- assess the feasibility of arranging face-to-face interviews for data collection and to trial alternative modes of interview if required;
- estimate the average duration of the interview;
- identify and address any practical problems that might arise before, during or after the interview process; and
- obtain feedback about the interview experience.³³

Following the pilot study, invitations were sent to additional contact persons via email. This resulted in a five volunteers.

³² The pilot study took part in October and November 2013 and ran concurrent to the next two phases of participant recruitment.

³³ Harvey observes there is a lack of guidance on whether pilot interviews with elites should be conducted. Here, the pilot interviews that took place were with law school contacts that were happy to participate in this capacity. William Harvey, 'Methodological Approaches for Junior Researchers Interviewing Elites: A Multidisciplinary Perspective' (2009) Economic Geography Research Group Working Paper Series No. 01.09 < www.egrg.rgs.org/wp-content/uploads/2014/02/egrg_wp0109-Harvey.pdf> accessed 4 August 2014.

At the same time, advertisements were posted on online social media sites including the UK Human Rights blog and the Law and Religion blog. Links to these invitations were shared on the social networking site Twitter. An advertisement was also included in an edition of the Discrimination Law Association e-news (Appendix 3). This approach yielded just one response.

In the main phase of recruitment, the Legal500 website was used to identify leading sets in London and the regions undertaking work in the areas of key interest.³⁴ The website of each set was visited to obtain the contact details of Senior Clerks and to review barrister profiles for individuals' areas of practice should individual barristers be interested in taking part. The Senior Clerks were contacted by email to ask if they would be prepared to distribute details of the research along with the researcher's contact details to members of chambers. Of the 12 Senior Clerks contacted, six replied, all of whom offered to circulate the information to members of chambers as requested. The researcher also contacted a number of barristers direct by email. Invitees were asked to contact the researcher, either by email or by post, to register their interest in taking part in the study.

Those responding to the invitation were sent a further email containing an information sheet and a consent form (Appendix 4). A further 12 volunteers were recruited in this way, making a total of 18 barristers with requisite experience in the legal areas of interest. Given the small sample size, it is acknowledged that the sample was not representative of the Bar (the limitations of this are discussed in 4.8).³⁵ However, the rich and thick data generated from this sample allowed the researcher to shed light on barristers' perceptions of the relationship between judges' religious beliefs (and other factors) and judging and provides sufficient information to allow the study to be replicated, this being one useful indicator of when data saturation is reached in qualitative enquiries.³⁶

³⁴ The Legal500 is renowned as the authoritative guide to the UK's leading law firms. It provides a comprehensive review of firms and sets throughout the UK across a range of legal practice areas. <www.legal500.com>28 May 2014.

³⁵ There were approximately 15,899 barristers practising in England and Wales in 2015 <www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/> accessed 14 October 2016.

³⁶ Patricia Fusch and Lawrence Ness, 'Are We There Yet? Data Saturation in Qualitative Research' (2015) 20 The Qualitative Report 1408.

4.6.3 Sample characteristics

Of the 18 barristers who were interviewed, thirteen were principally located in London whilst the remaining five practiced at the regional Bar. Four of the barristers were female. Barristers ranged in experience from less than three years since year of call to over 22 years at the Bar (Figure 4.2). Four were QC's and six sat as part-time judges at the time of the interviews.³⁷ As Figure 4.3 shows, interviewees had a narrow range of religious affiliations.³⁸

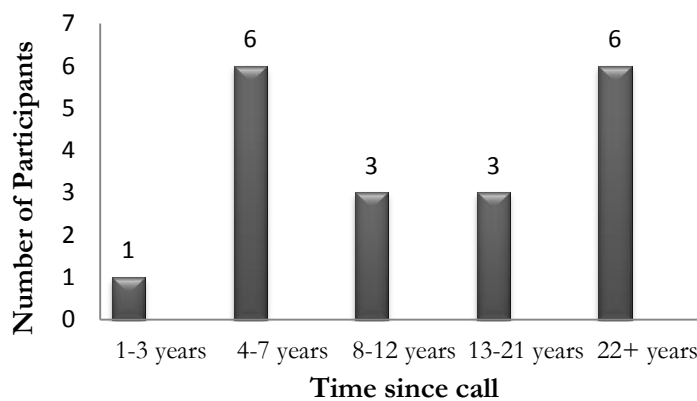


Figure 4.2 Barristers by year of call (n=18)

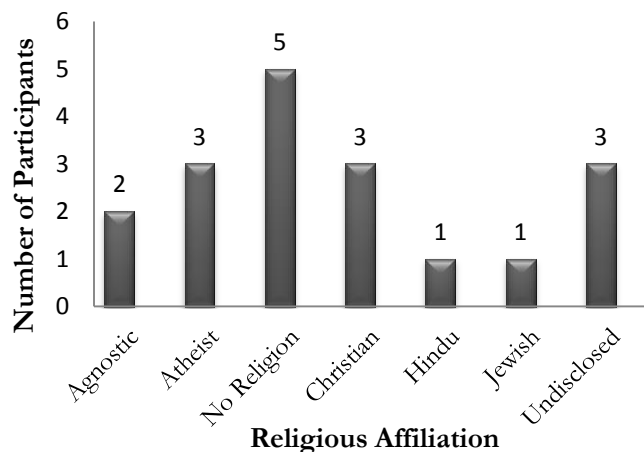


Figure 4.3 Barristers by religion (n=18)

³⁷ To comply with Judicial Office Guidance for Researchers, participants who sit as part-time judges were asked for their views based on their work as a barrister only. Judicial Office, Judicial participation in research projects Guidance for researchers (August 2013) www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial-research-guidance-january-2013.pdf accessed 10 December 2013.

³⁸ Here, religious affiliation is used to refer to whether an individual does or does not identify with a religious denomination. See David Voas and Alasdair Crockett, 'Religion in Britain: Neither Believing nor Belonging' (2005) 39 Sociology 11,15.

Whilst it could be argued that the categories ‘Atheist’ and ‘No religion’ should be aggregated under a single heading to reflect those with a lack of theistic belief, there are two reasons for not doing so in this study. First, the researcher wanted to foreground interviewee responses in a way consistent with a qualitative research approach.³⁹ Second, in the absence of further clarification from individual participants, it is suggested that the descriptor ‘No religion’ is ambiguous. On the one hand, it may refer to atheists - individuals who believe there is no God or gods (or other supernatural beings).⁴⁰ On the other hand, the descriptor may be used to describe individuals who believe in a God or gods but who are not connected to an organised religion. Alternatively, ‘No religion’ may reflect an agnostic viewpoint in which an individual is unsure as to whether a God or gods exist.⁴¹ The matter is yet further complicated by the fact that a reference to ‘religion’ can include a reference to a lack of religion.⁴² Whilst it is possible to discern which category of ‘No religion’ that some interviewees fall into from the interview data, it is not apparent in all cases. In hindsight, it would have been useful to ask all participants describing themselves as having ‘No religion’, to clarify the nature of their non-religious beliefs.

4.6.4 Data collection: semi-structured interviews

A semi-structured interview format was considered to be the most appropriate method of data collection.⁴³

Face-to-face interviews are traditionally at the vanguard of qualitative interviewing and the original intention of the researcher was to interview barristers face-to-face. However, upon commencement of the pilot study, it became clear that arranging face-to-face interviews with barristers would be problematic, both in terms of logistics and given the unpredictable and often hectic nature of life at the Bar. Following feedback from the pilot study, it was decided that face-to-face and virtual

³⁹ Rosalind Edwards and Janet Holland, *What is Qualitative Interviewing?* (Bloomsbury 2013).

⁴⁰ Julian Baggini, *Atheism: A Very Short Introduction* (OUP 2002) 3.

⁴¹ Robin LePoidevin, *Agnosticism: A Very Short Introduction* (OUP 2010) 9.

⁴² Equality Act 2010, s10(1).

⁴³ Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A practical guide for beginners* (SAGE Publications 2013) 81. Braun and Clarke observe that these interviews are well-suited to exploring participant understandings, perceptions and constructions of things that the participant has a personal stake in.

interview formats using the internet (such as Voice-over IP ‘VoIP’), email or telephone should be offered to participants. A summary of the advantages and disadvantages of each of these formats is provided in Appendix 5. An outline of the main methodological challenges of conducting elite interviews (gaining access to potential participants and managing the power relationship) can be found in Appendix 6.

Of the 18 interviews included in part one of this study, 16 were carried out using VoIP (Skype, FaceTime and Google Hangouts). One interview was conducted by telephone and one interview took place face-to-face.⁴⁴ The average duration of each interview was 37 minutes. All but one of the interviews were digitally recorded and transcribed. The one participant who asked not to be recorded gave permission for hand written notes to be made when being interviewed.

During the interviews, a standard set of questions was used.⁴⁵ The interview schedule contained a sequence of nine predominantly open-ended questions that were developed around four broad themes: judicial characteristics, client characteristics, adjudicating on religious sensitive issues; and diversity on the bench. The use of open-ended questions is common in semi-structured interviews and was particularly important in this study because, as Aberbach and Rockman observe: ‘Elites especially – but other highly educated people as well – do not like being put in the straightjacket of close-ended questions. They prefer to articulate their views, explaining why they think what they think’.⁴⁶

4.6.5 Data Preparation

Digitally recorded interview data was transcribed verbatim after each interview.⁴⁷ As the sole transcriber of the interviews, the researcher was able to become familiar with data content and make preliminary notes identifying points of possible interest

⁴⁴ Interviews were undertaken between October 2013 and June 2014.

⁴⁵ Bryman (n4) 442. Bryman suggests the interview schedule may be no more than a brief list of prompt to jog the memory or may take the form of a more structured list of issues or questions to put to the participant.

⁴⁶ Joel Aberbach and Bert Rockman, ‘Conducting and Coding Elite Interviews’ (2002) 35 PS 673, 674.

⁴⁷ It was decided that non-semantic sounds such as “um” and “erm” and “er” would not be recorded on the transcript.

from an early stage.⁴⁸ This marked the beginning of the analytic process.⁴⁹ Data was anonymised throughout the transcription process by use of marked generic descriptions. The transcripts were saved and encrypted as Microsoft Office Word Documents on a USB Flash drive. At the end of the transcription process, each participant was provided with a transcript of the interview for review and approval. Requests for amendments to the transcripts were acted upon in accordance with participants' instructions. Having an opportunity to review their transcripts enabled participants to validate their contributing data. This was useful for ethical and quality purposes.⁵⁰

The length of time taken to transcribe the interview data ranged between 2 hours for the shortest interview (duration: 12 minutes) and 12 hours for the longest interview (duration: 1 hour 30 minutes).

4.6.6 Data management and analysis

The researcher used a combination of computer assisted data analysis software (CAQDAS) and manual methods to analyse the qualitative data. Specifically, NVivo10 software was used to facilitate the management of the large amount of textual data generated for this project and as a tool for the initial generation of codes from which potential themes could be identified across the dataset. Manual methods were then used to further explore, arrange and develop themes and complete the analysis of the qualitative data.

The interviews were analysed using a predominantly inductive thematic analysis approach (TA) using the six-phase guide for TA outlined by Braun and Clarke (Appendix 7).⁵¹

It is only recently that Braun and Clarke have 'named and claimed' TA as a standalone method for qualitative data analysis.⁵² Prior to this, variants of TA were

⁴⁸ Marshall and Rossman state: "There is no substitute for intimate engagement with your data. Researchers should think of data as something to cuddle up with, embrace and get to know better". Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (5th edn, SAGE 2011) 210.

⁴⁹ Silverman observes the preparation of transcripts is not simply a technical detail prior to the main business of the analysis. David Silverman, *Doing Qualitative Research* (4th edn, SAGE 2013) 254.

⁵⁰ Although it is acknowledge that requests for amendments to the data may compromise the value of the data.

⁵¹ Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3 Qual Res Psychol 77.

used to analyse qualitative data. However, as a method in its own right, TA was criticised for being poorly defined and lacking the kudos of other branded analytic approaches.⁵³ However, the development of a clearly defined analytic procedure by which to identify common themes in data means that TA is now widely accepted as a branded method and is widely used for analysing qualitative data in social science research.⁵⁴

TA is defined as a qualitative method for the systematic identification, analysis and reporting of patterns – known as ‘themes’ – within a dataset.⁵⁵ It is used to provide a rich, detailed thematic description, or aspect of a research phenomenon or issue, and can also be used to interpret aspects of the said phenomenon or issue.⁵⁶ Given that the concept of coding as a strategy of data reduction is relatively straightforward, TA is seen as a foundational method of qualitative analysis.⁵⁷ Codes and themes can be either data-derived using a ‘bottom up’ inductive approach, closely linked to the semantic content of the data, or they may be research-driven using a deductive ‘top down’ approach, in which implicit meanings are identified.⁵⁸ Whilst thematic coding is used as a step in a number of pattern-based qualitative analytic methods, Braun and Clarke distinguish TA from other approaches such as Grounded Theory and Interpretative Phenomenological Analysis (IPA) on the basis that TA does not fix the researcher to specific methods for data collection, theoretical positions, epistemological or ontological positions; in this sense, it is ‘just a method’ as opposed to an approach to qualitative analysis.⁵⁹ This means TA can be used in a variety of ways to answer a range of different research questions. It is this accessibility and flexibility that influenced the choice of TA for this study.

Here, a predominantly inductive approach was taken in which codes were derived from the data. However, because a comprehensive review of existing literature that

⁵² Braun and Clarke claim to have ‘named and claimed’ thematic analysis as a standalone method within psychology in 2006. The use of thematic analysis is now used across a variety of disciplines. Braun and Clarke (n41) 178.

⁵³ This is despite the fact that thematic analysis underpins other pattern-based analysis such as Grounded Theory. It is in this sense that Braun and Clarke refer to thematic analysis as a ‘foundational method’ *Braun and Clarke* (n43)174.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid* 178.

⁵⁷ *ibid.*

⁵⁸ *ibid* 207.

⁵⁹ *ibid* 178.

explores the relationship between religion and judicial decision-making had been carried out prior to conducting and analysing the interviews, it is inevitable that the identification of themes will have partly been informed by the researcher's own *a priori* theoretical constructs.⁶⁰

IPA was briefly considered as an alternative to TA. IPA is an inductive approach that seeks to examine 'how people make sense of their major lived experiences',⁶¹ and therefore lends itself to experiential research in which participants are asked questions about their understandings and perceptions of phenomena.⁶² Like TA, IPA is a relatively new qualitative approach which involves a process of coding and the development of themes.⁶³ However, in contrast with the approach in TA in which coding is completed across the entire dataset to identify patterns in the data, in IPA 'emergent themes' are identified within each data item before patterns are developed into 'superordinate themes'. Furthermore, IPA has a strong idiographic focus.⁶⁴ This means sample sizes are usually small; in fact some IPA research may comprise no more than a single case.⁶⁵

After consideration, it was decided an IPA approach was not appropriate. The emphasis in this study is not on an understanding of participants' own 'lived experiences', beliefs and values but is on their understanding and perceptions of the influence of others' experiences, beliefs and values. Furthermore, the researcher decided that the focus should be on identifying patterns across the dataset rather than on an analysis with a strong idiographic influence.

⁶⁰ Braun and Clarke observe that while researchers will often give priority to an inductive or deductive approach, in practice, a thematic analysis will be informed by an amalgam of both approaches. Virginia Braun and Victoria Clarke, 'Thematic Analysis' in Harris Cooper (ed), *APA Handbook of Research Methods in Psychology Volume 2 Research Designs* (APA 2012) 58.

⁶¹ Jonathan Smith, Paul Flowers and Michael Larkin, *Interpretative Phenomenological Analysis: Theory, Method and Research* (SAGE 2009) 1.

⁶² Braun and Clarke (n43) 181.

⁶³ IPA was developed by psychologist Jonathan Smith in 1990s. Larkin et al. state that the analytical process involved in IPA is unremarkable compared to other qualitative methods. Therefore, they suggest that it may be more appropriate to define IPA in terms of a perspective rather than as a distinct method. See Michael Larkin, Simon Watts and Elizabeth Clifton, 'Giving Voice and making sense in interpretative phenomenological analysis (2006) 3 Qual Res Psychol 104.

⁶⁴ Smith (n61) 51.

⁶⁵ *ibid.*

4.7 Research Method Study II: Solicitor Perceptions Questionnaire

This section explains the methods used to gather and analyse data in relation to Part two of this mixed methods study.

4.7.1 Identifying the sample: Solicitors

A purposive sampling method was used to identify and recruit solicitors for this part of the research project. As discussed in Chapter 1.4, like barristers, solicitors are expert legal advisers. Working directly with clients, solicitors often negotiate on behalf of their clients and, if necessary, represent them in the lower courts. Solicitors with higher rights of audience can also represent clients in the higher courts (Crown Court, High Court and Court of Appeal).⁶⁶ If they do not carry out their own advocacy and there is a need to instruct counsel, a solicitor may still attend court and provide assistance to the barrister as required. Based on their observations in court, and more generally from their interaction with members of the judiciary within the wider legal environment, it is therefore argued that solicitors, like barristers, can provide an interesting insight into the relationship between judges' religious beliefs and judicial decision-making.

Justifying the use of a purposive sampling method

The sample was selected using a purposive, non-probability sampling strategy. As discussed in section 4.6.1, this method means that the sample is not chosen randomly but is selected 'based on a specific purpose'.⁶⁷ A major criticism of the use of non-probability sampling in social survey research is that because the researcher chooses who to select into the sample, some members of the population are more likely to be selected than others. This gives rise to sampling bias. Moreover, a non-probability sampling strategy prevents findings from being generalizable because it is not possible to ascertain of what population the sample is representative.⁶⁸ Nevertheless,

⁶⁶ Solicitors are granted rights of audience in all courts when they are admitted to the roll. However rights of audience in the higher courts cannot be exercised until a solicitor has passed an advocacy assessment based on the Solicitors Regulation Authority's higher rights of audience competence standards. See <www.sra.org.uk/solicitors/accreditation/higher-rights-of-audience.page> accessed 3 July 2015.

⁶⁷ Charles Teddlie and Abbas Tashakkori, 'Major issues and controversies in the use of mixed methods in the social and behavioral sciences' in Abbas Tashakkori and Charles Teddlie (eds), *Handbook of mixed methods in social and behavioral research* (SAGE 2003) 713.

⁶⁸ Bryman (n4) 183.

there are three main reasons why the use of non-probability sampling was justified in the second part of this study:

- The researcher had insufficient information to be able to identify the entire target population;
- The sample was initially limited to solicitors working in particular areas of law; and
- It is acknowledged as an effective method by which to select an exploratory sample in relation to a new or under-explored research area such as that in this research project.⁶⁹ In particular, here it was the range of responses that the researcher was interested in rather than the proportion of the population that gives a given response.⁷⁰

4.7.2 Sample criteria

Solicitors practicing in the areas of employment and family law were identified as being the main targets for recruitment. As explained in 4.6.2, the rationale for this narrow focus is that these areas of law are those in which religious or religiously-sensitive issues are most likely to arise.

4.7.3 Data Collection: Solicitor Perceptions Questionnaire

Self-completion questionnaires are acknowledged as a common means by which to investigate individuals' perceptions and attitudes in social survey research (a copy of the Solicitor Perceptions Questionnaire (SPQ) can be found at Appendix 8).⁷¹ This was considered to be the most appropriate instrument for data collection in this part of the study, the reasons for which are outlined below.

Firstly, the SPQ allowed the researcher to collect data from a large sample of solicitors. This contrasts with part one of the study in which the focus was on obtaining rich data from a comparatively small sample. Secondly, given both the size of the target population and the large sample size sought in this part of the study, the use of the SPQ was considered to be the most efficient and cost effective method of

⁶⁹ *ibid.*

⁷⁰ David de Vaus, *Surveys in Social Research* (6th edn, Routledge 2013) 88.

⁷¹ *ibid* 216.

data collection vis-à-vis other methods.⁷² Whilst the use of virtual interviews was considered as a means of data collection, it was decided that the number of interviews that would have to be conducted would be time-prohibitive. Thirdly, the use of an online questionnaire format allowed the researcher to incorporate question skip logic into the questionnaire design. This can help to speed up respondent completion times and avoid respondent fatigue. Fourthly, this format meant that response times were quick – for the most part, the responses to invitations to take part in the research were received within 48 hours of the email invitations being sent by the researcher.

From an administration perspective, using the SPQ provided the researcher with instant, basic survey data which was useful for the management and analysis of the data.⁷³ In addition, once the researcher had completed the time-consuming task of identifying and compiling a list of contact details for individuals meeting the sample criteria and had created the questionnaire online, delivering the invitation to complete the web-based questionnaire was reasonably quick.

Of course, the use of a web-based self-completion questionnaire is not without limitations. One of the major issues in a web-based survey relates to response rates. Where the response rate is low, data quality may be compromised. Specifically, questions about the representativeness of the sample may be asked which in turn prevents the findings from being generalizable. Factors that have been shown to affect response rates include the content and presentation of a web questionnaire, the sample and the mode of delivery, the degree of survey fatigue amongst the sample population and the nature of the sample.⁷⁴ In this study, the following strategies were employed in an effort to maximise response rates:

⁷² At the time of writing, the cost of a monthly 'Select' plan subscription to the SurveyMonkey website was £26 <www.surveymonkey.com/pricing/> accessed 7 March 2015. Had the researcher sent out the same number of email invitations to potential respondents by post in this study, the cost for postage alone would have been £3407.64. This is based on sending 2334 speculative questionnaires by second class post, at the lowest large letter rate (at the time of writing being £0.73) and including a self-addressed, pre-paid envelope at the same cost. Additional costs for paper, envelopes and printing have not been included in this estimate.

⁷³ This included data such as trend information and number of collected responses.

⁷⁴ Fan and Zheng group the factors affecting response rates in survey completion into three categories: society-related, respondent-related and design-related factors. Weimiao Fan and Yan Zheng, 'Factors affecting response rates of the web survey: A systematic review' (2010) 26 *Computers in Human Behavior* 132, 133.

- The length of the questionnaire was kept as short as possible. Based on the pilot study, the estimated questionnaire completion time was 15 minutes,⁷⁵ although a number of respondents were recorded as taking in excess of 30 minutes to complete the questionnaire (n=59).⁷⁶
- The design of the survey instrument was kept simple. The SPQ questions were organised into ten categories according to theme: Preliminary matters; About You; Relationship between judges' personal factors and judicial decision-making; Knowing about judicial personal factors; The effect of judicial personal factors on judicial decision-making; Relationship between judges' religious beliefs and judicial decision-making; Accommodating religious beliefs; How your religious beliefs affect your own approach; Specialist panel to hear religious or religiously sensitive cases; and Judicial diversity. A screen-by-screen design was used and a progress bar was added so that respondents were able to track their progress.
- All emails were addressed directly to the intended recipients. Whilst this was a time-consuming process, addressing potential respondents in this way has been shown to have a positive influence on response rates in web-based surveys.⁷⁷
- The researcher ensured that all research queries received from potential respondents about the research were answered promptly and comprehensively.

The researcher did not experience any major technical difficulties when administering the SPQ.

Questionnaire Development

The questionnaire design was principally shaped by the research questions and the findings from the interviews with barristers.

⁷⁵ Solicitors typically charge in 6 minute units based on an hourly rate. The more senior the practitioner, the higher the charge will be.

⁷⁶ The length of time for completion should be treated with caution as it reflects the period of time taken from starting the questionnaire until the finish, without taking into account any periods of interruption.

⁷⁷ Fan and Zheng (n74) 138.

A combination of question types was used in order to address the research questions. Dichotomous and nominal questions were initially used to elicit personal factual information. Open-ended questions were typically included where the nature of responses could not be anticipated or where it was predicated that there might be considerable variance in respondent answers. However, the majority of questions in the questionnaire took the form of Likert-type item questions.⁷⁸ A Likert-type item question typically consists of a closed response question in which respondents are asked to indicate their level of agreement to statements according to the given scale. Here, the interval measure used was a standard 5-point Likert scale in which: 1= Strongly disagree, 2=Disagree, 3=Neither agree nor disagree, 4=Agree, and 5= Strongly agree. Although the use of such attitude scaling does not detect nuanced differences between respondent attitudes, it provides a useful means by which to classify individual responses with respect to a particular attitude and can be used to explore how particular attitudes relate to other variables.⁷⁹

The initial draft of the SPQ was discussed at length with the supervisory team. Suggestions for improvement were implemented and the consultation process was repeated. Once the questions were finalised, the SPQ was re-created in an online format using SurveyMonkey. Transforming the questionnaire to this survey format enabled the researcher to customise the questionnaire design and apply question skip logic where appropriate to streamline users' experience and reduce the time needed to complete the questionnaire. At this stage, all questions were reviewed for errors and the logic was tested by the researcher. A unique web link was created so that the questionnaire could be opened for piloting.

De Vaus has emphasised the importance of pilot testing questionnaires prior to implementation and warns that skipping this stage is 'a risk that is not worth taking'.⁸⁰ Here, the pretesting of the questionnaire was considered to be vital in its development. When carrying out a pilot study, ideally the respondents should be comparable to members of the population from which the sample for the main study

⁷⁸ The questionnaire comprised of 28 questions as follows: 9 Likert-type questions, 11 closed questions and 8 open questions.

⁷⁹ A Oppenheim, *Questionnaire Design, Interviewing and Attitude Measurement* (Bloomsbury 2000) 195.

⁸⁰ De Vaus (n70) 117

will be selected.⁸¹ However, due to time constraints it was not possible to pilot the questionnaire on legal professionals outside of the Law School. Instead, the questionnaire was pretested amongst PhD students and academics from the Law School (n=10), several of whom are or have been in practice as solicitors or barristers. Those who agreed to test the survey were asked to comment on their understanding of the questions and identify any areas of concern or confusion, comment on question sequence and questionnaire design, look for issues relating to functionality and indicate the time taken to complete the questionnaire.

The feedback was generally positive. However, some revisions were made to the format and phrasing of a small number of questions to address ambiguities in meaning. An additional question was also incorporated into the questionnaire, the purpose of which was to elicit more specific information relating to the preceding question.

4.7.4 Sample selection

The SPQ was opened for the collection of online responses between March and June 2015.

Multiple strategies, akin to those used in Part one (Chapter 4.6.2), were used to recruit participants to this part of the study. Initially, existing contact persons meeting the inclusion criteria were invited to complete the questionnaire anonymously via email invitation. At the same time, a link to the questionnaire was advertised on the social media platform Twitter. These modes yielded a combined total of 27 SPQ responses. The main method used to recruit solicitors was also by invitation by email.⁸² The Legal500 and Chambers UK websites were used to assemble a list of leading firms of solicitors working in the legal areas of interest. The researcher visited the websites of each of these firms to identify practitioners working in employment and family law and, where possible, to obtain their direct email addresses. Personalised email invitations were then sent out to potential participants (Appendix 9).

⁸¹ Bryman (n4) 248.

⁸² The use of email is a common method by which to invite potential respondents to participate in web surveys. Fan and Zheng (n74).

Overall there were 264 logins to the questionnaire - 179 complete responses and 85 partial responses.⁸³ However, on close inspection of the complete SPQ responses, it was clear that a number of respondents worked in areas outside of employment and family law. Therefore, although leading to a loss of substantial amount of data, all responses failing to meet the requisite sample criteria were excluded from analysis. These remaining responses were thoroughly checked to look for signs of ‘ballot box stuffing’, that is, where the same respondent responds many times. There was no evidence of this. After cleaning up the data, the working sample size was reduced to 158.

4.7.5 Sample characteristics

Gender

Of the 158 solicitors who formed the sample in this part of the study, 54% were female and 46% were male. The percentage of female solicitors was slightly higher than the proportion of women solicitors with Practising Certificates in England and Wales at the time of the study (49%).⁸⁴

Area of legal practice

Solicitors were asked to state their main area of legal practice (SPQ Q3). Figure 4.4 shows that three-fifths of respondents (60%) worked in Employment law, the remainder practising primarily in family law (40%).

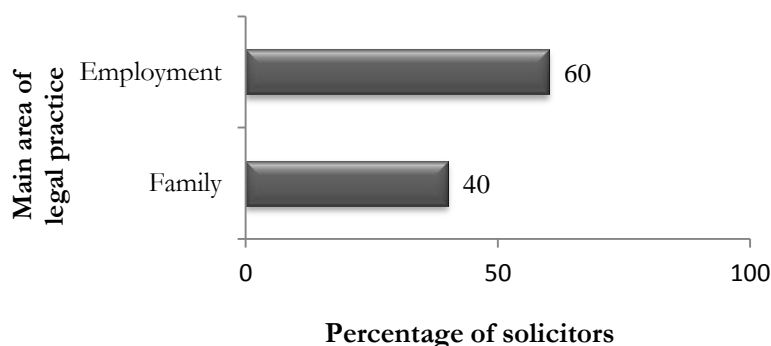


Figure 4.4 Solicitor profiles according to main area of legal practice (n=158)

⁸³ SurveyMonkey automatically assigns a ‘complete’ or ‘partial’ response status.

⁸⁴ The Law Society, *Trends in the solicitors’ profession Annual Statistics Report 2016*, June 2017.

Post qualification experience (PQE)

Solicitors were asked how long they had been in practice.⁸⁵ Figure 4.5 shows that solicitors were well-represented across each of the PQE bands. Just under one third of the sample comprised very experienced practitioners – those with 21 or more years PQE (29%). Four of the solicitors in this band held part-time judicial posts at the time of completion of the SPQ. The remaining groups of 16-20 years PQE, 11-15 years PQE, 6-10 years PQE and 0-5 years PQE represented 23%, 13%, 15% and 22% of the sample respectively.

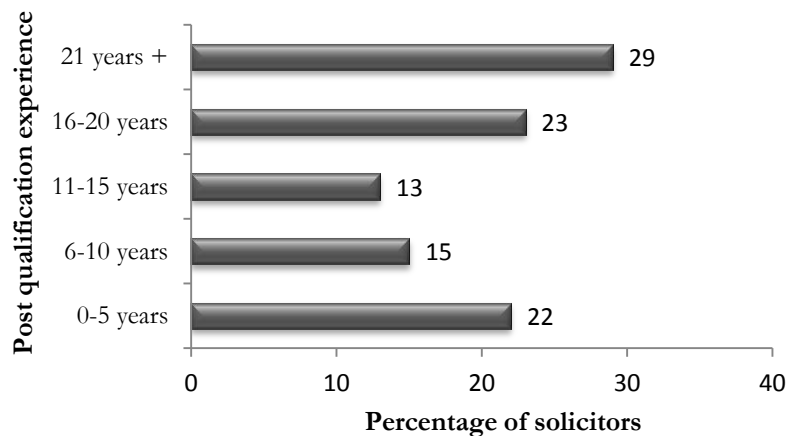


Figure 4.5 Solicitor profiles according to PQE (n=158)

There is no exact corresponding data regarding the current percentage of solicitors with practising certificates in England and Wales within each of the PQE bands used in the SPQ. However, drawing upon recent data from the Law Society, it would appear that the distribution of solicitors working in private practice based on years since admission is not too dissimilar from the sample in the present study. To illustrate, the Law Society figures show that the experience of solicitors in private practice based on years since admission is as follows: 0-9 years - 42%, 10-19 years – 28% and 20 + years – 30%. The data relating to respondents to the SPQ is broadly

⁸⁵ No account was taken as to whether individual respondents had taken career breaks since qualification.

comparable: 0-10 years PQE – 37%, 11-20 years PQE – 36% and 21+ years PQE – 29%.⁸⁶

Attendance at Court or Tribunal

Solicitors were asked ‘How often do you attend court or a tribunal?’ (SPQ Q9). For the statistical analysis, those who attended court on a monthly or more frequent basis were assigned the code ‘frequently’. This group comprised 55% of the sample.

Solicitors who attended court less than monthly were assigned the code ‘infrequently’. This accounted for the remaining 45% of the group (Figure 4.6).

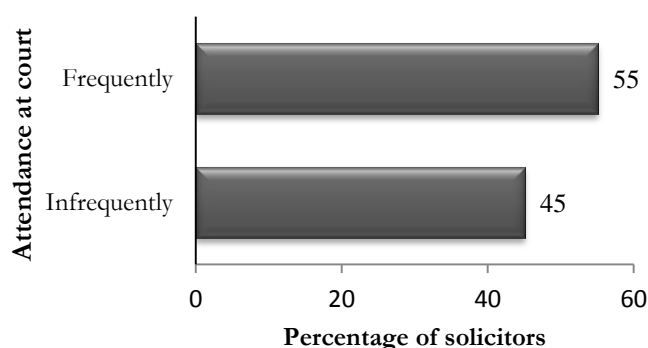


Figure 4.6 Solicitor profiles according to frequency of attendance at court (n=158)

Religious beliefs

Solicitors were asked how they would describe their religious beliefs (as distinct from their cultural background) (SPQ Q8). On initial coding, the largest category of responses comprised those who described their religious beliefs as Christian (55%). The next largest groups were individuals who described themselves as Atheist (14%) or as having ‘No religion’ (13%), followed by those identifying as Agnostic (9%), Muslim (2%), Sikh (1%), Jewish (1%), or as ‘any other religion’ (2%). 3% of respondents chose not to disclose their religious beliefs. This pattern broadly follows the Law Society’s data regarding the religious diversity profile of solicitors.⁸⁷ To illustrate, in the diversity profile data, 49% of respondents described themselves as Christian, 35% of respondents said that they had no religion - in the absence of

⁸⁶ Law Society Annual Statistics Report 2016.

⁸⁷ The Law Society, Diversity profile of the profession 2014: A short synopsis, June 2015 <www.lawsociety.org.uk/support-services/research-trends/diversity-in-the-profession/> accessed 19 August 2015.

separate categories for no religion, Atheist and Agnostic in the Law Society's diversity survey, it is assumed that those with these beliefs were grouped under the 'no religion' descriptor in the data. This was followed by respondents who were Jewish (3%), Muslim (2%), Hindu (2%), Sikh (1%), Buddhist (1%). 5% preferred not to disclose their religion in the Law Society's diversity survey.

Due to the relatively low frequencies for solicitors who declared their religious beliefs as anything other than 'Christian' in the SPQ, the 'religious belief' categories were collapsed under a new variable ('RBCOL_RC'). The largest group 'Christian' remained unaltered (55%). The categories Atheist, Agnostic and No religion were collapsed under the code of 'Unaffiliated' to form the second largest group constituting 35% of the sample.⁸⁸ Responses identifying with minority religious beliefs –Jewish, Muslim, Sikh and 'any other religion' were grouped together under the code 'Non-Christian' and accounted for just 6%.⁸⁹ The 'Prefer not to say' category remained unchanged although this was excluded from all analyses. A breakdown of respondent profiles according to religious beliefs is shown in Figure 4.7.

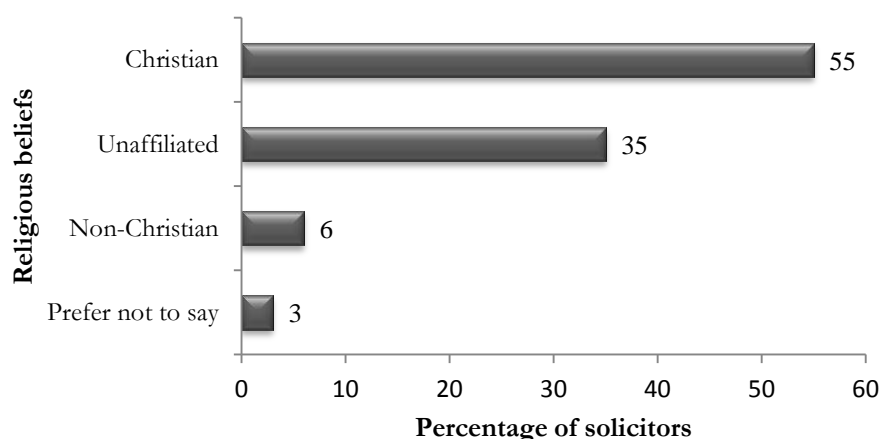


Figure 4.7 Solicitor profiles according to religious beliefs (n=158)

⁸⁸ Guidance was taken from the Pew Research Center. In a 2014 US Religious Landscape Study, the label 'Unaffiliated' was used to describe respondents who were either Atheist, Agnostic or 'Nothing in particular'. <www.pewforum.org/files/2015/05/RLS-05-08-full-report.pdf> accessed 15 July 2015.

⁸⁹ This approach has been used in research in other publications. Peter Brierley, 'Researching Religion' 1999, Question Bank Topic Commentary on Religion. The Question Bank is an ESRC funded Internet social survey resource based in the Department of Sociology, University of Surrey. <www.ukdataservice.ac.uk/media/263001/discover_qbcommentary_religion_brierley.pdf> accessed 15 July 2015.

4.7.6 Data preparation

The researcher used SPSS v.22 (Statistical Package for Social Sciences software) to analyse the quantitative data generated from the questionnaires. A number of respondents took the opportunity to augment their answers by making additional comments in the open-text comment boxes following each SPQ question. This and qualitative data that was not quantized was analysed drawing upon the principles of TA as described in section 4.6.6.

When carrying out survey research, it is common to find that some answers to questions have been left blank or are incomplete.⁹⁰ Such missing data, known as ‘missing values’ can lead to reduced sample sizes, a loss of data and bias in the data. It is therefore vital to explain how missing values were handled in this study. A manual assessment of the extent of missing data was carried out. The most common missing data pattern related to variables created in response to open-ended questions. The high rate of non-response to these types of question might speculatively be attributed to factors such as respondents’ own time constraints,⁹¹ response fatigue and question design. Every missing value in each of the cases in the SPQ dataset was coded, even where there was no response to a question.⁹² The missing data was allocated the code “99”. Where bivariate analysis was conducted, a pairwise deletion method was used. This method excludes a case only if there is missing data that is required for the specific analysis. It contrasts with the listwise exclusion method in which a case is only included in the analysis if it has full data on all of the variables listed for that case.⁹³ The advantage of using a pairwise approach is that fewer cases are dropped from the analysis. Other missing data handling options were considered. For example, the researcher looked at dropping all the cases with missing values from the analysis in order to leave a complete data set. However, this approach would have dramatically reduced the sample size. Alternatively, missing values could have been imputed. However, it was felt that this would not add value to the analysis.

⁹⁰ De Vaus (n70); Andy Field, *Discovering Statistics using SPSS* (3rd edn, SAGE 2009) 77.

⁹¹ The majority of respondents completed the questionnaire in working hours.

⁹² De Vaus (n70) 155.

⁹³ Julie Pallant, *SPSS Survival Manual* (4th edn, OUP 2010) 127.

4.7.7 Data analysis

Descriptive statistics were primarily used to describe the patterns in the responses of cases in the sample.⁹⁴ Simple frequency counts were used to describe single variables (univariate). Cross-tabulations were used to describe and detect relationships between two categorical variables (bivariate). Inferential statistics were also used, albeit sparingly. An approach similar to that suggested by Pallant was used to determine which statistical procedures were most appropriate for addressing the research questions (Appendix 10).⁹⁵

Most statistical procedures performed are based on a set of specific assumptions about the data being analysed. Most parametric tests assume the following conditions: (a) that the level of measurement is continuous (b) normality of the distribution of scores on the dependent variable and (c) homogeneity of variance in relation to scores when comparing groups. If these assumptions are violated, non-parametric tests should be used. As non-parametric tests do not assume the specific parameters of the sample population,⁹⁶ they are criticised for being less sensitive to differences in the data.⁹⁷ On the other hand, they are a useful means by which to detect differences between groups when parametric assumptions are not met. Here, normality of distribution was assessed using both the Kolmogorov-Smirnov test in SPSS and by visual examination of the data. The widely used Kolmogorov-Smirnov test compares the scores in the sample to a set of scores that are normally distributed. The p-value is the attained level of significance. Generally, if $p < 0.05$, the data is significantly different from a normal distribution and a non-parametric test should be used. If $p \geq 0.05$, the data is normally distributed and a parametric test can be used. In this study, all normality tests indicated that the data was non-normally distributed.⁹⁸ As such, non-parametric tests were used throughout the quantitative phase of the research.

⁹⁴ De Vaus (n70) 207.

⁹⁵ *ibid.*

⁹⁶ Field (n90).

⁹⁷ De Vaus (n70).

⁹⁸ This might be expected in relation to Likert scale type questions as the data is ordinal rather than continuous.

4.8 Limitations of research methods

As discussed above, sampling involving respondent self-selection was used to generate the two sample groups used in this empirical study.

This choice of sampling technique was motivated by practical considerations. It provided a quick and efficient means by which to recruit lawyers working in specific legal areas who have ample opportunity to observe judicial decision-making behaviour. In addition, self-selection was considered to be the most suitable means by which to attract volunteers with an interest in the research topic, and a commitment to participation which, it was hoped, would result in higher response rates. Of all the barristers who registered an interest in participating in this research, all but two had relevant experience in the key legal fields of interest. These two units were excluded from the analysis. Controlling for the quality of the solicitor sample was more time-consuming. To ensure that the sample consisted of solicitors working only in employment and family law, all SPQ responses were critically evaluated (with specific reference to demographic profiles and legal area of expertise) and those which fell outside the sample criteria were systematically excluded from the sample.⁹⁹ Whilst this resulted in a large loss of data, this step was deemed essential for quality purposes.

It is important to note that the use of self-selection sampling has implications for the analysis of lawyers' views in this study. As each of the samples comprised only those lawyers who responded to the invitations to participate, non-response bias cannot be eliminated. This form of bias occurs where there is a difference between the views of those who took part in the interviews or completed the SPQ and those of eligible non-participants. Consequently, it is impossible to claim that the findings of this study are generalizable to the research population. Relatedly, there is a risk that self-selection may reflect some inherent bias on the part of participants, for example, they may have a specific interest in religion generally, or particularly strong opinions about how judges reach decisions. As a result, there is a risk that certain views may be over-represented and the interpretation of findings exaggerated. Another limitation concerns the choice of research method in each part

⁹⁹ This also gave the researcher an opportunity to check for any signs of multiple responses from single respondents although it should be noted that the 'Multiple Responses' option was disabled in SurveyMonkey.

of the overall study. For example, the qualitative interviews with the barristers in part one and, to a lesser extent the qualitative feedback from part two, produced large quantities of textual data. This data was coded and analysed by a single researcher. Given the time and resources available in this project it was not feasible to validate the coding by peer review. Whilst every effort was made to reduce the potential for researcher bias by constantly reviewing the codes and coded data, it is acknowledged that coding is itself a subjective exercise and therefore the risk of researcher bias cannot be wholly eliminated from the analyses.

Finally, it is acknowledged that the researcher's choice to focus on the views of employment and family lawyers is itself a source of potential bias. Whilst every effort has been made to address these issues, they cannot be overlooked as possible limitations of the study.

4.9 Ethical considerations

A number of ethical considerations arise in any research project involving the collection of human participants. The ethical issues salient to this research project and the procedures that were put in place to deal with them prior to, during and after data collection (in respect of both the interviews with barristers and the SPQ) can be found in Appendix 12.

4.10 Conclusion

Chapter 4 has introduced the methodological approach upon which this socio-legal investigation is based and explains the reasons for the choice of exploratory sequential mixed method research design used for the empirical element of this study. The sample selection, data collection, preparation and analysis procedures in relation to both parts of this study have been explained in full. The next chapter moves on to address lawyers' perceptions of the relationship between judges' personal factors and judicial decision-making, the main discussion of which focuses on the central research issue, the interplay between religion and the process of judging.

CHAPTER 5

KEEPING AN OPEN MIND

5.1 Introduction

This part of the thesis turns to the empirical findings from the qualitative interviews with barristers (Part one) and the solicitor responses to the Solicitor Perceptions Questionnaire (SPQ) (Part two) relating to the central research question: Do lawyers perceive that judges' religious beliefs influence judicial decision-making? The chapter is divided into two main sections. To start, lawyers' perceptions of the role played by judges' personal factors are explored. These are found to be generally consistent with the now widely accepted view that there is a personal dimension to judicial decision-making (discussed in Chapter 2). This sets the foundation for a more focused look at lawyers' perceptions of the relationship between judges' religious beliefs (as one constituent of an individual's personal factors) and judicial decision-making. The analysis of the empirical data finds that whilst lawyers in this study are generally open-minded about whether an individual judge's faith impinges on the decision-making process, lawyers are satisfied that constraints on judging, both legal and non-legal, provide an effective means by which to limit the influence that such factors have on the decisional process.

5.2 Preliminary matters

5.2.1 Defining terms

Throughout this and the remaining chapters, the term 'lawyers' is used to collectively refer to the barristers and solicitors who participated in this study. The term 'practitioner' is used as an alternative to 'barrister' or 'solicitor'. 'Interviewee' refers solely to the barristers interviewed in part one of this study, whilst

‘respondent’ is used only to refer to the solicitors who completed the SPQ in part two of the study.

5.2.2 Respondent unique identifiers

Where extracts from the interviews with barristers are used to support findings from the data, they are identified by a ‘B’ followed by a unique identifier number. Quotes from solicitors in response to the SPQ are identified by an ‘S’ followed by a number and either ‘E’ for employment or ‘F’ for family to denote the respondent’s area of expertise.

5.2.3 Use of data

This chapter brings together the empirical findings from parts one and two of the thesis. Due to the different methods used to collect and analyse data, there are some instances in which lawyers’ comments about the relationship between judges’ personal factors and judging overlap with the discussion about the nexus between judges’ religious beliefs and judging and vice-versa. This is made clear in the text.

5.3 The nexus between personal factors and judging

As seen in Chapter 2, many judges, including those at the highest echelons of the judiciary, readily concede that, in difficult cases, their judicial decision-making is sometimes influenced by aspects of their individual personality, personal background and/or experience. This section explores whether this view is shared among the lawyers who took part in this empirical study, the rationale being that if lawyers think that personal factors are relevant to the process of judging, then judges’ personal religious convictions, as one constituent of an individual’s personal factors, may similarly be perceived to play a part in how judges reach decisions.

5.3.1 The majority view: the inevitability of subjectivity

A common thread running throughout the majority of interviews and SPQ responses was the view that judicial decision-making is inescapably infused with a myriad of

legal and non-legal factors. Figure 5.1 shows that all of the interviewees in part one (n=18) were adamant that judges' background factors were salient to the process of judging, whilst almost three-quarters (72%) of the solicitors in part two (n=158) agreed that judges' personal factors influence judicial decision-making (specifically in cases where there is no settled law or where judicial discretion is exercised).

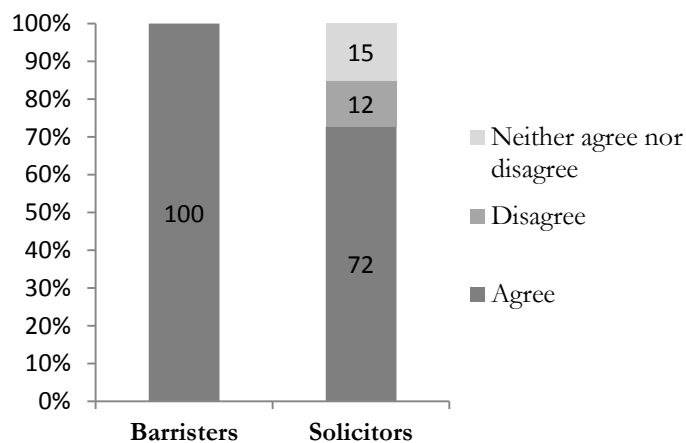


Figure 5.1 Lawyer perceptions of whether judges' personal factors influence judicial decision-making [Base sample: Barristers (n=18), Solicitors (n=158) [Source: Appendix 14]

Drawing on the interview responses from barristers and the qualitative open-text comments from solicitors which supplemented SPQ Q10, three common themes emerged as to why judges' personal factors were thought to be inherent in the process of judging: judges are human, unconscious bias and judicial discretion.

Judges are human

First, the majority of lawyers situated judging within a wider context in which all human decision-making, particularly that relating to disputes involving competing values, was understood to be innately value-laden. To suggest that personal factors play no part in the judicial decision-making process in cases involving the exercise of judicial discretion was dismissed by barristers and solicitors alike as idealistic or simply naïve:¹

¹ Brian Leiter, 'Legal Formalism and Legal Realism: What is the Issue?' (2010) 16 Legal Theory 111.

I think it's unrealistic to expect a judge to park his or her life experience at the door.... mostly we are looking at an objective legal test but it's inevitable that subjective factors come into play. (B2)

Such responses were frequently buttressed by reference to the fact that many senior judges recognise that there is a personal dimension to their judging and acknowledge that this may sometimes vitally affect their reasoning:

I think it's nonsense really to suggest that any judge would come to a case without bringing various packages or prejudices that they, like any other humans, would carry around with them... Judges, right up to the highest level without giving names, have admitted to me that the proposition that they leave their own personal characteristics, expectations and prejudices at the door is nonsense. (B15)

I am struggling to understand how any right thinking person could in all honesty not be influenced by personal factors... If the suggestion is that a judge might base his or her judicial decision-making entirely on reason rather than personal factors, how can it be proven that such reasoning is not itself influenced by personal factors? (S108E)

Highlighting the differences in judicial roles across the courts and tribunals hierarchy, some lawyers pointed to the fact that a degree of subjectivity in judging was unavoidable in some courts given that, in some instances, judges were expected to draw upon their own experiences to aid them in the adjudication process. For example, one solicitor commented that such influence was 'inevitable and indeed encouraged in the family courts' (S47F). However, this is not to say that it is appropriate for judges to solely base judgments upon their own subjective views about what, for example, is or is not in the best interests of a child. Any such discretion was said to be constrained by the requirement that any determination must be based on an objective assessment as to what is in the best interests of the child rather than a judge's personal views.

Making a similar point, several lawyers said that, in some employment tribunals, the very reason that non-legally trained wing members sit with an employment judge is because they have specialist knowledge or a specialised view of the facts which can

help provide balance and context in a given case. It was suggested that this inevitably introduced a personal element to tribunal decision-making, although crucially it was said that the lay members' contribution to the decisional process was kept in check by the presiding judge who, as S4E explained, had the effect of "reducing the effect that wing members' personal factors had on judicial decision-making". Of course, conversely it might be argued that the presence of wing members also can have an ameliorating effect on the approach of the employment judge with whom they sit.

The problem of unconscious bias

Having acknowledged that judges, like other decision-makers, are influenced by a multitude of factors when reaching decisions, lawyers typically constructed the way in which judges' personal factors affect judging as being that permeated through an unconscious, rather than conscious, cognitive process. Thus, in this respect, as in other professional decision-making contexts, it was accepted that an element of judicial subjectivity was simply unavoidable in adjudication. However, as the following extracts show, lawyers were not overly concerned about the effect of such unconscious bias on judicial determinations because it was felt that judges were sufficiently alert to, and therefore able to override, such bias by virtue of their judicial training and commitment to the judicial role:

I think actually in this country there is a very strong tradition...that judges don't allow, so far as they can avoid it, their personal perspectives influencing the way that they act and so anything that does happen is almost certainly unconscious rather than deliberate. (B5)

Obviously the judicial oath that we take means that we shouldn't let our backgrounds interfere but, unconsciously, such matters may come in. (B13)

It is inevitable that it will influence their judicial decision making, especially in terms of unconscious bias, but they are trained to recognise this and keep it in check. (S19E)

That the manifestation of unconscious bias borne from judges' personal factors was not perceived to be a cause of concern to the majority of lawyers in this study

is of particular interest. As the lawyers' comments above suggest, where judicial personal factors affect judicial decision-making, they do so only because the decision-maker is not consciously aware of, and therefore has no control over, such influence. By conceptualising the nature of influence in this way, any negative connotations associated with claims of judicial partiality are essentially assuaged by the fact that the judge is unaware of the role that his or her personal factors have played in the decision-making process. This view resonates with that of Banks and Ford who, in relation to their studies of racial justice and inequality in the US, suggest that one of the reasons why unconscious bias discourse is more politically palatable than claims of conscious bias is because it does not attract accusation or blame.²

Discretion

Lawyers were generally united in the view that it was principally in cases where the law was unclear or unsettled, rather than in black-letter cases, that judicial personal factors were most likely to, at least unconsciously, colour the decisional process. This view accords with psychological studies which find that cognitive biases are especially likely to influence decision-making when judgments are made under uncertainty.³ For example, B7, a senior employment law barrister and part-time judge explained that:

There are some legal cases which are matters of statutory construction and the judges are being effectively asked to decide whether $A + B = C$ and it is all pretty dry and pretty dull. A typical commercial contract case is a classic sort of case. But, outside that, where there are any areas of discretion, then individual views will inevitably play a part, and that's in the majority of cases.

Despite the homogeneity of views as to the subjective element in judging in cases involving discretion, many lawyers were again keen to stress that judges' personal factors played no more than a bit part in the process of judging because the effect of such influence was mitigated by, inter alia, judges' focus on doctrinal authority

² Ralph Banks and Richard Ford, '(How) Does Unconscious Bias Matter?: Law, Politics and Racial Inequality' (2009) 58 Emory LJ 1058.

³ Amos Tversky and Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases (1974) 185 Science 4157, 1124.

and a personal desire to meet the requisite standard of impartiality expected of a judge. Thus, for example, a family law practitioner opined:

There is, in matters that involve their discretion, indications that a judges' nature/views impact on a decision that they may reach. I would not go as far to say that it is completely dictated by their 'personal factors'. They [the judges], in general, are very careful about ensuring that their decisions are reasonable and objectively defined. (S136F)

However, others felt that the reach of judges' personal factors was wider, extending to all cases including those where the law was more certain. Of particular note, several lawyers felt that the doctrine of precedent potentially perpetuated an element of subjectivity in judging, the reason being that judicial decisions made today were quite possibly based on past reasoning that was subject to influence from the personal idiosyncrasies of former judges. This is perhaps somewhat paradoxical given that precedent predominantly serves as a constraint on legal decision-making. To illustrate, B6 said:

...even when judicial values, if we put it like that, aren't influencing a decision in an individual case, the judges are applying the common law. They are applying law made by other judges who presumably were exercising their own prejudices and values in deciding those cases because, on my premise, we can't make decisions in any other way than by exercising our prejudices and values.

These views are particularly interesting when considered in light of comments from other senior practitioners about the shift in judicial attitudes over the last half-century or so - from a time when prejudiced attitudes (often reflecting societal norms) were more evident than is the case today. For example, B19 recalled:

I know a time when personal views could form, could really affect, the way a judge handled a case. I mean, say thirty years ago, forty years ago... I know from the senior members of my first chambers that there were people who were appointed to the bench with extreme racist views. People who used to

write ‘Mr X does not represent black men’ on the brief and just sent it back, you know. It doesn’t happen now – society is a lot better informed, a lot more tolerant and a lot less biased.

Unsurprisingly, the judgments of Lord Denning, whose judicial decision-making had a reputation for being imbued with his own Christian beliefs and moral values,⁴ were frequently identified as representing a bygone era which was no longer representative of judging today:⁵

I suppose the last judge who really wore his religious beliefs on his sleeve when making his decisions would probably be Lord Denning and he came off the bench in 1982. I don’t think you would see a judge now saying, you know, “I’m a card carrying Christian or Hindu or Muslim or Jew and therefore I have come to the following conclusions”. (B16)

I thought Lord Denning was a terrible example actually of judges allowing their own personal biases to interfere with the objectivity of judging. And he didn’t realise I think that, quite often, his perspective on cases was informed by his own biases and preferences. But that really shouldn’t happen and I think it happens far less now than it did 50 years ago. (B5)

In light of these extracts, it would follow from B6’s view that there is a possibility that overtly subjective judgments of yesteryear, judgments that would potentially give rise to allegations of bias or applications for recusal and would almost certainly attract attention from the JCIO today, may at least potentially continue to exert a residual influence on judicial decisions by virtue of the doctrine of precedent, especially where precedent is on all fours with the facts of the case in hand.

⁴ Lord Denning once wrote “Many people now think that religion and law have nothing in common. The law, they say, governs our dealings with our fellows: whereas religion concerns our dealings with God. Likewise they hold that law has nothing to do with morality. It lays down rigid rules which must be obeyed without questioning whether they are right or wrong. Its function is to keep order, not to **do** justice. The severance has, I think, gone much too far. Although religion, law and morals can be separated, they are nevertheless still very much dependent on one another. Without religion, there can be no morality, there can be no law”. Lord Denning, *The Influence of Religion* (1981) 2 *Christian Legal Soc’y Q* 12.

⁵ Although Forsyth argues that, at least in the field of administrative law, the moral and political views of Lord Denning were found to ‘overwhelm’ sound principles in only a tiny number of judgments. Christopher Forsyth, ‘Lord Denning and Modern Administrative Law’ (1999) 14 *Denning LJ*.

5.3.2 Solicitors: a dissenting minority

To find that lawyers typically perceived judging to be influenced by personal factors was anticipated; it chimes with the modern conception of judging, endorsed by judges' own views about the factors that shape their reasoning discussed in Chapter 2, and is consistent with much of the existing literature considered in Chapter 3. It is interesting then, that a sizeable minority of lawyers, notably all of whom were solicitors, said that judicial personal factors have no impact on judicial decision-making or were undecided or neutral as to whether such factors were at play where the law was uncertain (12% and 15% of those who responded to SPQ Q10, Figure 5.1). Several explanations can be advanced for why some solicitors did not subscribe to the majority view.

Limitation of sample and methods

First, one possible reason which cannot be overlooked relates to the imbalance between the barrister and solicitor sample sizes, the former being much smaller and, therefore, potentially not capturing the range of diverging views as might be found in a larger sample. Relatedly, it may be attributable to the difference in the roles of barristers and solicitors; barristers more typically being judge-facing. However, this seems unlikely given that there were no stark differences in the views of solicitors according to the frequency with which they attended court. It may also reflect the different methods used to elicit lawyers' perceptions about how judges judge. Barristers were able to articulate the ways in which they perceived that judges' personal factors interact with judging compared to the solicitors whose responses to SPQ Q10 were restricted to stating the degree to which they felt such factors did or did not affect judging.

Distinguishing judges from other decision-makers

Second, these solicitors may genuinely believe that judges are able to set aside their personal views, predilections and prejudices from the decisional process; in other words, that judges are capable of being both neutral and attitudinally impartial.⁶ It will be recalled from Chapter 2 that Lucy contends that attitudinal impartiality does not require a judge to do the unrealisable and decide cases within a wholly legal

⁶ William Lucy, 'The Possibility of Impartiality' (2003) 25 OJLS 13.

vacuum; it requires judges to sunder only those subjective views and preconceptions that are relevant to the case being adjudicated. That said, whilst it may be possible to consciously set aside subjective influences in this way, neutralising the effect of unconscious bias is a more difficult proposition as the decision-maker may not be aware of how his or her own implicit prejudices affect their judgments.

Alternatively, denying the existence of a personal dimension to judging might be borne from the belief that the decision-making of professional judges is cognitively different to other forms of decision-making. Schauer considers this issue from a theoretical perspective.⁷ He observes that because the psychological dimensions to judging have, hitherto, been typically understood through the prism of cognitive and social psychology, empirical studies of judicial behaviour have focused too narrowly on a judge's attributes as a human rather than on his or her specific attributes as a judge and lawyer.⁸ In particular, Schauer distinguishes professional judges' 'second-order reasoning' from that of non-judges. This higher level of reasoning has been described as central to the judicial role because it compels judges 'to abide by a hierarchy of reasons, and specifically, to yield to higher order considerations, even if this does not lead to what, in other circumstances, would be ordinarily considered to be the right outcome in a specific case.'⁹ In other words, the 'best' legal outcome may not be that which is most fitting in a given case but is that which produces the most just result in the majority of like cases. It is because judges engage in decision-making tasks which are largely exclusive to the judicial profession (such as the selection and interpretation of laws relevant to a case) that Schauer contends that there may be some areas of decision-making in which judges decide differently to other non-judicial decision-makers. In addition, he suggests that factors such as legal or judicial education, legal acculturation and experience in the juridical sphere may potentially result in content- and method-based differences which distinguish judges' reasoning and decision-making from that conducted in non-judicial environments.¹⁰

⁷ Frederick Schauer, 'Is There a Psychology of Judging?' in David Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision-Making* (American Psychology-Law Society Series 2010).

⁸ *ibid* 104.

⁹ This contrasts with first-order reasoning in which people are principally concerned with reaching the right outcome in a given case. Dan Simon, 'In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging' in David Klein and Gregory Mitchell (eds), *The Psychology of Judging* (OUP 2010).

¹⁰ Schauer (n7) 105.

If, as Schauer hypothesises, there is a psychology of judging, might this also mean that judges are more able than other non-judicial decision-makers to expunge their personal factors from the adjudicative process? One way in which Schauer proposes to test his hypotheses is through the use of experimental psychological testing.¹¹ Whilst these methods could be used in relation studies that examine proceedings in the English courts, given the judiciary's reluctance to participate in research that explores whether non-legal factors affect how judges judge, it is highly questionable whether members of the judiciary would agree, or be granted permission, to be tested. Moreover, there are some concerns as to whether experimental designs that are conducted in a laboratory setting (such as case simulations) accurately capture the reality of judging.¹² Nonetheless, if there is something distinctive about how judges make decisions compared to others, ie, that there is a psychology of judging as Schauer theorises, then this may well explain why some lawyers perceive that personal factors play no role in adjudication.

Constraints on judging

A third reason is drawn from the supplementary qualitative data from the SPQ. Reflecting comments from those who thought that personal factors *do* affect judging, several respondents opined that whilst such factors were an unavoidable feature in judicial decision-making, the influence from such was largely nullified by a range of legal and non-legal constraints.

It is inevitable...but they are trained to recognise this and keep it in check. (S242)

It would be difficult to tell in the absence of a judge choosing to make reference to this in a judgment but, in any event, there is a framework and case law within which judicial discretion is exercised which limits the ambit of that discretion. (S121)

Similar views can be found in judges' own accounts of judging. For example, recognising that judges, like others, are susceptible to human fallibilities, Lord Mance talks about the factors that control what he describes as 'judicial excess or exuberance' (it is argued that the erroneous influence of personal factors may fall

¹¹ *ibid* 104.

¹² For a comprehensive discussion of this issue see Simon (n9).

under this descriptor).¹³ These include, inter alia, loyalty, precedent and methodology and internal collegiality. Similarly, having acknowledged that judges' personal values can affect judicial decisions in family cases, in Chapter 3, it was seen that Chisholm identifies three key constraints that serve to contain what he calls the 'values problem': legal constraints, non-controversial case-specific values and judicial professionalism.¹⁴

Respecting the hierarchy

Fourth, these solicitors may have felt professionally obliged to advance a view consistent with the formalist-legalist theory of judicial behaviour in order to shield judges from potential accusations of bias; the purpose being to avoid damaging the reputation of the judiciary and legal profession more widely. On a literal interpretation of the data, it is easy to see how the counter view may give rise to concerns as to judicial fairness and impartiality, not least because, as the law on bias makes clear, justice must not only be done, it should 'manifestly and undoubtedly be seen to be done'.¹⁵ On the other hand, toeing the official judicial line could have the opposite effect. If, as the data suggests, the general consensus amongst lawyers is that judicial decision-making is suffused with subjective influences (on the basis that judges, like all humans, are as vulnerable to different biases), those who advance the counter view may be accused of intentionally upholding an image of judging which does not reflect the reality of how judges judge, or at least fails to present a realistic account of how judges are perceived to judge; in other words, of promulgating an illusion of judicial objectivity.

An alternative explanation may simply be that solicitors are more deferential to the judiciary than their colleagues at the Bar in this regard. It would be interesting to compare the views of solicitor-advocates with solicitors who do not carry out their

¹³ Lord Mance, The Role of Judges in a Representative Democracy Lecture given during the Judicial Committee of the Privy Council's Sitting in the Bahamas (24 February 2017) <www.supremecourt.uk/docs/speech-170224.pdf> accessed 13 July 2017.

¹⁴ Such restrictions come in a variety forms from legal and institutional rules and principles to judicial training and professionalism and panel composition.

¹⁵ Lord Hewart CJ, *R v Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256, [1923] All ER 22.

own advocacy regularly to see if there was any indication that specialist advocates are less deferential than those solicitors who do less of their own advocacy.¹⁶

A view based on theory or practice?

Fifth, the deviation from the majority view may reflect the different bases upon which the lawyers approached the question about the relationship between judges' personal factors and judging. In other words, are the views of those who do not think that the personal attributes and affective commitments of a judge are reflected in decisional processes formulated on a conceptual construct of judging (i.e. on how they perceive that judges *ought* to judge), rather than from an experiential perspective (i.e. on how they perceive that the judges they actually appear before judge)? It is suggested that one way to assess whether this may be the case is to look for a divergence of responses to SPQ Q10 (Do judges personal factors influence judicial decision-making?) between solicitors who attend court frequently and infrequently. As all of the barristers (all of whom regularly attend court) made a positive link between personal factors and judging, it was hypothesised that solicitors who frequently attend court were also more likely to do so, having based their answers on their perceptions of judging in action (how judges *do* judge) vis-a-vis infrequent attendees whose responses are more likely to have been based on their visions of how judges ought to decide (and so reflect the traditional view of judging and how judges *ought* to judge). In fact, amongst those sharing the minority view, the frequent attendees were only marginally more likely to say that judges factors do not influence judging (17% compared to 7%), suggesting no clear distinction amongst this subset of solicitors based on how often they attend court (Appendix 14a).

In the dark about personal factors

A final explanation, also drawn from the qualitative feedback from the SPQ, relates to the difficulty in being able to confidently conclude that there is a positive relationship between judges' personal factors and judging when so little is known about the background of judges. For example, S113F stated: 'Maybe

¹⁶ Of the 20 solicitors with higher rights of audience who completed the SPQ, 10 agreed that personal factors affect judicial decision-making, 5 disagreed and 3 neither agreed nor disagreed.

religious and other beliefs are important but as judges are very good at keeping their personal side private it is impossible to test your hypothesis’.

5.3.3 What personal factors influence judicial decision-making?

Having found that there is perceived to be a personal dimension to the task of judicial decision-making, it is interesting to find that, when initially asked, many lawyers were sceptical as to whether it was possible to actually discern the influence of specific factors on judging through the direct observation of a judge’s behaviour in court or by looking for evidence of such in written judgments and case outcomes. This is an important point because much of the existing literature that explores the relationship between non-legal factors and judicial decision-making, particularly that in relation to the US judiciary, looks for a correlation between specific variables such as gender or religion and the judicial decision. However, this did not prevent interviewees or SPQ respondents from going on to identify the sorts of personal factors that they thought were most at play in the decisional process in cases where there was no settled law and/or judicial discretion was required.

Comparing the barrister and solicitors results, it was found that the personal factors identified as being the main contributors to how judges reach decisions were very similar between both groups of lawyers. Most typically, a judge’s personal background, personal and professional experience, and aspects of moral or other beliefs were said to be most influential. In contrast, physical personal characteristics, as a distinct subset of personal factors, were said to seldom play a part in the adjudicative process, with only a small number of lawyers identifying overt characteristics such as gender, ethnicity and age as being significant to how judges made decisions. The main findings from each sample group are now considered.

Barristers

Judges’ political values and social class most frequently featured in barristers’ conversations about the factors thought to be most evident in judicial reasoning. As regards the former, labels such as ‘political values’, ‘political views’ and ‘political ideology’ were used by interviewees interchangeably, and in an expansive, non-

partisan way, to describe judicial behaviour that reflected either a conservative or liberal outlook.¹⁷ In this context, a ‘conservative’ outlook is marked by a more permissive approach to the government whilst a ‘liberal’ approach tends to favour the interests of the individual. The following comment was typical:

Certainly in public law and discrimination law, in the areas I work within, it is very apparent, very quickly, what persuasion... Is someone likely to be empathetic to the little man? Is someone going to be very pro-state? ... I mean more their political views in a wider... perhaps political with a small ‘p’ as well as a capital [P]. (B3)

However, there was mixed opinion as to the frequency with which political views were thought to influence judicial decision-making. For example, one interviewee, a senior employment law practitioner (and part-time judge), felt that it did so only occasionally. At the same time, highlighting the role that a judge’s prior legal practice had on judicial reasoning, they said:

And the most visible way you tend to see it is if a judge has a background when they were an advocate or practitioner of a particular - acting for claimants or acting for respondents – then sometimes you suspect that trickles into the way they perceive cases. So if they are a little bit pro-claimant then that can come across; by no means always and very often not at all. (B5)

Another interviewee felt that the influence of judges’ political views was all pervasive and played a significant role in the decisional outcomes in some of the human rights cases that they dealt with:

Those are inherently political cases and the impact of individual judge’s values is just part of my day-to-day work – it is something I am always thinking about, and in fact, with a basic... you know, a claim for judicial review, one of the things I often find myself telling my instructing solicitors and my clients is that what will determine the outcome of this case is which judge we draw in the judicial lottery at the High Court. (B6)

¹⁷ For an interesting discussion as to the many conceptions of ‘politics’ used in judicial decision-making studies see: Bradley Joondeph, ‘The Many Meanings of “Politics” in Judicial Decision Making (2008) 77 UMKC L Rev 347.

B7, another senior employment barrister (and part-time judge), likewise implied that judges' political views affected actual case outcomes:

You know, you sometimes think 'Oh God, I'm in front of that judge I'll never get this off him. If I was in front of a different judge I would get that off him because he is more liberal in that regard.

Others expressed the view that judicial decision-making was intrinsically political, not because of the political idiosyncrasies of individual judges, but because the judiciary was itself part of the machinery of government:

You can really be up on the merits but you know you are not going to win because it would cause so much political ruckus if you did. But then they are always going to find a way to not let you win, and they will never overtly say it is because of these political reasons, or they are not supposed to, but that plays very strong. (B14)

Barristers' perceptions about the role of ideological preferences in a judicial context are of particular interest if, as Cross argues, political beliefs are treated as analogous to religious beliefs in relation to the way in which they can impact upon an individual's life.¹⁸ The recent EAT judgment in *The General Municipal Boilermakers Union v Henderson* lends some support to this view.¹⁹ In this case, the claimant, Mr Henderson, brought claims for unfair dismissal and discrimination because of his democratic socialist political beliefs, having been dismissed by his employer for gross misconduct. Reaffirming the Tribunal's conclusion that left-wing democratic socialism qualifies as a protected belief for the purposes of the Equality Act 2010, Simler J stated that 'Philosophical beliefs may be just as fundamental or integral to a person's individuality and daily life as are religious beliefs'.²⁰ If, as many of the barristers suggested, judges' ideological preferences play a role in judicial decision-making in certain cases, by analogy it is reasonable to hypothesise that decision-making by judges with sufficiently strong religious beliefs may similarly be coloured by those same religious beliefs in some cases. The question

¹⁸ Frank Cross, *Decision Making in the US Courts of Appeals* (Stanford University Press 2007) 70.

¹⁹ [2015] IRLR 451.

²⁰ *ibid* 62.

then necessarily focuses on the robustness of the legal and non-legal constraints which safeguard judicial impartiality.

Another factor commonly identified by barristers as having a palpable effect on approach was a judge's 'socio-economic background'. Talking about a family law case in which they had been involved, B14 said:

I did a case where there was a kid who had a foreign mother and she wanted to take him back [to her home country] ... and the father wanted [the child] to stay here. It was quite clear that the judge, because [the child] was enrolled at one of the private London prep schools... It was quite clear that the judge placed quite a lot of weight on that and thought, well, you've got excellent schooling – as if you couldn't have good schooling in the mother's home country because he was in some top London prep school where the judge probably sent [his or her] kids.

In another illustration as to the perceived impact of socio-economic background, B11 talked about judges who came from less privileged backgrounds. Having acknowledged that judges, as professionals, were clearly capable of dealing with cases with intellectual honesty and were well aware of the need to ensure that their personal background played no role in how cases were decided, B11 commented:

...if you're from a particular class as a judge, who has grown up in a working class background...or perhaps in an industrial town, you'll often find that they are more willing to see the credibility or reliability of a witness, if the witness is also from the background...if they have a witness who speaks in a similar way, and maybe does work or worked in a similar industry that their [the judge's] father did or their grandfather, they are very, very receptive or very willing to say "I believe that person". And you see it, and it's just sort of that, something that judges perhaps try to put out of their minds and they try to ignore but it happens too often, and you hear about it too often probably for it just to be coincidence.

Once again, the inference here is that when personal factors enter the decisional process it is assumed to be the result of an unconscious force rather than a deliberate choice on the part of the judge. Despite being open to criticism for anecdotalism,

such accounts clearly raise the possibility that, on occasion, judges are naturally more inclined to be empathetic to those with whom they have shared experiences or background than those with backgrounds which may be far removed from their own or about which they have little understanding. There is no reason to think that a common religious background, as a part of an individual's wider personal background, may not similarly (at least unconsciously) affect a judge's view at some stage in the proceedings. Whilst this might be thought to raise doubts about impartiality, it is significant that none of the barristers felt that judicial bias was a matter of concern, or that the presence of a personal dimension to judging gave rise to erroneous decisions. Rather, reflecting the views above, the influence of social background on judging was seen as inevitable because judges are human and are vulnerable to the same sorts of bias as everyone else: '...judges who tend to be at the very top end of the [class] spectrum... are probably prone to making judgments about people on the basis of class. But actually, you know, I think we all do. I think everyone does.' (B6)

Solicitors

Solicitors' responses to the open question 'What personal factors do you think are most likely to influence judicial reasoning where there is no settled law and/or judicial discretion is exercised?' (SPQ Q11) were analysed using a multiple response method (the primary purpose of which is for data exploration rather than statistical testing). This generated 165 responses. After listing all of the personal factors mentioned by respondents, a TA approach was used to determine the maximum number of themes (as opposed to specific factors) in any given response to SPQ Q11. Separate variables were then assigned the following six codes:

- Code 1 Moral and other beliefs
- Code 2 Personal characteristics
- Code 3 Personal background and experience
- Code 4 Professional background and experience
- Code 5 Attitudes towards others
- Code 6 None

It should be noted that these categories are not claimed to be mutually exclusive. This is not problematic as the intention of this section is to illustrate the wide range

of non-legal factors that are perceived to affect the judging process in cases where there is no settled law and/or judicial discretion is exercised, rather than to rank personal factors according to the number of times they are mentioned. The results of the multiple response analysis are shown in Figure 5.2. A full description of the responses falling within each of these codes can be found in Appendix 15.

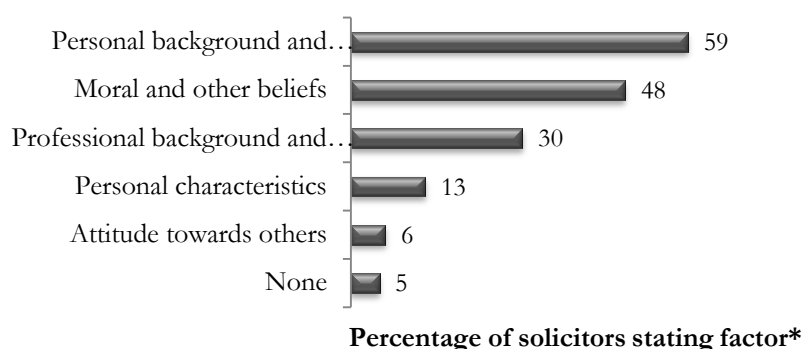


Figure 5.2 Solicitor perceptions of the main judicial personal factors that affect judicial decision-making (n=158) *The sample size is the number of respondents who gave at least one answer [Source: Appendix 16]

Figure 5.2 shows that 59% of the solicitors considered a judge's personal background and experience to be one of the main personal factors likely to affect judicial reasoning in cases where there was no settled law and/or judicial discretion was exercised. Whilst many respondents made general references to 'life experience', 'personal experiences' and 'personal background', others were more specific about which aspects of background and experience affected judging - an individual's upbringing, education, social class and family history were the most oft-cited factors. Almost half of the respondents (48%) identified personal factors such as an individual's moral, social, political, religious and/or ethical perspectives. These were coded as 'Moral and other beliefs'. There is clearly the potential for overlap between the factors grouped under this widely drawn category and other categories. For example, an individual's religious beliefs may be a product of their personal background (Code 3). At the same time, drawing upon the definition under the Equality Act 2010,²¹ religious beliefs could as easily be captured in the 'personal characteristics' descriptor. However, for the avoidance of doubt, all references relating to religion in this section fall within Code 1. A snapshot of examples of

²¹ Religion or belief is one of the protected characteristics under the Equality Act 2010, s.10.

responses under this head include: a ‘personal sense of what the judge perceives to be morally and/or ethically right’ (S71E), ‘moral outlook’ (R128) and ‘principles of fairness and justice’ (S137F). Other examples include: ‘religious/moral/ethical beliefs’ (S59F), ‘an understanding of the ‘politically/socially acceptable stance on the position’’ (S63E) and ‘ethical or faith aspects of their personalities’ (S100E). 30% of respondents identified a judge’s ‘Professional background and experience’ as most likely to affect judicial reasoning. The following responses were typical: ‘work experience’ (S181E), ‘...but I do think that professional experience and political views do influence judicial reasoning’ (S144F), and ‘what they did before becoming a judge (e.g. if they were a practising barrister)’ and ‘experience of business/commerce’ (S157E). Notably fewer respondents identified other factors such as judges’ personal characteristics (those mentioned included gender, age, race/ethnicity, sexual orientation) (13%) and judicial attitudes towards others (6%) as salient to how judges judge.

5.3.4 A challenge to orthodoxy?

As seen in Chapter 3, there is a wealth of existing literature, albeit mainly from other jurisdictions, which links an array of factors (personal and otherwise) with judging, particularly in cases involving the exercise of judicial discretion. As expected, the current findings strongly support this view; the majority of lawyers overwhelmingly perceive that the process of judging is imbued with both legal and non-legal factors, (including judges’ personal factors) particularly, but not exclusively, in cases where the law is unclear, under-determined and/or judges are vested with discretionary powers. For many of the lawyers in this study, views to the contrary lack any rational basis because all decision-makers, regardless of context, are thought to be open to unconscious bias.

To find that judges’ personal factors are largely perceived to be an unconscious source of influence on judicial decision-making chimes with findings from psychological studies in which human understanding, decision-making and conduct is shown to be affected by a range of cognitive biases including ‘implicit bias’.²² This term refers to the attitudes and stereotypes that affect individuals’

²² The idea that an individual’s judgments and/or actions are often subject to influence from an implicit cognitive process was first propounded by psychologists Greenwald and Banaji in 1995.

understanding, actions and decisions in an unconscious manner.²³ Revisiting the discussion about models of judicial behaviour in Chapter 2, it is suggested that it is when a judge engages in ‘System 1’ reasoning (when his or her decision-making is largely intuitive) that implicit biases are most likely to enter the adjudicative process. It is when the decision-maker attempts to override their intuitive response with more deliberative and conscious System 2 reasoning, that conscious and unconscious biases are more likely to be contained (although it is noted that psychologists have found that the strength of the intuitive System 1 element of decision-making exerts a powerful force over System 2 where a decision is uncertain or particularly difficult).

Of course the problem here is that to be able to reduce the potential impact that unconscious biases may have on judicial decision-making, an individual needs to be alert to their own unconscious biases. In fact, a range of experimental tests have been developed to measure such bias. The most widely used is the computer-based Implicit Association Test (IAT).²⁴ Research using the IAT indicates that implicit bias is pervasive across a range of settings, examples of which include health, education, housing and employment.²⁵ Importantly there is also evidence to indicate that judges’ decision-making is vulnerable to

Anthony Greenwald and Mahzarin Banaji, ‘Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes’ (1995) 102 *Psychol Rev* 4. The theoretical construct of the unconscious mind was popularised by Sigmund Freud in the early twentieth century. However, Greenwald suggests that it was not until the end of the twentieth century that a ‘new science’ of implicit cognition was developed which, unlike Freud’s psychoanalytic theory of the unconscious mind, attracted wide support amongst scientists. This is due to the fact that the research is generalizable. Anthony Greenwald and Linda Krieger, ‘Implicit Bias: Scientific Foundations’ (2006) 94 *Cal L Rev* 945.

²³ www.kirwaninstitute.osu.edu/research/understanding-implicit-bias/ accessed 25 November 2014.

²⁴ The IAT was pioneered by Greenwald, McGhee and Schwartz in 1998. See Anthony Greenwald, Debbie McGhee and Jordan Schwartz, ‘Measuring Individual Differences in Implicit Cognition: The Implicit Association Test’ (1998) 74 *J Pers Soc Psychol* 1464. A number of variants of the IAT have been developed including the simplified ‘brief IAT’ (BIAT). Sriram and Greenwald designed the BIAT with the intention of ‘reducing spontaneous variation in subject strategy’. N Sriram and Anthony Greenwald, ‘The Brief Implicit Association Test’ (2009) 56 *J Exp Psychol* 283. A religion specific BIAT is available at <www.implicit.harvard.edu/implicit/selectatest.html> Accessed 1 October 2014. In the first stages of the IAT, participants are familiarised with concept and attribute dimension words. Stages three to five of the IAT are the critical phases of the test. In stage three, the initial tasks are combined so that the participant has to sort both concept and evaluation words. At stage four, the key assignment is reversed to change the spatial location of the concepts. In the concluding stage five, the categories are combined so that they are opposite to what they were in stage three. It is the difference in the time taken to sort out the categories in stages three and five that produces an IAT score (slight, moderate or strong) which shows whether an individual has an implicit preference for one group over another

²⁵ Cheryl Staats and others, *State of the Science: Implicit Bias Review 2013* Kirwan Institute for the Study of Race and Ethnicity, The Ohio State University 2013 <www.kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf> accessed 7 November 2014.

unconscious bias. For example, Rachlinski et al. have tested whether trial court judges' implicit racial biases account for racial disparities in a US criminal justice context.²⁶ The authors found that implicit racial bias was widespread amongst the 133 judges who participated in the experiment; moreover, this was found to influence judges' decision-making. Interestingly, the authors also concluded that, in some cases, judges who were sufficiently motivated appeared to compensate for their own implicit racial biases in order to avoid the appearance of bias. Whilst this US study does not provide conclusive evidence as to the pervasiveness of implicit bias in judicial decision-making, considered in conjunction with research findings that explore implicit bias outside of a judicial setting, there is compelling evidence to support the view that unconscious bias does affect judicial decision-making and may even influence case outcomes. There is nothing to suggest that judges in the UK would be any less vulnerable to unconscious bias than their US counterparts, a view to which the lawyers in this study would appear to subscribe.

Prima facie, that the lawyers in this study perceive judicial decision-making to be influenced by judges' personal factors is inconsistent with what is here described as the 'orthodox view' of judicial decision-making, ie, the view that only the relevant facts and law should provide the basis of a judge's decision to meet the demands of fairness and impartiality. It is, therefore, significant that most of the lawyers in the study qualified their responses by saying that such influence was quelled by the force of legal and non-legal constraints. This view is consistent with Rachlinski et al.'s research which indicates that an individual's deliberative reasoning serves as one possible constraint on judging by effectively neutralising the impact that unconscious bias may have on judicial decision-making.²⁷

To find that many of the personal factors perceived by the two categories of lawyers as being contributors to how judges reach their decisions (that is, personal background and experience and moral and other beliefs) were matching was also expected. It is perhaps unsurprising that ideology/political values were considered

²⁶ Jefferey Rachlinski and others, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) Cornell Law Faculty Publications, Paper 786. Psychologists have typically focused on the role of implicit bias in juror decision-making.

²⁷ *ibid.*

to be especially salient given that judges are called upon to make what are often intrinsically political decisions. Drawing upon the work of Hayek, Drobak and North identify similar influences, developed from an individual's life experiences, that they suggest shape an individual's belief system, and which, they conclude, form part of the 'hidden' factors that influence judicial decision-making.²⁸ If, as argued throughout this thesis, it is axiomatic that religious convictions are a constituent of an individual's wider belief system, then it follows that a judge's religious outlook will inevitably play a part in his or her judicial reasoning in cases with a religious dimension. The question becomes to what extent?

Relatedly, that the lawyers in this study perceive hidden (as opposed to overt) judicial personal factors as those most likely to influence judicial decision-making is interesting, particularly when considered in light of Cahill-O'Callaghan's work on the influence of judges' tacit personal values outlined in Chapter 3. It will be recalled that Cahill-O'Callaghan finds a positive correlation between variations in the judgments of individual UKSC Justices and their inarticulate 'personal values' which constitute an oft-unconscious dimension of judging.²⁹

Given there is extensive evidence that judges' personal factors affect judging (both in the existing literature and the findings above), it was a surprise to find that a small number of solicitors did not subscribe to the majority view. In fact, on closer inspection, there appears to be little difference in how the lawyers perceive the relationship between judges' personal factors and judging; the only difference is that those who share the minority view focus on how judicial behaviour is constrained, whilst the majority tend to concentrate on the presence of judicial subjectivity, before going on to consider the limits on judging.

In summary, drawing on Tamamaha's terminology, it is posited that most of the lawyers who took part in this study are essentially balanced realists; they acknowledge that judicial decisions are influenced by non-legal factors, whilst acknowledging that the legal framework is the dominant force in shaping

²⁸ The authors mention influences from life experiences include parents and family, peers, teachers, religious authorities, government leaders for example. John Drobak and Douglass North, 'Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations' 26 J Law & Pol'y 131, 138.

²⁹ Rachel Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 J Law & Soc 596; Rachel Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity (2015) 35 LS 1.

adjudication. That the lawyers in this study appear generally nonplussed about the presence of judges' personal factors leads to the conclusion that, by and large, the constraints on judges serve as an effective means by which to suppress any potential *improper* influence (conscious or unconscious) that a judge's personal factors might otherwise have on the process of judging.

So why are these initial findings important? It is suggested that they are significant in at least two main respects. Firstly, and most importantly, to find that the majority of lawyers perceive that judges' personal factors, particularly personal background, experience and moral and other beliefs, affect judging lends strong support to the conceptual premise underpinning this thesis - that the religious beliefs of a judge may influence judicial behaviour. Indeed, it seems illogical to suggest that an individual's religious outlook, particularly a strongly held faith-based view, does not affect the decisional process when other beliefs (including moral values which shape or may be shaped by faith values) are perceived to play a part in how judges decide cases. That said, this point is tempered by the finding that, for the most part, lawyers perceive that such influence is: (a) unconscious, and (b) generally overridden by other considerations such as legal rules, principles and guidelines and judges' strong sense of duty as regards their judicial function. Secondly, as the majority of those who took part in the present study perceive the relationship between personal factors and judging in the same way as legal professionals outside of this study (including judges themselves), their views about religion and judging may also align with those of the wider legal community. Whilst this does not allow for the current findings to be generalized to the barrister and solicitor populations at large, it does suggest that further research would be useful to gain a clearer understanding of how personal factors are thought to affect judging and the implications this has on internal and external perceptions of justice.

The next section narrows the focus on how judges judge by exploring the relationship between judges' religious beliefs and judging through the lens of the lawyers who participated in this study.

5.4 Do judges' religious beliefs affect judicial decision-making?

On the central research question relating to how lawyers perceive the relationship between judges' faith and judging, the findings from both the Bar interviews and SPQ present a mixed picture. These findings mirror those observed in previous studies (such as those discussed in Chapter 3) in which attempts to discern whether judge-specific factors influence judicial behaviour have proved inconclusive, save for in specific cases.³⁰

5.4.1 The view from the Bar

In this phase of the enquiry, lawyers were first asked whether or not they perceived that judges' religious beliefs may be an influencing factor in the process of judging and, if so, in what sorts of cases. The universal consensus amongst barristers as to the presence of personal factors in judicial decision-making described in section 5.3 was not echoed in their perceptions of the relationship between judges' religious beliefs and judging. Thus, whilst all barristers were prepared to give examples of the sorts of case in which they felt that judges' religious beliefs *potentially* influenced judicial reasoning, the majority were uncertain as to whether judges' religious values *actually* affected the decisional process. The tendency was to err on the side of caution by indicating that this was unlikely in practice (the reasons for which are explored below). For example, B19, a senior barrister, said: '...do religious views colour the decisions of people in the judiciary? Frank answer: I don't know. My best guess is it probably doesn't'. Along similar lines, B15 opined:

... I see no reason in principle why religious factors wouldn't be part of that [the influence of personal factors] although, partly because of the extreme sensitivity of the topic, I've no doubt that is the sort of personal prejudice as it were – whether it's coming from the standpoint of having a particular religion or being predisposed to religious ideas or faith or being against religion or faith - that's the sort of area where judges would be generally much more reluctant to, at least consciously, allow their prejudices to influence them.

³⁰ Michael Heise, 'The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism' [2002] 4 U Ill L Rev 819, 834.

The overwhelming consensus was that if such factors were at play, the impact on judging was no more than slight. Moreover, most barristers said that if religion was an actual factor in decision-making, it would be difficult to draw a direct association because judges' religious beliefs were not common knowledge (whether within or outside legal circles), except for a few instances where extra-judicial comments or activities meant that such information was available.

That said, a handful of the barristers (notably including three QC's and a part-time judge) were more confident in linking a judge's religious beliefs with judicial decision-making. Mirroring their responses to the more general question about the role played by personal factors, these interviewees plainly perceived there to be an air of inevitability about a religious dimension to judging in some of the areas of law in which they worked. The following comment from B9 is illustrative:

Now, in some areas that I work in like family law...plainly religious views are bound to have an impact on the approach that the judge takes...We know that some judges are likely to be influenced by their religious and other views in the way they approach the cases.

Cases perceived to be vulnerable to influence

As to the sorts of cases in which judges' religious beliefs were perceived to *potentially* or *actually* affect judging, barristers were largely united in saying that these would be limited to a few specific legal areas; the most oft-cited being disputes involving the right to life and end of life issues. This is unsurprising given that the key issue in such cases, the sanctity of life, is a central tenet of many faiths.³¹ To illustrate, B13, a senior employment barrister (and part-time judge) opined: "...I've not been in the cases but some of the cases about right to die, particularly if the judge is a Catholic or Fundamentalist, although there are not many of those".³² Likewise, talking specifically about the high profile case *Re A (Children) (Conjoined Twins: Surgical Separation)*,³³ in which the Court of Appeal ruled that, contrary to the wishes of the parents (who felt that it was up to God and not the medical

³¹ Although of course it is reiterated that adherence to a particular religion does not necessarily reflect an individual's wholesale commitment to the core beliefs.

³² Both the Roman Catholic Church and Fundamentalists are philosophically opposed to the right to die.

³³ [2001] 2 WLR 480 (CA).

professionals to determine their children's fate) conjoined twins must be separated even though this would result in the certain death of the weaker twin, B18 said:³⁴

The Archbishop of Westminster actually came to court to give evidence on what the religious position was in that case, and you sort of ask yourself, well, why did they hear that? Because if the religious perspective had no impact on that case, then why were they hearing that... So I think in those sorts of cases of life or death, so medical cases where you've got people in a persistent vegetative state or where someone might die... medical cases where it will result in the death of someone – then I think probably the judges personal [religious] view is highly relevant.

Such views resonate with the comments of judges in the recent right to die case of *R (Nicklinson) v. Ministry of Justice*.³⁵ In *Nicklinson*, the UKSC was asked to consider, inter alia, the compatibility of the present law on assisted suicide with Article 8 of the ECHR and the lawfulness of the DPP's policy on assisted suicide.³⁶ In his judgment, Lord Neuberger acknowledged that the question under consideration raised 'a difficult, controversial and sensitive issue, with moral and religious dimensions'.³⁷ For this reason, he explained that it: 'undoubtedly justified a relatively cautious approach from the courts'.³⁸ This clearly aligns with the traditional non-interventionist approach of the courts in matters of religion (discussed in Chapter 2). In arguing why the issue in *Nicklinson* was a legislative issue and not for the courts to determine, Lord Sumption opined that such a decision was one that could not fail 'to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide',³⁹ personal opinions which, it is suggested, may well be informed by an individual's religious outlook. He went on to explain why, in his view, it was not appropriate for professional judges to

³⁴ In this case, the court had to consider: (1) what was in the best interests of the twins and (2) the lawfulness of an operation which would inevitably bring about the death of the twin who was incapable of a viable independent existence in order to preserve the life of the other who was capable of living an independent life following medical intervention.

³⁵ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, 230. These views were reiterated in the recent case of *R(Conway) v Secretary of State for Justice* [2017] EWHC 2447 (Admin), at 109. As an aside, *Nicklinson* also brings into sharp focus the impact that the HRA and the incorporation of convention rights has had in elevating the political significance of the judiciary.

³⁶ CPS 'Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide' <www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf> accessed 1 May 2015.

³⁷ *Nicklinson* (n35) 116.

³⁸ *ibid* 116.

³⁹ *ibid* 230.

impose their own views on such matters.⁴⁰ First, the issue at hand involved a choice between conflicting moral values, the right to commit suicide and the right of vulnerable people to be protected from pressure to commit assisted suicide, upon which there was no current consensus in society.⁴¹ For the courts to make a declaration of incompatibility on such an important issue would therefore lack constitutional legitimacy.⁴² Second, Parliament had already decided against changes to the law in this area.⁴³ Third, given the complexity of the issues involved, Lord Sumption argued that the Parliamentary process allowed for a more comprehensive consideration of this difficult issue than that which would take place in the courts.

On grounds of democratic legitimacy alone, it is agreed that what are socially divisive issues should be for Parliament to decide. However, it is argued that the courts are already called upon to make determinations on issues about which there is conflicting public opinion on a case-by-case basis. As Paterson and Paterson opine, the expansion in judicial power is partly attributable to the fact that politicians ‘off-load’ what the authors describe as ‘too hot to handle’ issues such as euthanasia.⁴⁴ Additionally, Lord Sumption’s assertion as to a lack of consensus on the issue of euthanasia is contestable. For example, the results of a YouGov poll in 2014 found that 69% of those surveyed supported legalising assisted dying in certain circumstances.⁴⁵ What threshold would have to be reached, if any, for the courts to intervene?

Agreeing that Parliament is the best forum in which to decide such a sensitive issue, Lady Hale, together with Lord Kerr, dissented from the majority judgment. She explained that the existing law was incompatible with Article 8 of the ECHR because it failed to take into account the particular circumstances of individual cases in favouring a blanket prohibition on assisted suicide. At the same time, Lady Hale

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² cf. the dissenting views of Lady Hale [299] to [325] and Lord Kerr [326] to [366].

⁴³ Nicklinson (n35) 231.

⁴⁴ Alan Paterson and Chris Paterson, ‘Guarding the guardians? Towards an independent, accountable and diverse senior judiciary’ (2012) CentreForum < www.centreforum.org/assets/pubs/guarding-the-guardians.pdf > accessed 10 December 2016.

⁴⁵ YouGov, ‘Majority of public ‘would probably consider’ assisted dying < <https://yougov.co.uk/news/2014/07/06/majority-public-would-consider-assisted-dying-some/> > accessed 12 February 2018.

made clear that, whatever her view of euthanasia, her reasoning in *Nicklinson* was based on her professional judgment and not her personal preferences. Appearing at odds with Lord Sumption's statement above, implicit in the following extract from Lady's Hale written opinion in *Nicklinson* is the view that a judge's personal beliefs can be divorced from the task at hand:

...my conclusion is not a question of "imposing the personal opinions of professional judges". As already explained, we have no jurisdiction to impose anything: that is a matter for Parliament alone. We do have jurisdiction, and in some circumstances an obligation, to form a professional opinion, as judges, as to the content of the Convention rights and the compatibility of the present law with them. Our personal opinions, as human beings, on the morality of suicide do not come into it.⁴⁶

It is perfectly reasonable to argue that a decision-maker's own stance on such emotive issues will be unlikely to *consciously* influence their reasoning. But can the same be said about an individual's unconscious bias? In the preceding section barristers confined any influence from judges' personal factors to that manifested in an unconscious manner only. Suppose Parliament enacted legislation which allowed judges to sanction assisted suicide in very specific circumstances on a case-by-case basis. Would a judge's decision be any less influenced by his or her unconscious religious bias when deciding a case involving the exercise of judicial discretion than it would have been immediately prior to such legislation coming into force? It seems unlikely. Clearly the argument here is not that any judge would wittingly substitute their own religious and/or moral values for the law. But it does raise doubts as to whether strongly held religious convictions that shape a judge's views about, say, the rightness or wrongness of assisted suicide, can be wholly extracted from a judge's decision-making in a case where there is a choice as to most appropriate outcome.

Having similarly identified right to life and end-of-life cases as those in which a relationship between judges' religious beliefs and judicial decision-making is most likely, other barristers expressed doubt as to whether or not the impact of

⁴⁶ *Nicklinson* (n35).

such beliefs could be distinguished from the tangle of other personal factors that were thought to affect judicial reasoning. Thus, whilst the influence of judges' religious beliefs on judging could not be wholly ruled out, it could not be ruled in either. Thus, commenting on a case they had been involved in, B6 reflected:

One of the judges declared to us his membership of a [religious] organisation in advance, and there was some kind of thinking about that and, at the end of the day, the case went ahead and he remained a judge. Do I think it influenced him? I have absolutely no basis for saying that but this is a case where [x] judges in the High Court found against us, [x] of the judges in the Court of Appeal found in favour of us and [x] found against us... How you explain those differences... You know, it has got to be because each of those judges is a different person.

Another area in which barristers felt that a judge's religious beliefs could potentially colour judicial decision-making was in cases concerning religious discrimination. Referring to the case of *R(E) v Governing Body of the Jewish Free School*,⁴⁷ in which it will be recalled from Chapter 2 that the Supreme Court had to consider whether a school admissions policy that gave preference to applicants recognised as Jewish by the Office of the Chief Rabbi was racially discriminatory, employment barrister B5 said:

And there was a very heavy Supreme Court case where some of the judges were Jewish, and I know most of the barristers were Jewish actually. But that's a case where you can see if there was going to be an impact from your own personal stand point it would be a case such as that.

That the religious composition of the judiciary was of interest in this case is seen in the remarks of one commentator, a senior QC, who has speculated that the panel of judges in *JFS* was convened 'in part having regard to the religious/cultural backgrounds of the justices hearing the case because of the particular religious and cultural sensitivities involved...'.⁴⁸ In fact, when discussing this with interviewees, the common view was that it was unlikely that any regard would have been given to

⁴⁷ [2009] UKSC 15.

⁴⁸ Aidan O'Neill, 'Religion and the Judiciary' *The Guardian* (London, 7 June 2010) www.theguardian.com/law/2010/jun/07/religion-judiciary-supreme-court accessed 17 June 2012. It should be noted that the commentator has said that there is no hard evidence to support his claim.

the religious backgrounds of the Supreme Court Justices when convening the panel in *JFS* or, indeed, that this would happen in any other case. For example, B9 commented: ‘I don’t know whether there was any thought went into that. I doubt it to be perfectly honest in the *JFS* case’. In a more general context, B17 opined that, whilst cases involving particular issues of legal complexity ‘may well be steered your way’ (that is, to a particular judge with expertise in dealing with the difficult legal issues concerned), the suggestion that this would stretch to consideration of judges’ religious beliefs was to “read in a degree of complexity to the listings process that is not there’.

Given that nine of the eleven UKSC Justices sat in *R v JFS*, it might be argued that there was little choice in deciding who should sit on the panel once considerations such as a judge’s availability and workload allocation were taken into account. That said, this was a close-call case where the majority and minority opinion was divided by a single Supreme Court Justice. As such, it is wholly conceivable that a slightly differently constituted panel might have reached a different result. Whether it would actually be possible to discern whether a difference in outcome could be attributed to a different religiously constituted panel (particularly when so little is known about judges’ religious identities and the literature shows that judicial decision-making is subject to wide range of legal and non-legal influences) is a more difficult question. This is further complicated by the fact that very little is known about the selection process for judicial panels, particularly in relation to the higher appellate courts in which such panels are convened.⁴⁹ Clearly, if there was evidence that the panel in *JFS* had been chosen with regard to the religious backgrounds of the judges, this would be a matter of serious constitutional concern because it would call into doubt one of the fundamental principles of law - the right to a fair trial. At the same time, if the court was selected in part based on the religious backgrounds of the judges, evidence suggests that the collegial nature of decision-making in the highest court is likely to serve as a forceful constraint upon the individual Justices.⁵⁰

In *JFS*, it is speculated that even if the UKSC had sat *en banc* (the purpose of which would have been to make sure no one could claim that the judgment would have

⁴⁹ Daniel Clarry and Christopher Sargeant, *Judicial Panel Selection in the UK Supreme Court: Bigger Bench, More Authority?* *The UK Supreme Court Yearbook – Volume 7* (2016).

⁵⁰ Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013).

been different with a different panel), the religious backgrounds of the judges would have still given rise to interest due to the religiously sensitive nature of the dispute and the fact that it was the first case heard by nine Justices in the newly formed UKSC. In any case, it is interesting to find that the religious make-up of the bench in *JFS* attracted comment outside the courtroom.

It is unsurprising to find that controversial clash of rights cases, particularly those between the right to religious freedom and protection against sexual orientation discrimination were also frequently identified by interviewees as a potential source of tension for judges, although again, as B19 indicated, such cases were said to be relatively uncommon:

I mean the areas where religion may be an influence are policy areas. In your bog standard road traffic accident case, or your bog standard unfair dismissal case, religion is not an issue. But, if you've got a case say, where if you recall, there was this couple who effectively banned gay couples from living in the same room in their B and B... Now, in a case like that it may be, or in the *Eweida* case...⁵¹

The controversial 'B & B' case which B19 refers to is *Bull v Hall*.⁵² It will be recalled that in this case the UKSC had to consider whether Christian hotel owners (the Appellants) had discriminated against same-sex civil partners (the Respondents) contrary to the Equality Act (Sexual Orientation) 2007 (EASOR). As devout Christians, the hotel owners had a room booking policy that reserved double rooms for married couples only. On arriving at their hotel, the Respondents were refused a double room on the basis that it was contrary to the hoteliers' religious belief in the sanctity of marriage between heterosexuals only. The Respondents brought a claim for discrimination on grounds of sexual orientation. The Appellants argued that it was the Respondents marital status and not their sexual orientation that led to their treatment. However, in this close-call case (3:2), the majority of the UKSC held that the Respondents had suffered direct discrimination on the basis that a homosexual couple could not comply with the requirement to be married (which was linked to heterosexual

⁵¹ *Eweida v British Airways plc* [2010] EWCA Civ 80.

⁵² [2013] UKSC 73.

orientation). As regards indirect discrimination, the Appellants accepted that they had indirectly discriminated against the Respondents, but argued that this was justified on grounds of their religious belief. Ruling to the contrary, the UKSC said that it was difficult to see how a belief that sexual intercourse between civil partners was sinful could be justified by any matters other than the Respondents' views on sexual orientation. At the same time, the UKSC stressed that the purpose of the EASOR was to ensure equal treatment of those of heterosexual and homosexual orientation in the provision of goods, facilities and services and that it was in the public interest to encourage committed, long-term relationships regardless of sexual orientation. If there were meant to be religious exemptions under the EASOR which permitted lawful discrimination, this would have been catered for under the 2007 Regulations. Whilst the court accepted that the Appellants' right to manifest their religious beliefs was engaged under ECHR, Article 9(1), interference with this right was considered to be a proportionate means of achieving a legitimate aim; the right of the Respondents not to be unlawfully discriminated against because of their sexual orientation.

Clearly, in a case such as this, it is not difficult to see how a judge with strong religious convictions might, at the very least, be susceptible to unconscious religious bias. Of course, in a clash of rights case between religion and sexual orientation (and indeed in cases where other human rights lock horns), it is also entirely plausible to speculate that a judge's views on sexuality (whether or not driven by religious dogma) might similarly be a source of positive or negative bias.

The minority view: experiential evidence

Returning to those barristers who positively linked judges' faith with judicial decision-making, it is interesting to see the evidence upon which their responses were based.

Having said that the interplay between judges' religion and judging was evident in the employment and healthcare cases they were involved in, B2 talked about a case in which it was felt that the judge, known to share the same religious background as the claimant, had appeared more sensitive to the religious issues

raised in the case than might have been the case if the judge had not shared the same religious background. Acting for the respondent, B2 said:

We were quite concerned by some of the comments and thought that [the judge] was automatically very sympathetic to the claimant's plight... I think the judge's take on what was a reasonable manifestation of reasonable practice in the workplace was very strongly influenced by their own views and previous religious background.

However, B2 went on to say that the respondent won this case. Therefore, the only definite conclusion that can be drawn here is that there was no evidence of religious nepotism. It will be recalled from Chapter 3 that this term is used by Sisk et al. to describe where a judge sharing the same religious beliefs as that of a claimant treats the claim more favourably than they would treat the claim from someone with a different religious background or with no faith.⁵³ On the other hand, this does not preclude the possibility that the judge, in trying to be and be seen to adjudicate in a fair and impartial manner, may have, at least unconsciously, avoided positively favouring the respondent by leaning too far the other way.⁵⁴ Indeed, one of the interviewees who also sat as part-time judge alluded to this dilemma in relation to their own judging. B13 said: 'I'm sure it's unconscious but sometimes you're almost looking over shoulder to think of whether people will criticise you for identifying with what is your own beliefs'. Of course, the difficulty in such cases is how to prove such bias.

Evidence of a positive relationship between judges' religion and judging was also identified by interviewees who talked about cases where they felt that there was a visible tension between the perceived religious identity of a judge and the constraints of the judicial role. For example, when asked whether judges' faith influenced the how judges reach decisions, B17, a part-time judge, said:

⁵³ Gregory Sisk, Michael Heise and Andrew Morriss, 'Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions (2004) 65 Ohio St LJ 491.

⁵⁴ Heise and Sisk suggested that this phenomena may be at play when they found a negative correlation with case outcomes in their study of Free Exercise and religious accommodation claims decision by US federal court of appeals and district judges from 1996 to 2005. Michael Heise and Gregory Sisk, 'Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts' (2013) Cornell Law Faculty Publications, Paper 915, 1371.

I think they absolutely shouldn't but I think on occasion they do... When you're looking at things like end of life decisions in which, for the individual concerned, one of the key factors for them is their religious beliefs, you do get situations where judges obviously grapple with the decision which they themselves find quite challenging because intellectually they're meant to wear their judges wig [inaudible segment] set aside what are obviously quite [inaudible segment] religious beliefs of their own.

Another barrister similarly described having been involved in cases where a potential conflict between the religious outlook of a judge, the facts of a case and the need to be impartial appeared to create a perceptible source of anguish for the decision-maker:

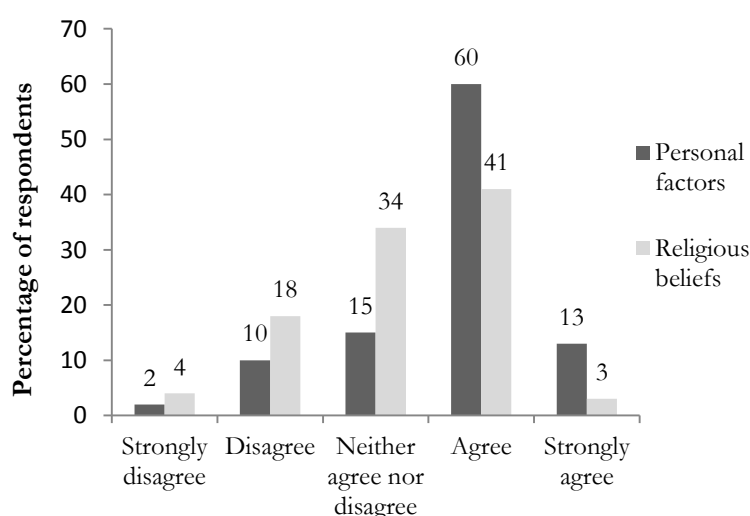
I suppose their religious instinct makes them want to really probe certain issues and be satisfied about certain things... On the other hand, they are probably aware of their own religious persuasion and try so hard not to let it influence them that I can almost sometimes see the struggle.

That said, overall there was a strong sense in which interviewees felt that, even if religious beliefs were to impinge on the adjudicative process, this would not give cause for concern because judges, by virtue of their judicial training, were adept at taking swift action to prevent or alleviate the impact of any such influence so as to prevent potential claims of judicial bias.

5.4.2 Solicitor views

Figure 5.3 shows that, like the barristers in part one, solicitors were also less certain about the part played by judges' religious beliefs in judicial decision-making compared to the role of personal factors more generally. At the same time, the findings indicate that they were also more likely to positively associate judges' religious beliefs and judging compared to the barristers. When asked to what extent they agreed or disagreed with the view that judges' religious beliefs influence judicial decision-making in cases where the law is unsettled or judicial discretion is exercised (SPQ Q16), just over two-fifths of the solicitors agreed or strongly agreed that the religious beliefs of a judge may be a contributing factor (44%), just under a

quarter of the respondents disagreed or strongly disagreed with this view (22%), and approximately one-third of respondents recorded a neutral response (34%).



SPQ Q16. Do judges' religious beliefs influence judicial decision-making?

Figure 5.3 Solicitor perceptions as to the influence of judges' personal factors and religious beliefs on judicial decision-making (n=158) [Source: Appendix 14 and 17]

The qualitative comments attached to SPQ Q16 show that solicitors who agreed that judges' religious beliefs influence judicial decision-making typically justified their answers using the same reasoning as that on which assessments of the relationship between judges' personal factors and judging were based. The following are typical of the comments made by solicitors in response to SPQ Q16:

A judge is as human as anybody else. Their moral compass will have been set/conditioned by their upbringing and education. (S200F)

I think unconscious prejudices always affect our reasoning and judgements as human beings and a judge is no different to anyone else in this regard. (S104E)

In other words, these solicitors understood the influence of a judge's religious beliefs, along with that from the other homologous judicial personal factors identified in section 5.3 above, as operating within a wider frame of reference in which an individual's personal factors (consciously motivated or otherwise) were considered to be an intrinsic facet of human decision-making.

A common pattern to emerge in the comments of those who recorded a 'Neither agree nor disagree' response was that their views tended to be skewed towards an 'agree' rather than 'disagree' response. This is inferred from comments in which these respondents said that they *had* been involved in cases where they had perceived that a judge's faith had been a salient factor (for example: 'I have had only occasional experience of a judge (sic) who is very obviously influenced (sic) by his faith' (S227E)), or said that a judge's religious beliefs would only be likely to influence a limited number of cases in specific legal areas (for example: 'It would only really affect cases such as illegal abortion, the withdrawal of sustenance from a terminal ill person, assisted suicide' (S96F)).

Similarly, the supplementary qualitative responses of those who recorded a negative response to SPQ showed that these solicitors' perceptions of the interplay between religion and judging are perhaps not as clear-cut as the quantitative responses initially suggest. Several of these respondents qualified their 'disagree' response by reference to the distinction between the impact of an individual's moral outlook and religious values, for example, S91E stated 'Basic moral grounding must influence decision making, but this is not specific to religion'. However, as discussed in Chapter 2, just because an individual's moral values are not always shaped by a religious perspective does not preclude the possibility that, in many instances, faith will colour an individual's moral values and wider personal outlook. Of course, this is not to suggest that the views of those who recorded a negative response to SPQ Q16 think that judges' faith definitely play a role in judging. Rather, the extracts suggest that the SPQ results may not be as cut and dried as the quantitative responses initially suggest. Clearly this is useful in evaluating which research methods may be most appropriate for future research in this area.

At this point, it is of interest to note that when asked about how much was known about the personal factors of the judges they appeared before (SPQ Q12), an overwhelming majority of solicitors who attended court on a regular basis reported that judges' specific religious beliefs were rarely, if ever, known (87%) and was the least known of several personal factors listed (which ranked in order of awareness from always to never known included: age, prior employment,

educational background, disability, political beliefs, family status, sexual orientation and religious beliefs).

5.4.2.1 Judges religion and judging based on solicitors' professional and personal factors

Solicitor responses to SPQ Q16 were further explored to see whether perceptions of the relationship between judges' religious beliefs and judging varied according to respondents' specific professional and personal factors. The statistical analysis revealed considerable consistency in responses among solicitors based on their area of practice, PQE, frequency of attendance at court and religious beliefs.

Area of Practice

Studies conducted in other jurisdictions suggest that whether or not there is a relationship between judges' religious beliefs and judicial decision-making can vary according to the types of case being adjudicated.⁵⁵ Having identified employment and family law cases as those in which religiously sensitive issues are likely to arise, it was hypothesised that the responses between the employment and family groups would be broadly similar. Indeed, Table 5.1 shows there was considerable homogeneity in responses between these two sub-groups. Employment solicitors were marginally more likely than family law practitioners to agree that judges' religious beliefs are a factor in judicial decision-making (41% compared to 35%), this difference being reflected in the 5% difference between the groups in the 'Disagree' responses.

What was more interesting was to find that there was no real consensus within groups as to whether religion plays a part in judging. Again, this may be attributed to the sorts of factors discussed previously. For example, those who perceive there to be a positive association between judges' faith and judging may see religion as part of the gamut of personal factors that inevitably have a subtle, often imperceptible influence on judges' reasoning.

⁵⁵ For example, as seen in Chapter 3, judicial studies literature from the US has shown that the religious background of a judge can have a modest effect on civil rights decisions, particularly in relation to gay and religious liberty rights, see Frank Cross, *Decision Making in the US Courts of Appeals* (Stanford University Press 2007) 73; Daniel Pinello, *Gay Rights and American Law* (CUP 2003).

On the other hand, those who disagree or are uncertain about this relationship may subscribe to a view that chimes with the idea of a psychology of judicial decision-making (that is that judges judge differently to other decision-makers), or may feel that effective constraints dampen the effects of religious (and other beliefs) on judicial reasoning.

| Judges' religious beliefs influence Judging SPQ Q16 | Employment | Family | Total |
|--|-------------------|---------------|--------------|
| Agree | 41% | 35% | 39% |
| Neither agree nor disagree | 35% | 35% | 35% |
| Disagree | 24% | 29% | 26% |
| N | 83 | 51 | 134 |
| | 100% | 99% | 100% |

Table 5.1 Religion and judging by area of practice (n134) [Source: Appendix 18a]

PQE

Insights drawn from the interviews with barristers in part one of this study indicate that more experienced barristers are likely to know more about the personal backgrounds of judges than their less experienced colleagues. On this basis, it might be speculated that the more experienced solicitors will take a definite position on whether judges' religious beliefs affect judicial determinations because they are more likely to know the religious identities of the judges they appear before than their less experienced colleagues. No prediction was made as to the direction of their responses.

Table 5.2 shows that there were no obvious patterns or linearity in the data. In fact the data presents a rather confused picture. For example, respondents in the 11-15 years and 21+ years PQE groups were those most likely to record a positive response to SPQ Q16 (both 44%), whilst those in the 16-20 years group were the group most likely to disagree that judges' religious beliefs influence judging (36%). Practitioners in the 0-5 years PQE band were the least likely to disagree with the view that judges' religious beliefs influence judicial decision-making (18%). The least experienced solicitors (those with less than 10 years PQE) were more likely to

record a neither agree nor disagree response than their more experienced colleagues. Again, as with the findings in relation to area of practice above, what is clear is that there was considerable variance in solicitors' perceptions of this relationship, regardless of PQE.

| Judges' religious beliefs influence Judging | PQE | | | | | Total |
|--|------------------|-------------------|--------------------|--------------------|------------------|--------------|
| | 0-5 years | 6-10 years | 11-15 years | 16-20 years | 21+ years | |
| Agree | 39% | 33% | 44% | 32% | 44% | 39% |
| Neither agree nor disagree | 43% | 39% | 33% | 32% | 31% | 35% |
| Disagree | 18% | 28% | 22% | 36% | 26% | 26% |
| N | 28 | 18 | 18 | 31 | 39 | 134 |
| | 100% | 100% | 100% | 100% | 100% | 100% |

Table 5.2 Religion and judging by PQE [Source Appendix 18b]

Frequency of attendance

It was hypothesised that solicitors' perceptions about whether judges' faith affects judging would differ according to the regularity with which they attend court; and, more specifically, that the answers of solicitors who attended court most frequently would mirror the views of the barristers in part one because these two groups appear in court most and have greater opportunity to observe how judges reach decisions. A cross-tab of responses to SPQ Q16 and frequency of respondents' attendance at court revealed a moderate relationship between these variables (Table 5.3). Interestingly, approximately half of the respondents who attended court infrequently agreed that a judge's religion might play a role in 'hard cases' – 17% more than those in the frequently group (48% and 31% respectively). This suggests that those appearing in court the most are those who are most confident in judges' ability to decide cases free from extraneous influences such as religion. Once again, there was a relatively even distribution of respondent answers within each of sub-groups.

| Judges' religious beliefs influence judging | Frequently attend | Infrequent attend | Total |
|--|--------------------------|--------------------------|--------------|
| Agree | 31% | 48% | 26% |
| Neither agree nor disagree | 39% | 30% | 35% |
| Disagree | 30% | 22% | 39% |
| N | 74 | 60 | 134 |
| | 100% | 100% | 100% |

Table 5.3 Religion and judging by frequency of court attendance [Source: Appendix 18c]

Religious beliefs

A final point of interest was whether perceptions of the relationship between judges' religious beliefs and judicial decision-making differed according to respondents' own religious beliefs. As will be discussed further in Chapter 6, in light of a growing number of high profile cases in which Christians have alleged discrimination because of their religion such as *Eweida*,⁵⁶ *Ladele*⁵⁷ and *Hall*,⁵⁸ concerns have been raised by a number of religious organisations that Christians have become increasingly marginalised in the courts, and in public life more generally. The findings from a Parliamentary Report on the freedom of Christians in the UK, 'Clearing the Ground' lends some support to this view:

We are convinced that there is a problem facing Christians in Britain today... We consider that this problem arises through high levels of religious illiteracy and through legal and cultural restrictions on actions and words that are normal in Christian belief.⁵⁹

This gives rise to the question of whether solicitors' perceptions of the relationship between judges' religious beliefs and judicial decision-making varied according to solicitors' own religious beliefs. The empirical data indicted a weak relationship (Table 5.4). It is interesting that Christian and non-Christian respondents were more likely than those in the 'Unaffiliated' group to believe that a judge's faith was a factor in the process of judging - 47% and 38% compared to 27% respectively. One possible explanation for this may be that responses of those in either of these religious groups (Christian and non-Christian) perceived the relationship between judges' faith and judging by reference to their own relationship with religion.

⁵⁶ *Eweida* (n51).

⁵⁷ *Ladele v London Borough of Islington and Liberty* [2010] IRLR 211 CA.

⁵⁸ *Bull* (n52).

⁵⁹ Christians in Parliament, *Clearing the Ground Inquiry Preliminary Report into the freedom of Christians in the UK*, February 2012 < www.eauk.org/current-affairs/publications/clearing-the-ground.cfm > accessed 12 March 2016.

In hindsight, it would have been useful to include a follow up question in which respondents were asked if, in cases where religious beliefs were perceived to influence judicial decision-making, they perceived the impact of such beliefs to favour or disfavour the claimant.

| Judges' religious beliefs influence Judging | Christian | Non-Christian | Unaffiliated | Total |
|--|------------------|----------------------|---------------------|--------------|
| Agree | 47% | 38% | 27% | 39% |
| Neither agree nor disagree | 28% | 50% | 43% | 35% |
| Disagree | 24% | 13% | 31% | 26% |
| N | 74 | 8 | 49 | 131 |

Table 5.4 Religion and judging according to respondents' religious beliefs [Source: Appendix 18d]

Following the descriptive statistics analysis, non-parametric tests were run. These showed that there were no statistically significant differences between solicitors as regards to their perceptions of the relationship between judges' religious beliefs and judicial decision-making based on their own area of practice, PQE, frequency of attendance at court nor their religious beliefs (Appendix 18e).

5.4.2.2 Cases in which judges' religious beliefs may affect judging

As to the sorts of cases in which judges' religious beliefs may influence judicial decision-making, like the barristers, solicitors typically identified those cases with strong moral, ethical and/or religious content, particularly in relation to family law cases (incorporating child law) and discrimination cases (SPQ Q19). This was expected given that each of the samples consisted of practitioners specialising in these areas. Various examples of the ways in which a judge's religious beliefs may potentially be at play in family cases were provided:

Children living with/spending time with same-sex parents; judgments over parents' lifestyles e.g. if promiscuous, being involved in the adult entertainment industries etc. (S125F)

Money in terms of quantum and arrangements for children in terms of making moral judgments. (S158F)

Catholic and other faiths that do not find divorce or marriage easy concepts, or find co-habitation without marriage as unacceptable, may dictate that a judge will treat future needs or contribution in family cases differently. (S209F)

‘Clash of rights’ discrimination cases involving disputes between equality rights (typically, but not solely, between religion and sexual orientation) in the provision of employment and goods and services were also frequently identified as being vulnerable to influence from a judge’s religious beliefs. Examples of responses included: ‘Cases involving religion not only on grounds of religion but on other protected characteristics’ (S248E); ‘... as is much in the news at the moment, the battle between conflicting rights/protections – see the ‘gay cake’ case in Northern Ireland’⁶⁰ (S47E); ‘Where different areas of discrimination law conflict, eg, religion/belief and sexual orientation and also dress codes’ (S184E).

A much smaller number of respondents mentioned criminal cases. A snapshot of examples of specific offences identified by respondents included, but was not limited to cases of ‘theft or dishonesty’, ‘involving drink and drugs, assault, murder and domestic abuse’, ‘sexual offences’ and ‘religiously aggravated offences’.⁶¹ Similarly small numbers of respondents explicitly identified right to life and/or right to die cases and human rights cases as the sorts of case in which the decision-maker’s religious beliefs was most likely to affect judicial reasoning.

5.4.3 Drilling down deeper: frequency, nature of influence and extent of impact

If a judge’s religious beliefs are perceived to potentially affect judicial decision-making as the findings above suggest, it is important to try and understand *how* religion is thought to potentially or actually affect judging. This section examines the three key aspects of this relationship: the prevalence, nature and extent of judges’ religious beliefs in the process of judging.

⁶⁰ The “gay cake case” refers to the Northern Irish case of *Lee v Ashers Bakery Co. Ltd & Anor* [2015] NICty 2. Mr Lee claimed for discrimination against on grounds of his sexual orientation, contrary to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and/or the Fair Employment and Treatment Order 1998, after Ashers Bakery refused to supply a cake decorated with the caption “Support Gay Marriage”, Sesame Street characters Bert and Ernie and a logo for Queerspace (a LGBT organization) to Mr Lee. The defendants argued that they were entitled to refuse to supply the cake based on the protection afforded to them under ECHR Article 9. The Northern Ireland Court of Appeal have since rejected the defendants appeal - *Lee v McArthur & Ors* [2016] NICA 29.

⁶¹ Of course this list is not exhaustive.

5.4.3.1 Perceptions of frequency

There were divergent views between the two groups of lawyers on the question of how often judges' religious beliefs were perceived to affect judicial decision-making. Implicit in the interviews with barristers was the view that judges' religion would only rarely affect cases, if at all. This is evidenced by the fact that the majority of those interviewed said that they had not been involved in such cases, or if they had, stressed that this was by no means a regular occurrence.

In comparison, the SPQ findings show that the majority of solicitors who positively correlated judges' religion with judging (SPQ Q16) felt that religiously sensitive issues were *occasionally* relevant in judicial decision-making. When asked how often judges' religious beliefs might be at play in cases where the law was unsettled or discretion was exercised (SPQ Q17), approximately three-fifths of the solicitors (61%) believed that they would occasionally be a relevant factor. Interestingly, almost one-fifth of respondents felt that religious beliefs *often* affected how judges judge (18%). As expected, none of the respondents recorded an 'Always' response. In contrast, one-fifth of respondents (20%) thought that judges' religious beliefs would rarely be an influencing factor (Figure 5.4).

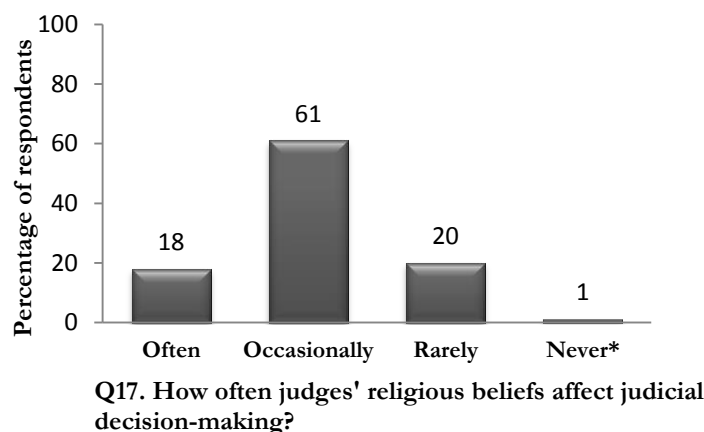


Figure 5.4 Perception of the frequency with which judges' religious beliefs influence judicial decision-making (n=121) [Source: Appendix 19] No respondents recorded an 'Always' response. * SPQ Q17 made clear that it was to be completed only by those who felt that judges' religious beliefs might affect judicial reasoning. The 'Never' option was included so that supplementary data from respondents who felt that judges' religious beliefs would not affect judging was excluded from any qualitative analysis.

Cross-tabs and non-parametric tests were used to see if there were any relationships between perceptions of frequency and respondents' area of legal practice, PQE, frequency of attendance at court or religious beliefs.

Area of Practice

Again, as Table 5.5 shows, there was consistency in the majority views in each subgroup. 59% and 64% of employment and family solicitors recorded that judges' religious beliefs occasionally affected judicial decision-making.⁶² Employment law specialists were more likely to say that judges' religious beliefs often affected judicial decision-making, although the difference was not that great (21% of employment compared to 13% of family law solicitors). In short, the views of both sets of practitioners were similar.

| Judges' religion affects judging: frequency | Employment | Family | Total |
|--|-------------------|---------------|--------------|
| Never | 1% | 0% | 1% |
| Rarely | 19% | 22% | 20% |
| Occasionally | 59% | 64% | 61% |
| Often | 21% | 13% | 18% |
| N | 76 | 45 | 121 |
| | 100% | 99% | 100% |

Table 5.5 Frequency with which judges' religious beliefs influences judging by area of practice [Source: Appendix 20a]

PQE

The cross-tabulated data regarding perceptions of frequency with which judges' religious beliefs influenced judicial decision-making according to respondents PQE presented a very mixed picture, with non-linear relationships across the PQE bands in respect of the 'Occasionally' and 'Rarely' response options (Table 5.6). To illustrate, one-third of respondents (39%) with 11-15 years PQE said that a judge's religious beliefs may occasionally affect judicial reasoning. Respondents with 16 or more years PQE were notably more likely to share this view – 66% of those with 16-20 and 66% of the most experienced respondents (those with 21+ years PQE) respectively. At the other end of the spectrum, the least experienced respondents were noticeably more likely than those in the 11-15 years PQE group to think that

⁶² The results of a Pearson's chi-square goodness-of-fit test are not reported because the assumption that there are at least 5 expected frequencies in each group of categorical variable was not met, even when the 'Often' and 'Always' categories were collapsed (after which 33% of cells still had an expected count of less than 5). This test is used to determine whether or not the instances of a number of categories occur equally frequently.

religion was occasionally an influencing factor – 54% of those with 0-5 years PQE and 53% of those with 6-10 years PQE respectively.

A similarly confusing relationship was seen in relation to the ‘Rarely’ responses. Respondents with 11-15 years PQE were most likely to think that judges’ religious beliefs would rarely affect judicial decision-making (31%), followed by the least experienced solicitors (0-5 years 25% and 6-10 years 21%). There was no marked difference between respondents with the least experience and the most experience.

| Judges’ religion affects judging: frequency | PQE | | | | | Total |
|---|-----------|------------|-------------|-------------|-----------|-------|
| | 0-5 years | 6-10 years | 11-15 years | 16-20 years | 21+ years | |
| Never | 4% | 0% | 0% | 0% | 0% | 1% |
| Rarely | 25% | 21% | 31% | 11% | 18% | 20% |
| Occasionally | 54% | 53% | 39% | 66% | 66% | 61% |
| Often | 18% | 26% | 31% | 11% | 15% | 18% |
| N | 28 | 19 | 13 | 27 | 34 | 121 |
| | 100% | 100% | 100% | 100% | 100% | 100% |

Table 5.6 Frequency with which judges’ religious beliefs influence judging by PQE [Source: Appendix 20b]

Frequency of attendance

Interestingly, akin to the barristers in part one of the study, respondents who attended court regularly were those most likely to say that religious beliefs were rarely a factor in judges’ decision-making – 24% compared to just 15% of those who attended less frequently. On the other hand, the proportion of the respondents in each of the two sub-groups who said that religious beliefs occasionally affected judging was almost identical (61% compared to 62% respectively) (Table 5.7).

| Judges’ religion affects judging: frequency | Frequently attend | Infrequently Attend | Total |
|---|-------------------|---------------------|-------|
| Never | 0% | 2% | 1% |
| Rarely | 24% | 15% | 24% |
| Occasionally | 61% | 62% | 59% |
| Often | 15% | 22% | 17% |
| N | 66 | 55 | 121 |
| | 100% | 100% | 100% |

Table 5.7 Frequency with which judges’ religious beliefs influence judging by frequency of attendance at court [Source: Appendix 20c]

Religious beliefs

An analysis of cross-tabulated data indicated the existence of weak to moderate relationships between the frequency with which judges’ religious beliefs were

perceived to influence decision-making and respondents' own religious beliefs (Table 5.8). Those in the group 'Christian' and 'Non-Christian' groups were 15% more likely to think that judges were often influenced by their personal religious beliefs than those in the 'Unaffiliated' group (25%, 25% and 5% respectively). On the other hand, those in the 'Non-Christian' group were more likely to think religion was occasionally a factor affecting how judges reach decisions (75%) compared to those under the 'Christian' group who were least likely to say this (58%). However, it is important to bear in mind that the 'Non-Christian' group was disproportionately small in number.

| Judges' religion affects judging: frequency | Christian | Non- Christian | Unaffiliated | Total |
|--|------------------|---------------------------|---------------------|--------------|
| Never | 1% | 0% | 0% | 1% |
| Rarely | 15% | 0% | 27% | 22% |
| Occasionally | 58% | 75% | 68% | 60% |
| Often | 25% | 25% | 5% | 18% |
| | N | 8 | 37 | 117 |
| | 72 | 100% | 100% | 100 |
| | | | | % |

Table 5.8 Frequency with which judges' religious beliefs influence judging by religious beliefs [Source: Appendix 20d]

The results of a Kruskal-Wallis H test indicated that there was a statistically significant difference between respondents' perceptions as to the frequency with which judges' religious beliefs affect judicial decision-making based on their religious beliefs: Christian (Mean rank = 62.89), Non-Christian (mean rank = 70.88) and Unaffiliated (mean rank = 48.86), $X^2(2) = 7.023$, $p = .030$. Subsequently, pairwise comparisons were performed using Dunn's (1964) procedure with a Bonferroni correction for multiple comparisons. This post hoc analysis revealed no statistically significant difference between the groups. The inference is that perceptions of the frequency with which judges' religion affects judging vary according to respondents' own faith, although there is no clear pattern as to how.

Thus, as regards perceptions of the frequency with which judges' religious beliefs influence judging, the study finds that most barristers felt that if, or for a minority when, a judge's faith impinged on his or her adjudication, this was limited so as to rarely affect only a narrow range of cases, typically those directly or indirectly

raising issues of moral, ethical and/or religious significance. Conversely, the findings from the SPQ indicate that the solicitors who positively correlated a judge's religion with judging perceived the impact of religious beliefs to be more frequent; approximately four-fifths of solicitors recorded an 'occasionally' or 'often' response to the question of how often judges' religious beliefs might influence judicial reasoning in cases where the law was unsettled or discretion was exercised. There are no immediately obvious reasons as to why there is such polarity in perceptions of frequency amongst two groups of lawyers who work in the same legal areas, particularly given that there were no discernible differences in the views of lawyers detected based on how often they appeared in court.

It is interesting to find that neither the qualitative data from part one nor the statistical analysis of SPQ responses in part two revealed any noteworthy differences in lawyers' perceptions of the frequency with which judges' faith was thought to affect judicial decision-making based on their area of practice, years of experience or the frequency of their attendance at court. The most likely explanation for this homogeneity of views amongst (as opposed to between) the two lawyer groups is related to their common legal training and work environment. On the other hand, there was a statistically significant difference based on solicitors' own religious beliefs. Given the uneven group sizes amongst the group and the results of the post hoc test, the only inference that can safely be drawn here is that solicitors' views about the frequency with which judges' religion plays a role in judging vary according to their own religious beliefs.

Overall, it is concluded that there is no clear consensus amongst the lawyers in relation to this first aspect of how judges' faith affects judging,

5.4.3.2 Nature of influence

The differences between the two lawyer groups above are further demonstrated in their differing interpretations of the way in which judges' religion was felt to impinge upon the process of judging.

Barristers

As discussed in 5.3 above, in conversations about the interplay between judges' personal factors and judging, a common theme to emerge was that interviewees felt

that any influence on judicial decision-making was typically manifested in an unconscious manner. Whilst the interviewees were not expressly asked about the way in which they felt that a judge's faith would impact on judging, it was clear from the conversations with barristers that the nature of influence that judges' religious beliefs was perceived to have on adjudication was similarly confined to that which was unconscious only, if at all.

Solicitors

Solicitors who agreed with the view that judges' religious beliefs affect judicial reasoning (in response to SPQ Q16) were asked directly how they thought they did so (SPQ Q18). As shown in Figure 5.5, it is interesting to find that just over half of the respondents (54%) thought that judicial decision-making was subject to both conscious and unconscious influences from judges' religious beliefs. Just over a third of respondents (36%) perceived the nature of influence more restrictively to that which was unconscious only. A small number of respondents (10%) said that they did not know the way in which judges' religious beliefs affected such cases.

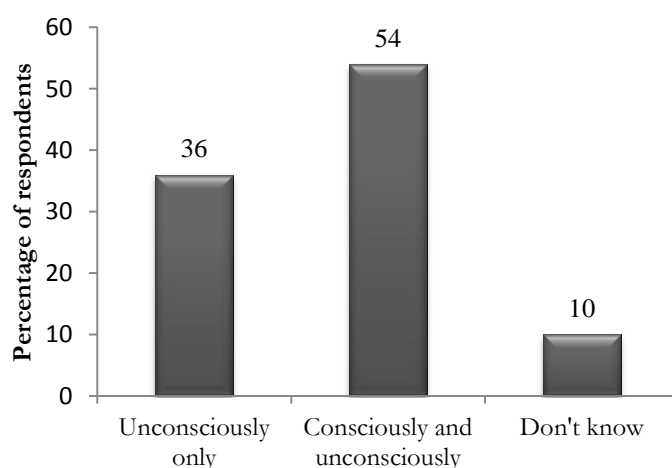


Figure 5.5 Solicitor perceptions of how judges' religious beliefs influence judicial decision-making (n=129) [Source: Appendix 21]

Once again, the SPQ data was interrogated to see whether there were any significant differences between solicitors' responses according to their area of practice, PQE, frequency of attendance at court and religious beliefs. Tables 5.9 to 5.12 show there was considerable homogeneity between respondents regardless of their demographic

characteristics. However, two observations are of note. First, employment practitioners were 15% more likely than family lawyers to report that judges' religious beliefs both consciously and unconsciously affect judging – 59% compared to 44% (Table 5.9) - although the difference was not found to be statistically significant. Second, it is worth noting the variance between respondents who were coded as Christian, non-Christian or Unaffiliated. Specifically, those in the non-Christian group were more likely to report that judges' religious beliefs influence judicial decision-making consciously *and* unconsciously than those in the other two groups (71% compared to 57% (Christian) and 48% (unaffiliated) (Table 5.12). However, once again this difference was not statistically significant. Given the small sample size for the non-Christian group, caution must be exercised when interpreting these results. What is clear, however, is that the solicitors who were coded under the two religious categories (Christian and non-Christian) were more likely than those in the non-religious group (Unaffiliated) to positively associate judges' religious beliefs with conscious and unconscious influence.

| Judges' religion affects judging: nature | Employment | Family | Total |
|---|-------------------|---------------|--------------|
| Consciously only | 0% | 0% | 0% |
| Unconsciously only | 33% | 42% | 36% |
| Consciously & unconsciously | 59% | 44% | 54% |
| Don't know | 7% | 15% | 10% |
| N | 81 | 48 | 129 |
| | 100% | 99% | 100% |

Table 5.9 Ways in which judges' religious beliefs influence judging by area of practice [Source: Appendix 22a]

| Judges' religion affects judging: nature | 0-5 years | 6-10 years | 11-15 years | 16-20 years | 21+ years | Total |
|---|------------------|-------------------|--------------------|--------------------|------------------|--------------|
| Consciously only | 0% | 0% | 0% | 0% | 0% | 0% |
| Unconsciously only | 25% | 32% | 21% | 47% | 44% | 36% |
| Consciously & unconsciously | 64% | 63% | 64% | 38% | 50% | 54% |
| Don't know | 11% | 5% | 14% | 16% | 6% | 10% |
| N | 28 | 19 | 14 | 32 | 36 | 100 |
| | 100 | 100 | 100 | 100 | 100 | % |
| | % | % | % | % | % | |

Table 5.10 Ways in which judges' religious beliefs influence judging by PQE [Source: Appendix 22b]

| Judges' religion affects judging: nature | Frequently attend | Infrequently Attend | Total |
|--|-------------------|---------------------|-------|
| Consciously only | 0% | 0% | 0% |
| Unconsciously only | 36% | 38% | 36% |
| Consciously & unconsciously | 51% | 57% | 54% |
| Don't know | 14% | 5% | 10% |
| N | 73 | 56 | 129 |
| | 100% | 100% | 100% |

Table 5.11 Ways in which judges' religious beliefs influence judging by frequency of attendance [Source: Appendix 22c]

| Judges' religion affects judging: nature | Christian | Non-Christian | Unaffiliated | Total |
|--|-----------|---------------|--------------|-------|
| Consciously only | 0% | 0% | 0% | 0% |
| Unconsciously only | 37% | 29% | 34% | 35% |
| Consciously & unconsciously | 57% | 71% | 48% | 54% |
| Don't know | 7% | 0% | 18% | 10% |
| N | 74 | 7 | 44 | 125 |

Table 5.12 Ways in which judges' religious beliefs influence judging by religion [Source: Appendix 22d]

Reconciling conscious and unconscious influences with the requirement for impartiality

In section 5.3 it was argued that framing the nature of influence as unconscious/implicit as opposed to conscious/explicit provides a means by which those lawyers who think judges' personal factors are a salient factor in judging can reconcile two seemingly incompatible claims: (1) non-legal actors play a role in judging, and (2) judges are impartial and objective arbiters of law. The argument is that judges who are oblivious to how their faith influences judging cannot be criticised for something about which they are unaware. The same argument can be advanced in relation to unconscious religious bias. Thus, to find that lawyers were broadly in agreement as regards the presence of unconscious religious influences in a judicial context is unexpected, both for the reason outlined above, and in light of previous research which highlights the role played by implicit bias in professional and personal decision-making, discussed in 5.3.

In fact the judiciary in the UK already recognise that judges can be susceptible to unconscious bias during the process of adjudication. The Judicial College's Equal Treatment Bench Book alerts judges to the dangers of unconscious prejudice.⁶³ Moreover, the meaning and effects of unconscious bias are explored in the

⁶³ Judicial College, *Equal Treatment Bench Book* 2013, 2.30.

College's national Business of Judging seminars,⁶⁴ during which judges are informed about IATs and are invited to take an IAT online (although they are not compelled to do so).⁶⁵ And in a recent lecture, Lord Neuberger voiced his concerns about the presence of unconscious bias in the courts:

...I worry about unconscious bias. And I worry about it in myself as much as in anyone else; because it is extremely hard to know if you suffer from it, and if so, in what way and what you can do about it.⁶⁶

Like those who took part in this study, Lord Neuberger does not think that unconscious bias in judging is surprising nor gives rise to alarm. However, amidst the growing body of literature regarding the effects of implicit bias on decision-making behaviour, Lord Neuberger has called for the topic of 'sub-conscious bias' to take a more prominent position on the judicial training agenda.⁶⁷ The findings from this study, together with the work of other scholars (such as Cahill-O'Callaghan on tacit personal values)⁶⁸ lends strong support to the call for further training in this area; after all, it is only by being trained to identify such bias that attempts can be made to mitigate against it, regardless of context.⁶⁹

Perhaps more significant in the present study is to find that a majority of solicitors felt that the religious beliefs of a judge may also consciously enter the decisional process. One possible explanation may relate to the differences in the role of the two different sets of lawyers who took part in this study. It is well known that judges typically come from a barrister background, especially those in the higher courts.⁷⁰ Therefore, as argued elsewhere in this thesis, barristers' might not wish to do or say anything to undermine the authority and prestige of an institution to which they aspire.

⁶⁴ Judicial College Prospectus 2014-2015.

⁶⁵ Judges are directed to the Project Implicit website <https://implicit.harvard.edu/implicit/> accessed 28 July 2016.

⁶⁶ Lord Neuberger, *Rainbow Lecture on Diversity* (House of Commons, 12 March 2014) <<https://www.supremecourt.uk/docs/speech-140312.pdf>> accessed 2 February 2015.

⁶⁷ Lord Neuberger, 'Judge not, that ye be not judged': judging judicial decision-making' (FA Mann Lecture 2015) <https://www.supremecourt.uk/docs/speech-150129.pdf> accessed 2 February 2015.

⁶⁸ Rachel Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity' (2015) 35 LS 1.

⁶⁹ *ibid.*

⁷⁰ Judicial Diversity Statistics for 2017 find that two-thirds of courts judges are from a barrister background <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/judicial-diversity-statistics-2017-1.pdf> accessed 21 December 2017.

Again, the different methods and questions used to elicit lawyers' responses to the question of how judges' faith is perceived to influence judging cannot be dismissed as a cause of discrepant views between lawyer groups. In particular, as discussed in Chapter 4, evidence shows that the respondents to online self-administered questionnaires (such as the SPQ) are more likely to give open and honest responses to sensitive questions compared to methods involving the presence of an interviewer.⁷¹ In addition, such questionnaires have also been found to be less susceptible to social desirability bias.⁷² As Tourangeau explains, this form of bias occurs when individuals 'distort their answers to avoid presenting themselves in an unfavourable light'.⁷³ This may explain why it is only the anonymous respondents to the SPQ who said that judges' religious beliefs consciously influence judicial decision-making. In hindsight, it would have been useful to conduct a barrister perceptions questionnaire (using similar questions to those in the SPQ) to (1) gain views from a wider section of the Bar community about the relationship between religious beliefs and judging and (2) compare in-group responses by reference to the data collection method used.

What is clear is that rhetoric in which the influence of judges' personal factors (including religious beliefs) is described as unconsciously, rather than consciously, manifested is ostensibly easier to square with notions of judicial impartiality and objectivity. This raises the question of whether the solicitor responses about the presence of *conscious* religious influences should give cause for concern in the judicial context. The argument is that if judges consciously allow their religious beliefs to affect how a case is decided in some cases, this surely introduces an unwelcome element of subjectivity into a process which demands that only the relevant facts and the law form the basis of a judge's decision. However, reflecting the argument advanced by Lucy as to the possibility of impartiality in an adjudicative context (discussed in Chapter 2), here it is suggested that the presence of conscious religious influence in judicial decision-making is reconcilable with the requirement for a judge to adjudicate free from bias, albeit in a limited sense.

⁷¹ Frauke Kreuter, Stanley Presser and Roger Tourangeau, 'Social Desirability Bias in CATI, IVR and Web Surveys: The effects of mode and question sensitivity' (2008) 72 Public Opin Q 847.

⁷² Andrea Frick, M Bachtiger and Ulf Rieps, 'Financial Incentives, Personal Information and Drop-Out in Online Studies' in Ulf Rieps, and Michael Bosnjak (eds), *Dimensions of Internet Science* (Lengerich 2001).

⁷³ Roger Tourangeau, Lance Rips and Kenneth Raskinski, *The Psychology of Survey Response* (CUP 2000) 257.

Take the following example. Judge X is a devout Christian. She subscribes to the core doctrines of Christianity which she manifests through various practices in her daily life. She is allocated to an employment case involving the issue of indirect religious discrimination. The claimant, also a devout Christian, sincerely believes that Sabbatarianism is a core tenet of her Christian faith. Her employer, having previously been able to accommodate her requirement not to work on Sundays now requires the claimant to do so. The claimant refuses to do so because of her Christian beliefs. She resigns and brings a claim for indirect religious discrimination.⁷⁴

Clearly, in a case like this, regardless of whether or not Judge X shares the claimant's views about Sunday working, it is entirely reasonable to expect that Judge X will consciously draw upon her religious knowledge to understand and be duly sensitive to the arguments advanced by the claimant. At the same time, Judge X must be mindful of the need to be, and be seen to be impartial and not allow her own beliefs to affect the way she decides the case.

In this scenario, Judge X's own faith may be seen to consciously influence the decisional process in two ways. First, as alluded to above, it provides one means by which she can better understand the relevant religious issues. Indeed, it would seem odd not to draw upon such personal knowledge and experience. In Lucy's words, to do so would mean that "The beings judging us would know nothing at all of what standard human lives look and feel like or, knowing something, would completely ignore it".⁷⁵ Second, having formed an opinion, Judge X engages in the conscious, reasoned and deliberative 'System 2' phase of decision-making (discussed in section 2.3.4) and enters into a process of self-reflection and, if necessary, self-correction. This provides the means by which non-legal considerations are prevented from surreptitiously affecting the judgment. However, a note of caution is due here. As previously mentioned, there is a risk that by making a concerted effort to ensure that she does not, or is not seen to favour her fellow religious adherent, Judge X may lean too far in the other direction. It will be recalled that Heise and Sisk offer this as one explanation for why they found judges' faith to be negatively correlated with case outcomes in their study of the influence of various factors on the Free Exercise and religious accommodation claim decisions by the federal court of appeals and district

⁷⁴ These facts are based on the case of *Mba v London Borough of Merton* [2013] EWCA Civ 1562 (CA).

⁷⁵ William Lucy, 'The Possibility of Impartiality' (2003) 25 OJLS 13.

court judges in the US.⁷⁶ Indeed, that self-conscious efforts to guard against partiality could potentially result in reverse ‘religious nepotism’ is implicit in the following comments from two of the senior barristers who participated in this study:⁷⁷

...not just in the jury’s perspective but in other areas of law, I think the suspicion is that judges who share the characteristic of the claimant or the victim are potentially less sympathetic than those who do not. (B5)

I’ve come in front of a Jewish judge, in fact two Jewish judges, and, in a way, I think both of them bent over backwards to be perhaps fairer to the right wing parties than if they hadn’t been Jewish. So, in a way you are almost going the other way from what your actual beliefs are. Do you see what I mean? (B13)

Thus, what serves as an important constraint on judging - judicial self-reflection and, where necessary, moderation – may, in and of itself, be a potential source of bias. There is no easy solution here. However, as suggested above, highlighting how conscious and unconscious biases affect judges’ judgment, and providing judges with effective strategies to alleviate the influence of such biases delivered under the judicial education and training programme is a good starting point.

That said, the argument above raises the question of whether it is actually meaningful (or indeed possible) to distinguish between conscious and unconscious influences that affect judicial decision-making. Drawing upon insights from psychology, particularly the dual process theory by Kahneman discussed in Chapter 2,⁷⁸ there is strong support for the view that the use of conscious-unconscious paradigm presents a false dichotomy because all human behaviour emanates from a combination of both these processes.⁷⁹ More specifically, it could be argued that the division of the nature of influence of judges’ religious beliefs (and other personal factors) into conscious and unconscious is artificial in a judicial context because, as seen in Chapter 2, the law on judicial bias makes no distinction between judicial reasoning which is consciously or unconsciously biased; what matters is whether

⁷⁶ Michael Heise and Gregory Sisk, ‘Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts’ (2013) Cornell Law Faculty Publications, Paper 915.

⁷⁷ Gregory Sisk, Michael Heise and Andrew Morriss, ‘Searching for the Soul of Judicial Decision Making: An Empirical Study of Religious Freedom Cases’ (2004) 65 Ohio St L J 491, 584.

⁷⁸ Daniel Kahneman and Amos Tversky, *Choice, Values and Frames* (CUP 2000).

⁷⁹ Roy Baumeister, EJ Masicampo and Kathleen Vohs, ‘Do Conscious Thoughts Cause Behavior?’ [2011] 62 Ann Rev Psychol 331.

there is actual or apparent judicial bias.⁸⁰ Whilst there is a natural alignment between apparent bias and conduct that is manifested subliminally, there is no reason to suppose that actual bias is the product of conscious forces only. Of course, the problem is the evidential burden in proving that unconscious influences have actually tainted an aspect of the decisional process.

5.4.3.3 Extent of impact

Barristers

Irrespective of whether they felt that there was a definite or potential relationship between a judge's faith and judging, a constant feature in the interviews with barristers was that the extent of influence of religious beliefs was narrowly confined to that affecting judicial approach rather than case outcomes. The analysis of the interview data revealed three main ways in which interviewees perceived judicial approach to be influenced by judges' religious beliefs: the nature of judicial interventions, the degree of sensitivity afforded to litigants, and, indirectly, how judges reacted to advocates.

Judicial interventions

One of the principal ways in which it was felt that judges' religious beliefs could affect judicial approach related to the nature of their questions and judicial interventions during proceedings. Judicial questions were sometimes more challenging, particularly if a judge's religious persuasion was the same as that of a litigant, although this was not thought to have a bearing on the final judgment:

I don't think... the ultimate outcome has been influenced by the religious views of the judge, but I do think that they course that the trial has taken, and the types of question and the areas where I've been pushed harder to explain something might have been.

⁸⁰ The conscious-unconscious distinction is relevant in relation to the sanctions meted out in response to an allegation or finding of bias. A judge who allows his or her decision to be consciously influenced by personal factors such as religion may be found guilty of serious misconduct and permanently disqualified from acting as a judge. In comparison, apparent bias may result in judicial recusal or disqualification from the case in question.

Where there was no such commonality, judicial questioning could be rather different. It is suggested that, particularly in cases in which judges are perceived to lack knowledge about minority faiths or new religious movements, it might reasonably be expected that a judge would be keen to seek clarification on specific matters about which he or she was unfamiliar or lacked sufficient understanding, so long as to do so was relevant and within the jurisdiction of the courts.⁸¹ In fact, the Judicial College gives guidance as to how judges can best demonstrate an understanding of difference and the problems faced by those from disadvantaged groups including adherents of minority faith groups; this includes the use of timely and sensitive judicial intervention as a means by which to ensure that parties from such groups can fully participate in proceedings.⁸² However, some barristers reported that a lack of judicial knowledge and understanding, particularly in cases involving minority religious beliefs, occasionally meant that judges were less inclined to ask faith-related questions during a trial, even though they thought it might be pertinent for judges to make such enquiries.⁸³ Thus, for example, B16 remarked:

So where you have clients who have religious beliefs that the judge just doesn't understand – whether it's because they are Scientologists or serious Muslims or committed Christians or whatever – it is as if the judge's don't understand the beliefs, they'll not bother to take the time to dispel that understanding...

Here, the perception is that some judges appear apathetic when issues of a religious nature, particularly those with which a judge is not generally conversant, arise. Of course, it could be argued that a lack of interest results from the fact that a judge feels confident that he or she has already been presented with sufficient information upon which to make a decision or that the issues are not relevant to the case in

⁸¹ 'The courts do not adjudicate on the truth of religious beliefs or the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment'. *Khaira v Shergill* [2014] UKSC 33 at para 45.

⁸² Judicial College Equal Treatment Bench Book Section 2,28.

⁸³ The Judicial College's Equal Treatment Bench Book states that 'Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice; it is for judicial office-holders to ensure they are properly informed and aware of such matters, both in general and where he need arises in a specific case', Judicial College, Equal Treatment Bench Book, Judicial College (2013) <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf> accessed 27 January 2015.

question. However, an alternative interpretation is that in some cases, judges are reluctant to ask questions about religious matters which may or may not be relevant, in order to avoid the risk of becoming engaged in religiously sensitive matters which may or may not be justiciable. In other words, it may be more convenient for difficult or particularly sensitive issues which are not pivotal in a case to be brushed to one side or, as the extract from B8 suggests below, to simply assign them to a generic category of ‘cultural differences’:

Things like religion play a part... because you could have your archetypal stuffy, white, middle class judge who just doesn’t understand, doesn’t want to understand, and just says: “Oh fine. Okay. Well, its cultural differences. Okay. Is that how you do it wherever you’re from? That’s fine.

What is particularly interesting to note is that the above accounts are based on the interviewee having had, or assuming, prior knowledge of a judge’s religious background in such cases.

Judicial sensitivity

In the extracts above it was suggested that occasionally some judges appear apathetic about, or are insensitive to, cases involving less familiar religious issues. Other barristers felt that religious difference had a more positive effect on judicial approach. Specifically, in cases where minority religions were involved, it was said that judges often appeared more sensitive to the parties than might otherwise be the case. This view is very clearly captured in the following extract from B5, who also sat as part-time judge at the time of being interviewed:

I think that judges who don’t share for example a religious background with the witness or the individual are particularly keen to be sensitive to them and are therefore prepared to take additional steps to make that person comfortable, which a judge from their own background may not feel is necessary.

Illustrating this point, another senior barrister (and part-time judge) described how a panel of judges who they had appeared before had ‘bent over backwards’ to allow a Rastafarian client to wear religious dress in court. The willingness of today’s judges to accommodate such religious differences was said to be in stark contrast with the

approach taken by judges in the past: “I mean things have changed quite a bit. In the old days, a Rastafarian, particularly if he wouldn’t take his hat off in a hearing, would have got the judges into real hysterics”. For B19, another senior employment barrister, such sensitivity stretched beyond the courtroom and was said to be symptomatic of, and a response to a wider ‘culture of taking offence’ and an ‘age of hypersensitivity’, particularly post 9/11. Thus, referring to an employment discrimination case to which they had been instructed, again related to the issue of religious dress, B19 opined:

I am going to do a headscarf case, a Muslim woman headscarf case. Now everybody is walking on eggshells in that case, even though they may not have to...the employer is bending over backwards to ensure that no offence is given or can be taken to be given. So we are living in a very hyper-sensitive time and I think that cuts across the board [to] men and women in the judiciary.

Interestingly, B2 was similarly sceptical as to whether all religious minority groups were treated with the same level of sensitivity:

I don’t find it translates across the board. To put it bluntly, I don’t think that if they find themselves with a Buddhist witness in front of them they are as concerned as with certain other religions which they get very concerned about offending. I’ll give you an example of a female Muslim witness who is wearing the full hijab or niqaab or whatever – they almost seem very stressed out by that and do try very hard to... yeah... tread on eggshells.

The views of B19 and B2 were supported by anecdotal evidence from B5. Following a high profile case in which Murphy J had to consider whether a female Muslim defendant was entitled to wear the niqaab during Crown Court proceedings,⁸⁴ B5 recounted:

I was talking to a [senior colleague] who said there had been some Egyptian judges visiting while this [case] was going on and they were really surprised that this was a problem because in Egypt the woman would have just been told to take it [the niqaab] off. Their perception was that the judges in this country

⁸⁴ *R v. D(R)* [2013] Eq LR 1034.

were being ultra-sensitive because they weren't themselves Muslim and therefore didn't put in context that wearing the niqab was not a tenet of the religion so much as a cultural decision that certain people in Muslim countries choose to do.

Whilst there has been a shift in judicial attitudes as regards religion over the last fifty years or so, judges may still be seen to have difficulty dealing with cases involving religiously sensitive issues. Thus, as the above extracts demonstrate, although the religious beliefs that give rise to a dispute may evolve, the sorts of religiously sensitive issues which judges have to grapple with remain the same regardless of the faith in question.

Advocacy strategy

Perhaps a less direct avenue by which judges' religious beliefs were perceived to have an effect on judicial approach was drawn from barristers' conversations about how much or little was known about individual judges' personal and professional backgrounds. Generally, interviewees said that their own approach in court varied according to which judge or tribunal was hearing a case. For example, B3 said:

Barristers talk to each other very openly about judges and the likelihood of them finding for them in a certain case once you know you are listed before somebody – it will obviously affect your negotiation strategy, your entire advocacy strategy ...

This raised the question of whether having prior knowledge about judges' religious beliefs influenced the approach taken by the advocate when representing their clients in court. Where barristers adapt their submissions and skeleton arguments with the intention of trying to appeal to, inter alia, the known religious sensitivities of a judge, the implication would appear to be that such judicial personal factors impact upon judicial approach, albeit perhaps in an oblique way. The data shows that barristers' responses were mixed. For example, B5 said that foreknowledge about a judge's religious background had no bearing on how they presented cases in court:

In my [22+] years of practice or so, I've never felt in a position where you should alter the way in which you present a case because of the gender or the

religion or the sexual orientation of the judge concerned... I was in front of a [] judge recently [] who wears a turban... I don't know indeed if he is Sikh or Hindu, an Indian sub-continent background. But it wouldn't have occurred to me in a million years for that to have had any impact at all in the way I presented the case or, indeed, have any impact in the way he dealt with the case'

Clearly B5 was confident that, as skilled professional decision-makers, judges are not likely to be swayed by subtle attempts by advocates to curry their favour by exploiting known judicial personal factors. Having typically come from a background at the Bar, judges are fully alert to the possibility that advocates will occasionally employ such tactics in an effort to win a case. Of course, it could be argued that this view is unsurprising given that B5 sits as a part-time judge and may be keen to ensure that the reputation of, and the public's confidence in, the judiciary is protected. B15 took a slightly different approach:

It has to be part of your approach as an advocate to try and play on and emphasise those points that you think will carry the tribunal. And you're never going to do it, or shouldn't do it, being any good at it, in a crude way. You're not going to say 'Your Lordship, as a good Christian you will appreciate blah, blah, blah...'... But you are going to be acutely aware of that because there are ways in which you can shape and order and present evidence and submissions.

Initially, this extract appears to suggest that there may be some merit in attempts to appeal to a judge's known religious preferences. However, B15 went on to say that playing to such religious sensitivities would not have that great an impact on their argument:

If you gave me a sheet with the information about all the judges' protected characteristics, plus all the other things we've been talking about, of course I would look at it and think would it affect the way in which I did things? There would probably be fewer cases in which, as an advocate, it would make a material change to the way in which I presented the case but I would always want to know because you do don't you.

The findings suggest that having foreknowledge of judges' religious beliefs will not play a significant part in influencing advocacy strategy. From this it might reasonably be concluded that it is unlikely that judges will react or take kindly to attempts to appeal to factors outside of those directly relevant to a case. Indeed, the position is summed up neatly by B4, a part-time judge, who plainly stated, "I'm not impressed by it".

Plainly, most barristers felt that the nature of influence from judges' religious beliefs would be limited to that which affected judicial approach only. However, it should be noted that one interviewee, a senior barrister, appeared to think that the extent of impact was greater in scope than perceived by the majority, so as to affect case outcomes as well. Whilst the following represents a single viewpoint, it is no less significant or valid than those of the majority of interviewees. B9, a senior QC, opined that:

Your basic thesis, I think, is absolutely right, [judges'] religious views do colour judgments. They do have an important influence on the outcomes of cases but it is an area that is very poorly understood.

The reasons for why there is a lack of understanding as to the relationship between religion and judging were explored in Chapter 3. However if, as B9 thinks, religion does play a role in the adjudication process, understanding the nature of, and how this relationship is managed becomes all the more important.

Solicitors

In order to determine how the solicitors who felt that religion was a factor in judging perceived the extent to which judges' personal factors such as religious beliefs affected the decisional process, SPQ respondents were asked to rate their levels of agreement with three statements as shown in Table 5.13 below (SPQ Q13). Based on the barristers responses to the interviews in part one of the study, it was hypothesised that solicitors would be much more likely to think that judges' personal factors affect judicial approach compared to case outcomes.

| STATEMENT | N | Agree | Neither agree nor disagree | Disagree |
|---|-----|-------|----------------------------|----------|
| 1 I think that a judge's personal factors affect judicial approach | 136 | 74% | 16% | 10% |
| 2 I think that a judge's personal factors affect case outcomes | 136 | 63% | 20% | 17% |

Table 5.13 Extent of impact of judges' personal factors on judging [Source: Appendix 23 and 24]

The findings show that solicitors did not confine the scope of influence of personal factors (including religion) as narrowly as the barrister in part one. Whilst a large majority (74%) felt that judicial approach would be affected, a significant proportion of respondents also felt that judges' personal factors including religion would affect case outcomes (63%).

However, an important note of caution should be made here. In the SPQ solicitors were asked about the impact of personal factors on judicial approach and outcome rather than that of religious beliefs more specifically. Thus, no direct comparison can be drawn between barristers and solicitors using the quantitative findings from the SPQ. Any future survey instrument should explicitly ask about the extent of influence that judges' religious beliefs are perceived to have on judging for comparative purposes.

Instead, the supplementary open-text comments from solicitors are used to gain an understanding of their perceptions of how judges' religious beliefs affect judging. The data suggests that, like the barristers in part one, SPQ respondents were less convinced that a judge's religion, as a constituent of his or her personal factors, had the same effect on judicial decision-making as other factors.. The following examples are illustrative:

The outcome of a case will be affected by which Judge we get but this is not due to religious factors (S252E)

There is very occasional situation where a decision is made in favour of an individual which appears to be due to a personal sympathy for the individual rather than other "personal factors" such as commonalities of age disability religion or belief" (S55)

These are marginal calls - they follow the law, and the law does constrain what they can and cannot do, but personal factors such as religion influence how they think.

A false dichotomy?

In the previous sections, it was suggested that a consequence of understanding the influence of judges' religious beliefs on judicial decision-making as an infrequent and unconscious process was that it helped to dilute any controversy that ensues from a view of judging that so much as hints at the possibility that judicial decision-making rests on anything other than the evidence and the law. Here it is argued that understanding the impact of religious beliefs as that affecting judicial approach only has a similar effect. Arguably, implicit in the view that judges' religious beliefs affect judicial approach only is that such a narrow construction presents little or no threat to judicial impartiality; it is only where a causal relationship is established between judges' religious beliefs and case outcome that judicial impartiality may be seen to be compromised.⁸⁵ However, guidance to judicial conduct makes clear that impartiality applies not only to decisional outcomes, but also to the process by which a decision is made.⁸⁶ Accordingly, confining the perceived nature of influence solely to judicial approach should not obviate the possibility of accusations of religious bias, nor does it necessarily serve to maintain trust and confidence in the judiciary.

Moorhead et al.'s review of existing literature as to what factors are related to public and participants (hereafter 'participants') levels of satisfaction with the courts and tribunals in England and Wales is insightful here.⁸⁷ Whilst much of the evidence reviewed is based on studies in the criminal sphere, it is interesting to note that the authors found participants' perceptions about *both* the fairness of court or tribunal procedures *and* outcomes are an important driver in participants' satisfaction with the justice system. If this is found to be the case in other areas of law such as in

⁸⁵ It is suggested that this approach parallels that used by participants in conversations about the effect of subjective influences on judicial decision-making where it was posited that because unconscious bias was considered to be less insidious than conscious bias, framing the nature of influence in terms of a conscious-unconscious dichotomy served as a convenient means by which participants could discuss the impact of judges' personal factors on judicial decision-making in a way least suggestive of judicial impropriety or partiality.

⁸⁶ Judges' Council, Guide to Judicial Conduct 2013, Section 1.4.

⁸⁷ Richard Moorhead, Mark Sefton and Lesley Scanlan, 'Just satisfaction? What drives public and participant satisfaction with courts and tribunals' Ministry of Justice Research Series 5/08 March 2008.

employment and family cases, distinguishing between the impact of judges' religious beliefs (and other factors) on judicial approach or outcome is not particularly helpful when discussing the role played by non-legal factors in adjudication. An associated difficulty with the approach-outcome dichotomy is the difficult question of whether the influence of religious beliefs on judicial approach can actually be extracted from the judgment stage of the judicial decision-making in the way that many of the lawyers in this study suggest. Taking questions from the bench during a trial as an example, if it is assumed that a judges' religious beliefs can affect the number and types of questions a judge asks but will not have any bearing on outcome, what is the rationale for making such enquiries? It could reasonably be argued that this fact finding stage of the decision-making process will have had some affect the way a judge interprets the facts and it is this which is perforce key in determining a case outcome. Linked to this, the use of the approach-outcome dichotomy is difficult to reconcile with the framing of judicial subjectivity within an unconscious paradigm. If the view that judicial approach and not outcome is subject to unconscious religious bias is applied consistently, at some point during the course of judicial reasoning it requires the decision-maker to somehow, consciously or unconsciously, extirpate biases including those about which he or she may be unaware.

5.4.4 Discussion

It is unsurprising that the majority of lawyers who took part in this study perceive there to be a melange of judicial personal factors that influence decision-making, particularly in cases where the law is unclear, unsettled or where judicial discretion is exercised. It accords with the widely acknowledged view that the craft of judging is far too complex an activity to be understood by sole reference to the facts of a case and the evidence alone. However, that the findings relating to perceptions of the nexus between judges' religious beliefs and judging are more nebulous is perhaps surprising given that in both parts of this study, judicial personal factors were considered by many lawyers to encompass an individual's belief system of which, for many people, religious beliefs may form part. It is difficult to explain this result. However, several non-mutually exclusive reasons are advanced as to why lawyers were more diffident when asked specifically about the relationship between religion and judging compared to that of personal factors and judging.

The most obvious reason is simply that many lawyers do not know the religious backgrounds of members of the judiciary. This raises the question of whether more should be known about the personal backgrounds of members of the judiciary, particularly those at the top tier of the judicial hierarchy, who have responsibility for adjudicating some of the most morally, socially, politically or ethically important issues of the day. This important question is considered in more detail in the next chapter. A second possible reason is that some lawyers have not considered this issue and/or have no experience of such so feel unqualified or are unable to offer any insight about if, and how, a judge's faith influences the judicial reasoning process, perhaps other than to conclude that it is not a matter of much concern (if any) in the courts. A third reason may be that lawyers are simply reluctant to comment on others' faith in the belief that such matters are sensitive, private and irrelevant for discussion in a public forum. Indeed, it is unsurprising to find that those working in an environment in which confidentiality and integrity are essential elements, acknowledge and respect the importance of judges' personal autonomy (in the present context being a judge's choice not to share their religious views and/or discuss them in public). Fourthly, as previously suggested, such uncertainty may be evidence of a more general unwillingness to criticise, or be accused of criticising the judiciary so as to avoid controversy. In this sense, lawyers can be said to display the 'habitus of a conventional lawyer including a respect for the hierarchy and values of legal office.'⁸⁸ Fifthly, it highlights the difficulty to be had in trying to distinguish the impact of an individual's personal religious values from their general worldview (Chapter 2). Thus, whilst some lawyers may be happy to make assumptions about the nexus between faith and judging, others appear loathe to draw conclusions when they find it difficult, observationally, to disentangle religious values from wider personal factors/values.

5.5 Concluding remarks

This chapter has looked specifically at lawyers' perceptions of the relationship between judges' religious beliefs and judicial decision-making, in order to directly

⁸⁸ Sommerlad uses this description in relation to the sample in her study of women judges in England and Wales. See Hilary Sommerlad, 'A Study of Women Judges in England Wales' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing 2013).

address the research question: Do lawyers perceive that a judge's religious beliefs influence his or her individual judicial decision-making, and if so how? In doing so, it has sought to make a unique and significant contribution to a growing body of literature which examines the factors that influence the process of judging.

Conclusions relating to differences between the responses of barristers and solicitors are found within the sections of this chapter. As to the broader findings, this part of the empirical investigation lends limited support for the first limb of the thesis which posits that judges' religious beliefs inevitably influence judging, particularly in cases involving religiously sensitive issues (set out in Chapter 1.1). It is limited in so far as most lawyers acknowledge that religion is one of a multitude of judicial background factors that *potentially* affect judicial decision-making in these cases, but are more equivocal when it comes to the claim that religious beliefs *inevitably* inform the decisional process. In relation to *how* judges' religion influences judging, this investigation has shown that there is no overwhelming consensus among lawyers as regards the frequency, nature and extent to which judges' faith affect adjudication. However, what is clear from the evidence is that religion, particularly compared to the role played by other legal and non-legal factors, is perceived to have a very marginal role in the process of judging at most, and is definitely not thought to be a consistent factor in judicial decision-making.

When it comes to the second limb of the thesis, the evidence suggests that most lawyers are confident that, even if judges' religious factors are at play, legal and non-legal constraints such as the doctrine of precedent, judicial training and professionalism act as a strong curb on the influence that they might otherwise have on individual judicial decision-making. This partly explains why the lawyers who took part in this study seemed unfazed by the claim that, sometimes, there may be a religious dimension to the process of judging and why they were adamant that judicial decision-making is highly unlikely to be tainted by religious bias. Overall, the overwhelming majority of lawyers expressed high praise for judges and the quality of their judicial decision-making, particularly, but not exclusively, in relation to the higher courts.

In the next chapter, lawyers' perceptions of whether, and if so how, judges' religious beliefs affect adjudication are explored in a more abstract way. Lawyers' views as to whether judges lack an understanding of, and sensitivity to religious issues are examined to see whether there is any evidence of an anti-religious bias in the judiciary. It considers whether there is any support for increasing religious diversity in the judiciary and asks whether it would be useful to know more about judges' religious backgrounds, particularly in relation to those in the higher courts, so as to be better able to examine whether correlations exist between religion and other judicial personal factors and adjudication.

CHAPTER 6

DEPERSONALISATION AND OPEN JUSTICE

In the previous chapter it was seen that most lawyers who took part in this study perceive judicial decision-making to be *potentially* vulnerable to unconscious influence from a judge's religious beliefs. Crucially, however, if or when a judge's religious views play a role in the process of judging, the general view of these lawyers is that any impact on judicial determinations is or will be minimal at best, and, crucially, does not give rise to concerns about religious bias in judicial decision-making. This chapter builds upon these findings by looking at three further areas relating specifically to the nexus between judges' faith and judging. Drawing on Lord Carey's criticism of the judiciary in *McFarlane v. Relate Avon Ltd*,¹ section 6.1 considers whether claims that the judiciary are insensitive to, and lack an understanding of matters relating to religion (in other words implying that the courts are anti-religious) have any credibility. This discussion is extended in section 6.2 by exploring lawyers' views about having specialist judges to hear cases involving religion. The findings show that, for the most part, lawyers do not support calls for specialist courts to deal with matters of religion because judges are considered to be sufficiently capable of handling such cases within the current legal structure, from an informed and impartial perspective. Section 6.3 looks at whether there is support for increasing religious diversity in the judiciary. Section 6.4 considers lawyers' attitudes towards, and the case for knowing more about, judges' personal factors such as religion. The reasons for these enquiries, specifically their relevance to the overall thesis, are further explained in each of the related sections.

6.1 Criticism of judicial reasoning in religious rights cases

In Chapter 5 it was found that the lawyers in this study are confident that judges demonstrate high levels of professionalism, and are fully aware of the need to

¹ [2010] EWCA Civ 771.

ensure that personal religious convictions (and other personal factors) do not cloud their judgments, particularly (but not exclusively) in cases involving religiously sensitive issues. In Chapter 5.4 it was also found that whilst some lawyers think that judges occasionally appear overly sensitive to religious issues, or conversely do not enquire about such issues where it would be pertinent to do so, there is little evidence in the empirical data that this affects judicial outcomes in a way that gives cause for concern. However, others have been more critical of the way judges handle cases involving religion, such as in relation to the restrictive approach taken in relation to what constitutes a manifestation of religion or belief under Article 9 of the ECHR, or in cases where religious rights clash with, and are said to be ‘trumped’ by, other protected equality or human rights claims. Critics argue that, in such cases, judicial decisions reflect and perpetuate an anti-religious (often anti-Christian) bias in public life.²

One proponent of this view is Lord Carey. In Chapter 1.3 it will be recalled that, in *McFarlane*,³ Lord Carey directly accused senior members of the judiciary of having ‘a disparaging attitude towards Christian faith and its values’,⁴ and of being unaware of basic issues relating to Christianity.⁵ He went on to imply that if judges do not grasp the key tenets of Christianity, then those from minority faiths have even less reason to be confident that judges dealing with disputes involving minority religions will have the requisite knowledge and understanding to adjudicate fairly.⁶ In the same vein, other Christian commentators warn about what is seen as the increasing marginalisation of faith in public life, including the secular courts. Again in response to the Court of Appeal judgment in *McFarlane*, former Archbishop of Rochester, Michael Nazir-Ali, accused Laws LJ of having ‘driven a coach and horses through the ancient association of the Christian faith with the constitutional and legal basis of British society’, and expressed his concerns that such judgments are a sign that ‘we are entering an absolutist era where there is no room for believers’.⁷ Trigg similarly maligns judges in the British courts who, he asserts, make ‘questionable assertions about the epistemological status of religion, and its place in the constitution’, and

² Alice Donald, *Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?* (2013) 2 OJLR 50, 52.

³ *McFarlane* (n1).

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ Michael Nazir-Ali, ‘The legal threat to our legal tradition’ *The Telegraph* (London 30 April 2010).

criticises them for not giving religious freedom due weight in a hierarchy of rights.⁸ And in what he describes as ‘the new orthodoxy’, Rivers posits that the equality agenda means that churches and religious associations now ‘find themselves boxed in... benefiting only from narrow exceptions narrowly interpreted by an unsympathetic judiciary’.⁹

There is also empirical evidence, albeit very limited, that the decisions of the domestic courts are perceived by some as indicative of judges’ failure to adjudicate such cases with a requisite level of understanding. Take, for example, the ‘Clearing the Ground Inquiry’ conducted by the Christians in Parliament which was set up in response to high profile judgments involving religious freedom such as *Ladele*,¹⁰ *McFarlane*¹¹ and *Eweida*.¹² Having sought evidence from Christian organisations, groups and individuals, the inquiry found that there was ‘a deep-seated and widespread lack of understanding about the nature and outworking of religious belief’, reflected in, inter alia, the judgments that courts issue.¹³ Whilst the Inquiry stressed that this did not mean that Christianity was badly treated, the frequency and nature of cases involving Christians was said to indicate ‘a narrowing of the space for the articulation, expression and demonstration of Christian belief’.¹⁴ However, as Donald finds in her research relating to the understanding of religion or belief in equality and human rights in a domestic context, because individuals’ perceptions are often influenced by a few high profile case-specific legal judgments, claims that there is a general trend of anti-religious (particularly anti-Christian) discrimination and marginalisation of faith in the public sphere lack an evidential base.¹⁵

Nor are such views universal amongst all Christian groups. Like the majority of the lawyers in this study, others perceive that judges do apply the law impartially, without any hint of religious bias. The contention that judges misunderstand religion

⁸ Roger Trigg *Equality freedom and religion* (OUP 2012) 154.

⁹ Julian Rivers, ‘Law, religion and gender equality’ (2007) 9 *Ecc LJ* 24, 52.

¹⁰ *Ladele v London Borough of Islington and Liberty* [2009] *EWCA Civ* 1357.

¹¹ *McFarlane* (n1).

¹² *Eweida v British Airways plc* [2010] *EWCA Civ* 80.

¹³ Christians in Parliament, *Clearing the Ground Inquiry Preliminary Report into the freedom of Christians in the UK*, February 2012 < www.eauk.org/current-affairs/publications/clearing-the-ground.cfm > accessed 12 March 2016.

¹⁴ *ibid* 5.

¹⁵ Alice Donald, ‘*Religion or belief, equality and human rights in England and Wales*’ Equality and Human Rights Commission Research report 84 (2012) 115.

is said to rest on two false propositions.¹⁶ First, the assumption that there is only one Christian view; one in which Christianity is traditionally privileged, irrespective of the interests and needs of others. Second, a belief that action linked to religion should in some way exempt religious adherents from certain legal requirements. So who is right? Is there evidence in recent case-law to support the claim that the judiciary are insensitive to, or demonstrate a lack of understanding of matters involving religion as Lord Carey and other critics assert?

Looking for evidence of religious illiteracy

As the examples below will demonstrate, at first blush, the outcomes and reasoning in some of the recent high profile cases on religious discrimination may well lead an observer to conclude that religious claimants, particularly Christians, are getting a raw deal in the British courts.

A core belief?

One area of criticism relates to judicial pronouncements as to whether a religious belief is or is not a ‘core’ part of an individual’s faith i.e. to the substantive-content approach of the courts. Until the recent ECtHR decision in *Eweida*,¹⁷ this issue was important in deciding whether conduct was a manifestation of religion (or belief) and so fell under the protection of Article 9 of the ECHR or merely motivated by a religion (or belief), in which case it did not qualify.¹⁸ If an individual’s manifestation of their religious beliefs was not core to their religion, the restriction of their manifestation was more likely to be proportionate than a restriction of core beliefs.¹⁹ Accordingly, it was less likely that a claim of religious discrimination would succeed than if those beliefs were a core part of the claimant’s faith. To illustrate, in *Ladele*,²⁰ the Court of Appeal stated (notably without explanation) that Ladele’s view of marriage (the belief in the union of one man and one woman for life to the exclusion of all others) ‘was not a core part of her religion’.²¹ This, it is

¹⁶ Ekklesia, ‘Misleading claims about discrimination against Christians’ (1 March 2011) www.ekklesia.co.uk/node/14235 accessed 15 June 2016.

¹⁷ *Eweida v UK* (2013) 57 EHRR 8 [82]. The ECtHR ruled that so long as there was a sufficiently close and direct link between the conduct and belief there was likely to be a manifestation of religion.

¹⁸ *Arrowsmith v UK* (1981) 3 EHRR 218.

¹⁹ Lucy Vickers, *Religious Discrimination in the Workplace: An Emerging Hierarchy?* (2010) 12 Ecc LJ 280, 295.

²⁰ *Ladele* (n10).

²¹ *ibid* [52].

argued, demonstrates a fundamental misconception about Christian beliefs on marriage because for many Christians, a belief in the sanctity of marriage is central to their faith.²²

The case of *Mba v Merton BC* raises a similar point.²³ Mba, a Christian, worked as a care assistant at a children's home. Following a change of rota, Mba was required to work on some Sundays. She refused on the basis that it was contrary to her Christian beliefs. After resigning, Mba brought an unsuccessful claim alleging, inter alia, indirect religious discrimination contrary to EERBR, reg 3. The ET dismissed Mba's claims. Whilst the Council's requirement for staff to work on Sundays (the PCP) did put Mba at a disadvantage, the ET said that this was objectively justified because, among other reasons, 'the belief that Sunday should be a day of rest was not a core component of the Christian religion'.²⁴ The EAT acknowledged that the assertion that Mba's beliefs about Sunday working were not a core part of her faith might reasonably be seen by some as offensive if considered in isolation, but explained that it was justified in so far as it was important to the question of proportionality under EERBR reg 3(1)(b).²⁵ Specifically, the EAT said if there is a PCP which applies to a whole group, but only adversely affects a minority within the group, the PCP will carry less weight in the proportionality test than it would do if it affected everyone in the whole group.²⁶

On Appeal, the Court of Appeal agreed that the Council had not indirectly discriminated against Mba; her employer could not provide their services any other way than by requiring all staff to work on Sundays. However, the Court did find that the ET had erred in its assessment of how Christians as a group would have been affected by the PCP, and said it had given too much weight to whether or not Mba's belief in Sabbatarianism was a core component of the Christian faith.²⁷ Based on evidence, Kay LJ opined that 'for some Christians, working on Sundays was unacceptable' and that Mba's religious belief genuinely embraced that injunction.²⁸

²² George Carey, *We Don't Do God: The Marginalization of Public Faith* (Monarch Books 2012) 98.

²³ [2013] EWCA Civ 1562.

²⁴ *ibid*[8].

²⁵ *Mba v Mayor and Burgesses of the London Borough of Merton* UKEAT/0332/12SM 13 December 2012 [42].

²⁶ *ibid* [46].

²⁷ *Mba* (n23)17.

²⁸ *ibid* [18].

Moreover, he stated that it was not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage.²⁹ Elias and Vos LJ agreed but for different reasons. Whilst the question as to whether or not Mba's refusal to work on a Sunday was a core component of the Christian faith would be a legitimate enquiry if the case was considered independently of Article 9, when Article 9 was engaged (as it should have been in *Mba*), there was no need to establish group disadvantage and secondly, the question of whether her beliefs were core or not was irrelevant.³⁰

The issue of what is or is not a core belief was also considered in *Eweida*.³¹ Controversially, the court commented that there was no evidence that practising Christians considered the visible display of the cross to be a requirement of the Christian faith, a point on which Eweida herself agreed. However, Lord Carey has argued that a judgment which has the effect of compelling a Christian adherent *not* to wear a cross as an expression of religious faith (because it has been held by another not to be important) is to force them to deny their faith.³² That the ECtHR subsequently ruled that Eweida's right to manifest her religion had been violated on the basis that the domestic courts had failed to give sufficient weight to her desire to manifest her religious belief appears to add some weight to this view.³³

Critics also point out that the courts have been more willing to decide what constitutes a core belief in relation to Christianity compared to other religions.³⁴ For example, in *Eweida*, *Ladele* and *Mba*, the courts determined that each claimant's religious belief was not a core requirement of their Christian faith. However, Vickers argues that in the earlier case of *Begum* for example, the House of Lords accepted that the Muslim schoolgirl's wearing of the jilbab was a sincerely and strong held belief but did not specifically question whether or not it was a core belief. Similarly, in *R(Watkins-Singh) v The Governing Body of Aberdare Girls' High School*,³⁵ in which the issue was whether a school's refusal to allow a Sikh pupil to

²⁹ *ibid* [17].

³⁰ *ibid* [39] (Vos LJ), [31]-[34] (Elias LJ).

³¹ *Eweida* (n12).

³² Carey (n22) 98.

³³ cf. the ECtHR decisions in the three other cases heard at the same time: Chaplin, Ladele and McFarlane. *Eweida v UK* (2013) 57 EHRR 8.

³⁴ Vickers (n19).

³⁵ [2008] EWHC (Admin) 1865.

wear a kara bangle contravened the Race Relations Act 1976, the High Court upheld the claimants right to wear the kara, even though Sikhism did not require her to do so. Silber J explained that the threshold for showing the claimant had suffered a particular disadvantage was met where that person genuinely believed on reasonable grounds that wearing the kara was a matter of *exceptional* importance to her racial identity or religious belief and the wearing of the kara was shown objectively to be of *exceptional* importance to his or her religion or race, even if the wearing of the kara was not an actual requirement of that person's religion or race.³⁶ It can be seen that in part, the reasoning of Vos LJ and Elias LJ in *Mba* aligns with the approach in these earlier cases suggesting that questions as to what is or is not a core belief depend on the *facts* of the case rather than the faith at issue.

More generally, critics argue that decisions in which judges declare what is or is not a core aspect of religion demonstrates that the courts are increasing willing to pronounce on theological issues about which they may not understand and are outside the competence of the courts.³⁷ Of course, this overlooks the fact that, in many instances, judges will have received evidence about whether a belief is or is not a core belief to enable them to make an informed decision on such matters.

Importance of religion

Returning to *Ladele*, it is suggested that the Court of Appeal's comment that her employer's requirement to conduct same-sex ceremonies 'in no way prevented her from worshipping as she wished' elsewhere,³⁸ arguably shows a lack of understanding as to the important role that religion plays in some people's lives. The centrality of faith in the lives of many believers is perhaps best captured by Archbishop Sentamu who, commenting on what he sees as an intolerance and illiberality about faith in the workplace, has said: 'Asking someone to leave their belief in God at the door of the workplace is akin to asking them to remove their skin colour before coming into the office. Faith in God is not an add-on or an optional

³⁶ *ibid* [56B].

³⁷ Lord Carey, 'Doing God in a Land that doesn't exist', Weston-super-mare (21 March 2014) <www.glcarey.co.uk/Speeches/2014/DoingGod.html> accessed 16 October 2017.

³⁸ *Ladele* (n10) [52] (Lord Neuberger).

extra...'.³⁹ If an individual is free to hold religious beliefs, but is not permitted to act in accordance with those beliefs (other than exercising the right to resign), it could be argued that the right to religious freedom is impotent.

Choice

The courts have also been said to (mis)conceptualise religion and belief as being a matter of individual choice.⁴⁰ In *Ladele*, for example, Hambler posits that the courts cast Ladele as the protagonist, 'actively choosing to indulge her whims'.⁴¹ In suggesting that Ladele wanted to cherry-pick which duties she was prepared to carry out (based on her religious beliefs), the courts appear guilty of misunderstanding, undervaluing, or at worst, trivialising the place of religion in individual's lives. Again, a similar approach is found in *Eweida*.⁴² In his judgment, Sedley LJ distinguishes age, disability, gender reassignment, marriage and civil partnership, race, sex and sexual orientation, all of which he states are 'objective characteristics of individuals' from religion and belief which he states are solely matters of choice.⁴³ It is acknowledged that, for many, religion is a matter of choice; this right being recognised as a fundamental human right under ECHR, Article 9. Others, however, would assert that religion is not a matter of choice (at least not in practice). It is often deeply entrenched in cultural traditions. In this sense, Trigg suggests that religion is an identity acquired at birth.⁴⁴ Moreover, in some circumstances, changing one's faith could have profound consequences for an individual such as exclusion from their community. In these cases, whilst ultimately the individual has choice, exercising that choice may be far from straightforward. Furthermore, as Sirjav asks, can religion be said to be a matter of choice in cases where children lack capacity to have a view about their own religious upbringing (such as in the family cases considered in Chapter 2)?

³⁹ John Sentamu, 'The intolerance towards Christians in the public sector is an affront' *Mail Online* (London, 13 February 2009) <www.dailymail.co.uk/debate/article-1144163/JOHN-SENTAMU-The-intolerance-Christians-public-sector-affront.html> accessed 12 June 2012.

⁴⁰ Andrew Hambler, *Religious Expression in the Workplace and the Contested Role of Law* (Taylor and Francis 2014) 163.

⁴¹ *ibid.*

⁴² *Eweida* (n12).

⁴³ *ibid* 40.

⁴⁴ Trigg (n8) 42.

Discussion

The examples above provide some evidence as to why judges are seen by some to adjudicate religious rights claims without due respect and sensitivity. Whilst the Christian cases are considered from an essentially external viewpoint, the approach in *Begum* and *Watkins-Singh* indicates that, in some cases, the law is open to consider religious practices from an internal perspective in which the belief system and its importance to the religious adherent is considered from the claimant's own point of view.⁴⁵ That some Christians have reason to feel aggrieved is also a point acknowledged by Lady Hale.⁴⁶ She suggests that it is because Christian practice is less demanding than other religions (for example, in terms of requirements such as dress code and dietary requirements) that followers of other faiths may be perceived to be treated more sympathetically by the courts. However, the argument advanced here is that criticisms as to how judges adjudicate reflect a misunderstanding of the law and the legal reasoning underpinning facts-specific judgments. It is not that judges are anti-religious or religion-insensitive; rather, the crux of critics' complaints seems to be that the law does not accommodate (or arguably privilege) religious beliefs in the way that the religious rights claimants and critics would like. Whilst a discussion about whether religious beliefs should be accommodated in particular settings is beyond the scope of this thesis, vitally, if there was a duty of reasonable accommodation, it would not obviate the need for judges to enquire into whether an act actually constituted a manifestation of religion.⁴⁷

In any case, as many judgments relating to cases involving religiously sensitive matters demonstrate, judges make a concerted effort to ensure that they have understood the salient religious issues, particularly in cases involving minority religious rights. This often includes evaluations of expert evidence on theological matters (as the family cases discussed in Chapter 2 demonstrate). There is no reason to suppose that judges are any less competent in dealing with this evidence as they are when assessing expert evidence in relation to other issues.

⁴⁵ Christopher McCrudden, 'Religion, human rights, equality and the public sphere' [2011] 13 Ecc LJ 26, 31.

⁴⁶ Lady Hale, Religion and Sexual Orientation: The clash of equality rights, Comparative and Administrative Law Conference Yale Law School 7 March 2014.

⁴⁷ Bob Hepple and Tufyal Choudhury, 'Tackling religious discrimination: practical implications for policy-makers and legislators', (2001) Home Office Research Study 221, 53.

6.2 An alternative approach: Specialist panels for religious issues?

To build on the finding that most lawyers think judges' religious beliefs do not affect judicial decision-making (at least not in a way that gives cause for concern or calls into doubt the ability of judges to decide cases in a fair and impartial manner), lawyers were asked for their views about the merits or otherwise of convening a specialist panel of judges to hear cases involving religious issues. The rationale for this enquiry is simple. It is contended that a lack of endorsement for specialist religious tribunals may buttress the main findings in Chapter 5. On the other hand, for the minority of lawyers who felt that judges' religious beliefs have a more profound impact on judging, a lack of support may indicate that Lord Carey's proposed solution to this issue was considered inappropriate; that is, that the proposed cure is worse than the disease. Conversely, strong support for the establishment of 'religious courts'⁴⁸ might point to underlying concerns about the interplay between religion and decision-making which are not directly evident in lawyers' responses to the question of whether judges' religious beliefs affect judicial decision-making.

Rejecting the plea for 'religious judges'

Echoing Laws LJ's response to Lord Carey's witness statement in *McFarlane*, the analysis of the interviews and SPQ shows that the majority of lawyers in this study were against the idea of having specially convened courts to hear cases involving religious rights - all of the barristers who were interviewed and just over half of the solicitors who responded to the SPQ (55%) said that they were opposed to Lord Carey's plea for specialist courts. A quarter of the solicitors recorded a neutral response (26%), whilst one-fifth of the solicitors expressed support for such a panel (19%) (Figure 6.1).

⁴⁸ The term "religious courts" is used in Patrick Elias, 'Religious discrimination: conflicts and compromises' [2012] EOR 222.

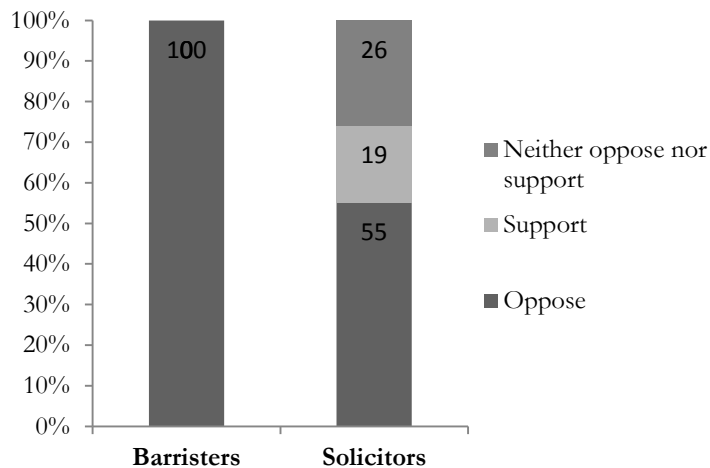


Figure 6.1 Lawyer responses as to whether they support or oppose the idea of a specialist panel of judges to hear cases involving religious rights SPQ Q23. Base sample Barristers n=18, Solicitors (n=136) [Source: Appendix 25]

The interview data and the qualitative comments from the SPQ (Q23) revealed three major reasons for why Lord Carey’s proposal was generally dismissed. These grounds were also pervasive in the responses of lawyers who recorded a neutral response, the views of whom were generally skewed towards a negative response.

Judges: professionalism

First, reflecting sentiments consistently expressed throughout the interviews and SPQ, the overarching view amongst most lawyers was that specially designated panels were wholly unnecessary because judges, especially those in the most senior ranks, possessed the requisite judicial intelligence and integrity to understand, be sympathetic to, and therefore adjudicate cases involving religious issues. As B5 pointed out, it would be very unlikely that an individual lacking these virtues would be sitting as a judge, particularly in the higher courts because ‘...the sort of sensitivity that you need to deal with those sorts of cases is the sort of level of sensitivity that people should have in the first place...’.

Further challenging Lord Carey’s assertion that judges are unaware of basic issues relating to Christianity and other faiths, many lawyers also expressed the view that religion was no more complex than other difficult issues that the courts had to deal with. The following extracts are illustrative:

...are religious factors such a specialist area that they require...or do you think our panel or our judiciary wouldn't be able to handle that? I don't know. I'm not sure it is a specialist area that you'd require specialist judges with that sort of knowledge. (B12)

I certainly do not think that you should be seeking out religious judges for cases of that sort because I don't think there is anything that is required that any suitably qualified judge should not be able to bring to the case. (B6)

Judges are perfectly capable of having an understanding of religious issues. You do not have to be of a particular faith to deal with a case (S121E)

On the odd occasion where a judge seemed ignorant of the interests and needs of a religious adherent or the religious issues raised in a case, a commonly shared view amongst the barristers was that it was the duty of the advocate to ensure that any matters about which the judge was uncertain were addressed. For B4, also a part-time judge, this meant that in cases where judges were accused of exercising poor judgment or demonstrating a lack of knowledge about the salient issues, it was the advocate and not the judge who was at fault. That said, as the following extract shows, this interviewee thought that this was a problem irrespective of the nature of the dispute being heard:

I think there are times when the judiciary get religion wrong....But that's not them, that's a failure of representation. It's one thing for them to say 'We've heard evidence and we reject it,' and I suppose there might be an argument, in particular cases, for asking the judiciary to treat evidence of religious practice as expert evidence, although they quite frequently do. But, it's quite another to say 'Well, they misunderstood the evidence because it wasn't presented to them properly'. I mean, that sort of thing can happen in any case.

Even though judicial understanding of religious matters was not considered to be an issue, it is noteworthy that lawyers felt that judicial training on different belief systems and associated issues was an important means by which to maintain and support judicial professionalism:

...all judges need that because they [religious issues] arise in all sorts of cases. You need to know whether the witness is more or less likely to be telling the

truth if he unwraps the Qur'an and takes it out of the bag or leaves it in the bag, you need to know whether you need to pack up early on a Friday afternoon so the [inaudible segment] Jew can go off and say his Sabbath prayers, you need to be aware of adjustments you might need to make to set hearing times when you've got Muslim witnesses who are on Ramadan. There are all sorts of areas that all judges need to be aware. (B16)

Likewise, B18 opined:

I see the issue there as being training and knowledge and awareness rather the judge's personal beliefs. ... We may even think it is suitable to have all judges trained in this way – to have a day-long training course... Maybe, we feel it should be part of the judicial training – that they should be made more religiously aware in the same way they are in other offences.

Opening a Pandora's Box

Another major reason for why lawyers were largely opposed to Lord Carey's call for religion-sensitive judges was based on the view that if a case could be made for the establishment of a specialist tribunal with the sole remit of hearing cases with a religious dimension, it would be only a matter of time before other groups would demand that their cases be heard by judges considered to have a heightened understanding of, and sensitivity towards specific personal circumstances relating to an individual claimant. To deny these groups the right to have their cases heard in specially constituted courts would be to unfairly privilege religion for no justifiable reason.

... if you had a specialist of panel of religious judges and, in other areas... well, the next thing is you might as well have a panel of gay judges and where does it stop? (B7)

'If this were to happen then specialist panels would have to be created for all protected characteristics... (S246E)

If one has 'religious judges' then you will also have to have 'sexual orientation judges', 'disability judges' and 'racial judges' etc. etc. Judges should judge all matters equally not just those which they have a sensitivity for. (S120F)

Here it is agreed that to create a system in which religious rights claimants are conferred an additional right to have their case heard by religious judges if their claims are unsuccessful in the lower courts has no place in a society which values equality for all; the idea is regressive and, arguably, it encourages the sort of inequality which human rights and equality laws aim to address.

It was not only socially disadvantaged and minority groups currently protected under the Equality Act 2010 that were thought to be those who would call for their own specialist courts; for some, this was just the thin end of the wedge. One SPQ respondent clearly felt that a dedicated court to hear religious rights claims would set a dangerous precedent in which the floodgates would be opened to all litigants who would essentially be able to judge-shop:

Should we also be considering having a specialist panel of judges with a proven sensitivity and understanding of what it is like to be in your 40s or of what it is like to be pregnant? Where should we stop? We are opening a can of worms. (S174E)

For those more amenable to the idea of specialist religious tribunals, such views might be seen as scaremongering. Moreover, the proposal for religiously sensitive judges to hear cases involving religious liberty, but not to have, say, gay judges hearing cases involving discrimination because of sexual orientation, might be defended on the basis that religion, by its very nature, deserves special treatment. For example, Trigg argues that the protection of religious rights and the nurturing of the principles of freedom and equality are ‘explicitly the product of a Christian vision’ in the UK.⁴⁹ The shift towards a secular democracy, he argues, is merely an ‘aberration’, at best a ‘fashion of the moment’; on this view, some elevated level of protection against religious discrimination is necessary.⁵⁰ It might also be argued that to select a tribunal panel member based on their specialist expertise or knowledge, including having a shared characteristic with a litigant, is not without precedent. Specifically, in sex and race discrimination in employment cases, selection of the lay members of a tribunal panel may be made so that at least one member of each sex (in sex discrimination claims), or at least one member with special experience of race

⁴⁹ Roger Trigg, *Free to Believe? Religious Freedom in a Liberal Society* (Theos 2010), 24 <www.theosthinktank.co.uk/research/2010/02/01/free-to-believe> last accessed 14 June 2017

⁵⁰ *ibid* 46.

relations (in race discrimination claims) is appointed.⁵¹ However, this is not a legal requirement and failure to appoint a lay member on these grounds does not affect the validity of the panel's composition.⁵² The justification for having non-legal members on tribunals is not only to draw upon their unique skills and expertise but also to ensure the judicial system is representative of those who come before the courts and of the wider society.⁵³

Other participants expressed concern that the establishment of a panel of judges qualified to hear religiously sensitive issues might also serve as a catalyst for the development of a pluralist court system in the UK. In other words, religious legal systems such as Sharia councils and the Jewish Beth Din courts could run parallel to the English legal system. B9 said:

If, by that [the suggestion to appoint a specially convened tribunal to hear religiously sensitive cases] you mean holding a particular religious view, I'm not sure that is the right way forward because you start to get the sense then of potentially religious courts. We are in a secular society when all is said and done.

Similarly emphasising that members of the judiciary sit as secular judges in a secular court system, B19 voiced concern that judges selected to hear religiously sensitive cases on the basis of their religion-sensitive credentials could fracture the current legal system:

The secular law is what it is and it holds primacy over all other belief systems so I don't see why there should be any special treatment... religion should just keep out and that's the end of it. Once you start making... you see, I recall people like Rowan Williams suggesting that perhaps Sharia law could play some part here... Absolutely no chance! We should not run parallel systems because that is the camel's nose...

⁵¹ This practice stems from an undertaking by the then Labour Government during the passage of Race Relations Bill, later to become the Race Relations Act 1976 (House of Lords, Lord Jacques, 15 October 1976 cc725).

⁵² *Habib v Elkington & Co Ltd* [1981] ICR 435.

⁵³ For an interesting insight as to the effect of panel composition on litigants perceptions of fairness in relation to race and ethnicity see Jane Aston, Darcy Hill and Nii Djan Tackey, 'The experience of claimants in race discrimination Employment Tribunal cases' (2006) DTI Employment Relations Research Series No. 55 .

Practical difficulties in convening a specialist panel

A third area of common concern amongst lawyers was the view that if even Lord Carey's calls for a specialist panel could be supported, the practicalities of establishing such a court would prove unduly problematic. Three key areas were identified.

Qualifying criteria

A frequent thread throughout the data was that it would be imperative for any judge seeking appointment to such a specialist panel to demonstrate an understanding of a range of religions and an appreciation of the effect that religious beliefs could have on an individual's daily living. This is illustrated in the following comment from S131E who, in response to SPQ Q24 which asked respondents to state the qualifying criteria they thought would be needed to sit on a specialist panel said: 'An understanding of faith issues and how they can impact the jobs we have to undertake', and 'Sympathy with the view that a decision based on conscience is not taken with a desire to discriminate or to prevent a particular outcome....' In theory, however, this requirement leaves the door open to all judges. Current Judicial Office guidance requires that all judicial office-holders must ensure that they are properly informed and aware of the cultures, beliefs and disadvantages of others, both in general and where the need arises in a specific case.⁵⁴ In other words, it is already taken as read that judges have or will acquire the necessary knowledge and understanding about different cultures and beliefs (including those of minority faith groups) to adjudicate cases in a fair and impartial way. Other concerns related to how an individual judge could demonstrate sufficient 'understanding and sensitivity' of religious issues for the purpose of selection to the panel. Some respondents thought that it would be sufficient for an applicant to simply show that they had undergone relevant training or already had experience of adjudicating religiously sensitive cases as illustrated in the following:

Appropriate training across the widest possible number of religions (as well, of course, as sufficient judicial experience) (S102E)

⁵⁴ Judicial College, Equal Treatment Bench Book, 2.31.

A background in dealing with sensitive religious cases, ie, possible (sic) sat on a Court of Appeal case which resulted in that case becoming a guidance case for the remainder of Judges... (S189E)

Another solicitor, S96E, felt that ‘an ability to understand and acknowledge the way in which personal upbringing has influenced an approach to these issues’ would be vital, whilst S137F was not alone in proposing ‘that being religious be a qualifying criteria’, albeit ‘efforts would need to be taken to ensure that the panel was balanced’.

Other issues that could arise include whether applicants would have to declare their own religious beliefs to qualify. If so, would those who exercised their right not to do so be barred from selection? Furthermore, would those with non-theistic religious beliefs qualify to sit? If the religious panel was limited to judges with theistic beliefs, this would undoubtedly lead to more discrimination claims because those having a lack of religion or religious beliefs would be subject to less favourable treatment than those with religious theistic beliefs. Of course, this would have time and cost implications for both the judiciary and the tax payer. It might reasonably be expected that religions falling within the legal definitions would be included in the qualifying criteria. On this basis, the panel would be pointless - all judges would be eligible because such definitions encompass having a lack of religion or religious belief. Of course, although ‘religious’ judges sitting on such a panel would still be required to adjudicate in a fair and impartial manner, might their decisions be more vulnerable to unconscious religious bias than judges with less strong religious convictions?

Composition

Even if a specialist ‘religion’ panel could be assembled, many lawyers in this study were unsure as to how such a panel should be composed. In his witness statement, Lord Carey said that he would support a panel comprised of judges of all faiths and denominations. However, this gives rise to a number of important questions. For example, who would allocate which ‘religious judges’ would sit on the panel in a given case? Would there be set protocols for panel composition in cases involving litigants from particular religious backgrounds? For example, could a Muslim claimant expect a Muslim judge to hear his or her case alongside panel members from other faiths? It is argued that this would be completely unworkable in many

instances due to the lack of religious diversity in the judiciary, particularly at the senior levels. Accordingly, would it be sufficient that a religious claimant had their case heard by a panel of judges which did not necessarily comprise a judge sharing the same or similar religious identity?

Returning to the floodgates argument considered above, there is also the question of what form a tribunal hearing a case involving a clash of rights, such as that between religious rights and the right not to be discriminated against because of sexual orientation, would take? On Lord Carey's proposal, the panel would comprise those who are sensitive to religious issues. However, there would be an equally strong argument for having representation from judges who are sensitive to, and understanding of the rights of the LGBT community to sit. Surely, a panel selected without reference to judicial religious background serves to minimise potential concerns about actual or apparent religious bias.

Identifying cases

Finally, as B4 commented, there is also the difficult issue of determining which cases would be heard by the tribunal because 'The other thing is you don't know when you are going to encounter it. I mean nobody screens the witnesses'. Some cases obviously engage religiously sensitive issues from the outset – religious discrimination cases or child cases involving disputes about religious upbringing being obvious examples. But what would happen in cases where religious issues came to the fore during proceedings? Would such cases have to be remitted from general court to the specialist tribunal? At the very least there would be major cost and time implications and, on this ground alone, the system would be unfeasible. Moreover, whilst judges sitting on a panel may well be versed in the religious issues, they may lack the breadth of legal knowledge to decide cases in areas of law in which they had no expertise. Put simply, the quality of decision-making could be compromised.

A counter view

Of the 19% of solicitors who supported the idea of a specialist court, it is perhaps significant that the majority (80%) identified as Christian, the remaining 20% being from the 'Unaffiliated' group (it will be recalled from Chapter 4 that this group

comprised those who identified as Atheist, Agnostic or No religion). Of those who made supplementary comments, all identified as Christian and were coded as infrequent attendees at court. Therefore, it is important to bear in mind the possible bias in these responses. It was clear from the SPQ data that these few respondents felt that, in some religiously sensitive cases, judges were failing to meet the grade in terms of the requisite level of religious literacy. Because of this, there was felt to be some merit in having a specialist court to hear religious rights cases. The following remarks clearly reflect a more widespread view, particularly among Christian groups, that religious views are being increasingly marginalised in the public square, including in the justice system:

Each religion does require particular understanding into their practices and not all judges necessarily have that level of knowledge. (S210E)

Issues of religious freedom are particularly sensitive in terms of having an understanding of the impact of such cases. A lack of understanding can often lead to a missing of points of significance in the circumstances of a case. (S135E)

And alluding to some of the recent clash of rights cases in an employment law context, S155E, opined:

I think that the religious discrimination laws have been watered down in practice by a series of decisions where religious views have been given inadequate weight when balancing factors. There is a strong suspicion that this is because the employment judges do not understand the sensitivities.

Once again, it is interesting to find that of all the lawyers who participated in this study, it was only solicitors who expressed support for a specialist panel. There was no pattern between groups according to their area of practice. The reason for the disparity between barristers and a minority of solicitors is unclear. Again, this may be attributable to the fact that a larger solicitor sample presented a greater opportunity for a wider range of opinion or be a result of the different methods used to collect and analyse data. It is also noteworthy that none of the solicitors from non-Christian backgrounds expressed support for a specialist panel. As this group only comprised a small number of respondents, the results must be treated

with caution. However, it can tentatively be questioned whether a lack of support for a specialist panel from those in the non-Christian group might be indicative of a view espoused by lawyers in Chapter 5, ie, that judges often appear more sensitive to the needs and interests of religious minority litigants than others (particularly Christian claimants) bringing religious rights claims.

Maintaining the status quo

There is no doubt as to the general tenor in the majority of lawyers' responses in the interviews and SPQ; that lawyers have confidence in, and respect for the quality of judicial decision-making in relation to cases involving religiously sensitive issues. Arguably, this reason alone renders the idea of a specialist panel to hear religious rights cases unnecessary; the message being 'if it ain't broke, don't fix it'. As seen above, there are other compelling reasons why, as Laws LJ opined in *McFarlane*, specialist courts would 'be deeply inimical to the public interest'.⁵⁵

Here it is argued that a panel of judges convened solely to hear religious rights and freedoms is difficult to reconcile with the requirement of impartiality (save perhaps where an effectively neutral panel is convened). It introduces a form of 'personalised' justice based on claimants' and judges' attributes which undermines the requirement for objectivity and impartiality in judging. This is not akin to other specialist courts and tribunals where, for example, family law magistrates or lay wing members on an employment tribunal are selected because they have special training and/or are expected to have a specialised perspective of the facts and evidence before them. The danger of having a religious panel with judges selected on the basis of their being religion-sensitive is that an element of claimant partiality is introduced. However, this does not mean that judges should not approach all religiously sensitive cases, like other difficult cases, without due regard to the religious beliefs and practices of those appearing before them.

6.3 Exploring lawyers' views about religious diversity in the judiciary

It is suggested that a further way to explore lawyers' views about the relationship between judges' religion and judicial decision-making is to assess views as to

⁵⁵ *McFarlane* (n1) 26.

whether there is a perceived need to promote and encourage greater religious diversity in the judiciary. The rationale for this argument is similar to that put forward in respect of other diversity strands. In relation to gender, for example, Hunter cites six basic reasons as to how and why improving gender diversity makes a difference to substantive decision-making.⁶⁰ Symbolic reasons include (1) increased democratic legitimacy, (2) the advancement of equality of opportunity, and (3) the provision of encouragement and active mentoring for women working in law. From a practical perspective, it is argued that (4) women judges may provide what Hunter describes as ‘a better courtroom experience’ for female litigants and witnesses;⁶¹ the assumption being that there will be less opportunity for gender bias and sexism in judicial decisions. Relatedly, it is argued that (5) the presence of women judges can have an ameliorative impact on judging from behind the scenes. As well as providing a different perspective, women judges ‘educate and civilise’ their male colleagues against gender bias and stereotyping for example.⁶² Finally, by virtue of their own life experiences and drawing upon Gilligan’s ‘different voice theory’, it is argued that (6) women bring a gendered sensibility to judging which can occasionally influence the way cases are decided.

In respect of religion, today’s judges sit as secular judges. However, a judiciary (particularly the senior ranks) that is perceived to largely comprise white male individuals brought up in households traditionally underpinned by Christian values may be thought to lack democratic legitimacy, particularly by those belonging to minority faith groups.⁶³ Some would argue that this is reinforced by the judiciary’s involvement in religious services such as the ‘Judges Service’ which, it has been claimed, at least gives the appearance of support for Christianity (and the Church of England in particular).⁶⁴ Whilst judges’ religious beliefs should have no bearing on how decisions are reached within a legal framework, a religiously diverse judiciary could instil or enhance public confidence in the perception that judges understand

⁶⁰ Rosemary Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-making’ [2015] 68 CLP 119.

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ Of course the irony here is that much of the criticism levelled at the judiciary is from Christians who feel that they are increasingly marginalised in an increasingly secular society.

⁶⁴ ‘NSS calls for end of Anglican judges’ services’ (National secular society, 28 September 2017) <http://www.secularism.org.uk/news/2017/09/nss-calls-for-end-of-anglican-judges-services> accessed 29 December 2017.

and/or are sensitive to faiths other than their own. So what do lawyers think about religious diversity in the judiciary?

Supporting judicial diversity: overview

Unsurprisingly, the data shows that both groups of lawyers overwhelmingly supported the need for greater diversity in the judiciary.

Barristers

Reflecting the trend in their previous responses, barristers were unanimous in their support for judicial diversity. Typical responses included: ‘I think it’s essential’ (B16), ‘I do agree with it very much’ (B13) and ‘I can answer that very quickly... a very, very strong yes’ (B10). The most common arguments in favour of a more diverse judiciary were those found in the diversity debate literature. As such, interviewees talked about the need for democratic legitimacy, equality of opportunity for those from minority and underrepresented backgrounds, and the effect of having judges from a wider range of backgrounds on the quality of judicial decision-making and justice.⁶⁵

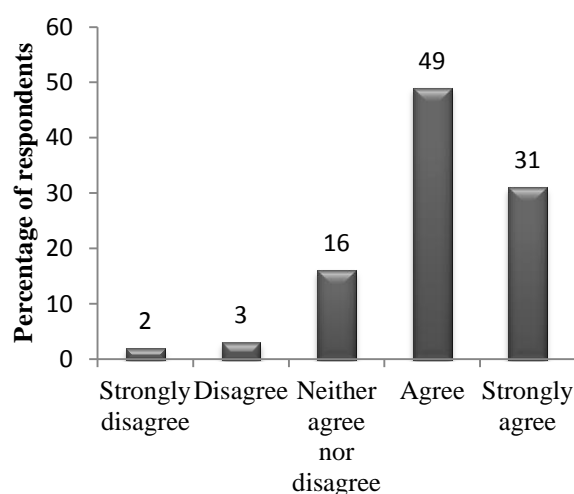
As an aside, it is worth noting that the majority of barristers were keen to emphasise that diversity should not come at the expense of merit and that using positive discrimination to accelerate progress to a more diverse judiciary was likely to hinder rather than enhance justice. This is neatly summed up in the following extract from B3: ‘I think the job of a judge is incredibly specialist. I think there is a huge difference between a good judge and a bad judge. It’s a difficult skill, and I think to just simply start recruiting people because they have diverse backgrounds would be an absolute disaster to the system.’

Solicitors

Figure 6.2 shows that, like the barristers in part one of the study, a significant majority of solicitors were in favour of having a judiciary with a more diverse background – approximately four-fifths (79%) of respondents, many of whom

⁶⁵ Geoffrey Bindman and Karon Monaghan ‘Judicial Diversity: Accelerating Change www.jac.judiciary.gov.uk/sites/default/files/sync/news/accelerating_change_finalrev_0.pdf accessed 27 August 2016.

expressed strong agreement . Just 5% of respondents disagreed that there was a need for greater diversity in the judiciary, and 16% recorded a neutral response.



SPQ Q25. Do you agree or disagree that there should be greater judicial diversity?

Figure 6.2 Solicitors' views about judicial diversity (n=134) [Source: Appendix 25]

The solicitors who agreed that there should be greater diversity gave similar reasons as the barristers above to justify their answers. The need for greater democratic legitimacy featured strongly, the following comments being typical: 'Judicial diversity is needed purely to show those accessing justice that all judges are not white or heterosexual' (S251E). S224E simply commented that 'I think the judiciary should reflect the makeup of society'. Making the same point, S64E made clear the importance of the role played by diversity in creating an equality of opportunity: 'This is primarily to ensure that individuals wishing to join the judiciary are not facing unreasonable barriers and also to provide an outward perception of the judicial system as not being unrepresentative'. That said, all of these respondents went on to say that these reasons were not sufficient to prioritise diversity over other basic requirements such as 'straight ability' (S245F) and a requirement for judges who were 'sensitive to, and understood the issues faced by litigants on a case-by-case basis' (S185E).

The few solicitors who recorded a neutral or negative response to SPQ Q25 justified their responses by suggesting that diversity arguments based on the need for democratic legitimacy were misleading because it was impossible to have a judiciary that reflected the populace in any meaningful way and that, in any case, the judiciary

operated successfully and in a way that meant that there was no need for it to reflect social diversity.

Again, reflecting the sentiments of the barristers, it is interesting that in many of the additional comments of the SPQ respondents, the pervading view was that it was essential that judges be appointed on merit and were not promoted as a result of positive discrimination based on specific background characteristics.

Addressing religious diversity in the judiciary

The widespread enthusiasm that punctuated lawyers' responses to the question of whether they supported greater diversity in the judiciary (in general) was not reflected in their responses to questions on the more narrow issue of whether specific judicial characteristics such as religious identity should be prioritised in diversity debates. The scope of diversity has recently been raised by Lord Neuberger who enunciated that diversity should go beyond 'familiar categories such as ethnic origin and gender' to include other areas such as social, educational and professional background.⁶⁶

Barristers

When asked about whether judicial diversity initiatives should extend beyond a relatively narrow focus on gender and ethnicity to encompass other diversity strands such as religion, the overarching view from those at the Bar was that the current approach to tackling a lack of diversity in the judiciary was generally sufficient and, with one exception discussed below, spotlighting other diversity strands was unnecessary for the time being. B16's view was typical:

We have not finished sorting out, and we are nowhere near sorting out gender equality. Our record on race is even worse...I think there is a great danger that if we try and sort out everything at once... I think those [gender and race] are serious social inequalities that we need to address.

That there is often an overlap between ethnic identity and religious identity meant that, for many interviewees, the current focus on increasing BAME judges would

⁶⁶Lord Neuberger, 'Keynote closing address to the International Council of Advocates and Barristers, World Bar Conference 2016' (16 April 2016) <www.supremecourt.uk/docs/speech-160416.pdf> accessed 19 April 2016.

indirectly bring about greater religious diversity in the judiciary. Thus, for example, B5 opined:

I think that the issue of a mix of religious groups will happen automatically with greater diversity in terms of ethnic mix. There is certainly, in my lifetime, never been a problem with Jewish judges or particular Christian denomination judges and, as the younger generation of very able Asian lawyers gets up to the stage where they are becoming judges, then the religious mix will expand to include judges from religious groups which come from south Asia and areas like that. And when you've got things like sexual orientation, I think that also will just work it out...

As indicated in B16's comment above and those below, there was one exception to the general view; socio-economic imbalance in the judiciary was identified as being an important area that had hitherto been neglected. For example, having said that the current narrow focus on gender and race diversity was misguided, and describing the current approach to improving judicial diversity as 'a total dead end', B9 went on to explain:

It's not the colour or the gender of the individual that's important in my view, background is, because its background that shapes views and perceptions of the individual judge.

Adopting a similar argument, B17 asserted:

I think the restriction to those two strands, it's not really a focus but a restriction to those two strands, is pretty short-sighted actually. I think it shows that in actual fact the political and wider ruling class are pretty stupid on these issues.

Like B9, B17 felt that diversity of background, particularly socio-economic status, was likely to be a more useful starting point by which to tackle the lack of judicial diversity than that which spotlighted gender and race.

It is of interest to this study that during the interviews there was no suggestion from the barristers that a more concerted effort to attract judicial candidates from minority religious backgrounds was necessary in order to improve judging or

justice. In harmony with the general tenor of the interviews, this suggests that the interplay between judges’ religious beliefs and judicial decision-making is not a source of concern to the barristers who took part in this study.

Solicitors

Solicitors were not specifically asked about whether they felt having a more religiously diverse judiciary was important. Instead, a matrix question was used to explore respondent views as to which diversity strands, including religion, were perceived to be most important in a judicial context. Specifically, in SPQ Q26 respondents were asked whether they felt that the narrow focus of judicial diversity initiatives (typically the focus is on gender and BAME) should be broader so to include any of the following characteristics: age; disability; gender re-assignment; sexual orientation; social class; political beliefs; and importantly religious beliefs.⁶⁷ Responses are presented in Figure 6.3 below.

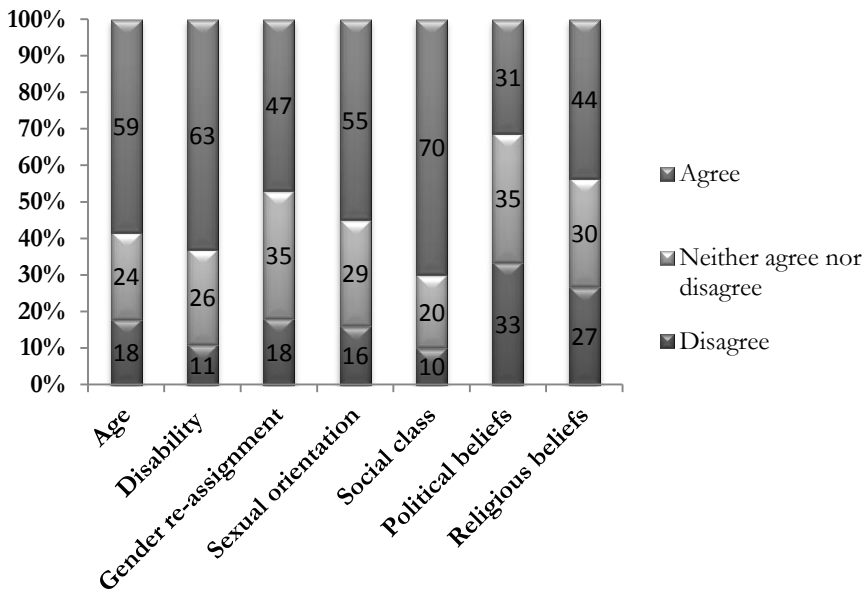


Figure 6.3 Solicitors’ views about extending the focus of judicial diversity initiatives
 Base sample: Age, Disability and Social class (n=106), Sexual orientation Gender-reassignment, Political beliefs and Religious beliefs (n=105) [Source: Appendix 27]

⁶⁷ An illustration of the limited focus of initiatives to improve judicial diversity is seen in the JAC’s equal merit provision policy which provides that where two or more persons are judged to be of equal merit and where under-representation of gender or race can be demonstrated, the JAC can consider applying the equal merit provision for the purpose of increasing diversity, Crime and Courts Act 2013.

Of the options listed in SPQ Q26, social class attracted the highest number of positive responses – 70% of respondents agreed that the focus of diversity initiatives should be extended to include social class, presumably in order to encourage those from less rather than more socially advantaged backgrounds to the judiciary. Disability, age and sexual orientation also ranked highly, each attracting the support of more than half of respondents in the sample – 63%, 59% and 55% respectively.

Notably fewer respondents agreed that the focus of diversity initiatives should be extended to the remaining characteristics. 47% of respondents felt that gender-reassignment should be included. A similar proportion agreed that religious beliefs should be included (44%), whilst significantly fewer respondents thought that the focus should extend to political beliefs (31%). Ranking based on levels of disagreement were similar to those relating to agreement. Responses in the ‘Neither agree nor disagree’ category were not insignificant; anything between one-fifth and approximately one-third of respondents recorded a neutral response to each of the characteristics listed in SPQ Q26.

Discussion

If there are concerns amongst lawyers about judges being insensitive to, or lacking an understanding of matters of faith in a way that affects judicial decision-making, this might be reflected in a desire to promote and encourage greater religious diversity in the same way that gender and BAME have been fore fronted in judicial diversity initiatives.⁶⁸ However, the findings from this study suggest that the majority of lawyers do not consider this to be necessary.

6.4 Remaining blind to judges’ faith

An alternative way to explore lawyers’ perceptions of the nexus between judges’ religion and judicial decision-making is to see whether lawyers think that more should be known about judges personal backgrounds, including their religion.

⁶⁸ *ibid.*

Barristers

Most barristers were strongly opposed to the view that a judge should be required to disclose his or her religious affiliation upon taking judicial office. For most interviewees, judges' religious beliefs were a personal matter.⁶⁹ On this construction, there is an assumption that because a judge's religion ought to be an irrelevant factor in how judicial duties are discharged there is no legitimate basis upon which judges should be required to declare their religious beliefs. The same argument can be advanced in relation to other judicial personal factors. Of course, the corollary of this is that if judges' religious beliefs (and other characteristics) are shown to influence judicial decision-making, and so can be said to impinge on the public sphere, there is a case to be advanced in support of disclosure. Whilst many of the barristers acceded to the possibility that judging *may* be affected by unconscious religious bias, the perceptions by many that any influence on judging would, at worst, be so slight as to be insignificant, outweighed any argument in support of disclosure. This view is implicit in the following comment from B5:

We shouldn't, as a matter of routine, be informed of what they [judges' religious beliefs] are because... two reasons. One, they are private but, more importantly, I just don't think there is a problem in this country with religious bias or even religious views affecting judges...certainly from my own personal experience, it's just not an issue...

Interviewees also pointed out that if litigants were able to ascertain the religious sensitivities of a judge, it would open the door to claims of judicial bias. This could, at the very least, delay or frustrate court proceedings. Thus, cautioning against a requirement for judges to declare their religious background B16 said:

I think the danger, if we start saying that information ought to be all in the public domain is that people will start saying 'Now I've got that information I ought to be able to do something with it' and the 'something to do with it' is to turn around and say to the judge 'you can't hear this case because your personal beliefs make it entirely appropriate for you to do so.'

⁶⁹ An individual has an absolute right to hold internal thoughts and beliefs in private, in the 'forum internum' under the ECHR, art 9(1).

And similarly citing the risk of claims of bias as a defence for why it was preferable to not to know too much about the backgrounds of individual judges, B8 reflected:

I think it's better that judges have this slight detachment from opening themselves up, not a detachment from reality, but from opening themselves up because, if you kind of bare yourself, there is always going to be a proportion of people who are going to seek to take advantage of that. These people [the judges] are meant to be interpreters of law at low level, and makers of law at a higher level, or I suppose benders of law at a higher level, and I think it is probably better that they are able to do that without thinking at the back of it: 'Well, is someone going to think I've only done this because I'm an atheist or because I am a Christian or because I am Jew or whatever...

There is some evidence to support such concerns. For example, it was seen in Chapter 1 that Cooke J faced strong criticism that his known conservative Christian beliefs may have influenced the length of sentence he handed down to the defendant in *R v Sarah Louise Catt*.⁷⁰ Likewise, one interviewee questioned whether former High Court Judge Sir Paul Coleridge would have been subject to as much criticism when discussing his views on traditional marriage if his own religious (Christian) views were not already widely known. Sir Paul Coleridge received a formal warning from the JCIO on the basis that his interviews and articles on the decline of marriage were 'incompatible with his judicial responsibilities and therefore amounted to judicial misconduct'.⁷¹ B16 explained that 'once he had done it the Judicial Complaints Office were just bombarded because every litigant who lost in front of him said "I lost because he didn't like my morality". So, you see what happens if you stick your head above the parapet and make those kinds of judgments known'.

Another barrister felt that any requirement for a judge to disclose their religion upon judicial appointment would also discourage people from applying for judicial office for fear of later being accused of bias.

⁷⁰ [2013] EWCA Crim 1187.

⁷¹ JCIO, *Statement from the Judicial Conduct and Investigations Office* (OJC 58/13 2013).

Solicitors

Solicitors were not asked directly whether they felt that individual judges' religion should be a matter of public record. They were asked for their views on the more general question of whether it would be useful to know more about the personal backgrounds of the judges hearing their clients' cases. As Figure 6.4 shows, views were very mixed. Two-fifths of respondents agreed that it would be useful (40%), approximately one quarter neither agreed nor disagreed (23%) and just over one third of solicitors disagreed (37%).

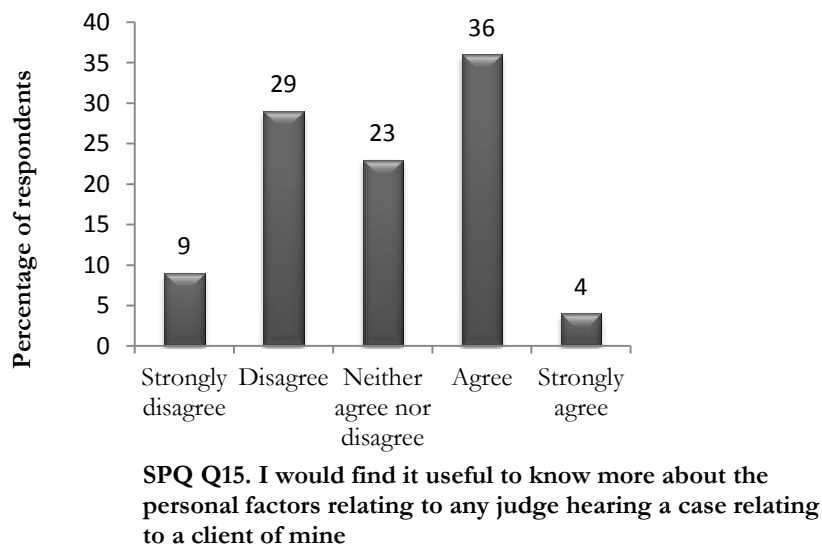


Figure 6.4 Views about knowing more about judicial personal factors (n=137) [Source: Appendix 28]

The most common explanation for why solicitors said it would be useful to know more about judicial backgrounds was that it would improve their own case presentation and help them manage their client's expectations more effectively. This view is clearly captured by S144F who explained that: 'It would be better for clients to have more certainty and for us as solicitors to be better equipped to provide a better level of service'.

There were several emergent themes in the responses of those who were opposed to the idea of knowing more about individual judges. Reflecting the views of some of the barristers considered above, the most basic reason was that judicial personal factors were irrelevant to, and had an insignificant impact on, judicial outcomes:

‘The impact of judges’ personal factors is never sufficiently significant to require prior knowledge or more information’ (S136E). This was frequently attributed to judges’ professionalism: ‘It should be irrelevant and I consider many judges try very hard for justice to be blind and applied equally.’ (S195F)

Like the barristers, many solicitors said that the personal affairs of a judge were simply a private matter. Some expressed concern transparency as to judicial personal backgrounds would amount to an infringement of an individual’s right to privacy. For example:

Personal factors are, by definition, personal and likely to be of a sensitive nature. It would not necessarily be appropriate for that information to be shared. (S54E)

Others felt that access to background information about judges would be inimical to justice; it would threaten the basic principles of judicial independence and impartiality and foster a culture of suspicion which in turn could undermine trust and confidence in the judiciary:

Judges are supposed to be neutral and independent. If their personal factors were known more than they already are, justice may not only not be done but not seen to be done. (S77E)

Personal factors are part of life and any degree of transparency would be oppressive for judges and of no practical value – it would never be right to vet judges for each case and so the information would have no added value.

For S83E, lifting the lid on judicial backgrounds could even ‘jeopardise important decisions, current and past’. Along similar lines, S59F argued that knowing more about judges could ‘lead to less objectivity from lawyers and, as suggested in the following extracts, could weaken an otherwise good case:

I would probably be interested in the personal factors of the judge but knowing them would probably make me over-emphasise that aspect of preparation rather than focusing on the strengths of my case overall. (S52E)

This would risk the possibility of trying to play to an audience based upon stereotypes and prejudices which would be unhelpful in a judicial process.
(S91E)

If people knew more the way in which a case is presented would deliberately try to work the angle based on that knowledge. Its best we don't know.
(S250E)

As the following extract illustrates, even if judicial background information was available, it was felt that it would be of little use when trying to predict case outcomes because it was impossible to predict how judicial reasoning would be affected:

It is hard to predict the effect of the knowledge on the Judge's view. For example, if I know my client has the disability as the judge I would ask myself – would a judge have more or less sympathy for an individual who claims not to be able to attend work because of the same disability when the Judge can attend on a daily basis? A similarity might make the Judge less rather than more sympathetic. More likely however the Judge would disregard altogether.
(S55E)

For S226F, the argument was rather less complicated. Knowing more about judicial background was of little use because judges' behaviour, like that of all humans, was inherently unpredictable.

The easiest to read and best known Judge will behave differently if her dog has just been put down and I wouldn't expect her to advertise the fact.

Discussion

The study findings thus far indicate that lawyers overwhelmingly perceive that judges' personal factors play a part in judicial decision-making when judicial discretion exists and when the area of law lends itself to value-judgment. There is less certainty about the role played by a judge's religious convictions, although most lawyers acknowledge that religious values may play a part in the decisional process, particularly in cases where judicial discretion is exercised and where religiously sensitive issues are involved. For this reason, it was anticipated that lawyers would

react positively to the suggestion that it would be useful to know more about judges' personal backgrounds and views. In fact, as seen above, the findings suggest that a majority of the lawyers in this study were not receptive to this idea for a variety of reasons. As discussed on Chapter 3.2, such attitudes reflect a strong tradition in which the anonymity of judges has been considered vital in order to maintain public confidence in the proper administration of justice. As Lord Neuberger explains:

...one of the advantages of the UK justice system has been that individual judges have never, or at least very rarely, been well known, let alone controversial figures. And this is desirable: justice should not, I believe, be personalised. It should be seen to be objective and reasonably detached, as the more it is about personalities the greater the risk of it being devalued and trivialised.⁷²

Kavanagh is similarly circumspect about knowing too much about individual judges' backgrounds and beliefs.⁷³ Whilst she acknowledges that judicial decisions depend in part on the judges' moral and ideological beliefs, Kavanagh advances four key reasons for why calls for enhanced transparency about individual judges' backgrounds and views (specifically those of the UKSC Justices) should be treated with caution.⁷⁴ There is no reason why similar arguments cannot be advanced in relation to judges at other levels within the judiciary.

As a preliminary point, Kavanagh notes that there has been little public interest in knowing more about judicial backgrounds.⁷⁵ However, whilst this may have been the case in the immediate period after the establishment of the UKSC (when Kavanagh's article was written), there are clear signs that, fuelled by the media, public attitudes may be shifting, at least in relation to judges in the appellate courts. Outside the current context, the reaction to the recent Brexit ruling,⁷⁶ and media comments about the perceived pro-EU bias of judges in general, and the

⁷² Lord Neuberger, Justice Innovation Programme Lecture for the Northern Ireland Assembly Committee for Justice (Belfast, 3 March 2016) < <https://www.supremecourt.uk/docs/speech-160303.pdf> > accessed 7 July 2016.

⁷³ Aileen Kavanagh, A New Supreme Court for the United Kingdom: Some Reflections on Judicial Independence, Activism and Transparency (2010) Legal Research Paper 58/2010.

⁷⁴ *ibid* 11.

⁷⁵ *ibid* 13.

⁷⁶ *R (Miller) v Secretary of State or Exiting the European Union* [2016] EWHC 2768 (Admin).

judges who heard the case in particular, is a case in point.⁷⁷ Moving on to challenge the claim that increased transparency may enhance public trust and confidence in the judiciary, Kavanaugh first argues that knowing more about judges may spark concerns about the subjectivity and possible arbitrariness of judging.⁷⁸ It is accepted that this is a risk. At the same time, this argument rests on a challengeable assumption – that the public believe in the ‘default understanding’ of the judge as ‘objective, neutral, and detached from any particular moral or political leaning...’⁷⁹ Do the public really think that judges are able to divorce their religious (and other) beliefs from the process of judging?⁸⁰

Second, Kavanaugh suggests that being more transparent about judicial backgrounds may be counter intuitive.⁸¹ This is because judges may feel more inclined to conceal the role that their personal factors play in judging for fear of criticism and/or claims of bias and request to recuse. This is supported by reference to the impact that increased transparency has had on judicial nominees to the US Supreme Court; for example, Justice Sonia Sotomayor is said to have distanced herself from an earlier view that her Latina upbringing might affect her decision-making. This argument is clearly more compelling. However, arguably this simply means that the status quo prevails. Judges do not currently explain how their own views have influenced how they have arrived at a decision.

Third, drawing on O’Neill’s work in relation to greater Government transparency on how public institutions function,⁸² Kavanaugh argues that knowing more about judges’ backgrounds raises the problem of ‘undifferentiated information’ whereby dubious sources, misinformation and unsorted information can lead to confusion

⁷⁷ Eg James Slack, ‘Enemies of the people: Fury over ‘out of touch’ judges who have ‘declared war on democracy by defying 17.4 m Brexit voters’ *Mail Online* (3 November 2016)<<http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>> accessed 2 December 2016.

⁷⁸ Kavanaugh (n73)14.

⁷⁹ Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Taylor and Francis 2012) 130.

⁸⁰ Anecdotal evidence obtained during this research suggests this may not be the case. In a small straw poll run by the researcher at a research showcase in Norwich, members of the public expressed the view that judges, like anyone else, were most likely influenced by personal factors during the course of their decision-making. Of course, this is unscientific and further research needs to be carried out in this area.

⁸¹ Kavanaugh (n73)14.

⁸² Onora O’Neill, *A Question of Trust: The BBC Reith Lectures 2002* (CUP 2002).

rather than clarity.⁸³ To illustrate her argument, Kavanagh again explains how a legally uneducated public may easily jump to conclusions about the validity and lawfulness of judicial decisions which are in part shaped by judicial background, life experience and personal views and values. This, she argues, may be exacerbated by inaccurate or hyped media reporting. Again, this is a forceful argument. The counter argument here is that if judges were more open and transparent, it would bring clarity because the sources being relied upon should be more reliable (although, of course, this is not guaranteed).

Finally, Kavanagh warns that enhancing transparency can create perverse incentives;⁸⁴ not only might judges conceal some of the factors that colour their reasoning, they may also be more cautious in deciding cases. Again, this is a strong argument. However, given the increased scrutiny of the judiciary, both individually and collectively, it is reasonable to suppose that judges already adopt such an approach in controversial cases; a cautious approach does not automatically mean that the quality of judging will be adversely affected as implied.

Given the raised profile and power of the judiciary over recent years (the main reasons for which were discussed in Chapter 1), together with the findings of this and other studies which suggest a relationship between judges' personal factors and judging, there is a legitimate case to be made for greater judicial transparency in relation to the backgrounds of members of the judiciary, particularly those sitting in the highest court. This is certainly a view to which former justice of the High Court of Australia, Michael Kirby, subscribes, at least in relation to UKSC judges. He posits that the public (being those affected by the UKSC's decisions) has 'a legitimate interest in knowing more about the values of potential appointees'.⁸⁵ At the same time, it might be argued that greater public awareness of, and understanding about how judges at all levels judge (including the factors that influence the way they make decisions) could increase public confidence in the judiciary and the justice system more generally. The more difficult question is that of

⁸³ Kavanagh (n73)16.

⁸⁴ *ibid* 17.

⁸⁵ Michael Kirby, 'A Darwinian Reflection on Values and Appointments in Final National Courts' James Lee (ed). *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Bloomsbury 2011) 12.

how open and transparent should the judiciary be? As regards whether more should be known about judges' religious backgrounds, there are valid arguments on both sides. However, based on the current findings, it is tentatively suggested that, on balance, because religion is not considered to be a significant issue in how judges reach decisions, the case for knowing more about judges' religious backgrounds is weak. That said, that some lawyers do perceive religion to play a role in judicial decision-making supports the argument advanced here that by conducting further research on the nexus between judges' religious beliefs and judging it may be possible to better understand the judicial role and properly address questions such as what constitutes optimal judicial openness and transparency in this regard.

6.5 Conclusion

This chapter has considered three areas which, it is contended, serve as an indirect barometer of lawyers' perceptions of the relationship between religion and adjudication. It was argued that if there were concerns that judges' own religious views taint individual decision-making, lawyers might be expected to be receptive to alternative ways by which to deal with religion-sensitive cases or to support increased religious diversity and transparency in the judiciary. There is little evidence in the data to indicate lawyers' support for anything other than the current regime. On this basis, and together with the findings in Chapter 5, it is concluded that, notwithstanding the fact that lawyers acknowledge that the religious beliefs of judges, along with other homologous judicial personal factors, may influence individual judicial decision-making in cases involving religion, they are confident that judges do not allow religious factors to affect judging in a way that compromises judicial impartiality. This is important, both to further the understanding of the factors that influence judicial decision-making across the court spectrum and to enhance the perceived legitimacy of the judiciary, whether individually or as a collective.

A summary of the main findings of the thesis as a whole, together with limitations and implications of the study, along with suggestions for future research are presented in the final chapter, Chapter 7.

CHAPTER 7

CONCLUSION: FAITH IN JUSTICE

Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human, strips himself of all predilections and becomes a passionless thinking machine.¹

7.1 Revisiting the research issue

Traditionally, judges have been portrayed as dispassionate, objective and neutral arbiters of the law who are unaffected by personal predilections, preferences or interests when carrying out the judicial role. Moreover, they have been depicted as having little choice in the matter'.² The judicial oath, legal rules and principles and a range of other constraints all serve to ensure that judges do not stray beyond the boundaries of legitimate judicial decision-making. As the Judicial Office's response to the request for judicial participation in this study makes clear (stated in Chapter 1.4), this classic conception of the judicial role continues to provide a principled model for how judges reach decisions today. Clearly, that judges are not biased, nor are seen to be biased, is of the utmost importance for maintaining public trust and confidence in the judiciary and the justice system. At the same time, contrary to the default image of the judge as an expert decision-maker imbued with 'superhuman' qualities,³ it is recognised that, particularly in cases where the law allows for a degree of discretion, there are an array of factors (in addition to the facts of a case and the relevant law) that can influence adjudication, including personal factors relating to individual judges.

This thesis has partly arisen from the inconsonance that exists between orthodox and contemporary discourse on how judges judge. Using a mixed methods approach

¹ Jerome Frank, *Re J A T Lindham*, 138 F 2d 650, 651 (2d Cir 1943).

² Dan Simon, 'A Psychological Model of Judicial Decision Making' (1998) 30 Rutgers LJ 1.

³ Dworkin famously imagined a judge as Hercules, 'a lawyer of superhuman skill, learning, patience and acumen'. Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 1997) 132.

within a pragmatic paradigm, this exploratory socio-legal study has focused on lawyers' perceptions of how the religious beliefs of professional judges affect judging in the English courts, religion being identified as one of many different personal factors that potentially influence how judges reach decisions. Looking at the religion-judging interface from the perspective of lawyers, specifically barristers and solicitors practising predominantly in the fields of employment and family law, has provided an opportunity to gain a valuable insight into this relationship. This thesis has sought to make a valuable contribution to existing knowledge of what factors influence judging and fill one part of the 'information black hole' that exists in our understanding of what judges do and how they do it. Whilst it represents one of a growing number of studies of judging in relation to the UK courts, to the researcher's knowledge, this is the first to empirically explore the relationship between judges' religion and their adjudication.

At the start of this thesis it was explained that the judiciary are increasingly tasked with deciding cases involving religion. It was suggested that this development can be attributed to two main factors: (1) the 'juridification of religion',⁴ and (2) an evolving evolving religious landscape in Britain (in which there has been a decline in those identifying as Christian and an increase in those having no religion or from minority religions). Moving to the conceptual foundations of this study, consideration was given to theories of judicial behaviour derived from political science and the fundamental tension that exists between conventional and contemporary models of how judges judge. Aspects of psychological research on judgment and decision-making in general were also touched upon. Contrary to the traditional view of how judges judge, existing empirical evidence from other jurisdictions and disciplines, together with extra-judicial comments from senior members of the judiciary in the UK, was found to provide unequivocal evidence to support the overarching premise underpinning this thesis, that there is a personal dimension to judging in relation to judges in the UK courts. It was posited that whilst the presence of personal factors in judging is seemingly at odds with the requirement for judicial impartiality, these competing concepts are reconcilable when, consistent with Lucy's contention, impartiality is understood in a restricted sense.⁵ This view acknowledges that judges

⁴ Russell Sandberg, *Law and Religion* (CUP 2011).

⁵ William Lucy, 'The Possibility of Impartiality' (2003) 25 OJLS 13.

judges bring their own life experiences with them to court; what is important, however, is that they put aside any personal views or prejudices which might constitute a legitimate ground for a claim of bias and prevents the judge approaching the case in hand with an open mind.

Turning to the empirical dimension of the study, an exploratory sequential mixed methods research design was used to gather lawyers' views about how judges' faith (and other factors) influences judicial decision-making. Part one involved semi-structured interviews with a sample consisting of 18 barristers predominantly working in the fields of employment and family law. Part two involved the administering of an online questionnaire, the SPQ, to solicitors. After data cleaning, this sample comprised 158 solicitors, again with expertise in employment or family law. The interviewees and SPQ respondents were asked about their perceptions of the influence of judges' religion on judicial decision-making, the focus largely being on cases involving religiously sensitive issues where there is no settled law and/or judicial discretion is exercised.

7.2 Key findings

The overarching research question for this thesis is: Do lawyers perceive that a judge's religious beliefs influence his or her individual judicial decision-making? To address this question, it was first situated within a broader context in which lawyers were asked for their views on whether and how judicial personal factors in general affect adjudication.

The most basic finding (and that which underpins the subsequent focus on religion) was that most lawyers overwhelmingly perceived that aspects of judges' personal backgrounds and experiences affect how judges judge. This is consistent with previous studies. For the most part, judicial personal factors (as distinct from the more narrow focus on judges' religious beliefs) were thought to permeate the decisional process in an unconscious manner, and usually in cases in which judicial discretion is exercised. Whilst judicial approach *and* outcome were thought to be influenced by the identity of the judge, the impact was seen as modest due to the constraining force of both formal and informal restrictions. Typically, political

and/or moral values and social-economic status were identified as personal elements having a discernible impact on how judges judge. In this regard, Griffith's thesis concerning the falsity of judicial neutrality remains persuasive (Chapter 3.1). Moreover, where judges' personal factors are perceived to affect judicial decision-making, that lawyers think that it is tacit rather than overt characteristics (such as gender and ethnicity) that are most likely to be at play lends strong support to Cahill-O'Callaghan's argument about the influence of judicial personal values on the adjudicative process (Chapter 3.1). Furthermore, it strengthens her critical argument that judicial diversity debates which largely focus on visible judicial characteristics overlook the important role played by more obscure factors in the judicial decision-making process.⁶

It was seen in Chapter 2.4 that many judges readily acknowledge that their background and values inevitably play a role in how they judge; in this regard the current findings can be said to reveal nothing new and their significance should not be overstated. However, the findings here can be distinguished from much of the existing judicial behaviour literature in one interesting respect.

It has been explained that many of the extant studies have focused on the influence of extraneous factors on judging in the appellate courts, usually the apex court, because it is here where judges have most discretion and are therefore most susceptible to subjective influences. This study has taken a different approach in which the spotlight has been on the views of lawyers working in specific areas of law rather than on specific courts. Irrespective of the court in which the judgment is made, to find that most lawyers felt that it was inevitable that judicial personal factors had a bearing upon how judges reach decisions (including outcomes) lends empirical backing to a much smaller body of literature which posits that judicial discretion is not limited to appeal cases, but is a feature in the majority, if not all, of the kinds of case that come before the courts. Ergo, the influence of personal factors in judging is potentially more extensive in scope than might be thought, even though it remains the case that the extent of impact continues to be significantly constrained by the limits of the law and judicial professionalism.

⁶ Rachel Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity' (2015) 35 LS 1.

When the focus narrowed to perceptions of the relationship between judges' faith and judging, the findings show that the lawyers in this study were generally much more reticent to positively link judges' religious identities with judicial decision-making compared to personal factors per se. This clearly suggests that other background factors are more salient than in judging than religion. In the main, when asked directly whether the religious beliefs of judges play a role in individual judicial decision-making, religion was identified as no more than a *potential* influencing factor affecting judging in areas of law touching upon or involving religiously sensitive issues (for example, discrimination and human rights cases and cases involving determinations as to someone's best interests such as in the right to life or a child's medical treatment), although a minority of lawyers thought that judges' religion did have a discernible impact on judging. Views as to the nature of influence varied between the two lawyer groups; barristers typically saying that if judges' religious beliefs were at play, they manifested in an unconscious manner, compared with solicitors who were more likely to say that judges' decision-making was subject to both conscious and unconscious religious influences. The empirical data did not allow for a definitive conclusion as to lawyers' perceptions of the extent of influence from judges' faith on judging (save for barristers confining this to judicial approach only). In any case, the argument advanced herein was that the distinction between judicial approach and outcome is of limited relevance because impartiality applies to both decisional process and outcome.

There was no evidence to indicate that lawyers' views were contingent on their PQE or their own religious identities, although both barristers and solicitors who attended court most frequently were those least likely to think that judges' religious beliefs were a relevant consideration in their decision-making. It is particularly reassuring to find that those appearing before judges on a regular basis are confident that religious bias is not an issue in the courts. Importantly, this exemplifies how understanding the relationship between judges' religion and judging can help increase the perceived legitimacy of the judiciary.

Thus, despite some differences in the views of barristers and solicitors, the general consensus was that judges' faith is not a salient factor in cases involving religiously sensitive issues, largely because other factors, notably the law, judges' training and a steadfast commitment to striving towards impartiality, exert much greater force on

the adjudicative process. This is buttressed by the findings discussed in Chapter 6 in which the majority of lawyers: (1) opposed the idea of specialist religious courts to hear disputes involving religiously sensitive issues, (2) did not identify the promoting religious diversity among the judiciary as a priority issue, and (3) were uncertain as to the benefits and appropriateness of knowing more about judges' religious identities (and other personal factors), if anything erring on the side of knowing less is better than knowing more.

From a methodological perspective, in so far as lawyers make a distinction between the influence of judges' faith on judicial approach and the decision itself, the thesis demonstrates that attempts to understand judicial behaviour by searching for correlations between specific variables such as religion and case outcomes (as seen in many studies of judicial decision-making, particularly in the US) leaves a void in our understanding of the *process* of judging. Whilst, ultimately, the focus of academic enquiries depends on why we want to know about how judges make decisions, it is argued that to meaningfully and significantly extend knowledge on how judges reach decisions, it is essential to look beyond the result and consider the decisional process, as has been done here. Only in this way can such studies fully help shape training programmes and enhance the legitimacy of, and public trust and confidence in the judiciary.

7.3 Implications of findings

This study has challenged the claim that studies of judicial behaviour, particularly those touching upon sensitive issues such as judges' faith, are 'illegal or practically impossible' in the context of UK judiciary.⁸ It demonstrates that addressing difficult questions about how judges judge from novel yet informed perspectives (such as that of lawyers who appear before judges and are acculturated in the legal system) offers one viable avenue by which researchers can gain otherwise inaccessible insights into relationships such as that between judicial background and judging. Nonetheless, it

⁸ Cheryl Thomas, 'Lack of Understanding about the Judiciary is Unacceptable and Dangerous' *The Guardian* (London, 6 July 2012) < www.theguardian.com/law/2012/jul/06/understanding-judiciary-dangerous > accessed 10 February 2013.

is clear that trying to distil the actual influence that specific factors such as religion have on judging presents a formidable challenge for researchers.

The findings of this study also have implications for the judiciary, specifically in relation to training and professionalism. Firstly, responses from lawyers who participated in the study highlight the important role that training plays in maintaining confidence and trust in the decisions judges reach. It is noteworthy, therefore, that although detailed guidance on religion can be found in the *Equal Treatment Bench Book*,⁹ there is currently no dedicated judicial training on matters relating to religiously sensitive issues. It is suggested that future training programmes could incorporate a seminar that considers some of the complex issues that arise in relation to matters of faith. Secondly, it is acknowledged that judicial training programmes already consider the meaning and effect of unconscious bias. The topic is covered in the Judicial College Business of Judging seminar in which, for example, unconscious bias is considered in relation to assessments of credibility and reliability of evidence.¹⁰ Judges are also informed about the Implicit Association Test (IAT) and are invited to take an IAT test online via Project Implicit. This is optional and for judges' own interest outside of the training environment.¹¹ At the time of conducting this research, the judiciary have also introduced 'Rethinking our Thinking' unconscious bias training.¹² There is a body of evidence to suggest that raising awareness about unconscious bias can motivate individuals to take corrective or 'debiasing' action.¹³ It is recommended that the Judicial College continues to deliver unconscious bias training for all judges to help develop judges' knowledge and skill as to how best to manage such bias. Raising awareness of this issue at the induction stage of judicial training for all judicial office-holders, and as part of continuing professional development, should encourage judges to actively engage in regular critical self-reflection on how the personal dimension to judging affects their decision-making. Whilst compulsory IAT tests may be useful to ensure judges fully engage with such training, the publishing of results is not supported for the same

⁹ Judicial College, *Equal Treatment Bench Book 2013*, Section 10.

¹⁰ Statement by Brian Evans (Judicial College) (Personal Communication 20 November 2014).

¹¹ *ibid.*

¹² Judicial College, Activities Report 2015-2016 < www.judiciary.gov.uk/wp-content/uploads/2013/07/review-of-activities-2015-2016.pdf > accessed 12 January 2018.

¹³ Cheryl Staats and others, 'State of the Science: Implicit Bias Review 2015' Kirwan Institute for the Study of Race and Ethnicity 2015 <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf> accessed 13 October 2016.

reasons advanced by Kang et al. who argue that this may foster a ‘feeling of resentment and counter the benefits of increased self-knowledge’.¹⁴

Finally, to find that lawyers generally perceive the influence of judges’ religion on judicial decision-making to be limited at best should instil the public with confidence in the quality, and impartiality of judicial decision-making in the UK. Of course, critics could argue that it is unlikely that the perceptions of those who are themselves part of the machinery of law would indicate anything other than respect for and confidence in the judiciary. Whilst the potential for response bias should not be ignored, there is no reason to think that the self-reported perceptions of lawyers who took part in the interviews or completed the SPQ represent anything other than their honest views of how judges judge; in short, their accounts have to be taken at face value. Save for a few exceptions, there appears to be a genuine belief amongst lawyers that judges, by virtue of their legal and judicial training and experience, are very capable of ensuring that judgments are principally based on the evidence and the relevant law, with any extraneous factors being manifested unconsciously and certainly not in a way that delegitimises the decisional process or case outcomes.

7.4 Study limitations

Exploring the factors that influence judging through the lens of lawyers has provided a useful means of addressing the central and associated research questions. However, as with any research, this study is not without limitations.

Whilst data from the Bar interviews and SPQ provided valuable data from which to explore the research question, the sample sizes in both parts of the study were small. Whilst efforts were made to avoid nonresponse to the invitations to lawyers to participate in this research, as discussed in Chapter 4.8, the risk of non-response bias cannot be eliminated. On the other hand, as seen in Chapter 4.6.3 and 4.7.5, each sample group comprised lawyers with a range of backgrounds. Although the response rate was disappointing in respect of both samples, this indicates that nonresponse bias is not a cause for major concern in this study.

¹⁴ Jerry Kang and others, ‘*Implicit Bias in the Courtroom*’ (2012) 59 UCLA Law Review 1124, 1177.

In addition, the sample was restricted to barristers and solicitors working in specific areas of law. It was the choice of the researcher to explore the views of lawyers working in employment and family law, in part driven by the researcher's own interest in (religious) discrimination in employment and belief that these are areas in which religious factors can be of upmost importance to litigants. Together with the small sample sizes, this means that the results cannot be claimed to be generalizable to areas of law outside of employment and family law, nor are they representative of the wider legal community. It is argued that the focus on lawyers' views about cases involving overtly religiously sensitive issues makes sense in a foundational study, however it is accepted that, within a broader context, this acts as a limit on the value of the empirical data.

It can also be argued that the present findings reflect lawyers' self-reported, subjective perceptions of the relationship between judging and judges' *perceived* religious identity. Accordingly, it may be claimed that the views of lawyers in this study do not accurately reflect how judges decide cases in practice. Notwithstanding such criticism, it is argued that understanding the way in which lawyers perceive judicial decision-making matters because lawyers' perceptions of judges, the courts and the justice system more generally can play an important role in shaping the way in which the public sees the courts.¹⁵

A further criticism relates to the interview schedule and SPQ design used. There were no existing templates from which to base interview questions or the SPQ instrument design and, as such, an inductive approach was taken in which the data guided the researcher. Accordingly, it is likely that some issues salient to the study remain unexplored. An associated issue relates to the researcher's choice of different methods of data collection. As discussed in Chapter 4, the first part of the study elicited barristers' views about the relationship between judges' religion (and other factors) and judging. This data was also used to develop the survey instrument in part two of the study. Whilst the use of a sequential mixed methods research design based on two sample groups of different legal professionals was straightforward at the data gathering and preparation stage, integration of findings for the purpose of

¹⁵ Murray Gleeson, 'Public Confidence in the Courts', National Judicial College of Australia 9 February 2007 < http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_9feb07.pdf > accessed 30 August 2016.

discussion was more problematic. This is due to the difficulties in bringing together asymmetric responses to similar rather than identical questions in each part of the study. In repeating the study, it would be useful to conduct interviews and administer a perceptions questionnaire to each professional group participating in the study. This would allow for more accurate data integration.

Finally, it would have been useful to have secured access to the judges themselves to find out how they perceive the way in which their religious beliefs impact the process of judging. Added to the barrister and solicitor data, this would have allowed for a more holistic view of the way in which judges' religious beliefs are perceived to affect judging. It is hoped that the findings from the current study, together with those from research conducted in other jurisdictions, may encourage the judiciary to consider allowing participation in future studies which aim to gain a deeper understanding of how judicial personal factors affect the judicial decision-making process.

Despite these limitations, it is argued that the empirical element of this study has provided a useful insight into the role played by judges' religious beliefs (and other personal factors) in the process of judging and makes an interesting and significant contribution to the scholarly literature in this area.

7.5 Future directions

It is clear from this exploratory study that many questions about the relationship between judges' faith and judging, theoretical and empirical, remain unanswered. To this end, the following roadmap for further research is proposed.

It would now be useful to target decision-making in specific courts, again with a focus on cases in specific legal areas in which religiously sensitive issues may be important to litigants. This would determine whether perceptions of the nexus between religion and judging are contingent on variables such as (a) the type of judge hearing a case, or (b) the level of court in which a trial takes place. In light of lawyers' responses about the sorts of cases in which religion may be an issue, it is envisaged that further research opportunities may present in relation to cases such as

those involving capacity and best interests issues including children and end of life decisions.

Different research methods to that used here (particularly quantitative studies) have commonly been used to explore how non-legal factors affect judging. Whilst useful in trying to predict how cases may be decided, the application of these methods is limited in the context of judging in the UK courts because of the lack of data about judicial backgrounds (particularly religion), and because the focus of the empirical studies centres on case outcomes rather than the overall process. It is argued that the adoption of a mixed method approach overcomes some of these limitations and, from a sociological perspective, helps to develop an understanding of how judges go about the business of judging as a process rather than simply allowing for conclusions to be drawn based on judicial determinations.

Other pathways by which to explore the relationship between judges' faith and judging include experiences of other court users, specifically litigants in person, for their perceptions of (a) the interplay between judicial personal factors and judging and (b) how religiously sensitive issues are handled by the courts in certain types of case. Furthermore, whilst mindful of the sensitivities involved, it is in the interests of open justice that members of the judiciary have an opportunity to discuss how their own faith affects adjudication, the challenges that this presents in a judicial context and how this is overcome.

Another avenue for future research involves experimental testing to explore how unconscious bias affects judicial decision-making. Replicating the approach taken by Rachlinski in relation to racial bias (described in 5.3.4),¹⁶ it would be interesting to analyse the results of judges' religious IAT's in order to determine whether unconscious religious bias is a live issue. At the very least, from a practical perspective, such research could be used by judges to improve their own judging. From a theoretical perspective, it may be useful in informing debate as to whether judges' decision-making is substantively different to professional decision-making in other contexts. What is clear is that given the interdisciplinary nature of the study of

¹⁶ Jefferey Rachlinski and others, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) Cornell Law Faculty Publications, Paper 786. Psychologists have typically focused on the role of implicit bias in juror decision-making.

judicial decision-making, collaboration with scholars from other disciplines would prove most useful in future.

Looking further ahead, comparisons between actual judicial reasoning and computer-based decision-making programs that utilise Artificial Intelligence provide exciting opportunities to further explore the impact that specific factors such as a judge's religious beliefs have on judging.¹⁷

It is hoped that adopting an alternative approach to the more typical quantitative methods used to examine the influence of non-legal factors on judging (discussed in Chapter 3) has provided an illuminating, meaningful and timely exposition of how lawyers perceive the relationship between judges' religious beliefs and adjudication. At the same time, the present study exposes the breadth and depth of the 'information black hole' that exists in the understanding of the factors that influence judges' decision-making in the UK courts. Whilst judges' faith may occasionally influence the process of judging in cases involving religiously sensitive matters, there is no compelling evidence to suggest that judicial religious bias is a live issue in the courts today. However, the evolving religious and legal landscapes mean that there is no room for complacency in understanding the interplay between judges' religion and judging in future studies of judicial behaviour.

¹⁷ The use of Artificial Intelligence in a judicial context has already been explored. eg, Atkinson compared the decisions of 32 cases decided by judges with decisions generated using computer programs. She found that there was a 96% success rate when AI decisions were compared with those of the judges. Monidipa Fouzder, 'Artificial intelligence mimics judicial reasoning' *The Law Society Gazette* (22 June 2016) <<https://www.lawgazette.co.uk/law/artificial-intelligence-mimics-judicial-reasoning/5056017.article>> accessed 12 September 2016.

APPENDICES

APPENDIX 1 Rejection letter to request for judicial participation in research



JUDICIAL OFFICE

ROYAL COURTS OF JUSTICE

STRAND

LONDON

WC2A 2LL

Ms Amanda Springall-Rogers
University of East Anglia
By email

30 June 2014

Dear Miss Springall-Rogers

Thank you for your e-mail of 30th April and the attached documents. You have requested judicial participation in your research project by way of interviews with senior members of the judiciary and an online questionnaire sent to all senior judiciary, aside from those interviewed, and all Circuit and Tribunal Judges. I am replying to your request on behalf of the Lord Chief Justice and the Senior President of Tribunals.

You will appreciate that we receive a number of requests for judicial participation in research of various forms. We have to consider such requests very carefully, to ensure that we place only appropriate demands on the time of judges.

Your project proposes to examine the relationship between religion and judicial decision-making and any effect that a judge's personal religious beliefs may have on their judicial reasoning. Having given careful consideration to your proposition, I am sorry to say that we have concluded that it would not be appropriate to seek judicial participation in the project. 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 can appreciate how important this project is to you so I know this news will come as a disappointment. I am sorry that we are unable to agree to your request.

Yours sincerely,

Amanda Jeffery

Amanda Jeffery: Deputy Director, Judicial Private Offices, Royal Courts of Justice, Strand, London WC2A 2LL
Phone: 020 7947 7837
Email: amanda.jeffery@judiciary.gsi.gov.uk
Website www.judiciary.gov.uk

APPENDIX 2 Research paradigms: positivism and interpretivism

Positivism

The ‘positivist’ worldview is traditionally characterised by quantitative research.¹ Traditional positivists believe that the social world can be explored in the same way as the natural world.² As such, it is assumed that there exists an external, single objective reality, the truth of which can be discovered through replicable empirical observation and precise measurement.³ This ontological position means that a researcher remains independent from the phenomenon of interest in order to prevent research outcomes being influenced by subjective values and biases.⁴ A positivist approach is typically associated with a hypothetico-deductive method in which research questions and hypotheses are developed and tested by measuring the relationship amongst variables using instruments such as questionnaires or surveys, although as Webley observes,⁵ there is nothing to prevent a qualitative researcher adopting a positivist worldview.

Interpretivism

Seen as the antipode of a positivist worldview, interpretivism is typically associated with qualitative research. Having gained prominence as a critique to positivism, interpretivists believe that there are socially constructed multiple realities of phenomena.⁶ As individuals interpret and give meaning to themselves and their environment, reality is a ‘social creation’ which cannot be measured objectively. Interpretivism is underpinned by a subjectivist ontology which recognises that a researcher’s own values affect how they interpret the phenomenon of interest. In contrast to positivism, research guided by an interpretivist philosophy tends to be inductive so that theories or patterns of meaning are developed from data that is

¹ The term ‘positivism’ originates from the nineteenth century by positivists such as Comte and Durkheim.

² Donna Mertens, *Research and Evaluation in Education and Psychology: Integrating diversity with quantitative, qualitative and mixed method* (2nd edn, SAGE 2005).

³ This purist view is challenged by post-positivists who assume that absolute objectivity is unattainable. Creswell explains that this is why a hypothesis is not proved or disproved; rather, a null hypothesis is accepted or rejected.) John Creswell, *Research Design* (4th edn, SAGE 2014) 7.

⁴ Egon Guba and Yvonna Lincoln, ‘Competing paradigms in qualitative research’ in Norman Denzin and Yvonna Lincoln (eds) *The SAGE Handbook of Qualitative Research* (SAGE 1994).

⁵ Lisa Webley, *Qualitative Approaches to Empirical Legal Research* (OUP 2010).

⁶ Like positivism, interpretivism originated in the nineteenth century and has its roots in the work of German sociologist Max Weber.

usually collected by means of interviews, focus groups, visual recordings or images or existing documents, for example.

The Paradigm Wars & the pragmatic worldview

In the 1980's, disagreement amongst scholars as to the merits and limitations of quantitative vis-a-vis qualitative research and their different philosophical foundations led to the so-called 'paradigm wars'. Purists on either side of the quantitative/positivist-qualitative/interpretivist continuum argued that as their respective paradigmatic orientations presented the ideal for research, quantitative and qualitative methods should not be mixed.⁷ It is largely as a response to these paradigmatic debates that proponents of mixed methods research have sought to position their research within alternative philosophical perspectives that support both quantitative and qualitative research, most typically being the pragmatic worldview.

⁷ Burke Johnson and Anthony Onwuegbuzie, 'Mixed Methods Research: A Research Paradigm Whose Time Has Come' 33 Educational Researcher 14.

APPENDIX 3: Barristers invitations to participate in research

INVITATION BY DIRECT EMAIL

Dear [],

PhD Research – Religion and Judicial Decision-making

I am a PhD Law research student at the UEA Law School in Norwich. I am writing to ask if you would be interested in taking part in my research project exploring the influence of extra-legal factors on judicial reasoning, particularly the nexus between judges' religious beliefs and judicial decision making.

The topic has been subject to extensive empirical research in the US where, given the highly politicised nature of the judicial appointments process, scholars have long been interested in the relationship between judicial values and adjudication, particularly in the appellate courts. The US findings indicate that, in certain legal areas, a range of variables, including the religious convictions of judges, may consciously or unconsciously influence judicial decisions. This raises the question as to whether a similar phenomenon be observed in the context of the UK judiciary.

What does participation involve? A major part of the study involves the use of qualitative methods to explore the research topic from a variety of perspectives, including that of the bar. A single semi-structured interview (either by video call or face-to-face) is used to seek views as to which extra-legal factors may influence judicial decisions, if any. Opinions regarding judicial diversity are also sought. Whilst the length of the interview will vary, it is expected to last between 20-40 minutes.

I would like to take this opportunity to thank you in advance for considering this request and I very much hope to hear from you.

Yours sincerely,

Amanda Springall-Rogers
University of East Anglia
Norwich Research Park
Norwich
NR4 7TJ

DLA eNews N° 136 October 2013

Are you a barrister or solicitor with higher rights of audience? If so, would you be interested in participating in a PhD research project on judicial decision making?

A DLA member (a PhD student at the UEA Law School, Norwich) is looking for barristers or solicitors with higher rights of audience to take part in a research project exploring the nexus between judges' religious beliefs and judicial decision making in UK courts.

The topic has been subject to extensive empirical research in the US where, given the highly politicised nature of the judicial appointments process, scholars have long been interested in the relationship between judicial values and adjudication, particularly in the appellate courts. The US findings indicate that, in certain legal areas, a range of variables, including the religious convictions of judges, may consciously or unconsciously influence judicial determinations. This raises the prospect that a similar phenomenon might be observed in the context of the UK judiciary.

What does participation involve? A major part of the study involves the use of qualitative methods to explore the research topic from a variety of perspectives, including that of the bar. A single semi-structured interview will be used to seek views as to which extralegal factors may influence judicial decisions, if any. Your opinions regarding judicial diversity will also be sought. Whilst the length of the interview will vary, it is expected that an interview will typically last between 20-40 minutes.

If you are interested in taking part in this study or if you would like further information please email A.Springall-Rogers@uea.ac.uk.

[General comments are also very welcome.](#)

UK HUMAN RIGHTS BLOG 24 November 2013

Request for help – religion and law

Courting Faith: Religion as an Extralegal Factor in Judicial Decision-making

Barristers sought to participate in PhD Research Project exploring the relationship between religion and judicial decision making. If you are interested in taking part, please contact Amanda Springall-Rogers at A.Springall-Rogers@uea.ac.uk

APPENDIX 4: Barristers' Participant Information Sheet and Consent Form

PARTICIPANT INFORMATION SHEET

Research Project Title: Courting Faith: Religion as an Extralegal Factor in Judicial Decision Making

Researcher Name: Amanda Springall-Rogers

PLEASE RETAIN A COPY OF THIS INFORMATION SHEET

You are being invited to participate in this postgraduate research project. Before you decide whether you would like to participate, it is important for you to understand why the research is being done and what your participation will involve. Please take time to read the following information carefully and discuss it with others if you wish. Please contact me if anything is unclear or if you would like more information. I would like to take this opportunity to thank you for your interest.

What is the aim of the study?

The central theme of the research project is to explore whether there is evidence to support the view that the religious beliefs of a judge may influence his or her judgments in hard cases, in UK courts. This area has not yet been subject to analysis in empirical studies in the UK. In contrast, the topic has been subject to extensive empirical research in the US where scholars have long been interested in exploring the relationship between various judicial characteristics and adjudication, particularly in relation to the US Supreme Court, where the judicial appointments process is subject to intense public scrutiny. Whilst US findings have proved inconclusive, there is sufficient evidence to suggest that the religious beliefs of a judge *may* inform judicial determinations in the higher courts in *specific legal areas*. This raises the prospect that a similar phenomenon might be observed in the context of the UK judiciary.

The research project considers this theme from both historical and contemporary perspectives. Extrajudicial writing and a selection of judgments over the last century will be analysed for indicative evidence of the past existence of a nexus between judges' religious affiliations and judicial decision making and to assess the courts changing approach to religion. For a contemporary perspective, your views are sought as to what extralegal factors are perceived to influence judicial decisions today, whether religion may be a relevant factor in judicial decision-making and,

more generally, for opinion as to whether religious values should be allowed to influence judgments in any way.

It is important to note that the aim of the research project is not to suggest that a judge's religious beliefs exert a major source of influence on his or her judgments. Rather, in the absence of any existing research, the study serves as a launch pad from which to determine whether religious beliefs can and should be included in future empirical legal studies that seek to understand what factors affect judicial decision making and to what extent they do so.

Why have I been asked to take part in this research project?

As a barrister or solicitor with higher rights of audience, you are well placed to offer insight into this topic, and express your views as to whether religious beliefs may be a relevant factor in judicial reasoning.

The information collected for the research project will be used to produce a PhD thesis and may be used in academic publications. Anonymised direct quotes from the interview transcript may be used.

What will participation involve?

An interview will be conducted at a time and place that is convenient for you. This can be face-to-face or by video call (e.g. Skype or FaceTime). The interview will be based around a semi-structured format and will typically last between 20-40 minutes.

The views expressed by participants will not be ascribed to any particular participant. Please see "How will your privacy and confidentiality be maintained?" below for details.

The points to be discussed include:

- Have there been any occasions on which participants feel a client's religious or non-religious beliefs may have in some way affected a judge's decision in cases in which religiously sensitive issues are raised? Has a client ever voiced such concerns themselves?
- Do participants think that, in some cases, judges have been influenced in their decision making by their religious beliefs? If so, in what way?
- Have participants ever been involved in a case/s in which they have felt that a judge's religious beliefs affected how a judge decided the case? If so, in what way?
- When cases are allocated, should regard ever be given to the religious background of a judge/s?

- Should judges be permitted to employ religious based reasoning (in addition to legal reasoning) in hard cases?
- If participants were judges, do they think they could set aside their own religious or non-religious beliefs in cases engaging religiously sensitive issues?
- Views as to the merits of increasing religious diversity within the judiciary.

Subject to your permission, the interview will be recorded on a digital audio recording device. You can decide to stop the interview at any point and, of course, you do not have to answer questions that you do not wish to. Following the interview, the researcher will manually transcribe the recording into text form. You will have an opportunity to check the transcript.

The recorded interview will be deleted upon transcription. Please note, if you would like to take part in the research project but would prefer not be recorded, the researcher is happy to take hand-written notes of the interview.

You are very welcome to a summary of the findings following the completion of the PhD thesis.

What will happen if I choose to withdraw from the study?

It is up to you whether to participate or not. If you decide to take part you are still free to withdraw during the interview, or at any time thereafter, and without giving a reason. If you choose to withdraw from the study all data will be withdrawn and destroyed.

How will your privacy and confidentiality be maintained?

If you agree to take part in the research project, all efforts will be made to ensure any information you provide will be kept confidential. All data collection, storage and processing will comply with the principles of the Data Protection Act 1998.

All efforts will be made to ensure that you cannot be identified as a participant in the study and that any information you disclose will not lead to any third party or specific case being identifiable in the research.

The digital audio file of the interview will be transferred from the recording device using audio management software to a memory stick that will remain in the researcher's office until the recording is transcribed. Upon transcription, the audio file will be erased from the memory stick and the memory stick will be physically destroyed.

The transcript of the interview will be anonymised through use of a pseudonym, known only to the researcher, and will be allocated a numerical identifier. A master

list identifying you to a pseudonym will be held on a password protected computer accessed only by the researcher. Other potentially disclosive text will be replaced with more generalized text and third parties and cases will be anonymised and/or allocated pseudonyms.

The transcript will be stored on a password protected computer and a hard copy will be stored in a locked filing cabinet to which the researcher has sole access. The transcript will not be available to other researchers without your express permission. Electronic data will be stored on a computer with password protection, at both login and individual file level, accessible only by the researcher.

At the conclusion of the study, the information or data collected from you may be retained and used (in its anonymised form) for future research only where the researcher has agreed to preserve the confidentiality of the data and subject to approval from the relevant research ethics committee.

What happens next?

If you would like to take part in this research project please contact me, Amanda Springall-Rogers, by email at: A.Springall-Rogers@uea.ac.uk, or complete the attached response form and return it to: A.Springall-Rogers, UEA Law (PGR), University of East Anglia, Norwich Research Park, Norwich NR4 7TJ.

If you do decide to participate I will contact you by return so we can arrange an interview, at a time and date that is convenient for you. You will be given this information sheet and asked to sign a consent form.

Further information and complaints procedure

If you have any questions or require more information about this research project or, if you decide you would rather not participate in the study but would like to make any comments about the research, please contact me. My contact details are:

Amanda Springall-Rogers
UEA Law School (PGR)
University of East Anglia
Norwich Research Park
Norwich
NR4 7TJ

Email: A.Springall-Rogers@uea.ac.uk

If you wish to make a complaint relating to your participation in this research project, please contact the research project supervisor:

Gareth Thomas
UEA Law School
University of East Anglia
Norwich Research Park
Norwich
NR4 7TJ

Email: G.Thomas@uea.ac.uk

Approval to conduct this research has been provided by the UEA General Research Ethics Committee in accordance with ethics review and approval procedures.

Thank you for your interest.

RESPONSE FORM

Research Project Title: **Courting Faith: Religion as an Extralegal Factor in Judicial Decision Making**

Having read the attached Information for Participants Sheet I would be interested in taking part in the above research project.

My contact details are as follows:

| | |
|-------------------|--|
| Name: | |
| Address: | |
| Email: | |
| Telephone: | |
| Date: | |

Please complete and return to:

Amanda Springall-Rogers
UEA Law School (PGR)
University of East Anglia
Norwich Research Park
Norwich NR4 7TJ

CONSENT FORM FOR RESEARCH PROJECT PARTICIPANTS

Research Project Title: **Courting Faith: Religion as an Extralegal Factor in Judicial Decision Making**

Researcher Name: **Amanda Springall-Rogers**

Thank you for your interest in taking part in this research. The researcher must explain the project to you before you agree to take part. If you have any questions, please ask the researcher before you agree to participate in the research project. Please complete this form after you have read the Information Sheet and/or listened to an explanation about the research. You will be given a copy of this Consent Form for your records.

***Please tick
or initial***

Participation

I have read and understood the Participant Information Sheet for the above research project. I have had the opportunity to consider the information and ask questions about the project.

☐

I understand that my participation is voluntary. I can withdraw at any stage of the research project without giving any reason. Should I decide to withdraw, I understand any records relating to my participation will be destroyed unless I agree that the researcher may retain and use the information.

☐

I consent to being interviewed and the interview being recorded using a digital audio device. I understand that I am under no obligation to answer questions should I choose not to do so.

☐

I understand that I will be given a transcript of the interview for my approval before it is included in the research project.

☐

Use of information

I understand and agree to the arrangements relating to privacy and Confidentiality set out in the Participant Information Sheet under the

☐

heading "How will your privacy and confidentiality be maintained?"

I understand that data will be processed manually and with the aid of computer software and I consent to the processing of my personal information for the purpose of this research project and that such information will be handled in accordance with the provisions in the UK Data Protection Act 1998.

☐

I agree that the researcher may access my contact details and interview transcript for the sole purpose of this research project.

☐

I understand that information gained during the research project will be used to produce a PhD thesis and may be used in academic publications.

☐

I would like to receive a summary of the results.

☐

I agree that information or data collected from me may be used in future research only where the researchers agree to preserve the confidentiality of the data and subject to approval from the relevant research ethics committee.

☐

Signed(Research Participant)

Print name.....**Date**.....

Signed.....(Researcher)

Print name**Date**.....

Please return to: Amanda Springall-Rogers, UEA Law (PGR), Norwich Research Park, Norwich, Norfolk NR4 7TJ. If you have any questions or issues relating to your participation in this research project, please contact the researcher by email at A.Springall-Rogers@uea.ac.uk, or by post to the above address.

If you wish to make a complaint relating to your involvement in the research, please contact the research project supervisor, Gareth Thomas, by email at G.Thomas@uea.ac.uk, or by post to Mr. Gareth Thomas, UEA Law, Norwich Research Park, Norwich, Norfolk NR4 7TJ.

Approval to conduct this research has been provided by the UEA General Research Ethics Committee in accordance with ethics review and approval procedures.

APPENDIX 5: Data Collection: semi-structured interviews

Advantages and disadvantages of the interview formats used in respect of this qualitative research

| Interview Format | Advantages | Disadvantages |
|---|---|--|
| Face-to-face | <p>Longer duration of interview</p> <p>Synchronous communication allows both parties to observe body language and other “social cues” (Opdenakker) and to establish a good rapport</p> <p>Easy to ensure ethical requirements for informed consent are met</p> <p>Better quality of digital recording</p> | <p>Time and cost of travel to participant’s work place or other neutral venue</p> <p>Physical access to participants’ places of work</p> <p>Difficulty in pre-arranging interviews without postponement at short notice due to erratic nature of barristers’ work</p> <p>The power asymmetry between researcher and elite participant may be magnified</p> |
| VoIP (USING Skype, FaceTime and Google Hangouts) | <p>Costs are minimal.</p> <p>Access to participants in different, remote geographical areas means access to larger sample</p> <p>Convenient and flexible in terms of time i.e. conducted during the day or evening, at work or at home.</p> <p>Reduces participant anxiety about location</p> <p>Rapport can be established</p> | <p>Network drop outs can disrupt the flow of the interview and may result in distorted data</p> <p>Opportunity to observe body language and other “social cues” can be hindered</p> <p>Risk of interviews being accessed by others, compromising participants confidentiality and anonymity</p> |
| Telephone | <p>Access to participants in different, remote geographical areas means access to larger sample</p> <p>Difficult to establish rapport</p> <p>Time and cost effective</p> | <p>Poor connection can disrupt the flow of conversation and may result in distorted data</p> <p>Less control of the interview situation for the researcher</p> |

APPENDIX 6: Interviewing legal elites: methodological challenges

The bulk of literature relating to strategies for conducting qualitative interviews focuses on standard interviews with non-elites in which a researcher is said to ‘study down’ because it is the researcher who identifies and controls the interview space. In contrast, there is a small but significant body of work on how to research elites. Much of this literature identifies methodological challenges that may arise where a researcher, perceived to lack power relative to the elite participant, is said to ‘study up’.¹ Two of the main methodological challenges relevant to the present study - gaining access and managing the power relationship - are considered below.

Gaining access

The first potential obstacle identified in the literature is gaining access to elites.² In many cases, access has to be negotiated through a gatekeeper; this can be a time-consuming process and, if unsuccessful, can prove fatal to the research project. On the other hand, it has been suggested that far from being a barrier to access, a gatekeeper who sees the merits in the research, and with whom the researcher can establish a rapport, can potentially open doors to elite participants who may not otherwise have been accessible to the researcher.³

Where direct contact can be made with the elite and the research topic is of interest to them, a busy schedule may simply prove too time prohibitive to enable their participation in the study. Moreover, where the elite invitee has offered their time, arranging a convenient interview date and location may prove problematic. Even where access can be successfully negotiated and an interview takes place, it does not guarantee the researcher will obtain the rich data they hope for because elites are also ‘in a position to manipulate information and to deny access to it’.⁴

In this study, the researcher negotiated access to elite participants via gatekeepers and through direct contact by email with potential participants. Gatekeepers, the Senior Clerks in Chambers, were initially contacted by email to ask if they may be

¹ Zoe Morris, ‘The Truth about Interviewing Elites (2009) 29 Politics 209, 213.

² Lewis Anthony Dexter, *Elite and Specialized Interviewing* (ECPR 2006).

³ William Harvey, ‘Methodological Approaches for Interviewing Elites’ (2010) 4 Geography Compass 193, 198.

⁴ Robert Mikecz, ‘Interviewing Elites: Addressing Methodological Issues’ (2012) 18 Qualitative Inquiry 482, 483.

willing to circulate details of the research project to members of Chambers. It was only when gatekeepers agreed to the researcher's request that an invitation to participate, together with a brief summary of the research, was forwarded. A number of gatekeepers were very happy to assist. However, of those contacted, half did not respond to the initial email or to a reminder sent 4 weeks after the first communication. Of the elite invitees contacted direct by email, approximately one third responded.

Managing the power relationship

As discussed above, in a qualitative interview, the power relationship between researcher and participant is often conceptualised as an asymmetric relationship in which power resides with the 'expert' researcher.⁵ However, in an elite interview, it is commonly assumed that this power dynamic is reversed in favour of the participant.⁶ The elite participant is seen as a 'professional communicator',⁷ used to being in charge. As such, there is a danger that the participant will dominate the interview and the novice researcher may be left in a position of relative disempowerment.⁸ Such an imbalance may also raise reliability issues.⁹ For example, research data may be distorted if the participant uses unfamiliar technical language,¹⁰ manipulates information or influences the way the researcher understands or interprets what was said, or makes it difficult to access, for example.¹¹

By virtue of the nature of work at the Bar, the elite participants in this study were highly intellectual, skilled orators. Accordingly, the researcher was very alert to the possibility that there may be a power imbalance in favour of the elite participants. Several strategies were employed in an attempt to achieve a degree of symmetry in the interview relationship. For example, the researcher ensured they were thoroughly

⁵ Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A practical guide for beginners* (SAGE Publications 2013) 89; ; Steinar Kvale and Svend Brinkmann, *InterViews: learning the craft of qualitative research* (2nd edn, SAGE Publications Ltd 2009) 33.

⁶ *ibid.*

⁷ John Fitz and David Halpin, 'Brief encounters: Researching education policy-making in elite settings' in Salisbury and Delamont (eds), *Qualitative studies in education* (Avebury 1995) 65.

⁸ Anna Boucher, Ahmar Maboob and Lydia Dutcher, 'Power and Solidarity in Elite Interviews' (2013) American Political Science Association 2013 Annual Meeting Paper; American Political Science Association 2013 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2301499 > accessed 4 June 2014.

⁹ *Dexter* (n2) 100.

¹⁰ *Kvale and Brinkmann* (n5) 147.

¹¹ *Mikecz* (n4) 482.

prepared before each interview. This involved making sure the researcher had a sufficiently strong depth of knowledge relating to the subject matter and, to a lesser extent, the professional profile of the participant.¹² Much of the literature on elite interviewing suggests such an approach is vital in order to establish trust and rapport and to legitimise the request for participants to take time out of their working day.¹³ It can also serve as a defence against participants' attempts to patronise the researcher.¹⁴ In addition, the researcher presented as an "informed outsider". Welch et al. suggest this is an effective strategy for tackling power asymmetry because elites 'like to use the interviewer ... as a facilitator of their own thinking and sounding board for ideas'.¹⁵

Where possible, interviews with more senior barristers were arranged towards the end of the interview timetable.¹⁶ This allowed the researcher time to hone their interview skills and enabled the researcher to draw upon previous interviews to enhance the credibility of the research.

That the majority of interviews were conducted in a virtual environment neutralised concerns about the potentially intimidating effect of the interview setting.¹⁷

¹² *Harvey* (n3). Harvey identifies this ability to acquire background information about the participant as a key advantage of interviewing elites. It also enables the researcher to concentrate on the subject matter where time us at a premium.

¹³ Harriet Zuckerman, 'Interviewing an Ultra-Elite' [1972] 36 *Public Opinion Quarterly* 2 164.

¹⁴ *Mikecz* (n4) 487.

¹⁵ Catherine Welch, Rebecca Marshcan-Piekkari, Heli Penttinen and Marja Tahvanainen, 'Corporate elites as informants in qualitative international business research' (2002) 11 *International Business Review* 611, 625.

¹⁶ The reference to 'senior' barristers refers to barristers with more than 15 years PQE and QCs.

¹⁷ It has been suggested that participants were more likely to disclose information away from workplace *Harvey* (n3).

APPENDIX 7: Braun and Clarke's Phases of Thematic Analysis

| Phase | Description of the process |
|---|--|
| 1. Familiarizing yourself with your data | Transcribing data (if necessary), reading, re-reading the data, noting down initial ideas. |
| 2. Generating initial codes | Coding interesting features of the data in a systematic fashion across the entire data set, collating data relevant to each code. |
| 3. Searching for themes | Collating codes into potential themes, gathering all data relevant to each theme. |
| 4. Reviewing themes | Checking if the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic 'map' of the analysis. |
| 5. Defining and naming themes | Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells, generating clear definitions and names for each theme. |
| 6. Producing the report | The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back of the analysis to the research question and literature, producing a scholarly report of the analysis. |

Source: Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A practical guide for beginners* (SAGE Publications 2013).

APPENDIX 8 Solicitor perceptions questionnaire (SPQ)

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

Welcome to this study that examines the relationship between religion and judicial decision-making.

As a solicitor, you are invited to take part in a research project that seeks your views on the nexus between judges' religious beliefs and judicial decision-making.

The information that you provide will form part of a wider PhD project entitled '*Courting Faith: Religion and Judicial Decision-making*', in which the relationship between religion and judicial decision-making is explored from the perspectives of solicitors and barristers.

It is only recently that religion has been considered as a factor in empirical studies of judicial decision-making in the UK. In contrast, there has been a wealth of empirical research exploring this relationship in other jurisdictions, most notably the US, where findings indicate that judges' religious beliefs affect judicial decision-making in certain legal areas. This project examines the feasibility of conducting further studies on this topic in relation to the UK judiciary. The aim of the study is to contribute to a wider understanding of the factors that influence judicial decision-making and to inform judicial diversity debate.

The questionnaire will take around 15 minutes to complete and will involve answering questions about how you perceive the relationship between religion and adjudication in the British courts. As a solicitor, you are well placed to offer insight into this topic.

If you choose to take part in this study, you may withdraw at any time without giving a reason prior to submitting your questionnaire responses. The questionnaire can be completed anonymously and all reasonable steps will be taken to ensure confidentiality. If you include additional comments these may be used in the write up of the research project. In such circumstances, potentially disclosive text and references to third parties will be anonymised and/or allocated pseudonyms. Information or data collected may be used in future research by the PhD researcher.

Contact details:

If you have questions about the research project, or if you require the questionnaire in an alternative format, please contact:

Amanda Springall-Rogers, PhD Researcher, at A.Springall-Rogers@uea.ac.uk or Professor Gareth Thomas, Project Supervisor, at G.Thomas@uea.ac.uk. Alternatively, please write to Amanda Springall-Rogers UEA Law (PGR), Norwich Research Park, Norwich, Norfolk NR4 7TJ.

This study has been reviewed and approved by the UEA General Research Ethics Committee in accordance with ethics review and approval procedures.

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING
SOLICITOR PERCEPTIONS QUESTIONNAIRE

Preliminary matters

* 1. Before starting the questionnaire, please confirm the following:

- ☐ I agree to take part in the study.
- ☐ I have read the information about the study.
- ☐ I understand that I am free to withdraw from the study prior to submitting my questionnaire responses without giving a
- ☐ reason. I understand that I may skip questions that I would prefer not to answer.

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING
SOLICITOR PERCEPTIONS QUESTIONNAIRE

About you

2. How long have you been a solicitor?

- ☐ 0-5 years
- ☐ 6-10 years
- ☐ 11-15 years
- ☐ 16-20 years
- ☐ 21+ years

3. Please state your main areas of legal practice in the box below.

4. Are you a solicitor with higher rights of audience?

- ☐ Yes
- ☐ No

If 'No', please state whether you appear as an advocate in the lower courts

5. Do you hold any part-time judicial posts? Judicial posts refers to those in both courts and tribunals.

- ☐ Yes
☐ No

If 'Yes', please advise the nature of your judicial post in the box below

6. In which geographic region are you principally based for work?

- ☐ London ☐ South East
☐ North West ☐ South West
☐ North ☐ Wales
☐ Yorks and the Humber ☐ Scotland
☐ West Midlands ☐ Northern Ireland
☐ East Anglia

7. What is your gender?

8. Of the options below, what best describes your religious beliefs (as distinct from your cultural background)?

If within one of the following options you associate with a particular denomination, please indicate which in the box below.

- ☐ Agnostic ☐ Muslim
☐ Atheist ☐ Sikh
☐ Buddhist ☐ Any other religion - please specify in the box below
☐ Christian ☐ No religion
☐ Hindu ☐ Prefer not to say
☐ Jewish

Other (please specify)

9. How often do you attend court or a tribunal?

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

Relationship between judges' personal factors and judicial decision-making

10. Do you agree or disagree with the view that judges' personal factors influence judicial decision-making in cases where there is no settled law and/or judicial discretion is exercised? *The term 'personal factors' is used here to refer collectively to an individual's background, experience and characteristics.*

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

Additional comments:

11. What personal factors do you think are most likely to influence judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised?

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

Knowing about judicial personal factors

12. Please indicate how much you know about the following judicial personal factors in relation to the majority of the judges that you appear before most regularly in court.

| | I always know | I often know | I occasionally know | I rarely know | I never know |
|--|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Age | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Disability | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Educational background | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Family status | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Political ideological preferences. This refers to whether a judge has a 'conservative' or 'liberal' approach rather than to political party affiliation. | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Prior employment | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Religious or other beliefs (including a lack of belief) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Sexuality | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Additional comments:

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

The effect of judicial personal factors on judicial decision-making

13. The following statements are about your perceptions of the ways in which judicial personal factors affect judicial decision-making. Please indicate the extent to which you agree or disagree with the following statements.

| | Strongly agree | Agree | Neither agree nor disagree | Disagree | Strongly disagree |
|--|-----------------------|-----------------------|----------------------------|-----------------------|-----------------------|
| I think that a judge's personal factors affect case outcomes | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I think that a judge's personal factors affect judicial approach (setting aside whether they affect case outcomes) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I think that a judge's personal factors have no effect on judicial approach nor on judicial outcomes | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| I often think that the outcome of a case will be determined by which judge we draw in the judicial lottery | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Additional comments:

14. To what extent do you agree or disagree with the following statement? *'Consideration as to the impact of a judge's personal factors on his or her judgments is part of my day-to-day work as a solicitor.'*

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

Additional comments:

15. To what extent do you agree or disagree with the following statement? *I would find it useful to know more about the personal factors relating to any judge hearing a case relating to a client of mine*. Please briefly explain your response in the box below.

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

Please briefly explain your response in the box below.

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

Relationship between judges' religious beliefs and judicial decision-making

16. To what extent do you agree or disagree with the view that the religious beliefs of a judge may influence his or her judicial decision-making in cases where there is no settled law and/or judicial discretion is required?

From this point onwards in the questionnaire, all references to 'religious beliefs' includes a lack of belief.

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

Additional comments:

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

17. If you agree with the view that the religious beliefs of a judge can influence his or her judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised, how often do you think that they may do so?

- ☐ Always
- ☐ Often
- ☐ Occasionally
- ☐ Rarely
- ☐ Never

Additional comments:

18. If you agree with the view that the religious beliefs of a judge influence his or her judicial reasoning, do you think that they do so:

- ☐ Consciously only
- ☐ Unconsciously only
- ☐ Both consciously and unconsciously
- ☐ Don't know

Additional comments:

19. If you agree with the view that the religious beliefs of a judge influence his or her judicial reasoning, in what types of case do you think this will be most likely?

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

Accommodating religious beliefs

20. To what extent do you agree or disagree with the view that a judge should be able to request an exemption from hearing a case involving religious issues or religiously sensitive issues because of his or her own religious beliefs? Please briefly explain your response in the box below.

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

Please briefly explain your response in the box below:

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING SOLICITOR PERCEPTIONS QUESTIONNAIRE

How your religious beliefs affect your approach

21. How often are you involved in cases where religious or religiously sensitive issues arise?

- ☐ Always
- ☐ Often
- ☐ Occasionally
- ☐ Never
- ☐ Don't know

Additional comments:

22. As a solicitor, please indicate which of the following statements best reflects your own approach when dealing with cases in which religious issues or religiously sensitive issues arise.

- ☐ I find it easy to set aside my own religious views
- ☐ I find it difficult to set aside my own religious views but I am able to do so
- ☐ I find it difficult to set aside my own religious views and I am never able to do so
- ☐ I do not think it is appropriate or necessary to set aside my own religious views
- ☐ Don't know

Additional comments:

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

Specialist panel to hear cases involving religious or religiously sensitive issues?

23. In the employment law case of *McFarlane v. Relate Avon Ltd* [2010] EWCA Civ 880, Mr McFarlane appealed against a decision of the Employment Appeal Tribunal rejecting his claims of unfair dismissal and religious discrimination brought against his employer, Relate Avon Ltd.

Mr McFarlane, a relationship counsellor, had been dismissed for refusing to counsel same-sex couples on sexual matters because to counsel same-sex couples would have been contrary to his religious beliefs.

In support of Mr McFarlane's application to appeal, Lord Carey, former Archbishop of Canterbury, provided a witness statement in which he appealed to the Lord Chief Justice to establish "a specialist Panel of Judges designated to hear cases engaging religious rights". Lord Carey said that "Such Judges should have a proven sensitivity and understanding of religious issues..."

Please indicate whether you support or oppose having a specialist panel of judges 'with a proven sensitivity and understanding of religious issues' to hear cases involving such issues as suggested by Lord Carey in *McFarlane v. Relate Avon Ltd*? Please briefly explain your response in the box below.

- ☐ I support having such a specialist panel of judges to hear such cases
- ☐ I oppose having such a specialist panel of judges to hear such cases
- ☐ I neither support nor oppose having a specialist panel of judges to hear such cases

Please briefly explain your response in the box below:

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING

SOLICITOR PERCEPTIONS QUESTIONNAIRE

24. If you support having a specialist panel of judges to hear cases involving religious issues as suggested by Lord Carey in *McFarlane v. Relate Avon Ltd*, please suggest what qualifying criteria you think there should be to sit on such a panel and why?

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING
SOLICITOR PERCEPTIONS QUESTIONNAIRE

Judicial Diversity

25. Judicial diversity is usually defined as meaning the extent to which women and black or minority ethnic groups are under-represented in the judiciary.

Do you agree or disagree that there should be greater diversity in the judiciary?

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

Additional comments:

26. Do you agree or disagree that the judiciary's current focus on increasing gender and ethnicity diversity in the judiciary should be extended to include any of the following characteristics? If you tick 'Other', please state the other characteristics that you think should be included in judicial diversity initiatives in the box below.

| | Strongly agree | Agree | Neither agree nor disagree | Disagree | Strongly disagree |
|----------------------|-----------------------|-----------------------|----------------------------|-----------------------|-----------------------|
| Age | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Disability | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Gender re-assignment | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Political beliefs | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Religious beliefs | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Sexual orientation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Social class | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Other (please specify):

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING
SOLICITOR PERCEPTIONS QUESTIONNAIRE

27. If you agree that the current focus on increasing gender and ethnicity diversity in the judiciary should be extended to include other judicial characteristics, please explain why in the box below.

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING
SOLICITOR PERCEPTIONS QUESTIONNAIRE

28. If you have any further comments on the issues being raised in this questionnaire, please use the space below.

COURTING FAITH: RELIGION AND JUDICIAL DECISION-MAKING
SOLICITOR PERCEPTIONS QUESTIONNAIRE

Thank you for completing this questionnaire.

APPENDIX 9: Invitation to take part in the online SPQ

INVITATION BY DIRECT EMAIL

Invitation to take part in PhD Research - Religion and Judicial Decision-making

Dear

I hope you do not mind me contacting you direct. I am a PhD Law student at the UEA Law School in Norwich. My research entitled "Courting Faith: Religion and Judicial Decision-making" examines the relationship between judges' decision-making and religious beliefs from the perspective of barristers and solicitors.

I am writing to ask if you would be so kind as to consider taking part in my research. Your participation would involve completing an online survey which seeks your views about the nexus between judges' religious beliefs (and other personal factors) and judging. The questionnaire takes approximately 15 minutes to complete. If you would like to take part, please click on the following link:

<https://www.surveymonkey.com/s/RB0515>

If you would like further details about the research project or would like to complete the survey in a different format, please do not hesitate to contact me.

I would like to thank you for your time in considering this request and I very much hope that you find this research of interest.

Yours sincerely,

Amanda Springall-Rogers

APPENDIX 10: Choice of statistical procedure

| STEP | CONSIDER |
|---|--|
| 1 What research questions are to be addressed? | Can the research question be asked in more than one way? If so, which question is most suitable given the nature of the data collected? Does the research question explore relationships amongst variables or relationships amongst groups? |
| 2 Identify the questionnaire items and scales that will be used to answer the research questions | Identify the following: each variable, how each variable was measured, how many response options were available and the possible range of scores. |
| 3 Identify the nature of each of the variables | Is the variable a dependent variable or an independent variable and how is it measured? Do the variable responses need to be collapsed? |
| 4 Is a parametric or non-parametric test appropriate? | What assumptions need to be met? Are these assumptions met? |
| 5 Consider the tests now available and choose which is most appropriate | Why is the chosen statistical procedure more appropriate than others? |

Steps for choosing which statistical technique to use for data analysis (*adapted from Julie Pallant, SPSS Survival Manual (Allen and Unwin 2005)*)

APPENDIX 11: Formal Application for Judicial Participation in Research

APPLICATION FOR JUDICIAL PARTICIPATION IN RESEARCH PROJECT

Applicant: Amanda Springall-Rogers (Researcher)

Position: PhD Law Research Candidate, University of East Anglia, Norwich

Project Supervisors: Mr Gareth Thomas
Professor Owen Warnock
Ms Gillian Daly

Working Project Title: Courting Faith: Religion as a Factor in Judicial Decision-making

Date of Application: 30 April 2014

COURTING FAITH: RELIGION AS A FACTOR IN JUDICIAL DECISION-MAKING

INTRODUCTION

Permission is sought from Heads of Divisions and the Senior President of Tribunals to invite judges to take part in interviews or to complete a short online survey as part of a PhD research project exploring lawyers' perceptions of the relationship between religion and judicial decision-making in British courts.

It is widely acknowledged that judges' personal backgrounds and experiences may impact upon their judicial decision-making, particularly in hard cases and in cases where judicial discretion is required. As such, in so far as religious belief may be a constituent part of a judge's background and integral to his or her personal outlook, religion could potentially affect judicial reasoning, consciously or unconsciously. There has been a wealth of empirical research exploring the relationship between religion and judicial decision-making conducted in other jurisdictions, most notably the US, where some findings indicate that religion does affect judicial reasoning in certain legal areas. However, there is a paucity of similar research in relation to the judiciary in Great Britain.

Using interviews and an online survey, this exploratory social-legal empirical study considers the relationship between religion and judicial decision-making from the unique perspective of judges. No alternative source of data can provide a similar insight. The survey will form part of a wider PhD project; the researcher has already conducted interviews with barristers to elicit opinion as to whether religious beliefs inform judicial reasoning. Whilst findings from those interviews have yet to be analysed, it is apparent that some of those questioned thought religion may play a role in judicial reasoning, albeit not so as to be determinative of case outcomes.

Judicial participation in the research project will provide an invaluable and distinct insight into how judges perceive the relationship between religion and judicial decision-making. The proposed study will make a valuable contribution to a greater understanding of how judges judge and help fill the 'information black hole' that currently exists in the understanding of the judiciary in the UK (Genn 2010).

RESEARCH AIMS AND OBJECTIVES

This foundational enquiry explores the nexus between two themes – religion and judicial decision-making.

Aims

The proposed research adds a new dimension to a burgeoning body of academic study that aims to fill the void in the understanding of the judiciary in the UK. It will contribute to a wider understanding of the factors that influence judicial decision-making and will inform the judicial diversity debate through an exploration of the relationship between religion and judicial decision-making from the unique perspective of members of the judiciary.

Judicial participation is crucial to the research project.

Objectives

The research objectives are:

- To assess, using qualitative research methods, judges' views as to whether religious beliefs (and other personal characteristics) are perceived by others to influence judicial reasoning.
- To examine, using qualitative interview techniques, the attitudes and experiences of senior members of the judiciary in relation to the question of what effect, if any, a judge's personal religious beliefs have on their judicial reasoning. There is no requirement for participating judges to disclose their own religious affiliation.

- To seek judicial opinion as to the merits or otherwise of having specialist judges to hear cases in which religiously sensitive issues are identified i.e. a requirement for judges hearing such cases to have what might be described as a 'religious ticket'.
- To explore views as to whether judges' religious beliefs should be subject to academic enquiry in the UK context.
- To assess the feasibility of including religious belief as a variable in future empirical analyses that explore how judges judge in our national courts.

METHODOLOGY

The project proposes to employ a mixed methods research strategy as follows:

1. Qualitative research - *Semi-structured interviews with senior members of the Judiciary*

Approval is sought to allow the researcher to interview current and retired Supreme Court justices and /or Lord and Lady Justices of Appeal, for the purpose of gaining an insight into how senior judges view the relationship between religion and judicial reasoning. The desired sample size is between 4-8 participants.

The use of elite interviews (that is to say interviews 'with persons who are leaders or experts in a community, who are usually in powerful positions' (Kvale 2009)) is an established method of enquiry in socio-legal studies of judicial decision-making. Over 30 years ago, in his benchmark text 'The Law Lords', Paterson interviewed 15 Law Lords and 46 barristers to explore decision-making in the House of Lords (Paterson 1982). In his most recent landmark study of appellate decision-making in the House of Lords and Supreme Court, Paterson again uses elite interviews to form the backbone of his research examining judicial decision-making as a social process (Paterson 2013).

In compliance with the guidelines for researchers seeking approval for judicial participation in research:

- The information provided will be confidential and all data collection, storage and processing will comply with the principles of the Data Protection Act 1998.
- A transcript of each interview will be made. No participant will be identified by name and information disclosed will not lead to any third party or

specific case being identifiable. Whilst direct quotations may be used, these will be non-attributable (For further details see Annex A, 'How will your privacy and confidentiality be maintained?').

- The researcher undertakes to provide relevant judicial Heads of Division and the judges interviewed as part of the research with a final draft copy of any report for comment prior to publication.
- Participants will not be asked about the merits of individual cases.
- To ensure judicial participation does not involve an undue burden on those taking part, interviews will typically take no more than 30 minutes (unless the participant has expressly agreed otherwise). Interviews will be by video-call (e.g. Skype), telephone or face-to-face according to the participant's preference.

A Participant Information Sheet is provided at Annex A.

A Participant Consent Form is provided at Annex B.

Questions for discussion are listed at Annex C.

A copy of the letter giving ethical approval for the research project is provided at Annex D.

2. Qualitative research - *Questionnaires to members of the Judiciary*

Approval is sought to allow the researcher to send an online questionnaire to the following members of the judiciary:

- Individual Supreme Court Justices as listed on the Supreme Court website (<http://supremecourt.uk/about/biographies-of-the-justices.html>).
- Members of the senior judiciary as listed under 'Senior judiciary' on the Judiciary of England and Wales website (<http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/list-of-members-of-the-judiciary/senior-judiciary-list>, details being correct as at 13 March 2014). Members of the senior judiciary who have agreed to be interviewed will not be asked to complete a questionnaire.
- Circuit judges as listed on the Judiciary of England and Wales website (<http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/list-of-members-of-the-judiciary/circuit-judge-list>, details being correct as at 6 December 2013).
- Tribunal Judges, a list of which should be available from the Judicial Office internal database (as per information provided in the Judicial Office response to Freedom of Information Request 79448, December 2012).

The questionnaire will ask judges for their views on factors affecting judicial decision-making and on diversity in the judiciary. The survey will be confidential and results will be presented in an anonymised form. Data collection, storage and processing will comply with the principles of the Data Protection Act 1998.

The draft questionnaire is provided at Annex E.

WHY EXPLORE THE RELATIONSHIP BETWEEN RELIGION AND JUDICIAL DECISION-MAKING?

Changing Judicial and Religious Landscapes

There has been a significant expansion in the power and reach of the British judiciary over the last 70 years (Genn, 2010). One consequence of this wider judicial remit is that judges are increasingly required to adjudicate on cases engaging novel, often controversial, issues of profound political, social and moral importance. In consequence, judges and judicial decision-making might reasonably have been expected to have captured the interest of the academic community in the UK. However, with a few notable exceptions (e.g. Griffith 1977, Paterson 1982, Robertson 1982), it is only recently that judicial decision-making has begun to attract the wider attention of legal scholars - who have traditionally focused on a legalistic analysis of cases rather than exploring decisions from a socio-legal perspective. This lack of academic scrutiny has been described as ‘an astonishing void in our understanding of the judiciary as a critical social institution...’ (Genn, 2010). Thomas goes further and suggests the lack of understanding about the judiciary is ‘academically unacceptable and socially dangerous’ (Thomas 2012).

Contemporaneously, the religious landscape of the UK has changed significantly. Whilst the cultural monopoly once enjoyed by the institutionalised forms of Christianity has waned and much of society has become increasingly secular, a growing number of judicial decisions relate to matters in connection with which many religions have clear positions or approaches. This, along with the promotion and protection of religious freedom under the Human Rights Act 1998 for example, means that judges are now more likely to find themselves deciding cases that engage religiously sensitive issues. In turn, this potentially gives rise to tension with the secular approach of the courts or may be a source of conflict for an individual judge if the religious issue in question runs counter to his or her own religious or non-religious beliefs.

Lack of Existing Empirical Research in the UK

Paterson observes that research into the work of the judiciary in the UK is currently undergoing a new lease of life (Paterson 2013). However, empirical studies that explore the influence of personal characteristics and values on judicial decision-making in the UK courts remain scarce. Of the few studies conducted, the scope has historically been limited to the relationship between judicial decisions and political values and/or social class and educational background (e.g. Griffith 1977, Robertson 1982, Arvind and Stirton 2012, Hanretty 2013) with little attention having been paid to the role of other demographic factors or values on judicial reasoning. In contrast, scholars in the US have long been interested in the link between judicial determinations and a myriad of other factors – gender, religion, race, age, prior employment and political ideology have been comprehensively analysed. These studies typically employ quantitative methods to analyse publicly available data often contained in longitudinal databases of US court decisions (Thomas 2013). Whilst US findings have proved generally inconclusive, there is sufficient evidence to suggest that a judge's religious convictions may inform judicial reasoning in the higher courts, consciously or unconsciously, in some legal areas.

Upswing in studies of judicial decision-making in the UK

It is only recently that scholars have become interested in investigating the influence of a wider range of variables on judicial reasoning to those few already examined in the context of the British judiciary i.e. political values, social class and educational background. For example, prompted by constitutional reforms and by initiatives to improve gender diversity in the judiciary, the role of gender on legal judgments is now subject to extensive investigation. Of particular interest has been the question of whether having a feminist philosophy makes a difference to judicial reasoning (e.g. Malleson 2003, Hunter 2008, Rackley 2009, Hunter, McGlynn and Rackley 2010). Significantly, the most recent investigation to explore the relationship between personal characteristics and judicial decision-making in the UK has broadened the scope of enquiry further. It is significant that, in an empirical study of tribunal decision-making in relation to Disability Living Allowance appeals using case simulation, Genn and Thomas assess the influence of factors including gender, age, household income, ethnicity and, for the first time, the religion of the panel members on appeal decisions (Genn and Thomas 2013). In light of these developments, this exploratory research project is particularly timely.

BENEFITS OF THE RESEARCH

The key benefits of the research are three-fold:

- ***Benefits the judiciary***

It will provide an opportunity for individual judges to reflect upon their own experiences of judicial decision-making and to assess how their attitudes compare to those of their colleagues and others involved in the judicial process. Such awareness can help improve judicial skills across the bench by encouraging 'greater self-conscious objectivity and heightened attention to legal rules and norms' (Sisk 2008).

- ***Improves and promotes the administration of justice***

Judicial participation demonstrates a tangible commitment to the promotion of greater transparency in, and access to, the judiciary, the value of which is to enhance public confidence in the judiciary and the administration of justice.

- ***In the public interest***

Waldron states judges 'are not deciding what to do as individuals; they are making decisions for and about a whole society' (Waldron 2008). On this basis, there is a legitimate societal interest in knowing more about the factors that inform judicial reasoning, particularly in cases in which morally and ethically sensitive issues are engaged.

TIMESCALE

The anticipated start date and duration is:

1. *Interviews*: Subject to approval, estimated start date June 2014 for completion October 2014.
2. *Questionnaires*: Subject to approval, it is anticipated questionnaires will be sent to members of the judiciary between June and July 2014.

Project due for completion: March 2015

ANNEX A

JUDICIAL PARTICIPATION INFORMATION SHEET (Interviews)

Courting Faith: Religion as a Factor in Judicial Decision-making

You are being invited to participate in this postgraduate research project. Before you decide whether you would like to participate, it is important for you to understand why the research is being done and what your participation will involve. Please take time to read the following information carefully. Please contact me if anything is unclear or if you would like more information. I would like to take this opportunity to thank you for your interest.

What is the aim of the study?

This research project explores the relationship between religion and judicial decision-making.

It is widely acknowledged that judges' personal backgrounds and experiences may impact upon their judicial decision-making, particularly in hard cases and in cases where judicial discretion is exercised. Therefore, in so far as religious beliefs may be a constituent part of a judge's background and personal outlook, a judge's religious beliefs could potentially affect judicial reasoning, consciously or unconsciously.

Forming part of a wider PhD research project, this study uses semi-structured interviews to explore the nexus between religion and judicial decision-making from the unique perspective of judges. There has been a wealth of empirical research exploring this relationship in other jurisdictions, most notably the US, where findings indicate that religion does affect judicial reasoning in certain legal areas. In contrast, it is only recently that religion has been considered in an empirical study of decision-making in the UK.

The aim of the research project is to explore the relationship between religion and judicial decision-making in order to gain a wider understanding of the factors that influence judicial decision-making and to help fill the void that currently exists in the understanding of how judges judge in British courts.

Why have you been asked to take part in this research project?

This project explores the relationship between religion and judicial decision-making from the perspective of members of the judiciary. As a member of the appellate judiciary, you are likely to be involved in cases raising unexplored legal issues where religion might well be relevant and, as such, you are well placed to offer insight into this topic.

The information collected for the research project will be used to produce a PhD thesis and may be used in academic publications. Anonymised direct quotes from the interview transcript may be used.

What will participation involve?

An interview will be conducted at a time and place convenient for you. This can be face-to-face, by video call (e.g. Skype) or telephone. The interview will be based around a semi-structured format and will typically last between 20 – 30 minutes.

What will happen if you choose to withdraw from the study?

It is up to you whether to participate or not. If you decide to take part you are still free to withdraw during the interview, or at any time thereafter, and without giving a reason. If you choose to withdraw from the study every effort will be made to ensure all data is withdrawn and destroyed. However, it will not be possible for data to be extracted and destroyed following submission of the PhD thesis for examination or where data is included in academic articles that have been accepted for publication.

How will your privacy and confidentiality be maintained?

If you agree to take part in the research project, every effort will be made to ensure any information you provide will be kept confidential. All data collection, storage and processing will comply with the principles of the Data Protection Act 1998.

All efforts will be made to ensure that you cannot be identified as a participant in the study and that any information you disclose will not lead to any third party or specific case being identifiable in the research.

A digital audio file of the interview (if agreed to) will be transferred from the recording device using audio management software to a memory stick that will remain in the researcher's office until the recording is transcribed. Upon

transcription, the audio file will be erased from the memory stick. On completion of the research project, the memory stick will be physically destroyed.

The transcript of the interview will be anonymised and will be allocated a unique identifier. A master list identifying you to the unique identifier will be held on a password protected computer accessed only by the researcher. Other potentially disclosive text will be replaced with more generalized text and third parties and cases will be anonymised and/or allocated pseudonyms. You will be asked to approve the transcript.

The transcript will be stored on a password protected computer and a hard copy will be stored in a locked filing cabinet to which the researcher has sole access. The transcript will not be available to other researchers without your express permission. Electronic data will be stored on a computer with password protection, at both login and individual file level, accessible only by the researcher.

At the conclusion of the study, the information or data collected from you may be retained and used (in its anonymised form) for future research provided the researcher has agreed to preserve the confidentiality of the data and subject to approval from the relevant research ethics committee.

What happens next?

If you are willing to take part in this research project please contact me, Amanda Springall-Rogers, by email at: A.Springall-Rogers@uea.ac.uk. If you decide to participate I will contact you by return so we can arrange an interview, at a time and date that is convenient for you. You will be given this information sheet and asked to sign a consent form.

Further information and complaints procedure

If you have any questions or require more information about this research project or, if you decide you would rather not participate in the study but would like to make any comments about the research, please contact me by email at: A.Springall-Rogers@uea.ac.uk or by post to: Amanda Springall-Rogers, UEA Law (PGR), University of East Anglia, Norwich Research Park, Norwich NR4 7TJ.

If you wish to make a complaint relating to your participation in this research project, please contact the research project lead supervisor by email at: G.Thomas@uea.ac.uk or by post to: Gareth Thomas, UEA Law, University of East Anglia, Norwich Research Park, Norwich NR4 7TJ.

Approval to conduct this research has been provided by the UEA General Research Ethics Committee in accordance with ethics review and approval procedures.

Thank you for your interest.

ANNEX B

JUDICIAL PARTICIPATION CONSENT FORM (Interviews)

Courting Faith: Religion as a Factor in Judicial Decision-making

Thank you for your interest in taking part in this research. If you have any questions, please ask the researcher before you agree to participate in the research project. Please complete this form after you have read the Participant Information Sheet relating to the research.

Participation

I have read and understood the Participant Information Sheet for the above research project. I have had the opportunity to ask questions about the project.

☐

I understand that I can withdraw at any stage of the research project without giving any reason. Should I decide to withdraw, I understand all data will be withdrawn and destroyed up until submission of the PhD thesis for examination or where data has been included in academic articles accepted for publication.

☐

I consent to being interviewed and the interview being recorded using a digital audio device.

☐

I understand that I will be given a transcript of the interview for my approval before it is included in the research project.

☐

Use of information

I understand and agree to the arrangements relating to privacy and confidentiality set out in the Participant Information Sheet under the heading "How will your privacy and confidentiality be maintained?"

☐

I understand that data will be processed manually and with the aid of computer software. I consent to the processing of my personal information for the purpose of this research project and

that such information will be handled in accordance with the provisions in the UK Data Protection Act 1998.

☐

I understand that information gained during the research project will be used to produce a PhD thesis and may be used in academic publications.

☐

I would like to receive a summary of the results.

☐

I agree that information or data collected from me may be used in future research only where the researchers agree to preserve the confidentiality of the data and subject to approval from the relevant research ethics committee.

☐

Signed:..... (Participant)

Print name:.....

Date:

Signed:.....(Researcher)

Print name:.....

Date:.....

Please return to: Amanda Springall-Rogers, UEA Law (PGR), Norwich Research Park, Norwich, Norfolk NR4 7TJ or by email to A.Springall-Rogers@uea.ac.uk. If you have any questions or issues relating to your participation in this research project, please contact the researcher by post or email at the addresses stated above.

If you wish to make a complaint relating to your involvement in the research, please contact the research project supervisor, Gareth Thomas, by post to Mr. Gareth Thomas, UEA Law, Norwich Research Park, Norwich, Norfolk NR4 7TJ or by email at G.Thomas@uea.ac.uk.

Approval to conduct this research has been provided by the UEA General Research Ethics Committee in accordance with ethics review and approval procedures.

ANNEX C

SCHEDULE OF QUESTIONS TO PUT TO JUDICIAL PARTICIPANTS

COURTING FAITH: RELIGION AS A FACTOR IN JUDICIAL DECISION- MAKING

Please note: Where questions refer to religious views or beliefs this should be taken to include the absence of such views or beliefs

1. Do you agree or disagree with the view that, in some cases, the decisions of judges are influenced by their own backgrounds, experience and personal outlook, in addition to the law itself? If so, can you please give examples of how this occurs (without referring to specific reported cases)?
2. Do you think religious beliefs can affect judicial reasoning, consciously or unconsciously? If so, what impact does this have on judicial decision-making?
3. Do your own religious views ever affect your judicial reasoning? If so, how?
4. How easy or difficult is it to set aside your own religious beliefs in cases involving religious issues or religiously sensitive issues where one or more of the arguments relied on is in conflict with your own beliefs?
5. To what extent do you agree or disagree with the view that a judge should be able to request an exemption from hearing a case involving religious issues or religiously sensitive issues on grounds of his or her own religious beliefs? Please briefly explain your response in the box below.
6. Have you noticed an increase in cases engaging religiously sensitive issues since the Human Rights Act 1998 came into force?
7. In the employment law case of *McFarlane v. Relate Avon Ltd* [2010] EWCA Civ 771, Mr McFarlane appealed against a decision of the Employment Appeal Tribunal rejecting his claims of unfair dismissal and religious discrimination brought against his employer, Relate Avon Ltd. Mr McFarlane, a relationship counsellor, had been dismissed for refusing to counsel same-sex couples on sexual matters because to counsel same-sex couples on such issues would be contrary to his Christian beliefs.

In support of Mr McFarlane's application to appeal, Lord Carey, former Archbishop of Canterbury, provided a witness statement in which he appealed to the Lord Chief Justice to establish "a specialist Panel of Judges designated to hear cases engaging religious rights". Lord Carey said that "Such Judges should have a proven sensitivity and understanding of religious issues."

Do you think there is any merit in having a specialist panel of judges with ‘a proven sensitivity and understanding of religious issues’ to hear cases engaging such issues? If so, how would you suggest panel members be selected? If not, why not?

8. How would you feel about having biographical information about you, including information about your religion, religious beliefs or absence of religious beliefs being widely available?

ANNEX D

ETHICAL APPROVAL FROM UEA



Amanda Springall-Rogers
LAW
UEA

Research and Enterprise Services
East Office (Arts Building)

University of East Anglia
Norwich Research Park
Norwich NR4 7TJ
United Kingdom

Tel: +44 (0) 1603 591574
Email: researchandenterprise@uea.ac.uk
www.uea.ac.uk/researchandenterprise

8th August 2013

Dear Amanda

I am writing to you on behalf of Professor Martin Barker, Chair, General Research Ethics Committee, in response to your submission of an application for ethical approval for your study 'Courting Faith: Exploring the Influence of Religious Affiliation as an Extralegal Factor in Judicial Decision Making'.

Having considered the information that you have provided in your correspondence Professor Barker has asked me to tell you that your study has been approved on behalf of the General Research Ethics Committee.

You should let this office know if there are any significant changes to the proposal which raise any further ethical issues.

Will you please let this office have a brief final report to confirm the research has been completed.

Yours sincerely

A handwritten signature in black ink, which appears to read 'Kat Humphries', is written over a horizontal line.

Kat Humphries
Administrative Assistant
Research and Enterprise Services East Office
University of East Anglia
Norwich Research Park
Norwich NR4 7TJ
Email: katherine.humphries@uea.ac.uk

ANNEX E

COURTING FAITH: RELIGION AS A FACTOR IN JUDICIAL DECISION-MAKING

RELIGION AND JUDICIAL REASONING - JUDICIAL PERCEPTIONS SURVEY

Questionnaire

The aim of this survey is to contribute to a wider understanding of the factors that influence judicial reasoning and to inform judicial diversity debate. The survey will typically take around 10 minutes to complete and will involve answering questions that seek your personal views regarding the relationship between religion and adjudication in the British courts. The survey forms part of a wider PhD research project in which interviews are also to be used to explore the perceptions of members of the judiciary in relation to these matters.

The information you provide in the survey is completely confidential – individual answers will not be published. If you choose to take part, you may withdraw at any time without giving a reason. At the end of the questionnaire, there is the option to provide your contact details should you also be willing to be interviewed. If you provide this information it will be held separately from your responses and will only be accessed by the project team.

The project team is: Amanda Springall-Rogers (PhD Researcher) and Gareth Thomas, Professor Owen Warnock and Gillian Daly (Project Supervisors).

This study has been reviewed and approved by the UEA General Research Ethics Committee in accordance with ethics review and approval procedures.

Before starting the survey, please confirm the following:

- ☐ I agree to take part in the study.
- ☐ I have read the information about the study.
- ☐ I understand that I am free to withdraw from the study at any time without giving a reason.

☐ I understand that I may skip any questions I would prefer not to answer.

Please note that if you would like to provide a more detailed response to a question you can do so where an additional comment box is found in the space below the question. A separate box is also provided at the end of the questionnaire should you have any further comments.

About you

1. What is your judicial role? ***Please select one.***

- ☐ Justice of the Supreme Court
- ☐ Court of Appeal Judge
- ☐ High Court Judge
- ☐ A retired member of the Senior Judiciary under 75 (as listed on the Judicial Office website < <http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/list-of-members-of-the-judiciary/senior-judiciary-list> >
- ☐ Circuit Judge
- ☐ Tribunal Judge or Chairman
- ☐ Other – *please specify*

2. How long have you held judicial office? ***Please count from the point at which you were first appointed as a judge whether on a part-time or full-time, salaried or fee-paid, basis.***

- ☐ 0 – 5 years
- ☐ 6 – 10 years
- ☐ 11 – 15 years
- ☐ 16 – 20 years
- ☐ 21 years +

3. In which jurisdiction do you sit? ***Please tick all that apply.***

- ☐ Civil
- ☐ Criminal
- ☐ Family
- ☐ Other - *please specify*

4. In which geographic region do you consider you are principally based for work?

- ☐ England Please specify:
- ☐ London
- ☐ Midlands
- ☐ South East

- ☐ North
- ☐ North East
- ☐ West
- ☐ Wales and Chester
- ☐ Scotland

Additional comments (if desired):

5. What is your gender?

- ☐ Female
- ☐ Male
- ☐ Transgender
- ☐ Prefer not to say

6. Of the options below, what best describes your religious beliefs (as distinct from cultural background)? If within one of the following options you associate with a particular denomination, please indicate which in the box below.

- ☐ None (please go to Q. 8)
- ☐ Agnostic
- ☐ Atheist
- ☐ Christian
- ☐ Muslim

- ☐ Jewish
- ☐ Hindu
- ☐ Buddhist
- ☐ Sikh
- ☐ Any other religion – please specify

Additional comments (if desired):

7. To what extent do you actively practice your religion? ***For the purposes of this question, ‘practice’ includes religious activities that are expected of believers ‘such as worship, prayer, participation in special sacraments, and adherence to religious dress and dietary laws, for example’ (Purdam, Afkhami, Crockett and Olsen 2007).***

- ☐ Always
- ☐ Often
- ☐ Occasionally
- ☐ Rarely
- ☐ Never

Additional comments (if desired):

The Relationship between Religion and Judicial Reasoning

8. To what extent do you agree or disagree with the view that the religious beliefs of a judge may influence his or her judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised?

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree (please go to Q.12)
- ☐ Disagree (please go to Q.12)
- ☐ Strongly disagree (please go to Q.12)

Additional comments (if desired):

9. If you agree with the view that the religious beliefs of a judge may influence his or her judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised, how *often* do you think that they may do so?

- ☐ Always
- ☐ Often
- ☐ Occasionally
- ☐ Rarely
- ☐ Never

Additional comments (if desired):

10. If you agree with the view that the religious beliefs of a judge influence his or her judicial reasoning, do you think that they do so:

- ☐ Consciously
- ☐ Unconsciously
- ☐ Both consciously and unconsciously

11. If you agree with the view that the religious beliefs of a judge influence his or her judicial reasoning, in what types of case do you think this will be most likely?

12. To what extent do you agree or disagree with the view that a judge should be able to request an exemption from hearing a case involving religious issues or religiously sensitive issues on grounds of his or her own religious beliefs? Please briefly explain your response in the box below.

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree

The Relationship between Religion and Your own Judicial Reasoning

13. Please use the space below to list the personal factors that you think will most likely influence your judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised. Examples include factors such as gender, age, family circumstances, educational background, prior employment and social class.

14. To what extent do you think that your own religious beliefs affect your judicial reasoning?

- ☐ Always
- ☐ Often
- ☐ Occasionally
- ☐ Never
- ☐ Don't know
- ☐ Not applicable

Additional comments (if desired):

15. How often do you adjudicate cases in which religious issues or religiously sensitive issues arise?

- ☐ Always
- ☐ Often
- ☐ Occasionally
- ☐ Never
- ☐ Don't know

Additional comments (if desired):

16. Please indicate which of the following statements best reflects your own approach when dealing with cases in which religious issues or religiously sensitive issues arise:

- ☐ I find it easy to set aside my own religious views
- ☐ I find it difficult to set aside my own religious views but I am able to do so
- ☐ I find it difficult to set aside my own religious views and I am never able to do so
- ☐ I do not think it is appropriate or necessary to set aside my own religious views
- ☐ Not applicable

Additional comments (if desired):

17. Have you noticed any change in the number of cases in which religious issues or religiously sensitive issues have been raised since the coming into force of the Human Rights Act 1998?

- ☐ Yes, significant increase
- ☐ Yes, moderate increase
- ☐ No, no change
- ☐ Yes, a significant decrease
- ☐ Yes, moderate decrease
- ☐ Don't know

Additional comments (if desired):

18. In the employment law case of *McFarlane v. Relate Avon Ltd* [2010] EWCA Civ 771, Mr McFarlane appealed against a decision of the Employment Appeal Tribunal rejecting his claims of unfair dismissal and religious discrimination brought against his employer, Relate Avon Ltd.

Mr McFarlane, a relationship counsellor, had been dismissed for refusing to counsel same-sex couples on sexual matters because to counsel same-sex couples would have been contrary to his religious beliefs.

In support of Mr McFarlane's application to appeal, Lord Carey, former Archbishop of Canterbury, provided a witness statement in which he appealed to the Lord Chief Justice to establish "a specialist Panel of Judges designated to hear cases engaging religious rights". Lord Carey said that "Such Judges should have a proven sensitivity and understanding of religious issues."

Please indicate whether you support or oppose having a specialist panel of judges 'with a proven sensitivity and understanding of religious issues' to hear cases involving such issues as suggested by Lord Carey in *McFarlane v. Relate Avon Ltd*?

- ☐ I support having such a specialist panel of judges to hear such cases
- ☐ I oppose having such a specialist panel of judges to hear such cases (please go to Q.20)
- ☐ I neither support nor oppose having a specialist panel of judges to hear such cases (please go to Q. 21)

19. If you support having a specialist panel of judges to hear cases involving religious issues as suggested by Lord Carey in *McFarlane v. Relate Avon Ltd*, please suggest what qualifying criteria you think there should be to sit on such a panel and why?

20. If you oppose having a specialist panel of judges to hear cases involving religious issues as suggested by Lord Carey in *McFarlane v. Relate Avon Ltd*, please briefly explain why.

21. If you have any further comments on the issues being raised in this questionnaire, please use the space below.

22. Would you be interested in taking part in an interview so your views on this topic can be explored in more detail? If so, please provide your contact details in the space below.

| |
|--|
| |
|--|

Thank you for taking the time to complete this survey.

APPENDIX 12: Ethical considerations

Obtaining ethical approval

Ethical approval was sought in an application to the University of East Anglia General Research Ethics Committee (G-REC) in 2013. In respect of the qualitative interviews with barristers, copies of the Participant Information Sheet and Consent Form were submitted to G-REC for scrutiny. Ethical approval was granted subject to the researcher's compliance with approval conditions (Appendix 11 Annex D).

Voluntary participation

Participation in the research project was on a voluntary basis. In relation to the qualitative interviews with barristers, contact with potential participants was made only where individuals responded to the initial invitation to take part in, or comment on, the research project. These participants were advised of their right to withdraw from the study at any time before, during or after the study. Respondents to the SPQ were advised that they could withdraw from the study prior to submitting the questionnaire response.

Informed consent

All individuals who expressed an interest in taking part in the qualitative interviews were initially provided with a Participant Information Sheet sent via email. The sheet contained comprehensive detail about the study such as the aims of the research, the right of the participant to withdraw from the study at any time and the procedures for maintaining privacy and confidentiality. Participants were invited to contact the researcher should the information sheet give rise to any questions or concerns about the study.

Given the potentially sensitive nature of the interviews conducted, it was decided that the use of a written consent form was the most appropriate means by which to obtain consent. Individuals agreeing to take part in the study were provided with a consent form for completion and return, either by post, email or by hand. The consent form contained a statement of confirmation which gave participants the choice of whether to consent to all or some of the points detailed in the Participant Information Sheet. On completion, participants were asked to retain copies of the

signed consent form and information sheet and to provide the researcher with a signed consent form. The researcher retained all signed consent forms in a secure storage cabinet. Due to the time lapse between the completion of the consent form and the interview date, the researcher sought verbal confirmation from the participant that they had read and understood the Participant Information Sheet and asked if there were any points that required clarification at the start of the interview. The participant was further reminded that they were free to withdraw from the study at any time.

Respondents to the SPQ were provided with details about the research project on the Welcome page of the online questionnaire. The Welcome page also provided the researcher's contact details so that potential respondents had an opportunity to contact the researcher if they had any questions prior to participation. At this point, it was also made clear that by giving consent, respondents permitted the researcher to include responses, including additional written comments, in the write up of the research project. Respondents were asked to give their consent to take part in the study on Page 2 of the online survey, completion of which was necessary in order to access the main part of the questionnaire.

Data Protection

Participants were advised that data collection, storage and processing complied with the provisions of the Data Protection Act 1998.

Anonymity and Confidentiality

Interviews with barristers

The Participant Information Sheet contained details about participant anonymity and confidentiality in the section headed 'How will your privacy and confidentiality be maintained?' At the start of the interviews, participants were asked to reaffirm their consent to allow the interview to be recorded using an audio digital recorder. If a participant advised that they did not consent to the recording of the interview, the researcher asked for permission to make hand written notes.

Interviews were subsequently transcribed by the researcher using computer. Throughout this process, transcripts were anonymised through the use of numerical identifiers and replacement terms. An anonymisation log was kept which was held

separately from the transcripts. Individual files were encrypted and stored on portable storage media (USB stick and CD). Hard copies of transcripts were held in a lockable filing cabinet to which the researcher had sole access. Participants were given the opportunity to review their transcript and were invited to request amendment and/or agree to its use in the research project.

CAQDAS (NVivo10) was used to assist the management of data. Access to NVivo10 was restricted by use of a password known only to the researcher.

SPQ

Using a web-based survey tool such as SurveyMonkey to collect and analyse data raises specific ethical issues relating to anonymity and confidentiality. Although respondents were not asked to provide identifying details such as their name or email address, the default position of the survey software is set to collect IP addresses.¹ To avoid IP tracking in this study, the default option was changed so that IP addresses were not included in the survey results. Furthermore, access to the SurveyMonkey account was restricted by use of a password known only to the researcher.

A small number of the questionnaire respondents asked to be provided with an executive summary of research findings on completion. A written list of these respondents and their contact details is held in a lockable filing cabinet, to which the researcher has sole access. This list will be destroyed after the Executive summary of findings has been distributed to those who have requested a copy.

¹ An IP (Internet Protocol) address is a unique address (numeric) that is assigned to any device connected to an IP network by server or router software.

APPENDIX 13: The Codebook

| Question item | Variable Name | Values |
|--|---------------|--|
| 2. How long have you been a solicitor? | PQE | 1 = 0 – 5 years 2 = 6-10 years 3 = 11-15 years 4 = 16-20 years 5 = 21 years + 99 = Missing |
| 3. Please state your main areas of legal practice in the box below. | AREAPRAC_RC | 1 = Employment 2 = Family 3 = Misc. (non-commercial) 4 = Other 99 = Missing |
| 4. Are you a solicitor with higher rights of audience? | HRA | 1 = Yes 2 = No 99 = Missing |
| 5. Do you hold any part-time judicial posts? | PTJUD | 1 = Yes 2 = No |
| 6. In which geographic region are you principally based for work? | LOC | 1 = London 2 = North West 3 = North 4 = Yorks and Humber 5 = West Midlands 6 = East Anglia 7 = South East 8 = South West 9 = Wales 99 = Missing |
| 7. What is your gender? | GEN | 1 = Female 2 = Male 99 = Missing |
| 8. Of the options below, what best describes your religious beliefs (as distinct from your cultural background)? | RBCOL_RC | 1 = Christian 2 = Unaffiliated 3 = Non-Christian 4 = Prefer not to say |
| 9. How often do you attend court or a tribunal? | ATTCT_RC | 1 = Frequently 2 = Infrequently 3 = Unclear 4 = Missing |
| 10. Do you agree or disagree with the view that judges' personal factors influence judicial decision-making in cases where there is no settled law and/or judicial discretion is exercised? | INFL_PF | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| | | |

| | | |
|--|--|--|
| 11. What personal factors do you think are most likely to influence judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised? | MAINPF1_RC MAINPF2_RC MAINPF3_RC MAINPF4_RC | 1 = Personal characteristics 2 = Personal experience and background 3 = Professional experience and training 4 = Personality 5 = Personal values and beliefs 6 = Attitudes towards other court users 7 = Other |
| 12. Please indicate how much you know about the following judicial personal factors in relation to the majority of the judges that you appear before most regularly in court. | KNOWAGE KNOWDIS KNOWEDU KNOWFAM KNOWPOL KNOWPREEMP KNOWRB KNOWSEX | 1 = I always know 2 = I often know 3 = I occasionally know 4 = I rarely know 5 = I never know |
| 13.1 I think that a judge's personal factors affect case Outcomes | PFCASEOUT_RC | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 13.2 I think that a judge's personal factors affect judicial approach (setting aside whether they affect case outcomes) | PFJUDAPP_RC | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 13.3 I think that a judge's personal factors have no effect on judicial approach nor on judicial outcomes | PFNOEFF_RC | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 13.4 I often think that the outcome of a case will be determined by which judge we draw in the judicial lottery | PFJUDLOTT | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 14. Consideration as to the impact of a judge's personal factors on his or her judgments is part of my day-to-day work as a solicitor'. | PFDAILY | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 15. I would find it useful to know more about the personal factors relating to any judge hearing a case relating to a client | KNOWMORE | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor |

| | | |
|---|----------|--|
| of mine'. | | disagree 4 = Agree 5 = Strongly agree |
| 16. Religious beliefs of a judge may influence his or her judicial decision-making in cases where there is no settled law and/or judicial discretion is required? | RBAFF | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 17. If you agree with the view that the religious beliefs of a judge can influence his or her judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised, how often do you think that they may do so? | FREQRB | 1 = Never 2 = Rarely 3 = Occasionally 4 = Often 5 = Always |
| 18. If you agree with the view that the religious beliefs of a judge influence his or her judicial reasoning, do you think that they do so: consciously; unconsciously; both consciously and unconsciously; or don't know. | NATRB | 1 = Never 2 = Rarely 3 = Occasionally 4 = Often 5 = Always |
| 19. If you agree with the view that the religious beliefs of a judge influence his or her judicial reasoning, in what types of case do you think this will be most likely? | CASERB | Qualitative |
| 20. To what extent do you agree or disagree with the view that a judge should be able to request an exemption from hearing a case involving religious issues or religiously sensitive issues because of his or her own religious beliefs? | CONEXM | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 21. How often are you involved in cases where religious or religiously sensitive issues arise? | OWNEXPRB | 1 = Always 2 = Often 3 = Occasionally 4 = Never 5 = Don't know |
| 22. As a solicitor, please indicate which of the following statements best reflects your own approach when dealing with cases in which religious issues or religiously sensitive issues arise. | SOLAPP | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 23. Do you support or oppose having a specialist panel of judges 'with a proven sensitivity and understanding of religious issues'? | RBPANEL | 1 = Support 2 = Oppose 3 = Neither support nor oppose |
| 25. Do you agree or disagree that there should be greater diversity in the judiciary? | JUDDIV | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree |

| | | |
|--|---|--|
| | | 4 = Agree 5 = Strongly agree |
| 26. Do you agree or disagree that the judiciary's current focus on increasing gender and ethnicity diversity in the judiciary should be extended to include any of the following characteristics? | AGEDIV (Age) DISDIV (Disability) GRDIV (Gender Re-assignment) PBDIV (Political beliefs) RBDIV (Religious beliefs) SODIV (Sexual orientation) SCDIV (Social class) OTHERDIV (Other) | 1 = Strongly disagree 2 = Disagree 3 = Neither agree nor disagree 4 = Agree 5 = Strongly agree |
| 27. If you agree that the current focus on increasing gender and ethnicity diversity in the judiciary should be extended to include other judicial characteristics | - | - |

APPENDIX 14: Frequency distribution of response to SPQ Q10

Do you agree or disagree with the view that judges' personal factors influence judicial decision-making in cases where there is no settled law and/or judicial discretion is exercised?

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|---------------------------------------|------------|------------|---------------|--------------------|
| Valid Strongly disagree | 3 | 1.9 | 1.9 | 1.9 |
| Disagree | 17 | 10.8 | 10.8 | 12.7 |
| Neither agree nor disagree | 24 | 15.2 | 15.2 | 27.8 |
| Agree | 95 | 60.1 | 60.1 | 88.0 |
| Strongly agree | 19 | 12.0 | 12.0 | 100.0 |
| Total | 158 | 100.0 | 100.0 | |
| Missing | 0 | 0 | | |
| Total | 158 | 100 | | |

Appendix 14a Solicitor responses to SPQ Q10 by frequency of attendance at court

| | | | Q9 Attend court | | Total |
|-------|----------------------------|--------------------------|-----------------|--------------|--------|
| | | | Frequently | Infrequently | |
| Q10 | Disagree | Count | 15 | 5 | 20 |
| | | % within Q10 | 75.0% | 25.0% | 100.0% |
| | | % within Q9 Attend court | 17.2% | 7.0% | 12.7% |
| | | % of Total | 9.5% | 3.2% | 12.7% |
| | Neither agree nor disagree | Count | 11 | 13 | 24 |
| | | % within Q10 | 45.8% | 54.2% | 100.0% |
| | | % within Q9 Attend court | 12.6% | 18.3% | 15.2% |
| | | % of Total | 7.0% | 8.2% | 15.2% |
| | Agree | Count | 61 | 53 | 114 |
| | | % within Q10 | 53.5% | 46.5% | 100.0% |
| | | % within Q9 Attend court | 70.1% | 74.6% | 72.2% |
| | | % of Total | 38.6% | 33.5% | 72.2% |
| Total | Count | 87 | 71 | 158 | |
| | % within Q10 | 55.1% | 44.9% | 100.0% | |
| | % within Q9 Attend court | 100.0% | 100.0% | 100.0% | |
| | % of Total | 55.1% | 44.9% | 100.0% | |

APPENDIX 15: Multiple response codes allocated to qualitative responses in SPQ 11

Personal Factors Variables PF1, PF2, PF3, PF4: Code 1 Moral & Other perspectives; Code 2 Personal characteristics; Code 3 Personal background and experience; Code 4 Professional background and experience; Code 5 Attitudes towards others; Code 6 None; Code 7 Other

| RESPONDENT ID | QUALITATIVE RESPONSE TO SPQ Q11 | PF1 | PF2 | PF3 | PF4 |
|---------------|---|-----|-----|-----|-----|
| 10 | sexism. As a family lawyer I know which judges are pro-wife and which are pro-husband. | 1 | | | |
| 11 | Upbringing, ethnicity | 3 | 2 | | |
| 15 | Individual makeup of the Judge | 7 | | | |
| 19 | Work experience | 4 | | | |
| 21 | Background for example practice prior to becoming a judge | 4 | | | |
| 25 | gender socio-economic background education race | 2 | 3 | | |
| 29 | The size and resources of the Respondent/Defendant; whether both parties are represented; the impact upon the Claimant of an adverse decision | 5 | | | |
| 31 | Experience and their understanding of the justice/fairness of the situation, indeed even where there is settled case law must Judge's, rightly in my view, seek to see where the justice lies first before applying the law. | 1 | 4 | | |
| 35 | Possible influencing factors could include background (cultural, religious), age, gender, experience in the particular area, political persuasion. | 3 | 1 | 2 | |
| 36 | Working life; class | 4 | 3 | | |
| 43 | Their moral perspective - what is the "right" outcome | 1 | | | |
| 44 | I think that an individual's background, life experiences and social/political views are inevitably bound to have a degree of influence over their reasoning and decision-making. Some judges are better than others at putting their personal views to one side. | 3 | 1 | | |
| 46 | The way in which a party presents themselves and their attitude/behaviour in | 5 | | | |

| | | | | | |
|----|--|---|---|---|---|
| | court. | | | | |
| 47 | background, education, religion, personal experience | 3 | 2 | | |
| 48 | Experience, social background influence views of what is normal or reasonable | 3 | 4 | | |
| 49 | Experience of similar cases whilst in practice as a lawyer (before becoming a judge - just because cases do not receive judgment and so become case law, it doesn't mean that the issue hasn't been litigated before) | 4 | | | |
| 50 | Previous practice (i.e. whether Claimant or Respondent friendly lawyer prior to joining the judiciary). Any personal experience of the matters in issue (i.e. a case involving the treatment of someone with mental health may be more personal to a judge who has a family member with a similar condition) | 4 | 3 | | |
| 51 | Not aware of any. | 6 | | | |
| 53 | background, sympathy with witnesses | 3 | 4 | 5 | |
| 55 | General perception of fairness and knowledge of how the business environment works | 1 | 7 | | |
| 57 | See above* | 3 | 4 | | |
| 59 | religious/moral/ethical beliefs | 1 | | | |
| 60 | Political views. | 1 | | | |
| 63 | A mixture of their own personal views and the prevailing politically/socially acceptable stance on the position | 3 | 1 | | |
| 65 | It is very difficult to comment as I seldom have knowledge of a Tribunal judge's personal beliefs or circumstances. However, in my experience their background sometimes plays a part (eg whether from an employee or employer friendly background) | 4 | | | |
| 66 | I don't believe personal factors significantly influence ET judges decision making. I believe, of any of these factors, a Judge's commercial experience is most likely to be an influencing factor | 4 | | | |
| 67 | The judge has to interpret what Parliament meant in statutory law, if a new angle/issue arises which has not been decided before. | 7 | | | |
| 71 | Personal sense of what the judge perceives to be morally and/or ethically "right" | 1 | | | |
| 72 | What they perceive to be justice | 1 | | | |
| 77 | The only factor should be whether their decision would be consistent with social | 1 | 3 | 4 | 2 |

| | | | | |
|----|--|---|---|---|
| | mores and what society in general would regard as acceptable. However judges will inevitably be influenced by their own background, experience and characteristics in their reasoning. This can lead to unexpected and at times strange outcomes. When advising a client on their prospects of success, a factor will be the identity and characteristics of the judge hearing the case. | | | |
| 79 | Personal experience or moral views | 1 | 3 | |
| 81 | I worry that there is institutional racism at times within the court system | 3 | | |
| 82 | Life experience Own position in life | 3 | | |
| 83 | Personal experience | 3 | | |
| 84 | Upbringing, personal financial circumstances (on financial matters), general ideas as to what is best for a child (in children matters) based on own upbringing and experience as a parent. | 3 | 1 | |
| 85 | Religious beliefs, their own upbringing, moral values | 1 | 3 | |
| 87 | Prejudices and biases (even if only sub-consciously) How much training the judge has received and how good that training was Upbringing Personality Number of years of experience as a judge | 5 | 4 | 3 |
| 88 | Religious views of the trial judge have not played a visible part in any orders made in my professional experience. | 6 | | |
| 89 | Cultural background, possibly religious and other beliefs | 3 | 1 | |
| 91 | personal knowledge and experience (or a lack of understanding of something that is different) can impact particularly on decisions relating to facts, such as whether a particular explanation is credible or reasonable. | 3 | | |
| 92 | Their background, political views | 3 | 1 | |
| 93 | I would hope none, but I do think that professional experience and political views do influence judicial reasoning. | 4 | 1 | |
| 94 | upbringing and background | 3 | | |
| 96 | whether the Judge is married or in a civil partnership , whether they have personal experience of looking after children , whether they are judgmental in their approach , whether they have experienced or can empathise with persons who are in personal or financial difficulty , and | 3 | 1 | |

| | | | | |
|------------|---|---|---|---|
| | whether their own needs as a child were met | | | |
| 98 | Personal experience | 3 | | |
| 100 | family history, economic situation and ethical or faith aspects of their personalities | 1 | 3 | |
| 102 | In the field of family law, the judges' personal views and experience on (1) the best arrangements for children, ie. whether with mother or father and the extent to which care should be shared (2) their views as to whether the primary carer should be expected to go out to work | 3 | 1 | |
| 104 | The full range - ie social background, education (public or private school), experience in the work place outside of the law (if any), age, sex etc etc. | 3 | 4 | 2 |
| 106 | Background before judicial appointment, social background, conduct or advocate | 4 | 3 | |
| 107 | i think judges bring their experience to bear on cases so what they have lived through may influence eg if they have adopted a child, been widowed etc | 3 | | |
| 121 | see above* | 6 | | |
| 123 | [personal life experience and judicial experience | 3 | 4 | |
| 124 | Again my comments are based upon the area that that I practice in but to give a few examples I do believe that a judge who has been divorced or suffered a marriage breakdown is unlikely to ignore that totally when making a decision. A judge is also likely to have a view about a persons reasonable needs based on their own expenditure. Another example is when should a non earning wife exercise her earning capacity . | 3 | 1 | |
| 125 | Background - education, class, life experience | 3 | | |
| 128 | Moral outlook, social class, education, race, gender, sexual orientation | 1 | 3 | 2 |
| 131 | Their individual world view, which will undoubtedly be shaped by their faith if they have one; changing societal norms | 1 | | |
| 132 | A Judge's moral/political/social beliefs (possibly including strong religious convictions if the Judge has these) | 1 | 2 | |
| 135 | background in terms of e.g. boarding school can be important factors and the judge's own experience of being parented | 3 | | |

| | | | | | |
|-----|---|---|---|---|---|
| | coupled with their own experience of having been divorced | | | | |
| 137 | Own experiences and principles of fairness and justice | 3 | 1 | | |
| 138 | None | 6 | | | |
| 140 | A desire to act justly by operating principles of fairness and equity. This desire may stem from a particular religious conviction but equally can be based on non-religious moral conviction. | 1 | | | |
| 141 | Background | 3 | | | |
| 144 | Gender, education, own life story | 3 | 2 | | |
| 146 | Their personal experiences, their own families. | 3 | | | |
| 147 | Experience in the law | 4 | | | |
| 155 | Political views are important in employment cases in the sense of the balance between employer and employee rights. I have no personal experience of religious beliefs having weighed in a decision. | 1 | | | |
| 156 | background, and experience | 3 | 4 | | |
| 157 | Experience of business/commerce and of family life | 4 | 3 | | |
| 158 | Gender, age | 2 | | | |
| 159 | Life experience | 3 | | | |
| 160 | Any of the judge's own personal experiences of the issues touched on in the case and the judge's political or philosophical (by extension, religious) views. | 3 | 1 | | |
| 161 | Personality often dictates level of patience / willingness to adopt a nuanced approach (at county court level). Faith / personal ethics also influence. | 1 | 7 | | |
| 162 | General life experience | 3 | | | |
| 163 | Class and education | 3 | | | |
| 169 | too wide to answer | 7 | | | |
| 173 | Some judges are scrupulously fair and clearly seek to apply what they see as a just outcome. Others are bad tempered and rude and consequently seem to "take against" advocates or parties sometimes. | 1 | 7 | | |
| 183 | I think there is a desire amongst judges to ensure that a fair result is obtained. Their view on fairness will be influenced primarily by the case but also their general experience | 1 | 3 | 4 | 7 |
| 185 | Political beliefs, upbringing/background of | 1 | 3 | 4 | |

| | | | | |
|-----|---|---|---|---|
| | a Judge, how long they have been a Judge and what they did before becoming a Judge (for e.g. if they were a practising barrister). | | | |
| 186 | personal world views (i.e. faith or no faith), personal ethics, social prejudices and preconceptions, compassion | 1 | | |
| 189 | Judges appear to be not confident in their wide ranging discretion, or are fearful of using their discretion when it is clear they have the power to do so. Furthermore, Judges appear to follow what all the other judges may be doing, which at that point in time may be the 'fashion' to do so, but then this changes over a period of time when a new guidance case emerges. | 7 | | |
| 190 | None they are impartial | 6 | | |
| 192 | Personal experience | 3 | | |
| 195 | Cultural mores and public policy such as upholding the rule of law and confidence in the judicial process | 1 | | |
| 197 | common sense, desire to do justice between the parties, recognition of public interest | 1 | | |
| 198 | Upbringing - i.e. belief systems (not necessarily religious) learned from parents, school and friends. Many judges come from a fairly narrow spectrum of society in terms of their education and the people with whom they interact professionally and socially. The same can be said for lawyers in general | 3 | 1 | 4 |
| 202 | It would be personal opinion because its human nature for one to express their views. From a judicial perspective its even more likely because the whole point of the judiciary is to dissect and advise on what is presented. In those circumstances there will always be a basis for opinion. | 7 | | |
| 206 | Their upbringing and personal beliefs | 3 | | |
| 210 | An individual's characteristics and their background | 2 | 3 | |
| 211 | past experience, ability to relate to witness ie are they likeable, genuine | 3 | 5 | |
| 212 | Family background, education, experience as a lawyer in private practice, moral/ethical/religious beliefs | 3 | 4 | 1 |
| 221 | upbringing, political views, age | 3 | 2 | 1 |
| 224 | cultural and religious | 3 | 1 | |
| 226 | Having a poor advocate on one side | 7 | | |

| | | | | |
|------------|---|---|---|---|
| 229 | Experience (both personal and professional) and subjective views. thoughts and beliefs. | 3 | 4 | |
| 230 | assumptions regarding commercial or economic realities experienced by business clients | 4 | | |
| 231 | Their life experience | 3 | | |
| 232 | social/ ethnic background including religion, own experiences / exposure to other social classes / ethnic backgrounds and where those experiences and exposure is lacking the perception of what they think other social classes / ethnic backgrounds are like. | 3 | 2 | 5 |
| 234 | The instinct of the judge for what is the just outcome. | 1 | | |
| 236 | Personal factors - their background and beliefs. | 3 | 1 | |
| 237 | Experience of life, generally - most good judges try to achieve justice where possible and, in doing so, they try to look past technicalities to identify the real issues. | 3 | 1 | 4 |
| 238 | Fairness, experience at the Bar or in practice | 1 | 4 | |
| 241 | Experience from having been a practitioner on eg the meaning of commercial terms used in a contract | 4 | | |
| 244 | Career experience, common sense, sense of fairness | 4 | 1 | 7 |
| 245 | The Judge's view of what the man on the Clapham omnibus would think - it is the Judge's job to be the representative reasonable man on the street, and some flavour of 'who' the Judge is is bound to creep in. | 1 | | |
| 246 | Where a Judge has personal characteristics which are the same as those being debated such as race, gender, disability, religion, sexual orientation etc | 2 | | |
| 248 | Their own experience | 3 | 4 | |
| 250 | I appear before civil judges where I think personal factors have little bearing. In the criminal court I think magistrates are heavily influenced by their background experience in sentencing, the crown court less so. | 3 | | |
| 253 | A sense of fairness/justice | 1 | | |
| 257 | class, culture and convictions | 3 | 1 | |

APPENDIX 16: Frequency of multiple response factors for qualitative responses in SPQ 11

What personal factors do you think are most likely to influence judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised?

| | | RESPONSES | | Percent of Cases |
|---------------|---|-----------|---------|------------------|
| | | N | Percent | |
| SPQ 11 | Moral and other Perspectives | 49 | 29.7% | 47.6% |
| | Personal characteristics (excluding religion) | 13 | 7.9% | 12.6% |
| | Personal background and experience | 61 | 37.0% | 59.2% |
| | Professional background and experience | 31 | 18.8% | 30.1% |
| | Attitudes towards others | 6 | 3.6% | 5.8% |
| | None | 5 | 3.0% | 4.9% |
| | Total | 165 | 100.0 % | 160.2% |

APPENDIX 17: Frequency distributions for response to SPQ Q16

To what extent do you agree or disagree with the view that the religious beliefs of a judge may influence his or her judicial decision-making in cases where there is no settled law and/or judicial discretion is required?

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|----------------|-----------------------------------|------------|------------|---------------|--------------------|
| Valid | Strongly disagree | 6 | 3.8 | 3.8 | 3.8 |
| | Disagree | 28 | 17.7 | 17.7 | 21.5 |
| | Neither agree nor disagree | 54 | 34.2 | 34.2 | 55.7 |
| | Agree | 65 | 41.1 | 41.1 | 96.8 |
| | Strongly agree | 5 | 3.2 | 3.2 | 100 |
| | Total | 158 | 100 | 100 | |
| Missing | | 0 | | | |
| Total | | 158 | 100 | | |

APPENDIX 18 Attitudes towards the relationship between religion and judging by respondent factors

Appendix 18a: Area of practice

| | | | Q3 Area of Legal Practice | | Total |
|-------|--------------------------|--------------------------|---------------------------|--------|--------|
| | | | Employment | Family | |
| Q16 | Disagree | Count | 20 | 15 | 35 |
| | | % within Q16 | 57.1% | 42.9% | 100.0% |
| | | % within Q3 Area of Prac | 24.1% | 29.4% | 26.1% |
| | | % of Total | 14.9% | 11.2% | 26.1% |
| | NAND | Count | 29 | 18 | 47 |
| | | % within Q16 | 61.7% | 38.3% | 100.0% |
| | | % within Q3 Area of Prac | 34.9% | 35.3% | 35.1% |
| | | % of Total | 21.6% | 13.4% | 35.1% |
| | Agree | Count | 34 | 18 | 52 |
| | | % within Q16 | 65.4% | 34.6% | 100.0% |
| | | % within Q3 Area of Prac | 41.0% | 35.3% | 38.8% |
| | | % of Total | 25.4% | 13.4% | 38.8% |
| Total | Count | 83 | 51 | 134 | |
| | % within Q16 | 61.9% | 38.1% | 100.0% | |
| | % within Q3 Area of Prac | 100.0% | 100.0% | 100.0% | |
| | % of Total | 61.9% | 38.1% | 100.0% | |

The results of a Mann Whitney U test showed that there were no statistically significant differences between respondent views as to whether there is a relationship between judges' religion and judicial decision-making based on their area of practice: Employment (mean rank =69.40), Family (mean rank=64.41), $U=1959.00$, $z = -.769$, $p = .442$.

| | | | Q2 PQE How Long have you been a solicitor? | | | | | Total |
|-------|-----------------------------------|-----------------|--|-------------|-------------|-------------|------------|--------|
| | | | 0 -5 years | 6 -10 years | 11-15 years | 16-20 years | 21 years + | |
| Q16 | Disagree | Count | 5 | 5 | 4 | 11 | 10 | 35 |
| | | % within Q16 | 14.3% | 14.3% | 11.4% | 31.4% | 28.6% | 100.0% |
| | | % within Q2 PQE | 17.9% | 27.8% | 22.2% | 35.5% | 25.6% | 26.1% |
| | | % of Total | 3.7% | 3.7% | 3.0% | 8.2% | 7.5% | 26.1% |
| | Neither agree nor disagree | Count | 12 | 7 | 6 | 10 | 12 | 47 |
| | | % within Q16 | 25.5% | 14.9% | 12.8% | 21.3% | 25.5% | 100.0% |
| | | % within Q2 PQE | 42.9% | 38.9% | 33.3% | 32.3% | 30.8% | 35.1% |
| | | % of Total | 9.0% | 5.2% | 4.5% | 7.5% | 9.0% | 35.1% |
| | Agree | Count | 11 | 6 | 8 | 10 | 17 | 52 |
| | | % within Q16 | 21.2% | 11.5% | 15.4% | 19.2% | 32.7% | 100.0% |
| | | % within Q2 PQE | 39.3% | 33.3% | 44.4% | 32.3% | 43.6% | 38.8% |
| | | % of Total | 8.2% | 4.5% | 6.0% | 7.5% | 12.7% | 38.8% |
| Total | Count | | 28 | 18 | 18 | 31 | 39 | 134 |
| | % within Q16 | | 20.9% | 13.4% | 13.4% | 23.1% | 29.1% | 100.0% |
| | % within Q2 PQE | | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% |
| | % of Total | | 20.9% | 13.4% | 13.4% | 23.1% | 29.1% | 100.0% |

Results of a Kruskal-Wallis H test indicated that there was no statistically significant difference between the perceptions of respondents as to whether there is a relationship between judges' religion and judicial decision-making based on the length of time they had been in practice: 0-5 years PQE (Mean rank = 71.13), 6-10 years PQE (mean rank = 64.11), 11-15 years (mean rank = 71.89), 16-20 years (mean rank = 60.42) and 21+ years (mean rank = 70.06) $X^2(4) = 2.058$, $p = .725$.

Appendix 18c: Frequency of attendance at court

| | | | Q9 Attend court | | Total |
|-------|-----------------------------------|--------------------------|-----------------|--------------|--------|
| | | | Frequently | Infrequently | |
| Q16 | Disagree | Count | 22 | 13 | 35 |
| | | % within Q16 | 62.9% | 37.1% | 100.0% |
| | | % within Q9 Attend court | 29.7% | 21.7% | 26.1% |
| | | % of Total | 16.4% | 9.7% | 26.1% |
| | Neither agree nor disagree | Count | 29 | 18 | 47 |
| | | % within Q16 | 61.7% | 38.3% | 100.0% |
| | | % within Q9 Attend court | 39.2% | 30.0% | 35.1% |
| | | % of Total | 21.6% | 13.4% | 35.1% |
| | Agree | Count | 23 | 29 | 52 |
| | | % within Q16 | 44.2% | 55.8% | 100.0% |
| | | % within Q9 Attend court | 31.1% | 48.3% | 38.8% |
| | | % of Total | 17.2% | 21.6% | 38.8% |
| Total | | Count | 74 | 60 | 134 |
| | | % within Q16 | 55.2% | 44.8% | 100.0% |
| | | % within Q9 Attend court | 100.0% | 100.0% | 100.0% |
| | | % of Total | 55.2% | 44.8% | 100.0% |

The results of a Mann Whitney U test showed that there were no statistically significant differences between respondent views as to whether there is a relationship between judges' religion and judicial decision-making based on the frequency with which they attend court: Frequent attendees (mean rank =62.20), Infrequent attendees Family (mean rank=74.04), $U=2612.50$, $z = 1.871$, $p = .061$.

Appendix 18d: Religion

| | | | Q8 Religious beliefs | | | Total |
|--------------|-----------------------------------|----------------|----------------------|---------------|--------------|--------|
| | | | Christian | Non-Christian | Unaffiliated | |
| Q16 | Disagree | Count | 18 | 1 | 15 | 34 |
| | | % within Q16 | 52.9% | 2.9% | 44.1% | 100.0% |
| | | % within Q8 RB | 24.3% | 12.5% | 30.6% | 26.0% |
| | | % of Total | 13.7% | 0.8% | 11.5% | 26.0% |
| | Neither agree nor disagree | Count | 21 | 4 | 21 | 46 |
| | | % within Q16 | 45.7% | 8.7% | 45.7% | 100.0% |
| | | % within Q8 RB | 28.4% | 50.0% | 42.9% | 35.1% |
| | | % of Total | 16.0% | 3.1% | 16.0% | 35.1% |
| | Agree | Count | 35 | 3 | 13 | 51 |
| | | % within Q16 | 68.6% | 5.9% | 25.5% | 100.0% |
| | | % within Q8 RB | 47.3% | 37.5% | 26.5% | 38.9% |
| | | % of Total | 26.7% | 2.3% | 9.9% | 38.9% |
| Total | | Count | 74 | 8 | 49 | 131 |
| | | % within Q16 | 56.5% | 6.1% | 37.4% | 100.0% |
| | | % within Q8 RB | 100.0% | 100.0% | 100.0% | 100.0% |
| | | % of Total | 56.5% | 6.1% | 37.4% | 100.0% |

Results of a Kruskal-Wallis H test indicated that there was no statistically significant difference between the perceptions of respondents as to whether there is a relationship between judges' religion and judicial decision-making based on their religious beliefs: Christian (Mean rank = 70.71), Non-Christian (mean rank = 70.69) and Unaffiliated (mean rank = 58.12), $X^2(2) = 3.830$, $p = .147$.

APPENDIX 19: Frequency distributions for response to Q17

If you agree with the view that the religious beliefs of a judge can influence his or her judicial reasoning in cases where there is no settled law and/or judicial discretion is exercised, how often do you think that they may do so?

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|---------------------------|------------|------------|---------------|--------------------|
| Valid Never | 1 | 0.6 | 1.0 | 1.0 |
| Rarely | 24 | 15.2 | 19.8 | 20.7 |
| Occasionally | 74 | 46.8 | 61.2 | 81..8 |
| Often | 22 | 13.9 | 18.2 | 100 |
| Total | 121 | 76.6 | 100 | |
| Missing | 37 | 23.4 | | |
| Total | 158 | 100 | | |

APPENDIX 20 Attitudes towards frequency with which religious beliefs affect judging by respondent factors

Appendix 20a

| | | | Q3 Area of Legal Practice | | Total |
|-----|--------------|---------------------------|---------------------------|--------|--------|
| | | | Employment | Family | |
| Q17 | Never | Count | 1 | 0 | 1 |
| | | % within Q17 Frequency RB | 100.0% | 0.0% | 100.0% |
| | | % within Q3 Area Prac | 1.3% | 0.0% | 0.8% |
| | | % of Total | 0.8% | 0.0% | 0.8% |
| | Rarely | Count | 14 | 10 | 24 |
| | | % within Q17 Frequency RB | 58.3% | 41.7% | 100.0% |
| | | % within Q3 Area of Prac | 18.4% | 22.2% | 19.8% |
| | | % of Total | 11.6% | 8.3% | 19.8% |
| | Occasionally | Count | 45 | 29 | 74 |
| | | % within Q17 Frequency RB | 60.8% | 39.2% | 100.0% |
| | | % within Q3 Area of Prac | 59.2% | 64.4% | 61.2% |
| | | % of Total | 37.2% | 24.0% | 61.2% |
| | Often | Count | 16 | 6 | 22 |
| | | % within Q17 Frequency RB | 72.7% | 27.3% | 100.0% |
| | | % within Q3 Area of Prac | 21.1% | 13.3% | 18.2% |
| | | % of Total | 13.2% | 5.0% | 18.2% |
| | Total | Count | 76 | 45 | 121 |
| | | % within Q17 Frequency RB | 62.8% | 37.2% | 100.0% |
| | | % within Q3 Area of Prac | 100.0% | 100.0% | 100.0% |
| | | % of Total | 62.8% | 37.2% | 100.0% |

The results of a Mann Whitney U test showed that there were no statistically significant differences between respondent views as to the frequency with which judges' religious beliefs affect judicial decision-making based on their area of practice: Employment (mean rank =62.77), Family (mean rank=58.01), $U=1575.00$, $z = -.829$, $p = .407$.

Appendix 20b

Results of a Kruskal-Wallis H test indicated that there was no statistically significant difference between the perceptions of respondents as to the frequency with which judges' religious beliefs affect judicial decision-making based on the length of time they had been in practice: 0-5 years PQE (Mean rank = 56.52), 6-10 years PQE (mean rank = 64.82), 11-15 years (mean rank = 62.19), 16-20 years (mean rank = 62.39) and 21+ years (mean rank = 60.91) $\chi^2(4) = 2.058, p = .918$.

| | | | Q2 How Long have you been a solicitor? | | | | | Total |
|-----|--------------|---------------------------|--|-------------|-------------|-------------|------------|--------|
| | | | 0 -5 years | 6 -10 years | 11-15 years | 16-20 years | 21 years + | |
| Q17 | Never | Count | 1 | 0 | 0 | 0 | 0 | 1 |
| | | % within Q17 Frequency RB | 100.0% | 0.0% | 0.0% | 0.0% | 0.0% | 100.0% |
| | | % within Q2 PQE | 3.6% | 0.0% | 0.0% | 0.0% | 0.0% | 0.8% |
| | | % of Total | 0.8% | 0.0% | 0.0% | 0.0% | 0.0% | 0.8% |
| | Rarely | Count | 7 | 4 | 4 | 3 | 6 | 24 |
| | | % within Q17 Frequency RB | 29.2% | 16.7% | 16.7% | 12.5% | 25.0% | 100.0% |
| | | % within Q2 PQE | 25.0% | 21.1% | 30.8% | 11.1% | 17.6% | 19.8% |
| | | % of Total | 5.8% | 3.3% | 3.3% | 2.5% | 5.0% | 19.8% |
| | Occasionally | Count | 15 | 10 | 5 | 21 | 23 | 74 |
| | | % within Q17 Frequency RB | 20.3% | 13.5% | 6.8% | 28.4% | 31.1% | 100.0% |
| | | % within Q2 PQE | 53.6% | 52.6% | 38.5% | 77.8% | 67.6% | 61.2% |
| | | % of Total | 12.4% | 8.3% | 4.1% | 17.4% | 19.0% | 61.2% |
| | Often | Count | 5 | 5 | 4 | 3 | 5 | 22 |
| | | % within Q17 Frequency RB | 22.7% | 22.7% | 18.2% | 13.6% | 22.7% | 100.0% |
| | | % within Q2 PQE | 17.9% | 26.3% | 30.8% | 11.1% | 14.7% | 18.2% |
| | | % of Total | 4.1% | 4.1% | 3.3% | 2.5% | 4.1% | 18.2% |
| | Total | Count | 28 | 19 | 13 | 27 | 34 | 121 |
| | | % within Q17 Frequency RB | 23.1% | 15.7% | 10.7% | 22.3% | 28.1% | 100.0% |
| | | % within Q2 PQE | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% |
| | | % of Total | 23.1% | 15.7% | 10.7% | 22.3% | 28.1% | 100.0% |

Appendix 20c

| | | | Q9 Attend court | | Total |
|-----|--------------|--------------------------|-----------------|--------------|--------|
| | | | Frequently | Infrequently | |
| Q17 | Never | Count | 0 | 1 | 1 |
| | | % within Q17 Frequency | 0.0% | 100.0% | 100.0% |
| | | % within Q9 Attend court | 0.0% | 1.8% | 0.8% |
| | | % of Total | 0.0% | 0.8% | 0.8% |
| | Rarely | Count | 16 | 8 | 24 |
| | | % within Q17 Frequency | 66.7% | 33.3% | 100.0% |
| | | % within Q9 Attend court | 24.2% | 14.5% | 19.8% |
| | | % of Total | 13.2% | 6.6% | 19.8% |
| | Occasionally | Count | 40 | 34 | 74 |
| | | % within Q17 Frequency | 54.1% | 45.9% | 100.0% |
| | | % within Q9 Attend court | 60.6% | 61.8% | 61.2% |
| | | % of Total | 33.1% | 28.1% | 61.2% |
| | Often | Count | 10 | 12 | 22 |
| | | % within Q17 Frequency | 45.5% | 54.5% | 100.0% |
| | | % within Q9 Attend court | 15.2% | 21.8% | 18.2% |
| | | % of Total | 8.3% | 9.9% | 18.2% |
| | Total | Count | 66 | 55 | 121 |
| | | % within Q17 Frequency | 54.5% | 45.5% | 100.0% |
| | | % within Q9 Attend court | 100.0% | 100.0% | 100.0% |
| | | % of Total | 54.5% | 45.5% | 100.0% |

The results of a Mann Whitney U test showed that there were no statistically significant differences between respondent views as to the frequency with which judges' religious beliefs affect judicial decision-making based on the frequency with which they attend court: Frequent attendees (mean rank =57.89), Infrequent attendees Family (mean rank=64.73), $U=2020.00$, $z = 1.226$, $p = .220$.

Appendix 20d

| | | | Q8 Religious beliefs | | | Total |
|-----|--------------|---------------------------|----------------------|---------------|--------------|--------|
| | | | Christian | Non-Christian | Unaffiliated | |
| Q17 | Never | Count | 1 | 0 | 0 | 1 |
| | | % within Q17 Frequency RB | 100.0% | 0.0% | 0.0% | 100.0% |
| | | % within Q8 RB | 1.4% | 0.0% | 0.0% | 0.9% |
| | | % of Total | 0.9% | 0.0% | 0.0% | 0.9% |
| | Rarely | Count | 11 | 0 | 10 | 21 |
| | | % within Q17 Frequency RB | 52.4% | 0.0% | 47.6% | 100.0% |
| | | % within Q8 RB | 15.3% | 0.0% | 27.0% | 17.9% |
| | | % of Total | 9.4% | 0.0% | 8.5% | 17.9% |
| | Occasionally | Count | 42 | 6 | 25 | 73 |
| | | % within Q17 Frequency RB | 57.5% | 8.2% | 34.2% | 100.0% |
| | | % within Q8 RB | 58.3% | 75.0% | 67.6% | 62.4% |
| | | % of Total | 35.9% | 5.1% | 21.4% | 62.4% |
| | Often | Count | 18 | 2 | 2 | 22 |
| | | % within Q17 Frequency RB | 81.8% | 9.1% | 9.1% | 100.0% |
| | | % within Q8 RB | 25.0% | 25.0% | 5.4% | 18.8% |
| | | % of Total | 15.4% | 1.7% | 1.7% | 18.8% |
| | Total | Count | 72 | 8 | 37 | 117 |
| | | % within Q17 Frequency RB | 61.5% | 6.8% | 31.6% | 100.0% |
| | | % within Q8 RB | 100.0% | 100.0% | 100.0% | 100.0% |
| | | % of Total | 61.5% | 6.8% | 31.6% | 100.0% |

APPENDIX 21 Frequency distributions for response to Q18

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---------|---------------------------------------|-----------|---------|---------------|-----------------------|
| Valid | Unconsciously only | 47 | 29.7 | 36.4 | 36.4 |
| | Both consciously and unconsciously | 69 | 43.7 | 53.5 | 89.9 |
| | Don't know | 13 | 8.2 | 10.1 | 100.0 |
| | Total | 129 | 81.6 | 100.0 | |
| Missing | 99.00 | 29 | 18.4 | | |
| Total | | 158 | 100.0 | | |

APPENDIX 22 Attitudes towards how judges' religious beliefs influence judicial decision-making

Appendix 22a

| | | | Q3 Area of Legal Practice | | Total |
|-------|--------------------------------------|--------------------------------------|---------------------------|--------|--------|
| | | | Employment | Family | |
| Q18 | Unconsciously only | Count | 27 | 20 | 47 |
| | | % within Q18. Nature of influence RB | 57.4% | 42.6% | 100.0% |
| | | % within Q3 Area of Prac | 33.3% | 41.7% | 36.4% |
| | Both consciously and unconsciously | Count | 48 | 21 | 69 |
| | | % within Q18. Nature of influence RB | 69.6% | 30.4% | 100.0% |
| | | % within Q3 Area of Prac | 59.3% | 43.8% | 53.5% |
| | Don't know | Count | 6 | 7 | 13 |
| | | % within Q18. Nature of influence RB | 46.2% | 53.8% | 100.0% |
| | | % within Q3 Area of Prac | 7.4% | 14.6% | 10.1% |
| Total | Count | 81 | 48 | 129 | |
| | % within Q18. Nature of influence RB | 62.8% | 37.2% | 100.0% | |
| | % within Q3 Area of Prac | 100.0% | 100.0% | 100.0% | |

The results of a Mann Whitney U test showed that there were no statistically significant differences between respondent views as to how judges' religious beliefs affect judicial decision-making based on their area of practice: Employment (mean rank =65.70), Family (mean rank=63.81), $U=1887.00$, $z = -.311$, $p = .756$.

| | | | Q2 How Long have you been a solicitor? | | | | | Total |
|-------|--------------------------------------|--------------------------------------|--|-------------|-------------|-------------|------------|--------|
| | | | 0 -5 years | 6 -10 years | 11-15 years | 16-20 years | 21 years + | |
| Q18. | Unconsciously only | Count | 7 | 6 | 3 | 15 | 16 | 47 |
| | | % within Q18. Nature of influence RB | 14.9% | 12.8% | 6.4% | 31.9% | 34.0% | 100.0% |
| | | % within Q2 PQE | 25.0% | 31.6% | 21.4% | 46.9% | 44.4% | 36.4% |
| | Both consciously and unconsciously | Count | 18 | 12 | 9 | 12 | 18 | 69 |
| | | % within Q18. Nature of influence RB | 26.1% | 17.4% | 13.0% | 17.4% | 26.1% | 100.0% |
| | | % within Q2 PQE | 64.3% | 63.2% | 64.3% | 37.5% | 50.0% | 53.5% |
| | Don't know | Count | 3 | 1 | 2 | 5 | 2 | 13 |
| | | % within Q18. Nature of influence RB | 23.1% | 7.7% | 15.4% | 38.5% | 15.4% | 100.0% |
| | | % within Q2 PQE | 10.7% | 5.3% | 14.3% | 15.6% | 5.6% | 10.1% |
| Total | Count | 28 | 19 | 14 | 32 | 36 | 129 | |
| | % within Q18. Nature of influence RB | 21.7% | 14.7% | 10.9% | 24.8% | 27.9% | 100.0% | |
| | % within Q2 PQE | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | |

Results of a Kruskal-Wallis H test indicated that there was no statistically significant difference between the perceptions of respondents as to how judges' religious beliefs affect judicial decision-making based on the length of time they had been in practice: 0-5 years PQE (Mean rank = 71.89), 6-10 years PQE (mean rank = 65.84), 11-15 years (mean rank = 75.43), 16-20 years (mean rank = 61.22) and 21+ years (mean rank =58.50) $X^2(4) = 4.346$, $p = .361$.

Appendix 22c

| | | | Q9 Attend court | | Total |
|-------|--------------------------------------|--------------------------------------|-----------------|--------------|--------|
| | | | Frequently | Infrequently | |
| Q18. | Unconsciously only | Count | 26 | 21 | 47 |
| | | % within Q18. Nature of influence RB | 55.3% | 44.7% | 100.0% |
| | | % within Q9 Attend court | 35.6% | 37.5% | 36.4% |
| | Both consciously and unconsciously | Count | 37 | 32 | 69 |
| | | % within Q18. Nature of influence RB | 53.6% | 46.4% | 100.0% |
| | | % within Q9 Attend court | 50.7% | 57.1% | 53.5% |
| | Don't know | Count | 10 | 3 | 13 |
| | | % within Q18. Nature of influence RB | 76.9% | 23.1% | 100.0% |
| | | % within Q9 Attend court | 13.7% | 5.4% | 10.1% |
| Total | Count | 73 | 56 | 129 | |
| | % within Q18. Nature of influence RB | 56.6% | 43.4% | 100.0% | |
| | % within Q9 Attend court | 100.0% | 100.0% | 100.0% | |

The results of a Mann Whitney U test showed that there were no statistically significant differences between respondent views as to how judges' religious beliefs affect judicial decision-making based on the frequency with which they attend court: Frequent attendees (mean rank =66.96), Infrequent attendees Family (mean rank=62.45), $U=1901.00$, $z = 1901.00$, $p = .447$.

Appendix 22d

| | | | Q8 Religious beliefs | | | Total |
|--------------|---|--------------------------------------|----------------------|---------------|--------------|--------|
| | | | Christian | Non-Christian | Unaffiliated | |
| Q18. | Unconsciously only | Count | 27 | 2 | 15 | 44 |
| | | % within Q18. Nature of influence RB | 61.4% | 4.5% | 34.1% | 100.0% |
| | | % within Q8 RB | 36.5% | 28.6% | 34.1% | 35.2% |
| | Both consciously and unconsciously | Count | 42 | 5 | 21 | 68 |
| | | % within Q18. Nature of influence RB | 61.8% | 7.4% | 30.9% | 100.0% |
| | | % within Q8 RB | 56.8% | 71.4% | 47.7% | 54.4% |
| | Don't know | Count | 5 | 0 | 8 | 13 |
| | | % within Q18. Nature of influence RB | 38.5% | 0.0% | 61.5% | 100.0% |
| | | % within Q8 RB | 6.8% | 0.0% | 18.2% | 10.4% |
| Total | | Count | 74 | 7 | 44 | 125 |
| | | % within Q18. Nature of influence RB | 59.2% | 5.6% | 35.2% | 100.0% |
| | | % within Q8 RB | 100.0% | 100.0% | 100.0% | 100.0% |

Results of a Kruskal-Wallis H test indicated that there was no statistically significant difference between the perceptions of respondents as to how judges' religious beliefs affect judicial decision-making based on their religious beliefs: Christian (Mean rank = 60.80), Non-Christian (mean rank = 62.50) and Unaffiliated (mean rank = 66.77), $X^2(2) = .945$, $p = .624$.

APPENDIX 23 Frequency distribution for SPQ Q13.1

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---------|----------------------------|-----------|---------|---------------|--------------------|
| Valid | Strongly disagree | 1 | .6 | .7 | .7 |
| | Disagree | 13 | 8.2 | 9.6 | 10.3 |
| | Neither agree not disagree | 22 | 13.9 | 16.2 | 26.5 |
| | Agree | 90 | 57.0 | 66.2 | 92.6 |
| | Strongly agree | 10 | 6.3 | 7.4 | 100.0 |
| | Total | 136 | 86.1 | 100.0 | |
| Missing | System | 22 | 13.9 | | |
| Total | | 158 | 100.0 | | |

APPENDIX 24 Frequency distribution for SPQ Q13.2

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---------|-----------------------------------|-----------|---------|---------------|--------------------|
| Valid | Strongly disagree | 4 | 2.5 | 2.9 | 2.9 |
| | Disagree | 19 | 12.0 | 14.0 | 16.9 |
| | Neither agree nor disagree | 27 | 17.1 | 19.9 | 36.8 |
| | Agree | 79 | 50.0 | 58.1 | 94.9 |
| | Strongly agree | 7 | 4.4 | 5.1 | 100.0 |
| | Total | 136 | 86.1 | 100.0 | |
| Missing | System | 22 | 13.9 | | |
| Total | | 158 | 100.0 | | |

APPENDIX 25 Frequency distributions for response to SPQ 23

Please indicate whether you support or oppose having a specialist panel of judges ‘with a proven sensitivity and understanding of religious issues’ to hear cases involving such issues as suggested by Lord Carey in *McFarlane v. Relate Avon Ltd*?

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|------------|------------|---------------|--------------------|
| Valid Support | 26 | 16.5 | 19.1 | 19.1 |
| Neither support nor oppose | 35 | 47.5 | 55.1 | 74.3 |
| Oppose | 75 | 22.2 | 25.7 | 100 |
| Total | 136 | 86.1 | 100 | |
| Missing | 22 | 13.9 | | |
| Total | 158 | 100 | | |

APPENDIX 26 Frequency distribution for SPQ Q25

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------|-----------------------------------|------------|--------------|---------------|--------------------|
| Valid | Strongly disagree | 3 | 1.9 | 2.2 | 2.2 |
| | Disagree | 4 | 2.5 | 3.0 | 5.2 |
| | Neither agree nor disagree | 21 | 13.3 | 15.7 | 20.9 |
| | Agree | 65 | 41.1 | 48.5 | 69.4 |
| | Strongly agree | 41 | 25.9 | 30.6 | 100.0 |
| | Total | 134 | 84.8 | 100.0 | |
| Missing | 99.00 | 24 | 15.2 | | |
| Total | | 158 | 100.0 | | |

APPENDIX 27 Frequency distributions for response to Q26

Do you agree or disagree that the judiciary's current focus on increasing gender and ethnicity diversity in the judiciary should be extended to include any of the following characteristics?

Appendix 27a: Age

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|------------|---------------|--------------------|
| Valid Strongly disagree | 4 | 2.5 | 3.8 | 3.8 |
| Disagree | 15 | 9.5 | 14.2 | 17.9 |
| Neither agree nor disagree | 25 | 15.8 | 23.6 | 41.5 |
| Agree | 52 | 32.9 | 49.1 | 90.6 |
| Strongly agree | 10 | 6.3 | 9.4 | 100 |
| Total | 106 | 67.1 | 100 | |
| Missing | 52 | 32.9 | | |
| Total | 158 | 100 | | |

Appendix 27b: Disability

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|------------|---------------|--------------------|
| Valid Strongly disagree | 4 | 2.5 | 3.8 | 3.8 |
| Disagree | 8 | 5.1 | 7.5 | 11.3 |
| Neither agree nor disagree | 27 | 17.1 | 25.5 | 36.8 |
| Agree | 52 | 32.9 | 49.1 | 85.8 |
| Strongly agree | 15 | 9.5 | 14.2 | 100 |
| Total | 106 | 67.1 | 100 | |
| Missing | 52 | 34.7 | | |
| Total | 158 | 100 | | |

Appendix 27c: Gender re-assignment

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|-------------|---------------|--------------------|
| Valid Strongly disagree | 7 | 4.4 | 6.7 | 6.7 |
| Disagree | 12 | 7.6 | 11.4 | 18.1 |
| Neither agree nor disagree | 37 | 23.4 | 35.2 | 53.3 |
| Agree | 40 | 25.3 | 38.1 | 91.4 |
| Strongly agree | 9 | 5.7 | 8.6 | 100 |
| Total | 105 | 66.5 | 100 | |
| Missing | 53 | 33.5 | | |
| Total | 158 | 100 | | |

Appendix 27d: Sexual orientation

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|-------------|---------------|--------------------|
| Valid Strongly disagree | 7 | 4.4 | 6.7 | 6.7 |
| Disagree | 10 | 6.3 | 9.5 | 16.2 |
| Neither agree nor disagree | 30 | 19.0 | 28.6 | 44.8 |
| Agree | 48 | 30.4 | 45.7 | 90.5 |
| Strongly agree | 10 | 6.3 | 9.5 | 100 |
| Total | 105 | 66.5 | 100 | |
| Missing | 53 | 33.5 | | |
| Total | 158 | 100 | | |

Appendix 27e: Social class

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|-------------|---------------|--------------------|
| Valid Strongly disagree | 5 | 3.2 | 4.7 | 4.7 |
| Disagree | 5 | 3.2 | 4.7 | 9.4 |
| Neither agree nor disagree | 21 | 13.3 | 19.8 | 29.2 |
| Agree | 55 | 34.8 | 51.9 | 81.1 |
| Strongly agree | 20 | 12.7 | 18.9 | 100 |
| Total | 106 | 67.1 | 100 | |
| Missing | 52 | 32.9 | | |
| Total | 158 | 100 | | |

Appendix 27f: Political beliefs

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|------------|---------------|--------------------|
| Valid Strongly disagree | 16 | 10.1 | 15.2 | 15.2 |
| Disagree | 19 | 12.0 | 18.1 | 33.3 |
| Neither agree nor disagree | 37 | 23.4 | 35.2 | 68.6 |
| Agree | 24 | 15.2 | 22.9 | 91.4 |
| Strongly agree | 9 | 5.7 | 8.6 | 100 |
| Total | 105 | 66.5 | 100 | |
| Missing | 53 | 33.5 | | |
| Total | 158 | 100 | | |

Appendix 27g: Religious beliefs

| | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------------------------|------------|------------|---------------|--------------------|
| Valid Strongly disagree | 13 | 8.2 | 12.4 | 12.4 |
| Disagree | 15 | 9.5 | 14.3 | 26.7 |
| Neither agree nor disagree | 31 | 19.6 | 29.5 | 56.2 |
| Agree | 38 | 24.1 | 36.2 | 92.4 |
| Strongly agree | 8 | 5.1 | 7.6 | 100 |
| Total | 105 | 66.5 | 100 | |
| Missing | 53 | 33.5 | | |
| Total | 158 | 100 | | |

APPENDIX 28 Frequency distribution for SPQ Q15

| | | Frequency | Percent | Valid Percent | Cumulative Percent |
|--------------|-----------------------------------|------------|--------------|---------------|--------------------|
| Valid | Strongly disagree | 12 | 7.6 | 8.8 | 8.8 |
| | Disagree | 39 | 24.7 | 28.5 | 37.2 |
| | Neither agree not disagree | 31 | 19.6 | 22.6 | 59.9 |
| | Agree | 49 | 31.0 | 35.8 | 95.6 |
| | Strongly agree | 6 | 3.8 | 4.4 | 100.0 |
| | Total | 137 | 86.7 | 100.0 | |
| Missing | 99.00 | 21 | 13.3 | | |
| Total | | 158 | 100.0 | | |

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