

Stereotyping and unconscious racial bias: stumbling blocks for parties, witnesses and aspirant lawyers alike. How should the law and the profession respond?

‘...if we are properly aware of our frailties and the problems they can lead to, we can watch out for them and correct or compensate for their consequences.’ – Lord Neuberger

In 1957, backbench Labour MP Archibald Fenner Brockway embarked on a crusade. His objective – to table proposals for a new a Private Members’ bill. A bill that he envisaged would ‘*set a moral pattern for the nation*’ and ‘*assuredly influence attitudes and practices in wider spheres*’.

The contents of his bill – proposals to prohibit discrimination on the grounds of colour, race, or ethnic or national origins. A subject of much contention at the time. In an era defined by the Notting Hill riots, the Bristol bus boycott and commonwealth immigration, the bill was frequently greeted with an amalgamation of aggression and apathy from the House. Brockway, indomitable in his purpose, would address Parliament nine times before his proposals garnered support. In 1965, his unrelenting efforts were rewarded with the enactment of Britain’s first law prohibiting racial discrimination - the Race Relations Act 1965.

Britain is a procrastinator when it comes to addressing issues of overt discrimination and racial disparities. In 2020, there is a risk of history repeating itself as we overlook a silent form of racial bias existing in the very fabric of our society.

The concept of unconscious bias was developed by psychologists over twenty-five years ago. It suggests our prejudices and perceptions can form at an unconscious level outside of our control. The result, our decisions are inadvertently affected by the underlying biases we all harbour. The potential for forms of unconscious racial bias to infiltrate our justice system and legal profession are thus inevitable. When they do, barriers to justice and equality are created for BAME individuals.

The most profound effects of unconscious racial bias can be seen on BAME criminal defendants. The extent is noted in The Lammy Review and the Sentencing Council’s 2020 research.

For specific offences, ethnicity will have a bearing on whether an individual is deprived of their liberty. Where an offence involves drugs, black defendants are 40 per cent more likely to receive a custodial sentence than their white counterparts. An example perhaps of judges employing their wide discretion in sentencing where black defendants are concerned.

But why would this be the case? Our judiciary is independent, impartial and the cornerstone of our legal system. Their duty to do right by all '*without fear or favour, affection or ill will*' is not taken lightly.

The answer is clearer when we consider how unconscious bias functions. Prejudices are formed unknowingly as a result of our exposure to stereotypical views. In the media, pop culture and society an association is continually made between drugs, gang culture and black males. '*We won't stop this by pretending it isn't young black kids doing it*' were the words echoed by Tony Blair in relation to tackling gangs and inner-city murders in 2007. The connection between black males and drug dealing is presented to society more than any other offence. Any mind becomes capable of joining the dots and allowing the stereotype to unconsciously influence decision making.

Unconscious racial bias also becomes an insurmountable hurdle for BAME individuals seeking entry to the legal profession. The low percentages of BAME individuals practicing as solicitors and barristers is well publicised. The problems lie with the gate keepers and selection processes. The mere presence of a foreign name on a CV can unconsciously invoke a stereotype that guides a decision. A tendency for lawyers to have an affinity to those from a similar social-economic and educational backgrounds is also evident. A mirror image of one's self would surely make the perfect protégé is the thinking employed.

For those BAME individuals with a golden ticket into the profession, racial bias will rear its head again when they are overlooked for senior positions in top corporate firms or the judiciary itself. With the majority in such positions homogenously white and from affluent backgrounds, there is an inadvertent endorsement again of those with a propinquity to similar privilege.

What then must the law and profession do to prevent hard-wired, unintentional prejudices from disadvantaging BAME individuals?

To consider we can rid ourselves of unconscious racial bias is unrealistic. The ingrained and personal nature of bias creates too many difficulties in this respect. Instead, rather than removal, our focus should be on acknowledging the existence of our biases and putting strategies in place to either prevent or mitigate their adverse effect on BAME individuals. As Lord Neuberger suggests, once we are aware of our unconscious biases, we can identify them. We should then seek to keep them in check.

In a criminal context, an additional level of scrutiny for sentencing decisions is required. Being subject to more scrutiny creates an incentive for one to question their own decision making. This goes to the crux of addressing unconscious racial bias. A 'think twice approach' is needed. The introduction of televised sentencing remarks, in some cases, and forthcoming guidance for sentencing in drug offences will also assist. Additional scrutiny may be deemed excessive, but there is no harm in adopting a belt and braces approach, particularly where an individual's liberty is at stake.

To remedy issues with entry and progression in the profession, mandatory anonymisation of applications for training contracts, pupillages and judicial roles should be considered. Information such as a candidate's name and university attended should be omitted. By removing the prompts that activate our unconscious racial biases we disable their effect. It is accepted that such biases could simply resume at the interview stage but having racially diverse panels in place would mitigate this.

Overcoming unconscious racial bias has been a difficulty for BAME individuals for too long. Knowing that the problem exists, places a responsibility on the justice system and the legal profession to control it. Lawyers are thankfully well versed in finding solutions to complex problems. We should proceed with the same sentiment Archibald Fenner Brockway had in 1957. Britain can do better.

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