

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

In the world of decision-making, not all roads lead to Rome. A wrong turn in mental processing can often lead a decision-maker to an unsound decision without his or her awareness. In the judiciary, where the delivery of justice depends on decisions, an innocent wrong turn could mean an innocent person's life ruined. This essay discusses one of the common wrong turns in decision-making: bias. In doing so, it proposes a two-pronged approach that aims to minimise the impact of biases, namely avoidance and elimination. Steps taken or promised to be taken by the judiciary to tackle racial bias will be analysed in the context of this approach.

All humans take shortcuts when making decisions. A mental shortcut is known as a heuristic, which is based on a set of statistics gathered through one's experience. Because the set of statistics is dependent on personal experience, it is subjective and often skewed. Skewed statistics lead to stereotypes, which in turn lead to biases. But biases can be avoided, and lawyers are well aware of this. It is why judges sometimes give special directions to the jury – directions which guide the jury on what facts to consider and what facts to disregard. The hope is that, by following the directions, members of the jury will revert to the path of logic. In other words, if the directions are properly followed, justice will be done.

The effectiveness of judicial directions is disputed but, due to laws protecting jury secrecy, can hardly be empirically studied. Nevertheless, what can be agreed is that there are better ways to avoid the engagement of biases than to consciously battle an inherent and involuntary instinct. One of which is to avoid its source in the first place. This can be done, for example, by ruling inadmissible evidence which are more prejudicial than probative. The

same applies to other decision-makers of the judiciary. The Lammy Review recommends that all identifying information be redacted from case information to allow the Crown Prosecution Service to make race-blind decisions. Most, if not all, chambers redact ethnicity information from application forms when selecting candidates for interview. Unfortunately, such 'blind' approaches to tackle biases in the input stage of mental processing are often impractical past the initial paper sift. Ethnicity becomes obvious when a defendant or witness gives evidence in court and when a candidate attends face-to-face interview.

In any event, a 'blind' approach should not prevent decision-makers from taking an 'eyes open' approach in the output stage. The 'eyes open' approach plays a crucial role in eliminating future bias in two ways. Firstly, it is only by scrutinising the decisions made that decision-makers can evaluate the effectiveness of their avoidance strategies. Recommendations made by the Lammy Review for criminal justice system agencies to record and publish data on ethnicity and to apply the principle of 'explain or reform' aim to serve this purpose, as does the judiciary's undertaking to publish statistics of the diversity of its judicial office holders annually. By consistently analysing new data, future reviews can better identify effective avoidance strategies. Secondly, publishing ethnicity data has the effect of correcting the stereotypes held by potential decision-makers, thereby reducing racial bias and its impact where it slips through all avoidance strategies.

Further, it should be no surprise that established stereotypes are harder to correct than those in their infancy. It follows that elimination strategies are most effective on the younger generations. As part of the initiatives set out in the Judicial Diversity and Inclusion Strategy 2020-2025, Diversity and Community Relations Judges and magistrates will meet with local communities, and case studies and visible role models will be utilised to highlight the diversity

of the magistracy. These measures serve to encourage applicants from under-represented communities by presenting to them a more diverse judiciary than they would otherwise perceive. Particular focus should be put on social media platforms, where impact on children and young adults is wide and forceful. Recent campaigns launched on Twitter using the hashtags ‘#MyRouteToTheBar’, ‘#IAmTheBar’, and ‘#ThisIsWhatABarristerLooksLike’ were especially effective in improving public perception of the profession.

This two-pronged approach tackles bias by targeting the underlying mechanisms of mental processing. Removing the source of bias remains the most direct strategy for avoiding bias in decision-making, but is often impractical and does little to correct established stereotypes in current decision-makers. A conscious effort to battle inherent human instincts to rely on heuristics can be taught and trained, but is difficult to systematically implement and evaluate. Meanwhile, elimination strategies take time to effect change and is most effective in the younger generations, thus are in themselves an inadequate response to the urgent need to tackle existing bias. However, despite all its shortcomings, the approach provides a theoretical framework within which innovative avoidance and elimination strategies may be developed and evaluated. After all, Rome was not built in one day.