BLACK ROBES – WHITE JUSTICE?

JUDICIAL RACISM – IS THE JURY STILL OUT?

AN ANLYSIS OF THE PAST, PRESENT AND FUTURE OF JUDICIAL RACISM AND BIAS IN THE BRITISH JUSTICE SYSTEM

Britain often claims to possess the finest justice system in the world with a "colour blind" approach to justice. However as the late Johnnie Cochran observed on his visit to London and Liverpool in 1995, "justice is neither colour blind nor is it equal". Historically, the justice system has been used to legitimise slavery and then colonialism from Elizabethan England to the post war era and the advent of the Immigration Act 1971. The question is the extent to which it is present today.

No democracy in the world can survive for long on a justice system which has at its core such glaring inequality based that determines a persons right to freedom on the colour of their skin or their gender. If we do cannot achieve equality under the law for all our citizens then British justice, which one of the cornerstones of our democracy becomes a castle built of sand. Unequal justice cannot amount to justice, when it is delivered by Judges and Magistrates that do not reflect the very communities they purport to serve.

We cannot expect to have a diverse Judiciary and Magistracy, and to recruit police officers, probation officers, prison officers and lawyers who look like us and are knowledgeable of our communities, if we are forced to operate in a system that is itself unwilling or unable to deliver justice equally to all. As Dr Martin Luther King said, "It is not possible to be in favour of justice for some people and not to be in favour of justice for all people". At present out of 161 members of the High Court Judiciary, there is not a single African Caribbean Judge, whilst only two are of Asian origin. Less than 2.5% of Oxford & Cambridge (from whom 86% of High Court Judges are drawn) graduates are of African Caribbean origin. The legal pipeline and the outcome are self fulfilling.

Recently in a very rare statement on race and diversity in the House of Commons, the Prime Minister Mr. Cameron said: "If you're black, you're more likely to be in a prison cell than studying at a **top university**. And if you're black, it seems you're more likely to be sentenced to custody for a crime than if you're white. We should investigate why this is and how we can end this possible discrimination.
"Only one in 10 of the poorest white boys go into higher education at all.
"There are no black generals in our armed forces and just 4 per cent of chief executives in the FTSE 100 are from ethnic minorities." He may have added that there are only two Asian High Court Judge and none of African Caribbean origin after the resignation of Linda Dobbs who recently spoke about her experience of race discrimination as a barrister and as a Judge.

The Zong massacre in 1781, where 132 slaves were thrown overboard en route in Jamaica led the Lord Chief Justice to rule in favour of the insurers that the African slaves were "goods" that should have been kept alive with the water that was available. The Solicitor General The Solicitor General, Justice John Lee, however, refused to take up the criminal charges claiming,

“What is this claim that human people have been thrown overboard? This is a case of chattels or goods. Blacks are goods and property; it is madness to accuse these well-serving honourable men of murder… The case is the same as if wood had been thrown overboard.”

That case illustrates better than any other the significant role played by Judges in upholding slavery and in the colonies several hundred years of torture and abuse that meant life expectancy in the Caribbean at only 27 years was akin to the worst rates of the Holocaust death camps of Nazi Germany. The consequence for colonialism both in the Caribbean, African and in the Indian sub continent was that African and Asian life was cheap and expendable.

In Kenya in the 1950’s during the Mau Mau uprisings over 1,090 Kenyans were executed by the British judiciary between 1951 and 1954. This appalling figure represents the most liberal use of the death penalty in British legal history and is double the number of those executed by the French during the war of liberation in Algeria ten years later. The courts in Kenya turned a blind eye to the massacres committed in the name of the British Empire over which the sun was setting in the blood of many of its subjects. At the same time the slightly more subtle end racial segregation was enshrined in social areas with all white clubs, restaurants and hotels being the norm throughout the Empire and in many parts of the UK. The famous cricketer Sir Learie Constantin challenged one the London hotel “colour bars” in wartime Britain.[1] It was little wonder that the lessons of racial superiority survived the days of empire and were adapted to meet the new communities in post war Britain.

The criminalization of African Caribbean youth and particularly men continued apace often supported by a Judiciary which saw itself as a bastion against this new tide of lawless immigrants. The use of the charge of “loitering with intent” or “sus”[2] was used to control the activities of black communities with the racial segregation at work challenged by the Birmingham bus boycott in 1958 and by racial attacks in Notting Hill. There were odd exceptions where British Judges, such as Lord Salmon sentenced white racists attackers using language that clearly condemned racist attacks but these were the exception.[3]

In 1984 the internationally recognized Black Power activist Stokeley Carmichael known as Kwame Toure, addressed the Society of Black Lawyers at the old Greater London Authority (GLA) building at City Hall. He spoke eloquently of the need for lawyers to defend the community by any means necessary and to confront the racism in the criminal justice system

In the aftermath of the Handsworth uprising in 1985, Birmingham Magistrates in the case of R v Mr Akpabio (a 17 year old young man of Nigerian origin), magistrates commented on the fact that, “we treat our coloured population fairly in Birmingham” after being challenged about their policy of convicting all defendants against the weight of evidence and giving out

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[1] www.100greatblackbritons.com/bios/lord_**leary_constantine**.html
Before 1944 it was common for West End hotels to refuse accommodation to black people. In 1943 this happened to Learie **Constantine**, one of the world's most ...

[2] https://en.wikipedia.org/wiki/**Sus_law**
In England and Wales, the **sus law** was the informal name for a stop and search law that permitted a police officer to stop, search and potentially arrest people on

[3] https://books.google.co.uk/books?id=_kUjn66qAksC
Vol. 8, No. 5 - Magazine
'**Race riots**' First, I want to go back some twenty-six years, to the **Notting Hill** race ... rioters were an insignificant section of the community (**Lord** Justice **Salmon**) ...

immediate custodial sentences regardless of mitigation. The leading black barrister Rudy Narayan famously claimed that to be a black advocate meant "having one foot at the Bar and another in the dock".

Throughout the post war era barristers could not even allege racial bias until the former Commission for Racial Equality wrote to the Bar Council in 1988 and agreed that this had to be permitted without a barrister being reported for misconduct. This followed a case in the Birmingham Employment Tribunal where Rudy Narayan had been reported precisely for that reason.[4]

In 1988 the His Honour Judge Prosser, the Resident Judge of Cardiff Crown Court demanded to know where counsel was born in the process of hearing his application for a multi racial jury. The Court of Appeal subsequently quashed the conviction and sentence in the case of R v Royston Ford (1989) 3 AER 445, protecting the trial judge's outrageous threats by asserting that the barrister must have been perceived to be "politically motivated"[5]. Racial bias was evident in numerous examples of racist remarks passed from the bench. In 1988, The Society of Black Lawyers (SBL), after a historic visit to Howard University in Washington D.C., to meet civil rights lawyers in the US met the Lord Chancellor Lord Mackay to advocate race training for all members of the Judiciary which was resisted by the Judicial Studies Board and many High Court judges.

The influence of the National Conference of Black Lawyers during those key days in Washington DC introduced SBL to some of the ex prisoner activists from the Attica State Prison uprising. The forceful presentation of Professor Angela Davis, the former Black Panther civil rights activist, now a law professor at Berkeley University California called for opposition to the prison industrial complex which relied on a disproportionate level of black detainees.

In 1988 SBL was asked to defend a number of black defendants in a public order case in Liverpool Crown Court and encountered an unprecedented level of Judicial hostility from the Recorder of Liverpool, HHJ Wickham. Lady Margaret Simy, the veteran Labour councillor spoke of the racism of Merseyside Police and the collusion of the justice system in criminalizing large numbers of the UK's oldest black community. The Recorder of Liverpool called for riot police to be stationed outside the Court doors in Derby Square, and threatened to have anyone who spoke out after the verdict was announced would be arrested for contempt.

The Judge shouted at the jury to "get out" when they unanimously acquitted all three defendants of violent disorder. There followed a series of cases, supported by Liverpool 8 Law Centre that led to several successful civil actions against Merseyside Police which helped curtail both the excesses of the police and the Judicial racism that appeared to support it. It also allowed access to justice for those communities that had to find their outlet on the streets and to hold the local police to account for their actions.

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[4] www.blacklawyer.org › Featured Project
Submitted by admin on April 29, 2011 – 10:59 pm Comments Off on Remembering **Rudy Narayan**: Blue heritage plaque for SBL co-founder. Remembering ...

[5] At the Crown Court D applied to the judge for a multiracial jury. The judge, under the misapprehension that counsel was about to use the case as a platform for racial haranguing, refused the application and, later, was intent on stopping defence counsel from asking any question which had any tinge of colour in it.

In a meeting in 1988 with the Chair of the Judicial Studies Board, SBL members D Peter Herbert and Christiana Hyde, (now a full time Employment Judge at Croydon Employment Tribunal) were told that Magistrates, police officers and probation officers probably did require training on race issues but not Judges! In discussions with the National Association of Probation Officers (NAPO) and the National Black Caucus (NBC) it was agreed that this situation was intolerable given the continued racist remarks Judges were making and the significant disproportionality in sentencing and bail decisions which had existed anecdotally for many years through out the UK.

Comments were collated about racist remarks from Judges all over the UK and whilst many were missed and went unrecorded major ones were published. Judge Bernstein in Liverpool Crown Court, was one of several who used the expression, Nigger in the woodpile" in a case involving a defendant of African Caribbean origin. The Recorder of London, Sir James Miskin spoke of a plot by, "murderous Sikhs" in a criminal trial he was hearing at the Old Bailey and on another occasion spoke at a "private dinner party" of 'nig nogs". None of these comments resulted in any disciplinary action against the Judges concerned as the establishment protected the Judiciary but were eventually forced in 1991 to accept race training was necessary.

By 1992 the occurrence of a number of racial murders in South East London, the increasingly frequent and embarrassing Judicial comments of a racial nature and the NACRO statistics about the huge % of African Caribbean men and women in prison led to the Home Office calling a conference to examine how to deal with race in the criminal justice system. Leading members of the Association of Black Probation Officers (ABPO), the National Black Caucus, SBL, Trevor Hall (a senior black civil servant at the Home Office), and leaders of the National Association of Probation Officers (NAPO) met as Home Office Consultants at Stafford to discuss recommendations. The vast majority of recommendations were rejected by the then Home Secretary, Sir Michael Howard, including the adoption of an anti discriminatory section of the Race Relations Act 1976. Whilst this was refused by the then Conservative Government the compromise was an undertaking to introduce a positive duty of the Home office under s 95 of the Criminal Justice Act 1991 to publish statistics on race, and gender in the Criminal Justice System on an annual basis.[6]

Behind the scenes the High Court Judge, Sir Henry Brookes, together with other more liberal High Court Judges, such as Mr. Justice Anthony Hooper Q.C. agreed to the necessity of having race training for all full and part time Judges. Sir Henry Brookes and Trevor Hall formed the basis for the new Ethnic Minorities Advisory Committee to the Judicial Studies Board, together with Lord Dholakia, tasked with developing a training model to address judicial racism that would seek to challenge stereotypes and assessments in sentencing and bail decisions.

After a visit to see how the Canadian Judiciary dealt with issues of race and diversity a model was developed that led to the first ever-judicial training on race being announced by Lord Taylor of Gosforth. The training was introduced over a five year period between 1991 and 1996 but specifically excluded all High Court Judges and Lord Justices of Appeal. Presumable this was on the basis that they had no need of such training being of such superior judicial

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[6] Racial awareness training for judges | The Independent
www.independent.co.uk › News › UK
15 Nov 1993 - A pounds 1m project to train **judges** in **racial** awareness was given the go-ahead by Lord Mackay, the Lord Chancellor. 'It is absolutely central ...

intelligence. Sadly, intelligence, jurisprudential or otherwise is no protection against prejudice and the exercise of power.

The training was conducted over a residential Friday to Saturday afternoon with several consultants taken primarily from the Ethnic Minorities Advisory Committee to the Judicial Studies Board, Chaired by Sir Henry Brookes. Sessions over dinner on a one to one between Judges and local community leaders and activists avoided any superficial discussion of football, music, sport or general political discussion that would distract from the matters at hand of racism and bias.

The murder of Stephen Lawrence in February 1993 brought the issue of racial murders into sharp focus following the arguments that racially aggravated offences should be added formally to Judges sentencing powers.[7] This faced significant resistance from those, including Sir Michael Howard, the then Home Secretary that the issue was already covered and would lead to the creation of problems in Northern Ireland if one chose to include religious hate crime.

This debate went on alongside the race training that was rolled out across England and Wales with a significant impact being made on the culture of full and part time Judges who for the first time had to face members of the BME community to hear first hand of their experiences of racism both on the streets, the workplace and often as UK citizens trying to enter the UK, or to be joined by family and friends. They heard first hand of both the daily routine of casual racism in the workplace through the whole spectrum of experience including the serious disparity of treatment in the court system and on the street, to the racism of many immigration laws the, effect of "marriages of convenience" that kept many legitimate Asian and African couple apart for years. The training received a significant boost from the use of a Panorama video featuring Neville and Doreen Lawrence talking fist hand about the murder of their son, and from Asian taxi drivers in Nottingham discussing racial attacks they and colleagues regularly suffered. The training session after the video was played underwent a visible sea change for those who participated and had regarded the training as a rather lighthearted affair.

In the assessments that have never been made public approximately 10% of the full and part time Judiciary resisted the training usually in a passive manner but occasionally in a more active sense, which was very disturbing. The general impression from EMAC and the JSB that the training was instrumental in changing the culture of the Judiciary. The key question would be whether it would lead to any change in sentencing and bail practice. No research was ever conducted to see whether it had made a permanent impact on the frontline of the exercise of judicial discretion.

Even after this training was conducted instances of overt racist comments occurred such as the example of Circuit Judge William Crawford Q.C. presiding over a case in Newcastle Crown Court who said when discussing a legal point he described hard working people as, "people who work like niggers". Although the Judge apologized in a statement issued by the Lord Chancellor's Department a social worker in Court said, "I was the only non white person in the court room and people felt sorry for me. I could see they knew I was offended. In 1997 that word is not acceptable.[8] Lord Mackay commented in issuing a rebuke, "remarks of

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[7] **[PDF]**
the stephen lawrence inquiry - Gov.uk
https://www.gov.uk/government/uploads/system/uploads/attachment.../4262.pdf

[8] The Independent, April 1997

this kind do wholly disproportionate damage to the perception of justice and the reputation of the judiciary." The Judge's remarks were "particularly surprising" as he had attended a course on racial awareness organized by the Judicial Studies Board. Lord Mackay recalled that in 1996 Lord Justice White said in the Court of Appeal that the word "nigger" could "never be used without offence to the principles of racial integration and good relations, which it is the policy of the courts to uphold".[9]

The use of the word "nigger" was reportedly the last words Stephen Lawrence heard as he was chased by the white gang, with the words, "What, what nigger". If the hate in the word needs emphasizing it has been used in many racial attacks, both fatal, violent or simply abusive. The racist who opened fire on black people on the tube in 2007 who made the subject to a life sentence with a minimum period of 15 years in custody, said he was going to "kill all black people" and referred to them as "niggers".[10] The use of this term in whatever context from the bench therefore sends out an appalling message to the whole of society and not just the minority group being targeted.

The most significant study of sentencing and bail decisions was conducted by Dr Roger Hood, of the Oxford University Criminology Department who assessed Judges, both full and part rime at Walsall and Wolverhampton Crown Court. The study assessed over 3,000 sentencing and bail decisions and found an "unexplained" disparity in sentencing and bail which found that African Caribbean defendants in particular were more likely to be given an immediate custodial sentence, with fewer previous convictions for the same offence as their white counterparts.[11]

The disparity in sentencing could actually be narrowed down to individual Judges although identification in this manner by name was specifically excluded by the Lord Chancellor. Some 25 years later in 2016 the statistics are worse than ever with the disparity in sentencing and bail decisions actually growing. The Magistrates Association, responsible for approximately 92% of all sentencing and bail decisions conducted less rigorous race training following the Judges training in the years that followed. Again there was some opposition to any need for the training, for example a magistrate in Witney, Oxfordshire willfully interrupted the sessions to such an extent he was asked to leave if he was unwilling to a allow the majority to listen and taken part. He subsequently left the training session. That was not an isolated incident but occurred at various times in different forms throughout the country.

The other primary change was the culture change of creating an "Equality Benchbook" as a resource tool to describe how discrimination of all forms works, and to provide detailed information on all ethnic minority groups, religions practices and customs as they may arise in the courtroom setting. This now covers all forms of discrimination and is compatible with the Equality Act 2010. The Equality Benchbook whilst provided for every member of the full and part time Judiciary has sadly been allowed to gather dust and has not formed a significant part of Judicial or Magistrates training since 1996.[12]

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[9] The Telegraph, 27th March 1997

[10] The Times, February 24th 2007

[11] https://www.amazon.co.uk/**Race**-Sentencing-Report-Commission.../dp/0198258402
Race and Sentencing: A **Study** in the Crown Court - A Report for the Commission of **Racial** Equality Paperback – 1 Dec 1992. ... This major **study** examines whether **race** is a factor influencing the sentences imposed on men and women in the Crown Courts in England. ... The findings will provide

[12] https://www.judiciary.gov.uk/wp-content/uploads/.../ETBB_all_chapters_final.pdf
Equal Treatment **Bench Book** • November 2013. 1. 1. **Equality** Act 2010. Key points. • The statutory torts prohibiting discrimination and related conduct are now ...

1 Evidence of disparity of sentencing and bail decisions have been examined by a number of UK academics over the years with a study by Dr Bonny Mlanga, a research fellow at the University of Hull Centre for Criminology and Criminal Justice, of a 5v year study of young men in Brent prior to 1996 found black defendants were more likely to be charged than their white counterparts but were significantly more likely to be acquitted because of lack of evidence, however of those convicted they were more likely to receive a custodial sentence.[13] The clear evidence of a number of studies is that disproportionate sentencing and bail decisions have continued apace seemingly impervious to the race awareness training that has been conducted since 1991. Studies have shown that:

- The chances of a young black male's custodial sentence at a Crown Court being 12 months or longer are 6.7 times those of young white men, accounting for other variables.
- The chances of a young male with parents of different ethnicities being prosecuted are 2.7 times that of a young white male with similar case characteristics.
- For a young female with parents of different ethnicities, the chance of being prosecuted is 6 times that of a white female who has committed a similar offence.[14]

The landmark Stephen Lawrence Inquiry in 1998 that produced an upsurge in the reporting of all hate crimes across the UK was sadly now matched by any significant culture shift in the Judiciary. There was throughout the country and massive "push back" against an organization being labeled, "institutionally racist". Many senior member of the Judiciary have never engaged with the residential training that was rolled out between 1991 and 1999 and the induction training for Judges has been devolved to training consultants who are far too preoccupied with retention of contracts or members of the Judiciary whose heart is not in challenging colleagues about what they actually do and think in practice.

Consequently, race is still perceived as a problem when encountered head on by most members of the Judiciary and Magistracy. Whilst, it is acknowledged that the vast majority of Judges or Magistrates do not commence a sentencing or bail exercise thinking that African Caribbean, defendants, especially women or Muslims are somehow more of a risk than the other members of society the outcomes of decisions are undeniably exercised against African Caribbean defendants.

Even if one factors in poverty, unemployment and other variables there is still not only an over representation in the prison population but in the means by which that disproportionate population is maintained. The probation service has mange dot ensure reports and recommendations are of a better quality with regular reference to the sentencing guidelines but the disparity of treatment keeps on growing.

The Sentencing Council, in the published guide to set out how the process is developed makes no mention of disparity in treatment on grounds of race or gender. If one looks at the whole of the guidelines there is no mention at all of the known facts that according to the official Home Office statistics the situation has grown steadily worse over the years with the Magistracy and Judiciary having to take full responsibility for the unlawful disparity which all

[13] "The Colour of English Justice" (Avebury) Independent 11.6.1997

[14] May, T. et al. 2010, Differential Treatment in the Youth Justice System, London: Equalities and Human Rights Commission

the evidence suggests is due to the passive operation of underlying and generally unconscious bias against BME defendants especially those of African and Caribbean origin.

In the short 5 minute video there is no mention of the under representation of BME professionals in every aspect of the criminal justice system. It is said that, "the punishment should fit the crime" and claims to promote the same practice in every area of the country so there is in effect no postcard lottery in sentencing. It is a cause of deep disquiet when the Council fails to issue any guidelines on the need to ensure that BME defendants are not treated more harshly than white defendants.

At present, people from **black and ethnic minority groups make up over a quarter of prisoners in England and Wales**, but only 14 per cent of the wider population.
Figures also show that 61 per cent of offenders from black and ethnic minority backgrounds receive jail sentences, compared to 56 per cent of white offenders.

The huge disproportionality in terms of stop and search is also ignored by the Council, as is any mention of race, ethnicity or gender or what sentences have the lowest rates of recidivism. Judges and Magistrates therefore sentence without any guidelines on how to work to achieve approach sentences and bail decisions, which do not discriminate on race, gender, ethnicity, or national origin. Courts are, quite correctly, given specific guidance on how to sentence young offenders and on racially aggravated offences but this "colour blind" approach to justice has clearly not worked. The Sentencing Council is sadly overwhelmingly, white male and middle class and has not of its won volition had the insight or guidance itself to square the circle between the appalling statistics of racial disparity shown every year in the s95 Criminal Justice Act 1991 statistics and the guidelines referred to every day by Judges and Magistrates up and down the country.

If there were a historic disparity of treatment against members of the Jewish community for instance there would be a major public debate. The admission by the Supreme Court that Judges in murder cases had been misdirecting themselves on the law of "joint enterprise" for almost thirty years is a prime example of a system that is capable of making fundamental errors of jurisprudence.[15] A system of justice that has the insight to review its own practice should be capable of change in such a key area and race and gender discrimination. The responsibility for change must rest with the Lord Chancellor and Lord Chief Justice who have been aware that this disparity of treatment has been prevalent for many years.

He may have added that the justice system in England and Wales has decided to monitor but thereafter ignore this significant problem in the 21 years since this training concluded. The maintenance of such race and gender driven sentencing undermines the credibility not only of the Sentencing Council, by the role of the Magistrates and Judiciary in England and Wales in this democratic Society. The rule of law must have as its most fundamental principle every person must be treated equally under the law. If this is not attempted every other claim that is made about justice is without any merit and undermines the concept of democracy in the United Kingdom.

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15 Joint enterprise law wrongly interpreted for 30 years, Supreme Court ...
www.bbc.co.uk/news/uk-35598896
18 Feb 2016 - She called **joint enterprise** "a lazy law", saying: "It should never have been invented. It's just been used to convict innocent people of **crimes** ...

The Parliamentary Review by David Lammy M.P.

On 31st January 2016, The Prime Minister, The Rt Hon David Cameron asked David Lammy MP to lead a review to investigate evidence of possible bias and disproportionate sentencing of African, Caribbean and Asian defendants in the Criminal Justice System as part of the Equality and Criminal Justice reform. David Lammy MP is to report back in spring of 2017
.
The former Prime Minister said, "We need to ask the difficult questions about whether the system treats people differently based on race. Charges, courts, prisons and rehabilitation to be scrutinised." The Rt Hon David Lammy, M.P., said, "I've been working in this area for almost two decades and am very pleased to accept the Prime Minister's invitation to lead this comprehensive, independent review across our criminal justice system. With over a quarter of the prison population coming from BAME background the urgency is clear.

The former Lord Chancellor and Justice Secretary, The Rt Hon Michael Grove MP, said: "An effective justice system depends on procedural fairness. Equality of treatment at every stage in the criminal justice process is essential.

There is a need for such a review, as a report entitled Statistics on Race and the Criminal Justice System 2012, produced by the Ministry of Justice found that a black person aged ten or older in 2011/ 2012, was six times more likely than a white person to be stopped and searched and nearly three times more likely to be arrested.

The same report found that only 26 per cent of white criminals were handed immediate custodial sentences compared to 31 per cent for black criminals and 32 per cent for Asian criminals. Again this differential treatment can be seen in the average custodial sentence for black prisoners was 23.4 months compared to 15.9 months for white prisoners. The publication of the interim report by the Lammy Review highlighted the serious disparity in treatment across the Criminal Justice System. The primary findings are a re statement of historical trends that found If you are African Caribbean you are 16% more likely to be remanded in custody than if you are white; you are also likely to obtain a custodial sentence of 24 months compared to your white counterpart's sentence of only 17 months.

This is not because African Caribbean men commit more serious offences than their white counterparts - these are punishments handed down for the same or similar offences. African Caribbean men are also subject to receiving immediate custodial sentences with fewer previous convictions than their white counterparts. Our perceptions have become the reality that means 41% of all young people in detention are now from BAME communities.

The publication of the interim report on 16th November 2016, has been given urgency to the comments by Lord Neuberger who has gone some in recognising the need for racial disparity to be tackled as a priority. In a recent speech, the President of the Supreme Court, Lord Neuberger, cautioned judges to think about how their unconscious attitudes may play a role in their judgments.[16] He has subsequently said that in light of the evidence that cognitive biases affect human decision making, he advocates for a better understanding of how they affect the justice system, and of what can be done to mitigate these effects. Lord Neuberger also advocates education and strategies to limit the effects of cognitive biases for key

[16] Neuberger, D. 2015, Fairness in the courts: the best we can do, Address to the Criminal Justice Alliance

participants in the criminal justice system, including judges, magistrates and jurors.[17]

Diversity and Equal Treatment for BME Judges

The Judicial Conduct Investigations Office (JCIO)

This branch of the Ministry of Justice is responsible for the conduct and disciplinary framework for all Judges and Magistrates in England and Wales. It has until recently continued its work without coming under adverse scrutiny. That is currently changing due to the number of BME Judges currently challenging the JCIO before the Employment Tribunals. The problem has arisen in large part due to the culture and habit of the Ministry of Justice for failing to place race and diversity at the center of their culture and practice, effectively ignoring the lessons learnt from the Judicial Studies Board and the Stephen Lawrence Inquiry.

There are currently three cases going through the system, which are exposing the lack of competence on race issues at the heart of the Judiciary. The first in time involves an Immigration Judge who complained to a local presiding Judge of disparity in the distribution and management of the workload as well as some other disparaging background comments from a white male, Senior Immigration Judge (SIJ). Rather than investigate the complaint properly the African female was allegedly sent threatening emails, some with words in capital letters, had the details of her complaint spread around her sitting center and was effectively placed in Coventry. None of the three white make Judges responsible were suspended or moved from post. An internal inquiry failed to address the Equality Act 2010 and looked simply at misconduct, which unsurprisingly it failed to find. The case is now subject to two Employment tribunal claims.

The second case now public, involved D P Herbert O.B.E. for allegedly making a public criticism of an electoral college Judge who had banned the former Mayor of Tower Hamlets from holding any public office for 5 years. Judge Herbert and many others objected forcibly to the use of the phrase by the Electoral College judge that Rahman had "played the race card". The allegation resulted in a nominated Judge, Underhill J recommending that Herbert be given a written warning for critiquing another Judge about race contrary to the regulations.

Neither the JCIO nor the nominated Judge considered Herbert's rights under @10 and @14 of the Human Rights Act nor the protection offered by s27 Equality Act 2010 that offers protection form victimization for speaking out about matters that may be contrary to the Act itself in its broader sense. The Lord Chief Justice has now intervened to refer the matter to a disciplinary panel. I is deeply disturbing that the Judicial Conduct regulations make absolutely no mention of the "Whistle Blower" and "Protected Act" provisions of the relevant legislation and that neither the staff at the JCIO not the nominated Judges appear to be aware of it. The disturbing feature of Herbert's case is that he was made subject to a bullying attempt to prevent him sitting by threatening to have him suspended without notice and without a report being made to the Lord Chief Justice. This was only withdrawn after he pointed out the case of his three white colleagues whom had not been suspended facing a far more serious allegation of ongoing victimization and bullying.

[17] POST correspondence with Lord Neuberger, 1st July, 2015

The third case, involved a clear case of judicial independence that has been converted into an allegation of misconduct after a cursory and biased investigation tat appeared to breach virtually every procedural rule. The "oppressive" questioning of a person with mental health issues was never specified but a finding made b=nevertheless. There have over the years been many complaints of Judges, in Tribunals and elsewhere that have been found shouting at witnesses, making jokes at their expense, making racist and or sexist remarks and simply been downright rude and abrasive. These are invariably treated as raising issues and rarely as misconduct.

It appears that, there is, as with every other profession in the UK a disproportionate number of BME Judges and almost certainly Magistrates who face disciplinary proceedings and sanctions. This would almost certainly mirror the experience of many barristers and solicitors where disproportionality comes with the territory. Given the already alarming under representation of BME Judges and Magistrates across England and Wales the racism that follows post appointment is wholly unacceptable.

It is little wonder therefore if white Judges fail to treat their BME colleagues with respect and equal treatment it should come as no surprise why they should treat BME defendants and probably witnesses and victims in the same cavalier fashion. It is little wonder therefore that BME communities are reluctant to experience this type of behavior from stepping up to perform an invaluable public service.

It is notable that the highly relevant and comprehensive, Equality and Diversity Policy for the Judiciary of October 2012 was never mentioned in any of the extensive correspondence or decisions made in all three cases. The collective failure by the Ministry of Justice Judicial Conduct Investigation Office (JCIO), several High Court Judges and the Presidents of the Immigration, Employment Tribunals and South Eastern Circuit to make even a passing reference is astonishing given the allegations of race, and sex discrimination, harassment and victimization that were central to all three complaints.

It is as if that policy had never existed. In the latest development in the Employment Tribunal cases the MOJ is now arguing that the MOJ (JCIO) and any disciplinary panels enjoy complete Judicial immunity from the Equality Act 2010 and the European Convention on Human Rights relying upon the case of P v The Metropolitan Police Commissioner due to be heard by the Supreme Court in the spring of 2017. In a somewhat contradictory stance, the disciplinary panel in the case of D Peter Herbert O.B.E., headed by Mrs Justice Laing D.B.E. has now accepted it is bound by the Equality Act 2010 and by @6 of the ECHR. That at least is a step forward and means it is impossible to argue Judicial immunity for such disciplinary panels. This precedent and message is clear that Judges sitting in judgment over their colleagues are not above the law but must act subject to it at all times.

Conclusion

Judicial racism and bias is not the only cause of the current unacceptable levels of disparity of treatment in the Courts but it is a significant cause that adds a final layer of abuse on an already discriminatory criminal justice system. Some 24 years after the comprehensive study by Dr Roger Hood, and some 22 years after the racist murder of Stephen Lawrence it is essential that race and gender bias is tackled head on with the seriousness it deserves and not swept aside as just an unexplained consequence of being thrown into the justice system.

Being equal under the law should not be an empty phrase highlighted on the MOJ website for public consumption but must be actively fought for if justice for all is to have its true meaning in Britain today.

The changes that have to be introduced are as follows:

a) The High Court Judiciary, Court of Appeal, and Supreme Court receive appropriate & effective training and undergo regular appraisals on the Equality and Diversity Policy for the Judiciary (2012), and Equality Bench book forthwith;
b) That similar training and appraisal be conducted for all members of the JCIO;
c) That there be effective ethnic, and gender monitoring of all complaints received and processed by the JCIO and by the various Presidents of the Tribunals and take positive action to address inequality in the complaints mechanism;
d) To take measures of positive action under s158 and s159 of the Equality Act 2010, such as a requirement to interview all BME and female applicants for Judicial office, and a fast track system to facilitate Judicial & Magisterial diversity;
e) Members of the High Court Judiciary, Court of Appeal and the Supreme Court be allocated a personal professional BME mentors to discuss with and be advised upon, equality and diversity issues and ensure they are addressed on a structured basis. Such mentors to report quarterly to an Equality and Diversity Committee, Chaired by the Lord Chief Justice. The purpose of he Committee, inter alia to identify trends and areas of concern.;
f) The current programme of "Diversity Champions" elsewhere in the Judiciary to be replaced by a list of professional and lay BME mentors who can identify and support the understanding and Implementation of The Equality and Diversity Policy of the Judiciary 2012;
g) Mandatory recording of all sentencing and bail decisions to highlight BME and gender monitoring to be conducted of each Crown Court and Magistrates Court with the publication annually of any disparity in sentencing and bail decisions under s95 of the Criminal Justice Act 1991.
h) The Sentencing Guidelines Council to be directed to address issues of race and gender disparity in sentencing relating to each offence so that sentencing Judges and magistrates are aware of the context within which BME and female defendants are being considered.
i) The MOJ to adopt a target that at least 20% of all newly appointed lay Magistrates be from BME communities by 2020 with a target of at least 15% of all lay magistrates to be from BME communities;
j) Similarly, with regard to the professional Judiciary the MOJ to adopt a target of at least 15% of all newly appointed Judges in each jurisdiction to be from BME communities with a 10% target overall by 2020.

D P. Herbert O.B.E.

December 2016