

Mandatory Jury Instructions on Implicit Bias

Muhammad Riaz, B.A., 3L, College of Law, University of Saskatchewan

Introduction

In 2019, Bill C-75 eliminated peremptory challenges in jury selection.

The Bill was passed in the aftermath of R v Stanley, with the intent of preventing an accused from arbitrarily eliminating jurors and ensuring a “favourable” jury.

In the aftermath of the Bill coming into force, important questions were raised about the constitutionality of the legislation.

R v Chouhan 2021

The Supreme Court upheld the constitutionality of eliminating peremptory challenges.

Intervenors such as the Canadian Association of Black Lawyers and the Federation of Asian Canadian Lawyers argued that peremptory challenges were an essential means of ensuring an unbiased jury. They feared that the removal of this safeguard would make it more likely that minorities might be tried by a means of all white jury, with no way to prevent implicit bias against the accused among the jury.

The Supreme Court held that there are other means beyond peremptory challenges to ensure unbiased juries. Specifically, the Court stated that Trial Judges “should consider” giving both general and case specific instructions to juries on implicit bias.

American Initiatives to Eliminate Implicit Jury Bias

In recent years some jurisdictions in the United States have undertaken innovative initiatives to directly address the issue of implicit bias. Models that have either been implemented or proposed include:

- Video and Written Instructions (Actual Program)
- Jury Training Course on Implicit Bias (Actual Program)
- Hybrid approach combining aspects of an implicit bias course, and written and video instructions (Proposed)

The aim of all such programs is to address the issue of implicit bias at a deeper level. The jurisdictions that have implemented such programs, and the commentators who have proposed them recognize that it is not enough to just tell jurors to be aware of implicit biases. Short and brief instructions are not conducive to facilitating the process of recognizing and overcoming bias.

Rather, it is important to go beyond the superficial, and give specific, detailed examples of implicit bias. Furthermore, delivering implicit bias instructions at multiple points during the trial process, and by multiple means further facilitates the process of active reflection and recognition of implicit biases.

National Judicial Institute Model Jury Instructions



In Canada, the National Judicial Institute currently has the following model guidelines on bias available through their website :

- [1] Every juror must be impartial, which means that every juror must approach the trial with an open mind and without preconceived ideas.
- [2] We all have beliefs and assumptions that affect our perception of the world. These perceptions can create a bias for or against others based on their personal characteristics [such as gender, race, ethnicity, sexual orientation, or employment status]. We may be aware of some of these biases, but unaware of others.
- [3] No matter how unbiased we think we are, we look at others and filter what they say through the lens of our own personal background and experiences. Unconscious biases may be based on stereotypes or feelings that one has about a particular group, namely, traits that one associates with that group. All human beings experience unconscious biases, but these biases can be overcome through self-reflection and introspection.
- [4] If you are selected as a juror, you will be asked to judge the evidence presented at trial fairly without bias, prejudice, sympathy or partiality.
- [5] Jurors are judges of the facts and must approach the case with an open mind, one that is free from bias, prejudice, sympathy or partiality. Impartiality requires active work. It requires that you be aware of your own personal beliefs and experiences, and that you be equally open to the views of others. If you are selected as a juror, it will be your duty to identify and set aside any prejudices or stereotypes that might affect your decision in this case.
- [6] There are things that jurors can do to help identify and set aside unconscious bias. If you are chosen as a juror, you will be instructed to:
 1. Take the time you need to reflect carefully and thoughtfully about the evidence.
 2. Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds, for example, [richer or poorer, more or less educated, older or younger, or of different gender, gender identity, race, religion, or sexual orientation] would you still view them, and the evidence, the same way?
 3. Listen to one another. You all have different backgrounds and will be viewing this case in light of your own insights, assumptions, and biases. Listening to different perspectives may help you to better identify the possible effects of hidden biases. Help one another to identify and resist the effect of unconscious bias.
 4. Resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or stereotypes.
- [7] I will now explain some requirements for jury service. Listen carefully. If any of these apply to you, you may not be able to serve as a juror in this case.

Conclusions

The elimination of peremptory challenges while done with the intent of ensuring unbiased juries, has the potential to worsen the, problem it was designed to solve. Given the historic over policing and overincarceration of Black, Brown and Indigenous Peoples in Canada, jury instructions on implicit bias should be mandatory in criminal trials involving an accused who is a member of a visible minority or a historically disadvantaged group.

The National Judicial Institute’s Model Jury instructions are rather superficial and fail to give specific and detailed examples of implicit bias. The Model instructions should be enhanced to encourage a deeper level of understanding and engagement, as done by implicit bias instructions given in the United States.

References

Case Law:
R. v. Chouhan, 2021 SCC 26

Journal Articles:
Anona Su, “A Proposal to Properly Address Implicit Bias in the Jury.” Hastings Women’s Law Journal. Volume 31. 2020.
R. v. Chouhan, 2021 SCC 26

Mashoka Maimona, “The R v Chouhan Series, Part I: Does the Blanket Elimination of Peremptory Challenges Actually Ensure More Diverse, Representative, and Impartial Juries?” University of Toronto Faculty of Law Review. Volume 79. 2021.

Other Sources:

“3.1.1 General Anti-Bias Instructions.” National Judicial Institute. November 2021. <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/preliminary-instructions/opening-instructions-to-the-trial-jury/general-anti-bias-instructions/>

CONTACT

MAR465@USASK.CA