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Structural Racism and Race Discrimination

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Abstract: What is the relationship between 'racism' and 'race discrimination'? The paper explores this question. It shows that once we look beyond racism understood colloquially as individual bigotry, to racism understood in a structural sense as embedded in the social, economic, cultural and political dimensions of the State itself, it is possible to locate racism in the practice of discrimination law, within the category of race discrimination. Yet, discrimination law frequently fails to grasp structural racism. The paper reveals how this happens and in turn shows how race discrimination can be infiltrated with a structural view of racism. The overall purpose is to establish that discrimination law fails to be relevant in the face of contemporary forms of racism in the absence of a structural view.

Key words: State; Direct Discrimination; Indirect Discrimination; Institutional Discrimination; Racialisation.

1. *Introduction*

Race discrimination is not racism. In fact, one would be hard pressed to find any reference to 'racism' in the law prohibiting race discrimination. Nowhere does the Equality Act 2010, or its predecessors Race Relations Acts of 1976, 1968 and 1965, prohibit 'racism'. The prohibition on race discrimination is defined as a prohibition on 'less favourable treatment'[1] and 'particular disadvantage'[2] based on race. There is no indication that the phrases 'less favourable treatment' and 'particular disadvantage' are to be interpreted as racism. As the UK Supreme Court in its very first decision on non-discrimination, its first decision at all, reminded us no less than four times—to be guilty of race discrimination was not to be interpreted as being a 'racist' in the popular

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[1] Equality Act 2010, s 13.
[2] Equality Act 2010, s 19.

sense of the term.[3] Assuming that it is racism which makes people racist, the implication was that race discrimination does not make the discriminator racist. Furthermore, as Lord Clarke in his concurring judgment clarified, overt racism, such as the belief 'that God had made black people inferior and had destined them to live separately from whites', would be discrimination based 'overtly on racial grounds ... *because* the criteria were inherently based on racial grounds and *not* because of the subjective state of mind.'[4] In other words, racism, understood in the popular sense captured in his example—as the belief of superiority of one race over another—did not feature in our legal understanding of race discrimination.

This is a pragmatic stance for discrimination law to assume. If racism is a subjective state of mind but a state of mind is 'not susceptible to investigation',[5] it is pragmatic to exclude it from proving race discrimination. Rather, race discrimination, especially direct race discrimination, can be proven with facts showing that the discriminator relied on 'racial grounds' irrespective of their state of mind, whether bigoted or benign.

This stance though rests on the assumption that racism *is* a subjective state of mind. It embodies a narrow understanding of racism as psychological and inhering in the minds of individuals. It grossly underestimates what racism is and in turn the work it does in understanding race discrimination. Importantly, it excludes from its ambit structural racism which is broader and stands for 'the complex totality of forces in British society which have produced racialised political ideologies and practices'[6] or, more simply, 'the whole complex of factors which produce racial discrimination'.[7] And in excluding this view, race discrimination appears to miss a large part of racism as it exists today.

The aim of this paper is to exhume the structural view of racism in discrimination law. It argues that while race discrimination and racism are not the same thing, race discrimination has a clear link with racism understood broadly and in reference to the processes of racialisation which define both the structure of racism and the individual instances

[3] *R v JFS* [2009] UKSC 15 [9] (Lord Phillips), [54] (Lady Hale), [156] (Lord Clarke), [184] (Lord Hope).
[4] ibid [150] (emphasis supplied).
[5] G Bindman, 'Proof and Evidence of Discrimination' in B Hepple and EM Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing 1992) 50.
[6] J Solomos, *Race and Racism in Contemporary Britain* (Macmillan 1999).
[7] M Banton and R Miles, 'Racism' in Ellis Cashmore (ed), *Dictionary of Race and Ethnic Relations* (4th edn, Routledge 1996) 308.

of race discrimination as part of that structure. Part II of the paper explores the meaning of structural racism, which will be helpful in mapping how it manifests in discrimination law. Part III does this mapping to show how structural racism seems to be the key to understanding race discrimination in some recent cases of both direct and indirect discrimination. Part IV sets out the main implications of drawing a link between structural racism and race discrimination. Part V concludes by reiterating the significance of this link in addressing instances of race discrimination which can only be understood as part of the 'invisible monolith' of structural racism.[8]

A few remarks on scope are in order. This paper cannot do justice to decoding *all* racism into *all* of discrimination law, so there are, unsurprisingly, limits to what is actually being done here. First, the paper does not deal with racism exhaustively either as a concept or in its many manifestations. It is concerned with one conceptual view of racism (structural) and does not negate other ways of thinking about racism (including in individual or institutional terms). There is thus no 'essence' to racism being suggested in the following pages; rather, the purpose is to present an account of structural racism as developed in social and political theory to show how that account can serve as an evaluative tool in discrimination law for understanding instances of discrimination which are rooted in structural racism.

Secondly, 'discrimination law' in the paper refers to the law on the prohibition of race discrimination as applicable in the UK, i.e. mainly as contained in the Equality Act 2010, article 14 of the European Convention on Human Rights enforceable via the Human Rights Act 1998, and the Race Directive 2000/43 of the European Union as was applicable to the UK until 2020. Similarly, the examples of case law brought forth in this paper do not represent all or the 'most important' jurisprudence that exists out there on race discrimination. The cases are chosen mainly because they exemplify structural racism as it manifests in individual cases of discrimination and thus serve as rich fodder for the present discussion. The examples are also recent and show the nature of contemporary race discrimination sharply, as concerned with the State and its institutions at the centre. This is in contrast with the traditional model of race discrimination in the UK concerned with, to put somewhat summarily, equal opportunity in matters of housing and employment, making it unlawful for employers, landlords, service

[8] R Eddo-Lodge, *Why I am No Longer Talking to White People About Race* (Bloomsbury 2018) 222.

providers etc to take race into account in their decision-making.[9] Because few attempts have been made to transcend this traditional model, it requires some leap of faith in seeing the cases discussed in this paper as cases of structural racism in fact. The paper hopes to show that race discrimination in these cases is just the tip of the iceberg which cannot be understood without taking into account the underlying edifice of racism; but because the edifice is underlying or hidden from plain sight, it also appears difficult to link it to race discrimination despite being pervasive.

Finally, much of the forthcoming analysis may seem familiar to those acquainted with Critical Race Theory in the US which involves a critique of discrimination laws for its narrow and liberal conceptions of 'race', 'racism' and 'antidiscrimination'.[10] This paper is located well within that critical realm. However, it seeks to do more than just mount a critique of liberalism which is well known to discrimination lawyers on either side of the Atlantic.[11] In the final analysis, it ends up showing that the structural view of racism is more than just about confronting the liberal framework of contemporary discrimination law, and instead about seeing that framework as open to subversion and being replaced with a substantive view of race discrimination which is capable of appreciating its link with racism.

2. *Racism: A Structural View*

In the post-war years, social science gradually moved away from a view of racism as inhering in the minds of individuals and expressed as aberrational behaviour. The focus on individual actors and their isolated acts was seen as eliding the systemic role of employment and industry practices, and state institutions and instrumentalities such as the police

[9] B Hepple, 'The Aims of Equality Law' (2012) 61 Current Legal Problems 1; C McCrudden, 'Institutional Discrimination' (1982) 2 Oxford Journal of Legal Studies 303.

[10] See, for an overview of the field, R Delgado and J Stefancic, *Critical Race Theory: An Introduction* (3rd edn, New York University Press 2017); K Crenshaw, N Gotanda and G Peller (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (The New Press 1996).

[11] See esp D Chalmers, 'Mistakes of a Good European?' in S Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001) and contributions in B Hepple and EM Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell Publishing 1992).

and the courts, in reinforcing racial hierarchies.[12] A broad view of racism as structural—embedded not in the minds of individuals but in the social, economic, cultural and political forces which define the relationships between people—came to be articulated to explain racism in the modern society.

One of the first incarnations of the structural view in the UK can be found in Sami Zubaida's work where he pleaded:

> There is a plethora of studies ... concerned with 'attitudes', 'prejudice' and 'discrimination'. They are remarkably uninformative; for the most part, they tell us about the relative readiness of sections of the population to subscribe to one set of verbal formula rather than another. What we need are studies of the way the race relations issues enter into the structures, strategies and ideologies of political parties and trade unions and governmental bodies.[13]

His entreaty was taken up by the likes of John Solomos and David Theo Goldberg.[14] Solomos thus developed 'a political analysis of racism' dedicated to a 'serious consideration of racism as a political issue along with complex questions such as the nature of state power and ideology in capitalist societies'.[15] This analysis of racism was not only different from psychological analyses of racism but also analyses 'from a narrow perspective of analysing the actions of governments and political institutions to deal *with a specific issue*.'[16] His interest, rather, was 'in the complex totality of forces in British society which have produced racialised political ideologies and practices, whether these forces be political or not.'[17] Furthermore, according to Goldberg, this kind of analysis had the State—as the 'racial state' – at its centre, because the State was:

> engaged in definition, regulation, governance, management, and mediation of racial matters they at once help to fashion and facilitate. For

[12] M Banton, *Race Relations* (Basic Books 1967); M Dummett and A Dummett, 'The State of the Nation' (1968) 517 The Dublin Review 186; M Banton, 'The Concept of Race' in S Zubaida (ed), *Race and Racialism* (Tavistock 1970); A Dummett, *A Portrait of English Racism* (Penguin 1973); R Miles, *Racism* (Routledge 1989); M Omi and H Winant, *Racial Formation in the United States* (1st edn, Routledge 1986); M Dummett, 'The Nature of Racism' in MP Levine and T Pataki (eds), *Racism in Mind* (Cornell University Press 2004).

[13] S Zubaida, 'Sociologists and Race Relations' in Proceedings of a Seminar: Problems and Prospects of Socio-Legal Research (Nuffield College, Oxford, 1972) 141.

[14] Solomos, *Race and Racism* (n 6); DT Goldberg, *The Racial State* (Blackwell 2002).

[15] Solomos, *Race and Racism*, ibid 15.

[16] ibid 15.

[17] ibid.

> one, racial states *define* populations into racially identified groups, and they do so more or less formally through census taking, law, and policy … in and through bureaucratic forms, and administrative practices. Second, racial states *regulate* social, political, economic, legal, and cultural relations between those racially defined, invariably between white citizens and those identified as neither white nor citizen … Relatedly, racial states *govern* populations identified in explicitly racial terms … Fourth, racial states *manage economically*. They oversee economic life, shape the contours of racially conceived labour relations, structure the opportunities or possibilities of economic access and closure.[18]

Racial states though are not necessarily racist states such as Nazi Germany or apartheid South Africa. Instead, these analyses showed that modern states—in the way that they were imagined or ideated, the way they govern, and the way the effects of their ideation and governance are experienced—are 'at once implicated in the possibility of producing and reproducing racist ends and outcomes.'[19] It is their openness to being 'racial' or to 'racialisation'—as a process of attaching racial meaning and hierarchy to people—that puts them at the heart of the structural view of racism.[20]

In this understanding of racism, law is not a neutral entity. Like other tools at the behest of the State, law too is implicated in the possibility of producing and reproducing racism, including through discrimination law. Solomos showed how this was possible in the context of the race relations legislations in the 1960s in the UK which, on the one hand, prohibited race-based distinctions, and on the other hand, conceived race relations as a problem of too many 'races' immigrating to the UK. Thus, race relations legislations went hand-in-hand with immigration legislation aimed at cutting back immigration from the 'New' commonwealth, of Black and Brown people, which was seen as the root cause of racial conflict in the society. The origins of the law

[18] Goldberg, *The Racial State* (n 14) 109–110 (emphasis in original).
[19] ibid 112–113.
[20] Miles, *Racism* (n 12) ('Racialisation is a dialectical process of signification. Ascribing a real or alleged biological characteristic with meaning to define the Other necessarily entails defining self by the same criterion', ibid 75; 'racialization of human beings entails the racialization of the processes in which they participate and the structures and institutions that result', ibid 76); K Murji, *Racism, Policy and Politics* (Policy Press 2017) ('racialisation as the process through which structural and ideological forces of race making and maintenance occurs', ibid 40; 'racialisation as expressing the ways in which social structures and ideologies become imbued with 'racial' meanings, so that social and political issues are conceived along racial lines', ibid 47).

prohibiting race discrimination, bewilderingly, seemed to have an 'inextricable link' with racism.[21] In Ann Dummett's damning words:

> it is quite clear from the history of the 1960s that the failure of the Race Relations Act to educate the public in favour of racial equality was due, not to the fact that governments play no part in educating public opinion, but to the fact that governments had succeeded all too well in educating public opinion *in favour* of racial discrimination for a full seven years before the Race Relations Act of 1968. The passage of the Act contradicted the whole trend of official policy towards black people . . . The legislation that *had* succeeded in educating public opinion in the wrong direction was the legislation which wrote racial discrimination into our immigration laws.[22]

In a detailed analysis of the discourse surrounding the passage of both the first immigration legislation and the first race relations legislation, Dummett was able to show how successive governments, politicians and media had constructed the dominant narrative of race discrimination as arising out of the presence of non-white people in the UK, a view unquestionably akin to racism but now repackaged as, simply, an immigration issue.[23] This is the kind of analysis Solomos hoped to rekindle when at the turn of the millennium he urged for 'detailed studies of the role of the state and government institutions in the development of race relations policies, the reasons why certain definitions of the race problem [immigration] have gained currency, and the reasons why a major gap has developed between the promise of equality and the reality of high levels of discrimination and systemic racism.'[24]

Twenty years later, few such analyses exist in discrimination law which take seriously the role of the State and the government institutions in producing racism. This is unlike the trajectory in the US where the structural view of racism developed in social and political theory[25]

[21] Solomos, *Race and Racism* (n 6) 73.

[22] Dummett, *A Portrait* (n 12) 181 (emphasis in original).

[23] See M Dummett and A Dummett, 'The Role of Government in Britain's Racial Crisis' in L Donnelly (ed), *Justice Denied* (Sheed and Ward 1969).

[24] Solomos, *Race and Racism* (n 6) 180. Importantly, this analysis includes how other systems such as capitalism, just as law, come to be intrinsically linked to racism. See C Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Zed Books 1983); A Sivanandan, 'Poverty is the New Black' (2001) 43 Race and Class 1.

[25] E Bonilla-Silva, 'Rethinking Racism: Toward a Structural Interpretation' (1997) 62 American Sociological Review 465, 469 ('the phenomenon which is coded as racism and is regarded as a free-floating ideology in fact has a structural foundation'); WM Wiecek, 'Structural Racism and the Law in America Today: An Introduction' (2011) 100(1) Kentucky Law Journal 1, 5 ('Structural racism is a complex, dynamic system of

was not only taken up, but developed equally, by discrimination lawyers. The most influential have been the Critical Race Theorists who posited racism as centrally concerned with the State, its government and its instrumentalities such as the law. In Derrick Bell's view, 'the vision of racism as an unhappy accident of history immunizes 'the law' (as a logical system) from anti-racist critique. That is to say, the Court would position the law as that which fixes racism rather than that which participates in its consolidation.'[26] Specifically, discrimination law, according to Kimberlé Crenshaw, was 'fundamentally ambiguous' and far from 'a permanent pronouncement of society's commitment to ending racial subordination'.[27] Peter Fitzpatrick was one of the earliest to translate this critical perspective into a critique of law in the UK,[28] but few sought to translate this squarely into the doctrine of discrimination law as Critical Race Theorists in the US had. Thus, analyses of racism as extant in structures, especially structures which the State itself ideates, governs and affects (including discrimination law), remain unventured in the context of discrimination law in the UK.

Before I attempt such an analysis below, it is useful to parse through the implications of this structural view which are particularly relevant in discrimination law.

First, the structural view takes us away from the episodic manifestation of racism as the consequence of isolated and unexpected acts of individual perpetrators, and towards a view of racist consequences as embedded in the very existence of the structures which are at the helm of defining and governing the relationships between people. Structural racism is more dispersed than simply a blanket policy of segregation or

conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color. It comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities in life outcomes.'); JA Powell, 'Structural Racism: Building upon the Insights of John Calmore' (2008) 86 North Carolina Law Review 791 ('Structural racism or racialization emphasizes the interaction of multiple institutions in an ongoing process of producing racialized outcomes.').

[26] D Bell, Race, *Racism and American Law* (6th edn, Aspen 2000) 123.

[27] K Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1331, 1335.

[28] P Fitzpatrick, 'Racism and the Innocence of Law' (1987) 14 Journal of Law and Society 119, 122 ('racism marks constitutive boundaries of law, persistent limits on its competence and scope. Being so limited, law proves to be compatible with racism.'). See also Chalmers, 'Mistakes of a Good European?' (n 11) 21 ('law becomes central, as the instrument through which both the individual is ascribed responsibility as the primary source of racism and the State responsibility for dealing with the consequences of racism.').

apartheid. It exists throughout the labyrinth of the State, such that laws (immigration laws, criminal laws, welfare laws etc), policies (housing allocation etc), practices and rhetoric deployed by the State are, both on their own and concertedly, capable of giving effect to racial hierarchy. In the words of Richard Delgado and Jean Stefancic 'racism is ordinary, not aberrational—"normal science," the usual way society does business, the common, everyday experience of most people of colour'.[29] In fact, it is the very quotidian, versus the exceptional, quality of racism which makes it so potent and invisible at once.[30]

Secondly, racism does not exist independent of but in concert with other forms of hierarchy and disadvantage which infiltrate the structures. This is because 'race' as a marker of social differentiation is itself routed through a range of other concepts. As Ali Rattansi reminds us:

> we must pay close attention to the ways in which the notion of race, and its associations with skin colour, facial features, and other aspects of physiognomy, has been intertwined, amongst other things, with issues of class, masculinity and femininity, sexuality, religion, mental illness, and the idea of the nation.[31]

Thus, racism is co-constituted, as Staurt Hall's pioneering work showed, by notions of nation and ethnicity;[32] and also, as Catherine Hall's work showed, by gender and class.[33] One could call this view of racism as intersectional as it compels us to view racism as defined by more than just 'race', and instead as '*racisms* [which] cannot be understood without considering their interconnections with ethnicity, nationalism, class, gender and the state.'[34]

Thirdly, on this view, racism exists not as a historical fact fixed in time but as a constantly evolving and mutating phenomenon whose actual modalities are forever shifting. As Devon Carbado and Cheryl Harris note, while there *is* a social force called 'racism', 'its content and effects, and the technologies through which it is expressed, are neither

[29] Delgado and Stefancic, *Critical Race Theory* (n 10) 8.

[30] S Rodríguez Maeso, '"Europe" and the Narrative of the "True Racist": (Un-)thinking Anti-Discrimination Law through Race' (2018) 8 Oñati Socio-legal Series 845; Fitzpatrick, 'Racism' (n 28).

[31] A Rattansi, *Racism: A Very Short Introduction* (Oxford University Press 2007) 12.

[32] S Hall, *The Fateful Triangle: Race, Ethnicity, Nation* (Harvard University Press 2017).

[33] L Davidoff and C Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780-1850* (Routledge 1987); C Hall, *Civilising Subjects; Metropole and Colony in the English Imagination 1830-1867* (Chicago University Press 2002).

[34] F Anthias and N Yuval-Davis, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle* (Routledge 1992) viii (emphasis supplied).

transhistorical nor predetermined.'[35] So, the history of racism, as illustrated in the examples of Holocaust and segregation, and more broadly even colonialism and imperialism, is relevant not only because it helps unravel racism of another time but because it helps understand racism *today*. Racism is thus considered both mutable and enduring in its ability to regenerate itself via continuing and disparate effects of the past which do not just disappear because of certain historical moments calling an end to racism, such as the defeat of Nazi Germany at the end of World War II, or the passage of civil rights legislation in the US and the passage of the race relations legislation in the UK in the 1960s. A structural view rather commits to the understanding of racism being constantly updated in light of contemporary factors.

Fourthly, racism is to be understood not as an all or nothing judgement 'to identify quickly and with more or less complete certainty who is really racist and who is not',[36] but as an evaluative tool for assessing practices, processes and state of affairs in a given society as a whole. It is, as Floya Anthias and Nira Yuval-Davis see it, *a discourse* of how the structures that we inhabit, ideate, operate and affect themselves in not necessarily racist, but racial or racialised ways.[37] Racism is thus often understood as 'racialism' or 'racialisation'—both of which seek to complicate our view of racism from being a declaration of racial superiority to a more sustained analysis of the dialectical processes or discourses through which racial meaning and in turn racial hierarchy and disadvantage get embedded in the society.[38] Importantly, for discrimination lawyers, this means that although discrimination law may seem to be concerned with specific instantiations or points within this discourse (as direct or indirect discrimination), those specific instantiations or points would make sense only as part of this discourse because their meaning is lost otherwise. The paper seeks to lay bare this discourse in discrimination law.

3. *Structural View in Practice*

This section applies the structural view to the reasoning in race discrimination cases. The point is not simply to call out or attach the label

[35] DW Carbado and Cheryl I Harris, 'Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory' (2019) 132 Harvard Law Review 2193, 2214.

[36] Rattansi, *Racism* (n 31) 2.

[37] Anthias and Yuval-Davis (n 34).

[38] R Barot and J Bird, 'Racialization: The Genealogy and Critique of a Concept' (2001) 24 Ethnic and Racial Studies 601.

of structural racism to things, but to show, in careful detail and by example, how structural racism can be wielded as an evaluative lens in understanding race discrimination. Wielding this lens entails observing how the discourse of racialisation is *dispersed throughout* the structure of the modern state and through its individual institutions and instrumentalities viz. politics, law, police, courts, and economic and social policies for housing, employment etc; and then observing how individual acts of race discrimination come about *as part of* this structure.

A. *Direct Discrimination*

In the following four examples, I will try to show how structural racism seems to explain that which may be called direct race discrimination or 'less favourable treatment' under section 13 of the Equality Act. In addition, I will draw attention to the structural view of racial harassment under section 26 of the Equality Act. One of the main arguments that emerges from the discussion below is that structural racism as embedded in State structures such as criminal laws, policing and immigration, can surface as direct discrimination based on racial grounds even when the racial link is obscured by seemingly race-neutral structures because these structures are capable of operating as proxies for race and racialisation.

It is useful to begin with *Bianca Durrant v Chief Constable of Avon & Somerset Constabulary*[39] as a straightforward case which shows how 'normal' structures seem to have race encoded into them such that the routine operation of those structures fails to reveal any differential treatment even when they apply differently to different racial groups. The events in *Durrant* transpired thus. The appellant, a Black woman, was racially abused by a taxi marshal. Her friend, a white woman, confronted the taxi marshal which led to the two of them being seized and assaulted by the taxi marshal. When the police arrived, they reached straight for the appellant and arrested her. After some time, they also arrested the friend. Though it was only the appellant who was hand cuffed, despite any resistance on her part, and then put in the police van, referred to as 'the cage', while her friend was seated in the front of the van with the police officers and without handcuffs. On the way to the police station, the appellant, unable to balance herself since handcuffed, was banged and thrown around in 'the cage', with the police officers in the front laughing at her. She was then made to wait in 'the

[39] [2017] EWCA Civ 1275.

cage' before being taken out and processed at the police station. By this point, she had made several unsuccessful requests to use the toilet. When detained in a cell with three other police officers, the appellant had to move herself to one corner and urinate. She was later released but asked to return for an interview on a specified date. When she attended, voluntarily, and as the CCTV confirmed, as politely as one could, she was searched and placed in a cell again as she waited for her legal representative to arrive. Meanwhile, her friend too arrived at the police station for the interview but was asked to wait in a consultation room; she was not searched and was provided with magazines and allowed to call a babysitter.

At the Court of Appeal, Lord Justice Sales agreed that almost everything in the case was direct race discrimination—from the appellant being targeted for arrest and being handcuffed to not being allowed to use the toilet—other than her treatment at the police station on the day of the interview. He confirmed that the difference on the interview day 'was fully and satisfactorily explicable by reason of the different ways in which the [appellant and her white friend] presented at the police station. The appellant was treated in accordance with normal procedures applicable to everyone regardless of their race. [Her white friend] was given special dispensation from those normal procedures because she was visibly upset and in a fragile state.'[40]

It is good to know that the police followed 'normal procedures' applicable to everyone regardless of their race. But the question that arises is, why were normal procedures followed for the Black woman and dispensation granted for her white friend? In fact, why was the Black woman, perceived to be less fragile and more in control despite being in an objectively worse situation in comparison to the white woman (having been previously mistreated and misjudged by the police officers and at the very police station)? Why is detention in a cell and handcuffing deemed less worse and normal for the Black woman, while being asked to wait in a consultation room without being searched and with magazines and access to babysitting, reserved for her friend? What kind of stereotypes and perceptions about Black criminality and white fragility inform these day-to-day workings of the police? How do notions of femininity interact with these stereotypes? So, the question is not whether normal procedures are followed. Rather the question was whether normal procedures and the dispensation from those

[40] ibid [47].

procedures had anything to do with race, and in this case, both race and gender.[41]

Here is some data to help put this into context. Black women comprise just 3% of the total female population in England and Wales but constitute 6.7% of the women entering the criminal justice system and 8.9% of the prison population.[42] Black women are twice as likely as white women to be arrested, they are 29% more likely than white women to be remanded in custody and 25% more likely to receive a custodial sentence.[43] What these statistics show is that looking for conscious detrimental treatment or even unconscious bias in police[44] does not help reveal race discrimination when race is coded into the very procedures which are meant to be applicable as non-racial and neutral; especially criminal procedures such as handcuffing and detention when they seem to be premised on the criminality of Blackness, and dispensations from such procedures premised on whiteness. In other words, focussing on individual perpetrators, their actions and their state of mind, as Lord Justice Sales does, in finding whether there was conscious or unconscious racial bias, goes only so far as to detect overtly discriminatory treatment. But it does not catch all kinds of 'less favourable treatment' which are based on racial differentiation which is part of the very structure or procedures within which individuals operate, because the structures themselves have racial meaning.

One may observe that I resist using the language of institutional racism here to describe what I think is structural in fact. Institutional racism in the UK, as famously described by Sir William Macpherson refers to:

> The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic

[41] The question was also *necessarily* whether this was an intersectional claim of discrimination based on two grounds (race and gender) but whether an intersectional understanding was embedded in the claim of race discrimination itself. In other words, the question to be asked perhaps was whether the racialised application of the 'normal procedure' was gendered in that the category of race/racial grounds was infiltrated by an understanding of gender. See S Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 60–61.

[42] Prison Reform Trust, 'Counted Out: Black, Asian and Minority Ethnic Women in the Criminal Justice System' (2017) <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Counted%20Out.pdf> accessed 7 April 2021.

[43] ibid. See also N Uhrig, 'Black, Asian and Minority Ethnic Disproportionality in the Criminal Justice System in England and Wales' Ministry of Justice Analytical Services (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639261/bame-disproportionality-in-the-cjs.pdf> accessed 4 April 2021.

[44] *Durrant* (n 38) [5].

> origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.[45]

Two things are pertinent in this definition—first, that institutional racism is after all considered unwitting; and secondly, that it is ultimately pegged to individual actions or attitudes in an organisation.[46] As we saw in the previous section, structural racism is different. It is not unwitting. It is well-considered and well-managed, lending itself to 'analytic rationality'[47] because it is imagined and regulated in a broad-based way such as through immigration and criminal laws. It is also not to do with individuals or collectivities; but with the State itself: its government, institutions and instrumentalities, in the way that they imagine and apply themselves.[48] It is thus vastly broader than the notion of institutional racism. To adopt Coretta Phillips' framework:

> Existing conceptualisations of institutional racialisation would place it at the meso level, with microlevel racialisation constituted by individual-level practices and interactions. Macro-level racialisation takes into account structural forces beyond individual practices and institutional processes.[49]

Unfortunately, institutional racism qua Macpherson's definition has been taken to be structural racism in the UK with the effect that structural racism has been elided.[50] But institutional racism as it applies to

[45] Sir William Macpherson of Cluny, 'The Stephen Lawrence Inquiry Report' Cm 4264-1, TSO, London, 1999.

[46] D Mason, 'After Scarman: A Note on the Concept of "Institutional Racism"' (1982) 10 New Community 38.

[47] R Bernasconi, 'Racism is a System: How Existentialism became Dialectical in Fanon and Sartre' in *The Cambridge Companion to Existentialism* (Cambridge University Press 2012) 351.

[48] Its American counterpart is broader, in that it focusses on 'social practices or patterns [that] at once structure and give meaning to human interaction' but is still not sufficiently political or State-oriented to encompass structural racism fully. IF Haney Lopez, 'Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination' (2000) 109 Yale Law Journal 1717, 1723.

[49] C Phillips, 'Institutional Racism and Ethnic Inequalities: An Expanded Multilevel Framework' (2011) 40 Journal of Social Policy 173, 175.

[50] This is perhaps most visible in the UN Committee on the Elimination of Racial Discrimination's Concluding observations on the twenty-first to twenty-third periodic reports of the United Kingdom (2016) CERD/C/GBR/CO/21-23 [22], which terms inequalities in health, employment, education, "stop and search" practices and the criminal justice system, all matters of 'institutional racism'. See for the dangers of 'widespread and simplistic' use of institutional racism, J Williams, 'Redefining Institutional Racism' (1985) 8 Ethnic and Racial Studies 323. See also the conceptual conflation of

a particular institution such as the police fails to get at the racism embedded in the very scaffolding of modern policing centred around inherently racialised framings of stop and search, traffic stops, arrest, use of force and deaths in contact with police.[51] It is a modern construct because it is not simply a relic of the past but of recent making, with the State's contemporaneous investment in the use of its power to embed racialised meaning (and in turn racial hierarchy) into seemingly neutral laws and policies in new and imaginative ways. For example, Liberty and StopWatch recently questioned the freshly created offence of 'driving when unlawfully in the UK' under the Immigration Act 2016 as potentially affecting anyone appearing to be an immigrant or an outsider, i.e. non-white persons, who are already known to be twice as likely to be stopped in their vehicles as compared to whites.[52] But these policies are not neutral polices to begin with. Race is encoded within them in the way that they are conceived in reference to the UK's BAME population which has been understood as in the need of being constantly checked and controlled for the suspicion of being unlawfully present in the country.[53] Such has been the result of the 'hostile environment' policies adopted by the government, which have coincided with the adoption and enforcement of the Equality Act in the last ten years. In the fifty years since the adoption of the first Race Relations Act 1965, the trajectory of discrimination law continues to be inextricably linked to the message of anti-immigration. The key difference now is that the message is spread out more widely and given effect to not just in immigration laws but law, policy and governance more generally, covering areas of criminal law and policing to access to housing and driving. Racism is thus more structurally rooted than ever before. Yet, it is more difficult to identify structural racism now given that it is 'coded into' the 'normal procedures' classified as neutral and as nothing to do with race. But the inherent racialisation of these normal procedures is borne out immediately when they are applied directly in reference to race, as was the case in *Durrant*.

different types of racism, and in particular, the narrowing and then setting aside of institutional racism in Commission on Race and Ethnic Disparities: The Report (Sewell Report), March 2021.

[51] J Lea, 'The Macpherson Report and the Question of Institutional Racism' (2000) 39 The Howard Journal 219.

[52] Liberty and StopWatch, 'Driving While Black: Liberty and Stopwatch's Briefing on the Discriminatory Effect of Stop and Search Powers on Our Roads' (2017) 4–6 <https://www.stop-watch.org/uploads/documents/StopWatch_Liberty_Driving-while-black_2017.pdf> accessed 4 April 2021.

[53] See J Walvin, *The Black Presence* (Orbach and Chambers 1971) (tracing the early development of this idea in the UK).

This is also borne out, for example, in stop and search, a timeless practice most recently upheld as lawful by the Supreme Court in *Roberts v Commissioner of Police of the Metropolis*.[54] Blacks are nine and a half times more likely to be stopped and searched than white people,[55] a disparity which is known to be 'particularly stark' in the case of suspicion-less stop and search under section 60 of the Criminal Justice and Public Order Act 1994, where, according to Home Office's own data, 38% of searches in 2017-18 involved Black people, when Black people comprise less than 3.3% of the country's population.[56] This is not a mere statistical disparity to contend with, to understand why Blacks are targeted more than whites, but to understand how the power for suspicion-less stop and search has come to be linked directly to race, and once again, to interrogate the ideas of criminality of Black lives and Black bodies that frame the very reason these powers come to exist and the way they are applied to Black people *because* they are Black.[57]

Instead, what the Supreme Court did in *Roberts*, when faced with an individual claimant, Mrs Roberts who clutched her handbag nervously when confronted by a police officer for not having paid her bus fare, was to not only validate the force used in restraining her to the ground, handcuffing and forcible searching her, but also uphold the validity of section 60 of the Criminal Justice and Public Order Act 1994. In the 19 pages that occupy the Supreme Court's terse decision, Lady Hale and Lord Reed cite at length the precedents which make out Mrs Roberts' treatment to be 'in accordance with law' as required by article 8 of the ECHR, but declined to consider her claim of race discrimination under article 14, which was at the heart of the complaint. They recount the many constraints placed on the police to keep their power in check but do not examine how that police power is indeed exercised in the case of Mrs Roberts and those like her, on the basis of their

[54] [2015] UKSC 79. See also *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307.

[55] R Booth, '"Institutional racism": 20 years Since Stephen Lawrence Inquiry' *The Guardian* (22 Feb 2019) <https://www.theguardian.com/uk-news/2019/feb/22/institutional-racism-britain-stephen-lawrence-inquiry-20-years> accessed 4 April 2021.

[56] Home Office, 'Stop and Search Statistics Data Tables: Police Powers and Procedures Year Ending 31 March 2018', Table 10. See also Peter Keeling, 'No Respect: Young BAME Men, the Police and Stop and Search' <http://criminaljusticealliance.org/wp-content/uploads/2017/06/No-Respect-290617-1.pdf> accessed 4 April 2021.

[57] P Gilroy, 'Police and Thieves' in *The Empire Strikes Back: Race and Racism in 70s Britain* (Routledge 1982); PAJ Waddington, K Stenson and D Don, 'In Proportion: Race, and Police Stop and Search' (2004) 44 British Journal of Criminology 889.

race.[58] The discussion is thus completely sanitised of considerations of race, racism or race discrimination, the judges seemingly unaware of the reality of the world beyond the courtroom in which stop and search transpires. Instead, they make this statement which has little basis in either the subjective experience of Black people or the objective data on stop and search:

> Any random "suspicionless" power of stop and search carries with it the risk that it will be used in an arbitrary or discriminatory manner in individual cases. There are, however, great benefits to the public in such a power … The purpose of this is to reduce the risk of serious violence where knives and other offensive weapons are used, especially that associated with gangs and large crowds. It must be borne in mind that *many of these gangs are largely composed of young people from black and minority ethnic groups*. While there is a concern that members of these groups should not be disproportionately targeted, *it is members of these groups who will benefit* most from the reduction in violence, serious injury and death that may result from the use of such powers. Put bluntly, it is *mostly young black lives that will be saved if there is less gang violence in London and some other cities*.[59]

What is troubling about this statement is that it takes a wholly patronising view of the Black community when the community has consistently advocated against these police powers and instead advocated for a public health approach to knife crime and gang violence and greater community-oriented initiatives to uplift those involved.[60] But what is even more troubling is that this statement was made despite the Court having refused an appeal on grounds of race discrimination explicitly and thus having divorced itself from matters of race, racism and race discrimination altogether. The Court below had refused to take into account the research and data on suspicionless stop and search, considering it 'controversial' and giving rise to 'difficult issues of interpretation'.[61] The Supreme Court on the other hand did not just not consult this evidence but went a step further to profess its unfounded views on the Black community and its experience of stop and search *without* considering the claim of race discrimination.

[58] *Roberts* (n 53) [42]–[47].
[59] ibid [41].
[60] A Forrest, 'There Is a Way to Tackle London's Knife Crime Problem' (*VICE*, 12 January 2018) <https://www.vice.com/en/article/yw5qy5/there-is-a-way-to-tackle-londons-knife-crime-problem> accessed 22 September 2021.
[61] [2014] EWCA Civ 69 [32] (Maurice Kay LJ)

This is yet another specimen case of structural discrimination where the State and its institutional machinery such as the police, criminal law and even the courts, are engaged in constructing and then regulating an inferior and unfavourable view of Black and ethnic minority groups, linked to criminality and violence. Discrimination in this case occurs not only at the point where Mrs Roberts is questioned for not paying her bus fare and then turned to ground for appearing nervous and clutching her bag, but through the long process of racialisation starting from the point when the State frames its power using proxies such as criminality and immigration, which are in turn based on a racialised view of the world.

These proxies seem to evade scrutiny because they do not seem to be sufficiently linked to 'race' as defined in the Equality Act. But these proxies can, in principle, be read into race discrimination by, first, taking a sufficiently broad and interconnected view of the current indices used to track 'race' under section 9(1) of the Equality Act, i.e. colour, nationality, and ethnic or national origins; and secondly, treating race and racism as co-constituted by other personal characteristics such as sex, age, disability etc and other identities and contextual factors such as class, immigration status and so on. *Taiwo v Olaigbe*[62] serves as an excellent illustration of this broad understanding of both race and racism, which carried with it the potential of opening up race discrimination to a structural view of racism. It is thus useful to unpack why the Court was unable to do this in fact.

The appellants in the case were Ms Taiwo and Ms Onu. They are both Nigerian and brought to the UK as domestic workers by their employers who were also Nigerian. Their passports were seized by their employers. They were made to work round the clock, without holiday or rest, denied minimum wage, underfed, and physically and verbally abused. There was no doubt that their circumstances gave rise to claims of unfair dismissal, unpaid wages and the violation of the Modern Slavery Act 2010. The question before the Supreme Court was whether their mistreatment based on immigration status also amounted to race discrimination on grounds of nationality under the Equality Act. According to the appellants, immigration status was but a function of nationality in that it was indissociable from it. Lady Hale agreed that while immigration status of a domestic worker was a function of

[62] [2016] UKSC 31.

nationality, in that their vulnerability arose out of their non-British status, still, it was dissociable from it because:

> Clearly, however, there are many non-British nationals living and working here who do not share this vulnerability. No doubt, if these employers had employed British nationals to work for them in their homes, they would not have treated them so badly . . . But equally, if they had employed non-British nationals who had the right to live and work here, they would not have treated them so badly. The reason why these employees were treated so badly was *their particular vulnerability* arising, at least in part, from *their particular immigration status* . . . it had nothing to do with the fact that they were Nigerians. The employers too were non-nationals, but they were not vulnerable in the same way.[63]
>
> The point about this case is that the criterion in fact being adopted by these employers was not nationality but, as Mr Allen freely acknowledges, being "a particular kind of migrant worker, her particular status making her vulnerable to abuse".'[64]

That then failed the race discrimination claim since Ms Taiwo and Ms Onu's treatment was said to be because of *their particular immigration status* but not necessarily their nationality. This view is susceptible to critique. It is true that *many non-British nationals living and working* in the UK do not face similar treatment as the appellants. Indeed, white Australians or Canadians working in the UK do not often face such treatment. Such is the history of immigration in the UK is which is deeply entangled with slavery, colonialism, and the Empire with marked distinctions between how (white) 'Old' Commonwealth (Canadians, Australians and New Zealanders) has been treated on the on hand and how (non-white) 'New' Commonwealth (Africans, Caribbean and Asians) has been treated on the other. Race (including racial grounds such as nationality) thus has much to do with immigration status in post-colonial Britain.[65]

That said, even the middle-class employers who were Nigerians in this case, did not face such treatment. As the Court itself acknowledged, immigrant status in this case was inherently bound up not only with nationality, but also with the status of a domestic worker which in turn is racialised, gendered and class-based.[66] Which means that

[63] ibid [26] (emphasis supplied).
[64] ibid [30].
[65] See esp A Dummett and A Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld & Nicolson 1990).
[66] See S Atrey, 'Beyond Discrimination: *Mahlangu* and the Use of Intersectionality as a General Theory of Constitutional Interpretation' (2021) International Journal of Discrimination Law.

immigration status itself is a varied concept which runs along racial, coloured, national and ethnic lines, often all at the same time.[67] The Court was however closed off to seeing how racial grounds such as nationality and other statuses such as immigration and domestic work are actually constituted in this intersectional way. It instead ended up framing racial discrimination à la nationality as narrowly limited to national origin or official passports or visas which elided the reality that these are themselves derived from other statuses including gender, class and domestic work.

Had the Supreme Court asked whether the treatment in this case constituted race discrimination when race discrimination is understood not in terms of *one* of the categories listed in Section 9(1)–colour, nationality, and ethnic or national origins but perhaps a combination of them; and also as co-constituted by other statuses, viz. gender, class and nature of work;[68] it may have, like its South African counterpart in *Mahlangu v Minister of Labour*[69] reached a very different conclusion. For what it is worth, it is useful to note that the South African Constitutional Court in *Mahlangu* found that discrimination against domestic workers was intersectional in nature because domestic workers in South Africa are predominantly Black women, which means that they suffered discrimination *as* domestic workers on the basis of their race, sex and class. The Court did not say that domestic work in South Africa was, in and of itself, a matter of race, but it was open to seeing that it *could be so* in a particular context where domestic workers are predominantly Black women. Similarly, the claim in *Taiwo* was not that all treatment of migrants in the UK is based on racial grounds such as nationality, but that specifically, the mistreatment of Black female domestic migrant workers could be so because race discrimination for them is co-constituted by an ever so complex understanding of racial and other grounds. Importantly, this does not require any formal recognition of intersectionality or the recognition of a new ground which the Parliament has not legislated, because it is not about the intersection of existing grounds or the recognition of new grounds as much as it is about the broad intersectional nature of 'race' and racial

[67] See Rattansi, *Racism* (n 31); Anthias and Yuval-Davis, *Racialized Boundaries* (n 34). See also TE Achiume, 'Beyond Prejudice: Structural Xenophobic Discrimination against Refugees' (2013) 45 Georgetown Journal of International Law 323.

[68] A Brah, 'Difference, Diversity, Differentiation' (1991) 2 International Review of Sociology 53 ('Structures of class, racism, gender and sexuality cannot be treated as "independent variables" because the oppression of each is inscribed within the other—is constituted and constitutive of the other').

[69] [2020] ZACC 24.

grounds such as colour, ethnic or national origins under the Equality Act. So, had Lady Hale pursued her line of thought in *Taiwo*, that the criterion relevant to this case 'was not nationality but . . . "a particular kind of migrant worker, her particular status making her vulnerable to abuse"', she may just have uncovered something about the nature of race discrimination suffered by this 'particular kind of migrant worker' which could not be reduced to *one* thing such as nationality.

I want to take one final example of the way in which structural racism is missed in direct discrimination and it is to do with the way we conceive of rules around liability, particularly the stalled development of liability for third-party racial harassment. Simply put, employers are not responsible for failing to prevent racial harassment by third-party unless their own failure is connected to the race of the employee. As a rule of liability, this fails to do anything about workplace harassment which too, is not just about individuals, but structures which give rise to harassment and in fact remain complicit in and sustain harassment. Structures, especially employment and workplace structures, are thus seen to be relevant in the causal chain of harassment not because they directly aid or promote harassment but because of their relative power in preventing and addressing it.[70] Over forty years of advocacy around sexual harassment as sex discrimination and social movements like #MeToo have driven home this point which is essentially about recognising the power relations within the workplace. Unfortunately, nothing of the sort seems to have happened for racial discrimination which continues to be understood not in a structural but an individual sense.

Thus, in *Colleridge Bessong v Pennine Care NHS Foundation Trust*,[71] Choudhury J at the Employment Appeal Tribunal rejected that section 26 of the Equality Act could be read to impose liability on an employer for third party racial harassment.[72] The case involved a mental health service provider which operated a secure, residential unit for adult men subject to treatment orders under section 3 of the Mental Health Act 1987. The claimant, who was Black African, was a mental health nurse employed at the unit. He was seriously assaulted by a patient and ended up in a hospital. The incident was reported to the police and to the service provider but no mention was made to the fact that the assault was racially motivated in that the patient had shouted 'You

[70] See generally C MacKinnon and RB Siegel (eds), *Directions in Sexual Harassment Law* (Yale University Press 2012).
[71] UKEAT/0247/18/JOJ (2019).
[72] See also *HB Conteh v Parking Partners Ltd* UKEAT/0288/10/SM (2010).

fucking black I'm going to stab you now'.[73] In fact the same patient had a history of racist behaviour towards black members of staff and had asked the night before the said incident: 'Why it was all black people working in the ward?'.[74]

Despite a slew of authority that was cited, including the EU Race Directive, European Charter and the International Labour Organisation's Convention 190 on violence and harassment, all indicating a more structural approach to harassment, Choudhury J found nothing more in these than a mere encouragement to third parties to avoid harassment, and certainly no liability for failing to prevent or redress it. Instead, he preferred to read section 26 as only giving rise to liability when the employer's (not just the third party's) conduct is based on race. This interpretation though conflated harassment under section 26 with direct discrimination under section 13. The former requires harassment to be 'related to' a protected characteristic while the latter requires less favourable treatment to be 'because of' a protected characteristic. Equating the two ended up making liability for harassment to be attached to 'mental processes' instead of workplace structures.[75]

If Choudhury J had paid attention to the nature of harassment to do with the lack of proper reporting procedures, adoption of steps for prevention, and fair and speedy redressal of complaints, instead of isolated individual behaviour, he would have found this structural understanding as very much 'related to' race. But it seems that a long-standing view of discrimination and harassment as individual-driven and nothing to do with structures impedes this understanding and in turn impedes the imposition of liability where liability *should* exist because of the power relations between the parties.[76] There is nothing explicit barring such a reading of the provisions of the Equality Act. Choudhury J reasoned that nothing explicit was present to prefer such a reading. But just as the substantive meaning of race discrimination does not come via the legislation, the meaning of racial harassment also does not. It was up to him to appreciate that the statutory language was capable of bearing the weight of the meaning of harassment as it transpires and is experienced in the world.

[73] *Bessong* (n 70) [4].
[74] ibid [6].
[75] ibid [53].
[76] *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446.

B. *Indirect Discrimination*

Independent Workers Union of Great Britain v Mayor of London[77] and *Secretary of State for the Home Department v R (on the application of) Joint Council for the Welfare of Immigrants*[78] were both decided by the Court of Appeal in 2020 and are currently under appeal at the Supreme Court. It is not so much about what was decided or what will be decided in the cases ultimately that matters though. I want to use these two rather recent cases as illustrative of the peculiar dynamics of indirect race discrimination today. The following discussion thus deconstructs the conceptual thinking behind what the decisions say and do not say, to isolate what is at play in these cases of indirect discrimination in a structural sense.

Independent Workers Union of Great Britain v Mayor of London, or as we may call it—*the minicabs case*—concerned a challenge to the Mayor's decision to remove the congestion charge exception for minicab drivers in London. The decision is said to have disproportionately affected BAME minicab drivers and hence to constitute indirect discrimination under section 19 of the Equality Act. Indeed 94% of the minicab drivers are BAME and 71% of them live in the most deprived areas of London earning less than an average of £23,000 per annum. In contrast, 88% of drivers of hackney carriages, or as better known, black cabs or taxis, are white, a group which continues to be exempted from the congestion charge. The removal of the exemption would cost the minicab drivers 10% of their net income. It was conceded that the removal was indeed discriminatory: that it was a neutral policy that applied not on the basis of race or ethnic origin but put BAME drivers at a particular disadvantage as compared to white drivers. It was also agreed that the policy had a legitimate aim—that it was aimed at reducing traffic and thereby pollution in London. The only contention there was, was whether the policy was proportionate, i.e. whether it was appropriate, necessary, and balanced the particular discriminatory effect against the need for such a measure.[79] Simler LJ at the Court of Appeal found that the policy was appropriate in that, Lewis J at the Court below, had carefully considered evidence which projected a 6% reduction in the number of private hire vehicles which translated to

[77] [2020] EWCA Civ 1046.
[78] [2020] EWCA Civ 542.
[79] *Bilka-Kaufhas GmbH v Weber Von Hartz* (Case 170/84) [1984] IRLR 317; *Hardys & Hansons plc v Lax* [2005] IRLR 726, [19]–[34] (Pill LJ), [54]–[55] (Thomas LJ), [60] (Gage LJ).

1% reduction in traffic congestion as 'meaningful' and 'not insignificant'.[80] She then found that the policy was necessary and that no other less intrusive means (viz., charging operators, cap and control licensing, introducing wage protection and/or the provision of rest areas) were available to the Mayor.[81] The Court of Appeal had one final hurdle to cross: of balancing. It was argued that the magnitude of impact especially since it was based on race and suffered by a vulnerable group, was not properly weighed up. The impact on the BAME minicab drivers was one that affected 'aspects of their personal integrity, affecting their status as citizens in London.'[82] But Simler LJ was convinced that even though the policy attracted a high level of scrutiny because it was challenged, even if indirectly, as discriminating on the basis of race,[83] it was properly balanced since 'the stark statistical imbalance in this case [had] led both the Mayor (and Transport for London) and Lewis J to confront this concerning feature of the measure adopted, and to *scrutinise with particular care* the nature and significance of the impact on the disadvantaged groups when balancing that against the aims and objects to be achieved.'[84] In other words, it was the 'careful analysis' of the magnitude of impact by the Mayor and the court below that saved the policy.[85] But for those still likely to be affected by the congestion charge it just had to be accepted that 'their income would reduce or they would have to work longer hours to meet their basic costs including payment of the congestion charge'.[86]

On the face of it, there is nothing wrong with the analysis conducted in this case. But that is exactly what is disturbing about this case: that race discrimination law seems to sustain rather than address clear discriminatory impact on vulnerable groups such as the UK's BAME population. Thus, although even Simler LJ described this case as 'particularly troubling', nothing in her analysis alleviates the troubling impact whereby, at best 31% (35,000) and at worst 94% (106,000) of BAME minicab drivers lose 10% of their annual income and be relegated to being second-class workers and citizens, literally, at the margins of their own city—London. It is useful to isolate what makes this

[80] *Minicabs case* (n 76) [41]–[43].
[81] ibid [58] [62].
[82] ibid 76.
[83] ibid 71.
[84] ibid 78.
[85] ibid 79.
[86] ibid.

impact, described as 'stark' at five different points in the Court of Appeal judgment, fall through the cracks of discrimination law.

Though indirect discrimination is meant to address impact rather than the criterion of discrimination, any impact can ultimately be justified if the net gain from a policy is established. This much is uncontroversial. But the net gain from policies which address crises such as urban overgrowth, climate change or even the pandemic, can always be shown because of, perhaps, the monumental nature of the challenge the policy is trying to address. This is a very different situation from the traditional application of indirect discrimination to narrow and discrete policies of, say, a single employer. Modern States are looking at facing crises of monumental scale raising a significant challenge for discrimination law from this net gain perspective. The question for the States and for discrimination lawyers is essentially this: who are we willing to sacrifice for net gain? Unfortunately, in a highly racialised and unequal society it will likely be racial minorities who may be hit first and worst by most policies.[87] This is because their pre-existing disadvantage makes them disproportionately vulnerable to negative impact of a policy, which can otherwise be absorbed by those who are not so vulnerable.[88] Unless we recognise this very fact and refuse to accept net gain predicated on the dispensability of lives of minorities (including women, disabled persons, aged persons, sexual minorities etc) we are accepting that discrimination law will continue to sustain race discrimination. This seems perverse given that the Equality Act carries the preambular statement requiring Ministers of the Crown and others to make strategic decisions about the exercise of their functions having 'regard to the desirability of reducing socio-economic inequalities'.

One way to achieve this is to use a mediating principle, such as that developed for climate change, that any policy for adaptation and mitigation of risk must not only avoid worsening the situation of vulnerable groups but in fact must specifically cater to their needs as a matter of priority.[89] Without a mediating principle, the balancing exercise would plainly accept, as in the case of minicab drivers, that urban overgrowth, pollution and climate change can be very closely, if not directly

[87] A Rattansi, 'The Uses of Racialization: The Time-Spaces and Subject-Objects of the Raced Body' in K Murji and J Solomos (eds), *Racialization: Studies in Theory and Practice* (Oxford University Press 2005).

[88] T Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 126.

[89] See esp General Recommendation No. 37: Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change, U.N. GAOR, Committee on the Elimination of All Forms of Discrimination Against Women, 69th Sess., U.N. Doc. CEDAW/C/GC/37 (2018) [2] [30] [64].

linked to, disadvantaged groups in that the risk borne by them will be the risk the State is willing to take to improve the conditions of the majority in the face of crisis. In fact, we seem to have wholly given in to this logic with the current pandemic which has hit vulnerable groups the hardest.[90]

However, such a mediating principle already exists in discrimination law; one which mandates adjusting the standard of scrutiny based on the suspect-ness of the ground at stake. In the *minicabs case*, although the Court *cites* the principle that impact based on race attracts a stringent standard of scrutiny,[91] it did nothing *with* the principle. There is no sign of the scrutiny being appropriately raised. Rather, there is every sign of extraordinary deference being attached to the decision of a democratically elected representative making the impugned policy.[92] And that is where structural discrimination comes in. Policies which have a disproportionate impact on racial groups when enacted by the government at a high level, such as by the Mayor, seem to actually receive *less* scrutiny under the existing doctrine. The two judicial principles: (i) a high standard of scrutiny to be attached to discrimination involving a suspect ground such as race, and (ii) a high degree of deference to be attached to a decision of a democratically elected representative or government, thus seem to pull in opposite directions, with the latter outweighing the former by its utter normative force.

Now, it must be admitted that these principles are normally in conflict in such circumstances anyway. But the reason it seems more problematic here is because deference is, *in principle*, running counter to a structural view of racism which sees the State as centrally implicated in governing the existing race relations which maintain the status quo where non-white and non-British people fare worse than others. On the one hand, the structural view would thus warn against a principle according extraordinary deference to decisions and policies of *the State*, especially the government, which is particularly susceptible to majoritarian impulses which exclude racial minorities; let alone allow such a principle to be one on which a case turns. On the other hand, the structural view would befittingly align with the letter and spirit of the

[90] A Hirsch, 'If Coronavirus Doesn't Discriminate, How Come Black People are Bearing the Brunt?' *The Guardian* (8 May 2020); A Lentin, 'Coronavirus is the Ultimate Demonstration of the Real-World Impact of Racism' *The Guardian* (12 May 2020).

[91] *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1WLR 3213.

[92] *Minicabs case* (n 76) [72].

Equality Act as legislated by the Parliament, such that the enforcement of the Act by the courts guarantees the reduction of socio-economic inequalities in fact.

The Secretary of State for the Home Department v R (on the application of) Joint Council for the Welfare of Immigrants, or as better known—*the right to rent case*, further complicates the fundamental incompatibility of principles applicable in indirect discrimination. The case involved a challenge to the provisions of the Immigration Act 2014 ('the 2014 Act') which provided for a scheme whereby landlords were tasked to carry out checks on prospective tenants to ensure that they were not irregular migrants. The scheme, as Lord Hickinbottom at the Court of Appeal described plainly, was part of the 'hostile environment' policy of the government to encourage migrants to regularise their immigration status or leave the country by imposing restrictions on accessing employment, housing, healthcare, banking, driving licences etc which made it difficult to continue staying without a regularised status.[93] It was contended that the scheme discriminated against non-white British people and non-white migrants, by encouraging landlords to rent to those who seemed British either because they were white, had English names or had an appropriate accent.[94] In other words, landlords would simply have found it easier to rent to anyone who did not seem like a migrant.

Once again, the risk that the scheme was discriminatory was appreciated by the government from the outset.[95] The evidence before the Court was incontrovertible, that: '(i) landlords discriminated on grounds of nationality in favour of those with a British passport against those without; and (ii) in respect of those without a passport, they discriminated on grounds of race in favour of those with stereotypical ethnically British attributes (such as name, colour and accent) against those with-out.'[96] And once again, the Court agreed that there was discrimination and the inquiry centred around the justification analysis. There was little doubt that the scheme had a legitimate aim to 'support a coherent immigration system in the public interest',[97] that it was rationally connected to this aim, and that there were no other less

[93] *Right to Rent case* (n 77) [3].
[94] This was a challenge under the Human Rights Act 1988, in particular, for the violation of articles 8 and 14 of the European Convention on Human Rights.
[95] *Right to Rent case* (n 77) 22
[96] ibid 4.
[97] ibid 113.

intrusive means to further this aim.[98] So the question was really one of balancing.

According to Lord Hickinbottom, the scheme was justifiable on a correct application of the balancing test which gave due regard to the decision of 'democratically-elected and democratically-accountable national authorities in implementing social and economic policies.'[99] This meant that the scheme was owed a wider margin of appreciation such that unless the decision was 'manifestly unreasonable' it was deemed to have struck a fair balance between the infringement of non-discrimination and the public interest served.[100] While the margin of appreciation was meant to be wider, the degree of deference should have been narrower when the decision involved discriminatory effects on suspect grounds such as race or sex.[101] That said, in this case, the Court was of the view that the Parliament was to be afforded 'very considerable deference' because the measure concerned the aim of reducing irregular immigration and was successful in making private sector accommodation unavailable to irregular migrants, by making it difficult to continue living in the UK without a regular status.[102] While the efficacy of the scheme was hard to be empirically verified or even quantified and that 'more data collection and analysis might have been done in attempt to assess it', it was agreed that 'the evidence point[ed] towards the Scheme having made *some*, and more than insignificant, contribution to that aim.'[103]

The scheme was thus allowed to stand despite the lack of clear evidence that its benefits outweighed the impact on racialised groups. At various points in the judgment, the Court reminded that *some* landlords did not discriminate, meaning that not *all* migrants or non-ethnically British persons were going to be discriminated against. Much like in the *minicabs case*, *some* discrimination was deemed acceptable. The balancing test simply just allowed for such a reductive analysis to stand without a mediating principle at work. Yet, again, there was the mediating principle that the Court acknowledged, which required attaching a higher standard of scrutiny to cases of discrimination involving suspect grounds such as race.[104] Nevertheless,

[98] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700.
[99] *Right to Rent case* (n 77) [127].
[100] ibid [134].
[101] ibid [140].
[102] ibid [145]–[146].
[103] ibid [146].
[104] ibid [173].

according to the Court, extraordinary deference attached to the decisions of a democratically-elected and democratically-accountable representatives of the State, '*even* where discrimination is on the basis of a core attribute such as sex or race'.[105] The fact that the Parliament seems to have been aware of the risk of discrimination seemed to suggest to the Court that discrimination should be allowed to stand, and *if* the discriminatory impact had been *greater than that was expected by the Parliament*, *then* it was for the Parliament or the Secretary of State to course correct.[106] The Court simply ended the matter by stating that while 'discrimination in all its forms is, of course, abhorrent',[107] since the Parliament did not *intend* to discriminate but only *coincidentally* ended up doing so, all discrimination was justified.[108] What is more, the sheer presence of the State as the respondent in a discrimination case, seems to have hollowed out any sincere application of the justification analysis, especially at the balancing stage with little discussion of the actual discriminatory impact (both tangible and expressive) in going through the right-to-rent check as a non-British or BAME person.

In the end, the global concern with these types of cases is this: that the discussion in them seems entirely removed from how race discrimination manifests itself today. Instead of overt racist intentions of individuals or unwitting policy-making by the government, there are well-drawn and purposefully crafted policies of the State which are self-aware about the discrimination they perpetuate. Discrimination thus resides in the way the State ideates, operates, and manifests itself—both as an idea and in its everyday governance. In the *minicab case* this involved the Mayor of London's acute awareness of the policy being particularly damaging towards the life conditions and citizenship of minicab drivers in London, a price he was willing to pay to address traffic congestion without having to show that a different course could be pursued to achieve the aim. It was in fact the minicab drivers themselves who were asked to show what other options existed, as if governance, especially to avoid any impact based on race, were left to them, and not, as per the Equality Act, to the 'Ministers of the Crown and others'.

The deflection of attention from the State seems to have been complete by a total immunising of the State from scrutiny by according

[105] ibid [148] (emphasis supplied).
[106] ibid [147].
[107] ibid [148].
[108] ibid.

extraordinary judicial deference to the *reasons* the State proffered in explaining its intent behind the impugned policies rather than focusing on the *evidence* of impact of the policies, despite the express wording of indirect discrimination under the Equality Act. In the *right to rent case* this involved accepting the State's own view of itself as principally closed to immigration, and only open to a certain kind of migrant who can withstand an otherwise hostile environment experienced in the mundane dealings of day-to-day life such as accessing housing, employment, healthcare etc. The fact that the State effectively makes border police out of landlords, employers and healthcare providers under the hostile environment policy, is then the State's prerogative because it is essentially to do with how the State sees and operationalises itself: something which the court thought it could not assess. If the State's ideation and operationalisation of itself effectively excluded or diminished non-white persons, ethnic minorities and all actual or perceived migrants generally, was then up to the State. Discrimination law, especially as enforced by the courts, seemed to be able to do nothing about such race discrimination.

4. *Implications*

The analysis until now has shown that race discrimination has a link with structural racism and that appreciating that link especially in terms of the processes through which structural racism arises and proliferates (i.e. via processes of racialisation), helps understand race discrimination. In fact, as the critique of the courts' jurisprudence above shows, race discrimination is often missed without this structural perspective especially when direct and indirect discrimination are not aberrational, episodic, individualistic and unwitting; and instead arising out of racism that is coded into structures, especially those to do with the State itself.

This analysis has two kinds of implications. First, on a micro level, as we saw, individual concepts and principles in discrimination law seem misaligned with a structural view of race discrimination. Thus, (i) in *Durrant*, a differential application of rules of arrest and custody is not caught as 'less favourable treatment' when formal rules and exceptions to those rules are already divided along racial lines, making any difference in treatment disappear; (ii) in *Roberts*, a differential application of stop-and-search is not even examined on equality grounds,

with the Court laying bare its assumption that seemingly neutral police powers could not possibly be exercised discriminatorily even when there is evidence that they *are* applied differently; (iii) in *Taiwo*, a narrow and acontextual definition of 'race' under section 9 of the Equality Act seems to exclude race discrimination in a structural sense and as linked to immigration, work status, gender and class; (iv) in *Bessong*, the conflation of the requirement for racial harassment under section 26 with direct discrimination under section 13 of the Equality Act barred liability where liability could exist when conceived in terms of the relationships of power in an employment setting; (v) in the *minicabs case* and *right to rent case*, the application of the proportionality test and in particular: (a) the lower standard of scrutiny attached to racial classifications/impact; (b) the high level of deference attached to decisions of the State and the government; (c) the acceptance of racial impact as not only inevitable but expected, allowed for no room, even conceptually, to take a structural view which was critical of the role of the State itself in governing race relations. This paper has shown how each of these aspects can be reasoned differently from a structural perspective.

Yet, secondly, on a macro level, this depends on what we think a prohibition on race discrimination is meant to target and ultimately achieve. Jurisprudence on race discrimination seems normatively inert as to the meaning of race discrimination or the purpose of the prohibition on race discrimination. The technical phrase 'less favourable treatment' and 'particular disadvantage' defining direct and indirect discrimination under the Equality Act, do not explain what (race) discrimination is. The phrases seem to simply stand in for an anti-classification principle (for direct discrimination), or a mechanical balancing act for weighing up relative disadvantage between groups (for indirect discrimination).[109] Leading jurisprudence in the UK on race discrimination including cases such as *Mandla v Lee*,[110] *R v JFS*,[111] and *Essop v Home Office*,[112] gives away little if anything on the substantive meaning of race discrimination. Is it, as the claimants in the *minicabs case* and *right to rent case* argued, about impairment of personal integrity or belongingness to a society, or as in the *Taiwo* case, about unequal protection of the prohibition of race discrimination based on

[109] Bindman, 'Proof and Evidence' (n 5) 6 (commenting on *James v Eastleigh Borough Council* [1990] 2 AC 751).
[110] [1982] UKHL 7.
[111] *JFS* (n 3).
[112] [2017] UKSC 27.

immigration status? Or is it about humiliation by police officers in cases like *Durrant* and *Roberts*? There is no clear substantive test for pinning down why race discrimination is wrong in a moral, affective or material sense. But more importantly, for our purposes, there is also no substantive test which links race discrimination to a substantive understanding of 'race' and 'racism', or calls out race discrimination when it perpetuates racism, especially in a structural sense. It is perhaps this emptiness of race discrimination as a statutory wrong that this paper has tried to address. It has done so in one small but significant way, by reviving the link of race discrimination with racism. It has showed how race discrimination can be linked back to racism which is hidden to surface-level analysis because it is structurally embedded and hence part of the way modern States govern.

Why is this link important? It is important because in its absence race discrimination fails to be identified and redressed in law when it is based on structural racism. If the general aim of the prohibition of race discrimination is, say, to 'secure the reduction of discrimination by eliminating from decisions illegitimate considerations based on race ... that have harmful consequences for individuals',[113] then we can link discrimination, both in terms of its cause (considerations based on race) and effect (harmful consequences for individuals), to structural racism, or more precisely, to the processes of racialisation which (i) cause race-based considerations and racial hierarchy to be internalised within the structures that govern us; and (ii) lead to real and material (socio-economic) impact which is detrimental to some groups more than others.[114] These processes can happen at an individual level, but they are never limited to it, and as the examples in the caselaw showed, they often happen at a structural level. There is no principled reason to limit race discrimination to exclude the ways in which structural racism serves as the basis of or the consequence of State measures. If anything, the open definitions of direct and indirect discrimination leave room for structural racism to be recognised.

This does not mean extending the causal chain of analysis to remote and dispersed facts about racism or processes of racialisation, but simply, to take a more grounded view of cases of race discrimination as

[113] C McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Fredman (ed), *Discrimination and Human Rights* (n 11) 253.

[114] 'Race Discrimination' in Cashmore (ed), *Dictionary of Race and Ethnic Relations* (n 7) 305–306; M Verlot, 'Understanding Institutional Racism' in *Europe's New Racism* (Berghahn Books 2002) 31.

existing within a given social reality, having a unique history, and located in a particular context and moment in time in which an instance of discrimination arises. As Michael Banton reminds us: 'If accusations of discrimination are to be adjudicated in court it must be defined with greater precision than racism. For a full understanding of what is entailed in the concept of racial discrimination, however, it is necessary to interrelate its legal and sociological aspects.'[115] And that is perhaps all: without conflating race discrimination and racism, we could use structural racism as an evaluative lens in race discrimination cases for bringing alive the sociological aspects of both racism and race discrimination. This means making individual instances of race discrimination in a case relate to the broader discourse on structural racism which gives racialised meaning to those individual instances. Throughgoing historical, statistical, anthropological, cultural and anecdotal evidence can help build up the 'social facts' about structural racism. But in the final analysis, this is only possible when those within the juridical and adversarial model of discrimination law show conceptual openness to the sociological aspects of race discrimination as connected to both the idea and reality of structural racism. The rest—more micro-level analysis in discrimination law—as this paper has shown, can follow on from this substantive, macro-level structural perspective.

5. *Conclusion*

> In a world where blunt, obvious acts are just the tip of the iceberg of racism, we need to describe the invisible monolith. Now, racism can be found in the way a debate is framed. Now, racism can be found in coded language . . . We need to see racism as structural in order to see its insidiousness. We need to see how it seeps, like a noxious gas, into everything.[116]

Racism infiltrates how things are organised in a society, especially by the State. Instances of race discrimination exist as part of this invisible monolith of racism and can be identified and redressed when seen this way but not otherwise. Thus, this paper has argued for infusing discrimination law, in the way it is conceptualised and operationalised,

[115] M Banton, 'The Nature and Causes of Racism and Racial Discrimination' (1992) 7 International Sociology 69, 73.
[116] Eddo-Lodge (n 8).

with a structural view of racism which recognises that the State is centrally implicated in the production and reproduction of the conditions which give rise to individual instances of race discrimination. That is, race discrimination feeds off the background conditions of or processes of racialisation in the State. The hope is that this analysis will provide guidance for interpreting and enforcing the prohibition on race discrimination differently; and in a way which does not exclude from its remit cases which can only be appreciated as part of the invisible monolith of structural racism.