A Common Law Principle of Racial Equality?

Introduction

Despite all the effort,[1] it is difficult to say if arguments in favour of equality as a constitutional principle in the UK have succeeded.[2] Juridically, equality is largely confined to the existing statutory framework—the Equality Act 2010 and the Human Rights Act 1998. Judges invoke equality in a limited manner to comport with the technical features of the statutory instrument rather than as a general guiding principle.[3] Judicial statements about equality as central to democracy and rule of law remain significant rhetorically and mainly as obiter, in the absence of being invoked independently and as the basis of a finding.[4] The UK Supreme Court in *R (on the application of Gallaher Group Ltd and others) v The Competition and Markets Authority*[5] has thus made it amply clear that whatever the value of equality may be, it lacks constitutional currency.

Within this landscape appear a handful of cases which engage common law to attack racial discrimination. These cases invoke racial equality as a matter of rationality or reasonableness rather than constitutional or statutory law. Their presence prompts a question. What is the status of racial equality at common law? This article is dedicated to answering this question. It argues that although racial equality is not an independent ground of judicial review, its invocation in other grounds generates the possibility of addressing racial discrimination in matters of governance and of general importance. Although this possibility has not yet been activated, it continues to be raised in judicial review cases. In principle, this leaves open the door to activating something like a common law principle of racial equality, especially in cases which prove unwieldy under statutory law either because of its formal limits or because of the way in which it is applied under the Equality Act 2010 and the Human Rights Act 1998.

Engaging Common Law

References to race in common law jurisprudence precede references to racial equality. But race seems to have played no role in common law reasoning in these early cases.

For example, in the 1944 decision in *Constantine v Imperial Hotels*,[6] the refusal of an innkeeper to admit a West Indian cricketer on the basis of his race was considered unlawful, not because the refusal was based on race, but instead because the refusal violated the innkeepers' duty under common law to admit travellers. Race, though obviously present and part of the factual matrix of the case, was not considered relevant in the decision.

Likewise, in the 1958 decision *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe*,[7] the right of a union to bar its members from performing at a venue operating a colour bar was protected not because of the colour bar per se but because of the union's right to the "lawful protection of their

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1 TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993) ch 7; Jeffery Jowell, "Is Equality a Constitutional Principle" (1994) 7 C.L.P. 1 [hereafter Jowell, "Is Equality a Constitutional Principle"]; Aileen McColgan, "Discrimination Law and the Human Rights Act 1998" in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Approaches to Human Rights* (Oxford: Oxford University Press, 2001) [hereafter McColgan, "Discrimination Law and the Human Rights Act 1998"]; Colm O'Cinneide, "Fumbling Towards Coherence: The Slow Evolution of Equality and Anti-discrimination Law in Britain" (2006) 57 N.I.L.Q. 57; Christopher McCrudden, "Equality and Non-Discrimination" in David Feldman (ed), *English Public Law* (2nd edn, Oxford: Oxford University Press, 2009); Michael Foran, "Equality before the Law: A Substantive Constitutional Principle" [2020] P.L. 287.

2 Colm O'Cinneide, "Equality: A Constitutional Principle?" (2011) UKCLA Blog <https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/> accessed 4 August 2024; Colm O'Cinneide, "Equality: A Core Common Law Principle, or 'Mere' Rationality?" in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart, 2020).

3 See Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (3rd edn, Oxford:, Hart 2023) and Sandra Fredman, *Discrimination Law* (3rd edn, Oxford: Oxford University Press, 2023).

4 See esp *Matadeen v Pointu* [1999] 1 A.C. 98 [8]; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [132].

5 [2018] UKSC 2 [hereafter *Gallaher*].

6 [1944] K.B. 69.

7 [1958] 3 All E.R. 220.

members' interests and livelihood". In other words, it was not race equality but other legitimate rights and interests which formed the basis of the successful challenge.

This trend continued even after the first race relations legislation was enacted in 1965.[8] Race equality lacked any authoritative or persuasive value in guiding a public authority's decision under common law. Thus, in *Wheeler v Leicester CC,*[9] a local council's decision to deny a sports club the use of their grounds was found to be unlawful. The fact that the refusal was based on the grounds of racial equality and required the sports club to denounce the English team's decision to go to apartheid South Africa was considered important but ultimately impermissible as it was held as tantamount to compelling private actors to adopt a public authority's view on racial equality.[10]

In a similar vein, in *R v Lewisham LBC ex p Shell UK*,[11] a local council's decision to boycott all Shell products was found to be unlawful, even when the refusal was based on the fact that the boycott promoted good race relations by denouncing a company which traded in apartheid South Africa. The Court did not deny that it was reasonable for the council to pursue good race relations through such a boycott, especially in a borough which had a substantial Black population. But it found that the boycott was tainted by an "extraneous and impermissible purpose": of having Shell cease trading in South Africa.[12] According to the Court, since Shell, a private corporation, had not done anything wrong, it could not be unfairly targeted by a public authority with the purpose of having it cease its trading in South Africa.

Judges also seem to draw on an adverse position in statutory law to foreclose routes to claiming racial equality at common law. In *R v Birmingham City Council ex p Darshan Kaur*,[13] the Court upheld the disparity in the provision of translation services restricted to Punjabi, Hindi and Urdu as it believed that such disparity would have been treated as lawful under statutory law. The Court did not query the invocation of common law judicial review to challenge the disparity in access to consultation based on language.

Yet, statutory law seems to have defined the limits for common law in matters of racial equality. In *Annis Mangera v Ministry of Defence,*[14] the Court argued that provisions under the Race Relations Act 1976 concerning requirements to bring cases of racial discrimination had to be complied with strictly as no independent fundamental right of non-discrimination existed outside of the statute and that "[t]he offence of discrimination there created [under statutory law] however is not and cannot be a common law tort."[15]

Thus, while racial equality remained invisible in the pre-statutory equality law era, it seems to have been forcefully rejected at common law since equality legislation was introduced. Yet, there has been occasional retreat to racial equality at common law both before and after the introduction of equality legislation. Sometimes, recourse to racial equality at common law has even succeeded. Therefore, just as there has been resistance to recognising a principle of racial equality, at the same time, there has also been periodic recognition of racial equality as part of the existing grounds of judicial review. Common law adjudication has in fact pulled in both directions.

A striking example is the 1976 decision in *Oppenheimer v Cattermole*.[16] The case concerned whether UK courts could recognise a decree passed by the Nazi government which stripped Jewish persons of their citizenship when they emigrated from Germany. The consequence of such recognition would have been the deprivation of benefit of a double taxation treaty between the UK and Germany. Neither the recognition nor its consequence was deemed acceptable by the Court. According to Lord Cross, the decree "singled out on racial grounds" only Jewish people and thus constituted "so grave an infringement of human rights that the courts of this country ought to refuse

8 Race Relations Act 1965.
9 [1985] A.C. 1054.
10 *Wheeler* [1985] A.C. 1054 at 1078–1080.
11 [1990] Pens L.R. 241 (1987).
12 *Ex p Shell UK* [1990] Pens L.R. 241, paras 70, 72.
13 [1990] 7 WLUK 11.
14 [2003] EWCA Civ. 80.
15 *Annis Mangera* [2003] EWCA Civ. 80, para 24.
16 [1976] A.C. 249.

to recognise it as a law at all."[17] Racial equality thus played a central role in Lord Cross' reasoning and ultimately furnished the grounds for refusing to recognise a decree passed by the Nazi government.

A similarly strong reliance on racial equality was placed by the House of Lords in *Gurung v Ministry of Defence*.[18] The Court struck down the exclusion of Gurkha soldiers from ex-gratia compensation for former prisoners of war as irrational on the basis that the exclusion was "for practical purposes racial in nature."[19] This was because the exclusion was basically based on non-European status. To the Court, this was a breach of the principle of equal treatment, which it considered to be a part of *Wednesbury* unreasonableness.[20]

But this strong reliance on racial equality in *Gurung* does not seem to have been followed in later cases on similar issues. Thus, in *The Association of British Civilian Internees Far Eastern Region v Secretary of State for Defence*[21] the Court upheld a distinction which excluded from ex-gratia payment, British subjects who were prisoners of war but did not have either their parents or grandparents born in the UK. The Court agreed that while the distinction was presumably racial and hence irrational, it was still based on "close links" with the UK and hence, ultimately, rational.[22] The fact that the "close links" essentially acted as proxy for race was left uninterrogated by the Court. The Court engaged little with the dicta in *Gurung* and its reliance on equal treatment based on race.

Later, *Secretary of State for Defence v Mrs Diana Elias*[23] characterised the decision in *Abcifer* as "surprising" and as a departure from *Gurung*.[24] *Elias* reasoned that this was because *Abcifer* was "argued and therefore decided on more conventional judicial review lines".[25] But even *Gurung* was decided on conventional judicial review lines—on *Wednesbury* unreasonableness specifically. The particular facts of each case notwithstanding, *Abcifer* was no more conventional than *Gurung* in judicial review terms. The difference between the application of *Wednesbury* reasonableness in *Gurung* (where it included racial equality) and *Abcifer* (where it did not include racial equality) is thus inexplicable.

Even where *Gurung* has been remembered and reinforced, its scope has been unduly limited. For example, in *R (on the application of Limbu et al) v Secretary of State for the Home Department*,[26] the Court insisted that "the common law principle of equal treatment" from *Gurung* applied as a matter of rationality review irrespective of whether the statutory right to equality was engaged or not.[27] Yet, the claimant's case in *Limbu* failed as it was considered to be based on the ground of nationality not race. So, despite the reiteration of "the common law principle of equal treatment" in *Limbu*—the principle was considered to be limited to equal treatment on the basis of race and not nationality. *Limbu* thus limited racial equality to exclude equal treatment based on nationality. Given that nationality is now explicitly included in the ground of race under statutory law, this limitation seems conceptually misguided.[28]

But in most cases neither *Oppenheimer* and *Gurung* nor the general principle of equal treatment within the ground of rationality review are invoked in the service of racial equality. Wherever common law is invoked alongside statutory law in a case of racial equality, the former is entirely ignored. For example, in *R (on the application of Bibi) v Secretary of State for the Home Department*,[29] the challenge to an immigration rule requiring foreign spouses to pass a test in

17 *Oppenheimer* [1976] A.C. 249 at 277.
18 [2002] EWHC 2463 (Admin).
19 *Gurung* [2002] EWHC 2463 (Admin), para 28 (emphasis in original).
20 *Gurung* [2002] EWHC 2463 (Admin), para 59.
21 [2003] EWCA Civ. 473.
22 *Abcifer* [2003] EWCA Civ. 473, paras 42, 46.
23 [2006] EWCA Civ. 1293.
24 *Elias* [2006] EWCA Civ. 1293, para 28.
25 *Elias* [2006] EWCA Civ. 1293, para 28.
26 [2008] EWHC 2261 (Admin).
27 *Limbu* [2008] EWHC 2261 (Admin), para 50.
28 Equality Act 2010 s. 9(1)(b).
29 [2015] UKSC 68.

English before moving to the UK was made both under articles 8 and 14 of the European Convention on Human Rights and as "irrational and therefore unlawful on common law principles".[30] The latter claim based on common law was left unexamined without explanation.

A similar trend emerges when common law challenges appear alongside the Equality Act 2010. For example, *R (Hottak) v Foreign Secretary*[31] challenged the difference in a British scheme of assistance applicable to locally employed Afghan staff as compared to those governed by the scheme in Iraq, both under the Equality Act 2010 and the "common law prohibition of discrimination".[32] The latter was left unexamined *as a claim* of discrimination or racial discrimination and summarily dismissed on the grounds of rationality. The Court did not make a connection between rationality review and racial equality as was made in *Gurung*.[33]

To sum up, no independent ground of racial equality exists at common law, just as no independent ground of equal treatment exists at common law. But racial equality *has* been invoked as part of common law judicial review within the ground of rationality. On rare occasions such as *Oppenheimer* and *Gurung* it has proved to be successful for claimants alleging racial discrimination. But mostly, common law claims of racial equality are either forgotten or ignored especially when invoked alongside challenges based on statutory law.

Recalling Common Law

It appears then that common law is seldom invoked to address matters of racial equality.[34] The field of statutory equality law subsumes most claims of racial equality. Yet, as the previous section showed, sporadic references to the prohibition of racial discrimination in common law judicial review have been made over the decades, despite the existence of statutory law. What do these references actually contribute to?

This section posits that they contribute to two things mainly. First, they help fill the gap in protection especially where the Equality Act 2010 or the Human Rights Act 1998 may be ineffective or inapplicable. Second, in the absence of a self-standing constitutional principle of equality, especially racial equality, common law can still set a high bar for judicial review of exercise of public power as it did in *Oppenheimer* and *Gurung*. The fact that these contributions often fail to materialise (despite being pursued) exposes the reticence of judges to common law judicial review in this area of racial equality—a reticence neither doctrinally explicable nor normatively justified.

Common law judicial review of racial equality can be useful where it exceeds the existing limits of statutory law. Although this article does not deal with statutory law whose promises and pitfalls are too numerous to be aired here,[35] it is worth noting at least that statutory equality law has so far played a limited role in truly questioning or guiding the exercise of public power in a substantial way when it comes to racial inequality.[36] In fact, in cases of deep-seated yet unsettling structural racial inequality, claims of racial discrimination are either not considered or do not succeed under statutory law.

Roberts v Commissioner of Police of the Metropolis[37] is a stark example. The case concerned a challenge to police stop and search powers on the basis that they had a disproportionate impact on Black people in the UK. At the heart was the treatment of Mrs Roberts who had clutched her handbag nervously when she was confronted by a police officer for not having paid her bus fare. She was restrained, brought to the ground, handcuffed and forcibly searched for behaving

30 *Bibi* [2015] UKSC 68, para 2.

31 [2016] 1 WLR.

32 *Hottak* [2016] 1 WLR, para 84.

33 *Saleh Mohammad Turani v Secretary of State for the Home Department* [2021] EWCA Civ. 348; *R (on the application of Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11.

34 This was the case even before the proliferation of the statutory law on racial equality. See A. Lester and G. Bindman, *Race and Law* (Middlesex: Penguin, 1972). See also A. Lester, "English Judges as Lawmakers" [1993] P.L. 269; A. Lester, "Discrimination: What Can Lawyers Learn from History" [1994] P.L. 224.

35 S. Atrey, *Anti-racism as a Legal Principle* (Oxford: OUP, *forthcoming*).

36 S. Atrey, "Structural Racism and Race Discrimination Law" (2021) 74 C.L.P. 1.

37 [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.

suspiciously. The Supreme Court justified the force used against her and upheld the validity of stop and search powers in general. In the lead judgment of the Supreme Court, Lady Hale and Lord Reed cited at length the precedents which made out Mrs Roberts' treatment to be "in accordance with law" as required by the right to private life under article 8 of the European Convention on Human Rights, but declined to consider the racial discrimination claim under article 14 which prohibits racial discrimination in the exercise of fundamental rights. This was despite the fact that Black people are about ten times more likely to be stopped and searched in the UK.[38] The appeal on this point, which had failed before the court below, was not allowed to be considered by the Supreme Court.[39]

Where racial inequality *is* allowed to be considered, it is often considered triflingly, with a light touch judicial review that has become a norm both under the Equality Act 2010 and the Human Rights Act 1998 especially when the defendant is the state.[40] Racial discrimination claims which do succeed happen to be either obvious cases of direct rather than indirect discrimination[41] or cases where the state or the public authority fails to plead a justification or concedes to indirect racial discrimination.[42] Where the state or the public authority does defend its position, it often succeeds, by the sheer force of the fact of having taken that position rather than through the application of a robust standard of scrutiny by the court.[43] The legitimacy of the state or a public authority in making policy choices which have inadvertent negative racialised impact is assumed and hence often left unchallenged by judges.[44]

Independent Workers Union of Great Britain v Mayor of London[45] and *Secretary of State for the Home Department v R (on the application of) Joint Council for the Welfare of Immigrants*[46] are just two examples where a light touch judicial review assailed over plain statistical disparity of racialised outcomes. In the former, the Court justified what it admitted was a "particularly troubling"[47] economic impact whereby, at best 31% (35,000) and at worst 94% (106,000) of Black and Asian Minority Ethnic minicab drivers lost 10% of their annual income due to a policy of the Mayor of London. In the latter, the Court justified the impact of the right to rent checks which the government itself agreed had an adverse impact on non-white British people and non-white migrants. Racialised discriminatory impact even where established and acknowledged appears dispensable against what is deemed reasonable, that is, not an egregious, case of exercise of public power. Given this state of affairs, one may legitimately wonder what, other than a general principle of racial equality, could serve as a backstop against racialised discriminatory impact, racial inequality and structural harm.

Where statutory equality law may be ineffective in challenging the exercise of public power in a meaningful way, common law can step in since common law judicial review is fundamentally about the lawful exercise of public power. This is because, in principle, common law judicial

38 R. Booth, ""Institutional racism": 20 Years Since Stephen Lawrence Inquiry" (22 Feb 2019) *The Guardian*, https://www.theguardian.com/uk-news/2019/feb/22/institutional-racism-britain-stephen-lawrence-inquiry-20-years; Home Office, "Stop and Search Statistics Data Tables: Police Powers and Procedures Year Ending 31 March 2018" Table 10, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/751147/stop-search-police-powers-procedures-mar18-hosb2418-tables.ods. See also P. 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.

39 See also *Regina (Turani and another) v Secretary of State for the Home Department* [2021] EWCA Civ. 348 and *R (on the application of Marouf) v Secretary of State for the Home Department* [2023] UKSC 23.

40 *Abdulaziz, Cabales and Balkandali v The United Kingdom* (1985) 7 EHRR 471; *Independent Workers Union of Great Britain v Mayor of London* [2020] EWCA Civ. 1046; *Secretary of State for the Home Department v R (on the application of) Joint Council for the Welfare of Immigrants* [2020] EWCA Civ. 542.

41 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55.

42 *R (on the application of Diocese of Menevia) v Swansea City and County Council* [2015] EWHC 1436 (Admin).

43 *Abdulaziz, Cabales and Balkandali v The United Kingdom* (1985) 7 EHRR 471; *Independent Workers Union of Great Britain v Mayor of London* [2020] EWCA Civ. 1046; *Secretary of State for the Home Department v R (on the application of) Joint Council for the Welfare of Immigrants* [2020] EWCA Civ. 542.

44 S. Atrey, "Structural Racism" at 22–33.

45 [2020] EWCA Civ. 1046.

46 [2020] EWCA Civ. 542.

47 *Independent Workers Union of Great Britain* [2020] EWCA Civ. 1046.

review has an intimate and immediate relationship with public power. Its purpose is literally to scrutinise the lawful exercise of public power. It thus has the normative capacity to scrutinise public power for the breach of racial equality as a matter of grounds of judicial review such as reasonableness. As *Gurung* shows, this capacity, when exercised, can be particularly valuable in cases of exercise of non-statutory power and where no human rights instrument may be applicable to obtain relief.

For example, cases challenging the exclusion of Palestinian refugees from being considered under the UK government's resettlement schemes had the potential to be considered and decided differently than they were—where the judges plainly rejected that the exclusion was a rational exercise of power even though they admitted that the result was the exclusion of Palestinian refugees.[48] It is interesting to note that while the courts rejected that the Equality Act 2010 applied to the exercise of public power in this case (due to extraterritoriality), it did not reject that the common law principle of rationality applied to the case. Had the courts then considered the application of that principle to cases of racial inequality in light of *Oppenheimer* and *Gurung* specifically, it could, potentially, have appreciated that the common law does regard certain kinds of effects on non-nationals and those outside of the UK, seriously. The courts however showed no awareness of this line of thinking in common law. Instead, the decisions did not question the racialised impact at all within the ground of rationality and simply accepted the enactment of resettlement schemes themselves as rational.

But this line of thinking can be useful—especially in the UK which lacks a single document in the form of a written constitution—in expressing general principles of fundamental importance through common law. Common law has been capable of laying down enduring principles of broad application for the exercise of all public power.[49] Although common law can be developed and indeed changed, it cannot simply be repealed like a statute. It can act as a bulwark against majoritarian politics and protect the interests of racialised minorities. Its normative capacity thus extends to its constitutional salience in expressing what can potentially become a commitment to racial equality. It appears that the appeal to this normative capacity continues to be made by valiant litigants but consistently shut down by the courts.

Perhaps exactly for these reasons then, the common law protection of racial equality is normatively significant and should continue to be invoked despite its waning popularity in doctrine. It is because, in spite of what the practice suggests, in principle, it is invaluable in holding public actors accountable given its fundamental connection with judicial review of public power.

Conclusion

This article has explored the existence of a principle of racial equality in common law jurisprudence. While a number of cases have invoked racial equality or the prohibition of racial discrimination in common law judicial review, it is not apparent whether these cases express a clear principle either independently or as embedded within traditional grounds of review such as rationality. Yet, in the few cases that something akin to a principle of racial equality has been invoked and embraced (such as *Oppenheimer* and *Gurung*), it is clear that it serves a role which statutory law cannot or will not fulfil, especially in the absence of a constitutional principle of equality. In principle, thus, there are good reasons for pursuing racial discrimination claims, especially claims which challenge the exercise of non-statutory public power, through common law judicial review. Hypothetically, this pursuit could then become the path for development of either a general principle of racial equality at common law, a ground embedded in other grounds of judicial review such as rationality, and even a constitutional principle of racial equality. At present, however, judges seem averse to this pursuit.[50] But without this pursuit, the commitment to racial

48 *Regina (Turani and another) v Secretary of State for the Home Department* [2021] EWCA Civ. 348; *R (on the application of Marouf) v Secretary of State for the Home Department* [2023] UKSC 23.

49 D. Jenkins, "From Unwritten to Written: Transformation in the British Common-Law Constitution" (2003) 36(3) Vand J.T.L. 863.

50 For example, *Turani* [2021] EWCA Civ. 348; *Marouf* [2023] UKSC 23.

equality in the UK remains half-hearted if considered a matter of statutory protection alone; thus lacking broader constitutional significance as a matter of rule of law and democracy.

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