

# The United Kingdom on Race

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The United Kingdom's Commission on Ethnic and Racial Disparities, led by Tony Sewell, has recently published a report ("the Sewell Report"), which has been widely discredited since its launch by [charities](#), [education unions](#), [academics](#) and politicians. [The report](#) contends that institutional racism is an overused concept (p. 27), that slavery should be reimagined to have served the positive ends of berthing a culturally "remodelled Africa/Britain" (p. 8), that racialised minority groups should no longer assume that they may be disadvantaged owing to racism and should "help themselves" through empowerment in what it describes as an "era of participation" (p. 7). This is all premised on the idea that the UK is essentially a fair society in which opportunities are generally open to its citizens, with few exceptions. The report contends that the UK can serve as a beacon on racial equality for Europe and the rest of the world (p. 8).

Far from a guiding light, I would warn European constitutional lawyers and policy makers to understand this as an urgent warning. Using the UK's progressive track record of legal provisions on racial discrimination, the report moves to obscure racism's systemic aspects. There is a profound disconnect between the theory of the UK's legal protections against racism and the lived reality of race in Britain, which reveals race as an important and persistent determinant of social experience.

## Context

Leaving aside systemic and structural forms of racism, which domestic legal systems in Europe are uniformly bad at recognising and addressing, legal conceptions of racial discrimination and approaches to anti-racism differ within Europe. For instance, France bans the concept of race categorically. Germany did not have domestic anti-discrimination law that covered racial discrimination until 2006. In most of Europe, there is a presumptive 'prohibition with exceptions' with regard to collecting data on race and ethnic origin. At least in theory, some facets that characterise the legal discourse around race and racism in the UK seem exemplary. The UK has had racial equality legislation in place [since the 1960s](#), which means that some basic vocabulary and infrastructure has been available for the legal recognition of racial harms and injustices since. Further, the UK encourages the collection of data disaggregated by race, particularly in the employment market, in policing encounters and in education, in order to track disparities and identify potentially discriminatory practices in these sectors. This has certainly helped anti-racism efforts to gain traction in the legal domain—a fact that should not be undervalued. Without being able to identify and discuss patterns of racial disadvantage, we would be unable to generate the types of political discussions and broad initiatives that rely on statistical data as a basis for action.

However, the legal progress over the past half century has not dealt with, once and for all, persistent forms of racial discrimination and inequity. Whether legal progress has even resulted in proportionally less racial discrimination than on the continent is debatable, since enormous racial disparities still exist in the UK across the sectors of [employment](#), [education](#) and [criminal justice](#), among other areas of social life, including [housing](#), [public health](#), and within the [immigration system](#). The fact that we can measure certain forms of racial inequity does not mean that we have sufficiently dealt with the problem of racism, its structural nature, or its relationship to empire, as discussed in [Empire's Endgame: Racism and the British State](#). Britain still has a long way to go in addressing structural racism, as evidenced by various episodes in recent years, such as the [Hostile Environment Policy](#), the [Prevent Policy](#), the [Windrush Scandal](#), and the [Grenfell Tower disaster](#).

In short, whilst the UK has had what are arguably the most nuanced and longstanding legal and social policies to track racial discrimination and litigate it in the courts, it is also a country where racial discrimination still characterises many aspects of social life, albeit in a different way than it might have half a century ago.

## The Sewell Report and the Misnomer of ‘Disparity’

The Sewell Report has attracted broad criticism. It essentially argues that widespread structural discrimination is no longer a problem in the UK. Critics argue that this is not only incorrect, but that it [mischaracterises research on health disparities](#), serves to [discredit anti-racism work](#), and [sidelines robust debate](#) on racism.

In my view, the Report highlights a profound misunderstanding of how racism works and how it is treated in law. The use of data to justify conclusions in the Report is generally [selective](#) and unreliable. My focus, however, is on the way it suggests we should conceive of racism as an analytical and interpretive category. It introduces a framework for mapping the differences between what it refers to as explained and unexplained racial disparities on one hand, and forms of racial discrimination and racism on the other. This framework seeks to roll back decades of work in understanding racism and translating that understanding into advocacy and social policy. The stated purpose of this framework is to counter the misapplication of terms like institutional racism to situations where a racial disparity can be established but evidence of discrimination has not yet been determined. However, it never clearly defines what this evidence should look like, but it simultaneously forecloses the idea that racism should be an expansive notion, which devalues the scholarship and social thought of the last half-century (p. 45). The framework ultimately obscures racism by setting an unattainably high bar for determining what it is, which threatens to shut down debate on scrutinising potential racism.

### 1. *Explained Racial Disparities*

First, the concept “explained racial disparities”, as defined in the report, implies that if disparities can be attributed to factors such as geography, class or sex, they cannot also be a function of race or racism. This is underscored when on page 6, the

report states “[t]he evidence shows that geography, family influence, socio-economic background, culture and religion have more significant impact on life chances than the existence of racism,” as though race has no bearing on these other factors. Race, culture and religion are intertwined social categories in Britain. Moreover, this ignores the past 30 years of legal thinking on intersectionality, as coined by Kimberlé Crenshaw—where one lives or one’s socio-economic background may very well have to do with the intersection of race, sex, and other social categories. So, if another factor besides race contributes to one’s disadvantage, it does not then neutralise the role that race plays. To invalidate the importance of racism as a contributing factor to a given racial disparity moves us farther away from understanding how racism interacts with other forms of marginalisation and exclusion, not closer to it.

### 1. *Unexplained Racial Disparities*

Second, the concept “unexplained racial disparities” suggests that even if racial disparities are persistent, so long as we have no conclusive evidence of what is causing them, we should not consider that they may be expressions of a form of racism (institutional, systemic, etc.). In other words, if racism can’t be proven, it doesn’t exist. However, if we have statistical evidence of the impact of policies and practices on a racialised group, a clear context in which this disparity is playing out, and the social commitment to make things better, what is lost by understanding such a persistent condition of disadvantage as a form of racism? This is, after all, the way the UK Supreme Court understands the role of evidence of the cause of disparities when determining indirect racial discrimination (see [Essop 2017 UKSC 27](#)).

The report suggests that we should regard these disparities as unsolved mysteries until they can be evidenced, but it never defines what such evidence should entail. Evidence of overt racial bias or intention to discriminate are not the most relevant factors in evaluating racial stratification. It has long been known that racial disadvantage does not rely on an overtly malicious and intentional decision having been made to produce a given racial disparity, the way it may perhaps have been in the mid-20th century (even the report agrees that overt discrimination is not the most common form in today’s Britain, p. 27). In light of this, the UK Supreme Court provides a more realistic appraisal of what constitutes racism than the Sewell Report—that is to say, once a disparity has been determined to exist, one needs only look to the context as a factor for understanding the disparity and its effects before deciding that (indirect) racial discrimination has occurred.

### 1. *Institutional and systemic racism*

Third, the report uses the 1999 Macpherson Report (p. 34) as a reference point for conceptualising institutional forms of racism. There are two points of disconnect between the report’s use of institutional racism and the reality of racism in modern Britain.

First, the report refers to ‘an institution,’ in the singular, rather than recognising that the forms of racial exclusion, marginalisation and disadvantage that may occur as a result of the postures, policies or practices of adjacent institutions may tell a larger,

more detailed story of racial discrimination than the view of a single institution. One might argue that the Sewell Report then goes on to define “systemic racism” as precisely this register of discrimination; however, a guiding motif running through the report is that institutional racism is, as a term, being overused and misapplied, and the suggestion is not that one should be using the term ‘systemic racism’ instead. Rather, the implication is that situations in which institutional racism is being used should not be referred to as racism or discrimination at all, but rather demoted to the terrain of explained or unexplained disparities.

The second point of disconnect builds upon the first. The Macpherson Report, crucially, suggests that unwitting forms of discrimination count as *discrimination*. This means that intention to discriminate is not a prerequisite characteristic of institutional racism. This is important because it also means that the effects on the group being underserved or otherwise disadvantaged should be the primary measure of discrimination, not the intention of the institutional actors, who may not appreciate the impacts of their policies until the policies are challenged and reviewed. This, in my view, is also supported by the general legal test for proving indirect discrimination—in short, that a facially neutral policy, practice or criterion (PPC) that has a disparate negative impact on a group defined by a protected characteristic (e.g., race, sex, religion, etc.) is indirectly discriminatory, and it is up to the actor or institution (e.g., employer) to justify the PPC by claiming that there is a legitimate aim for it, and the PPC is necessary and proportionate to achieving the aim. It is not a perfect comparison to compare discrimination claims under equality laws (in this case, the UK Equality Act) to the analysis of institutional racism, but my point is that it would be a break from the way the UK and the rest of Europe understand the burden of proof for discrimination to require a measure of intentionality or the presence of overtly racist attitudes in order to argue that racial discrimination is present in or across their institutions.

## Implications for Anti-Racism in Europe

“Society has ‘defined racism down’ to encompass attitudes and behaviours that would not have been considered racist in the past. This is one reason for the rising sensitivity, the language of microaggressions and safety, and stretching the meaning of racism without objective data to support it.” ([the Sewell Report](#), p. 45).

The Sewell Report demonstrates wilfully incorrect analysis of race and racism in British society, and European countries would do wise not to emulate this line of reasoning. While the Report recognises the importance of accurate data collection in determining racial disparities, it rejects the notion that these disparities, persistent over generations, should be seen as evidence of racial disadvantage and a case to be answered. The notion that social discourse on racism has become too expansive sounds mainly like a desperate attempt to block the burgeoning scholarship, activism and global discourse that seeks to understand race in its historical relationality with colonialism, capitalism and forms of cultural imperialism; for those uncomfortable with acknowledging the yardstick of the past is an inadequate measure for the present, the wide breadth of racial analysis is surely jarring. But one should not forget that slavery, apartheid and colonialism were, after all, not always regarded as

racist per se, but rather as civilisational and religious destiny. We cannot wish racism away by simply deciding that it no longer exists. We must strive to supply the level of intellectual rigour that is necessary to do actual anti-racism work.

If race can serve as a meaningful category of analysis in predicting opportunities, wealth, criminalisation and even mortality rates, then we cannot simply leave such disparities to remain outside the realm of how we understand racial stratification. Nor can or should we expect to encounter a singular cause of racial disadvantage in a given sector or rely on intentional racism to continue to be the main source of racial stratification. The cumulative, intersectional and historical aspects of racism's embeddedness in European societies makes racism a difficult phenomenon to regulate with law and policy, but as we have seen with the policy of constitutional colourblindness in [France](#), former US President Donald Trump's executive order [banning the term 'structural racism.'](#) and now with downgrading patterns of racism to mere disparity in the UK's Sewell Report, attempts to delegitimise the language of racism do little more than make racism more difficult to identify, discuss and combat. These attempts stifle honest and nuanced social exchange about power result in an impoverished set of tools for a thorough-going analysis of societal racism.

