The Baring Foundation

THE PURSUIT OF RACIAL JUSTICE THROUGH LEGAL ACTION

An overview of how UK civil society has used the law 1990–2020

By Dr Bharat Malkani, School of Law and Politics, Cardiff University

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About the Baring Foundation

The Baring Foundation is an independent foundation which protects and advances human rights and promotes inclusion. The Foundation's Strengthening Civil Society programme aims to support civil society organisations to embrace the law and human rights based approaches as effective tools for achieving positive change for individuals and communities.

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Introduction

The topic of racial justice in the United Kingdom is never far from the headlines, or off the political agenda. The Windrush Scandal that came to light in 2018; the disproportionate effect of Covid-19 on ethnic minorities; sportspeople speaking out against racism; and the toppling of a statue of the slave-holder and benefactor Edward Colston in Bristol in June 2020 have all recently generated conversations about historical and contemporary racial injustices in the UK.[1]

These conversations have not always been amicable. Despite the re-emergence of the Black Lives Matter (BLM) movement and increasing support for anti-racist efforts, the problem of racism in the United Kingdom today is still significant.[2] All too often, therefore, advocates for racial justice have found it necessary to turn to the legal system for help.

As part of the conversation about racial injustice and the role of the law in challenging such injustices, the Baring Foundation commissioned this report into how legal action has been used by Civil Society Organisations (CSOs) to challenge racial injustice in the UK since 1990. The purpose of this report is to set out what work has been undertaken, and to identify the opportunities and challenges that legal action presents to those engaged in anti-racist work.

1 On Windrush, see Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Guardian Faber Publishing 2019). On Covid-19 and ethnic minorities, see Zubaida Haque, Laia Bécares, and Nick Taylor, 'Over-exposed and Under-protected: The Devastating Impact of COVID-19 on Black and Minority Ethnic Communities in Great Britain' (Runnymede Trust 2020). Available at www.runnymedetrust.org/uploads/Runnymede%20Covid19%20Survey%20report%20v3.pdf. On sportspeople taking a stand against racism, see Paul Ian Campbell, 'Taking the knee in football: why this act of protest has always been political' *The Conversation*, June 16, 2021. Available at theconversation.com/taking-the-knee-in-football-why-this-act-of-protest-has-always-been-political-162541. On the toppling of the statue of Edward Colston, see Anna Russell, 'How Statues in Britain Began to Fall' *The New Yorker*, 22 June 2020. Available at www.newyorker.com/news/letter-from-the-uk/how-statues-in-britain-began-to-fall.

2 See, for example, The Runnymede Trust, 'England Civil Society Submission to the United Nations Committee on the Elimination of Racial Discrimination' (The Runnymede Trust, May 2021). Available at www.runnymedetrust.org/uploads/CERD/Runnymede%20CERD%20report%20v3.pdf.

Summary of findings

The law can be a powerful tool in the struggle against racial injustices, but the law is not a panacea for the ills of racism. While there are many strengths to the contemporary legal framework, civil society organisations have encountered numerous barriers to accessing justice for victims of racism. These include cuts to legal aid, which have had a disproportionate impact on racialised people because of the systemic economic injustices that they face. Indeed, cases of racial injustice are often compounded by class and poverty, as drawn out by the examples later in this report.[3]

Civil society organisations have also found that although formal legal processes like litigation can be helpful for providing financial compensation; and for setting standards and developing norms of behaviour, the adversarial nature of legal action can have an adverse impact. Formal legal processes can exacerbate existing tensions and do little to foster genuine learning and understanding on the part of the perpetrator. Informal legal processes, though, can be particularly effective at securing redress for the victim without the costs, time, and emotional stresses associated with litigation. Informal processes include actions such as writing letters to organisations and service providers, facilitating mediation, and raising awareness of legal rights and duties that people and organisations possess under relevant anti-discrimination laws.

When contemplating formal and informal legal action, civil society organisations need to be particularly cognizant of how their own biases and prejudices might affect their work, and they must aim to provide a holistic service to their clients given that incidents of racial injustice have a ripple effect that extends beyond the incident in question.

These findings are developed over the course of this report. Sections 3 and 4 outline methodological and terminological issues, and Section 5 provides an overview of race and law in the UK prior to 1990. Readers who want to skip to the post-1990 landscape can start at Section 6, which provides a snapshot of racism in the UK today. Sections 7 and 8 provide some analysis and evaluation of how CSOs have used legal action, setting out areas for further research.

3 On the relationship between race and class, see A. Sivanandan, 'Race, class and the state: the Black experience in Britain' (1976) 17(4) *Race & Class* 347-368; Akala, *Natives: Race and Class in the Ruins of Empire* (John Murray Press 2019).

Methodology

This report is not intended to provide a comprehensive account of the ways in which civil society organisations have used legal action to challenge racial injustices. It is intended to provide a broad overview, and identify areas for further research. A selection of examples are used to highlight issues that individuals, civil society organisations, and lawyers need to take into account when contemplating legal action.

In order to identify relevant examples and issues, data has been drawn from a number of sources. First, various texts on the topic of race and law were consulted. This included academic literature as well as books written for a more generalist audience, to gauge general themes and issues. Second, some key cases and legislation were analysed in order to map the contemporary legal framework that provides the basis for legal action. Third, the websites of some civil society organisations involved in legal challenges to racial injustices were reviewed, since these sites are a rich source of information. Fourth, several individuals working in this field were contacted with a request to be interviewed. Even though only a few quotes from these interviews appear in this report, it should be noted that these conversations inform much of the analysis that follows.[4]

4 A list of interviewees can be found in the Appendix. The views of these individuals and organisations should not be taken to reflect the views of all CSOs and lawyers engaged in anti-racist work, but they illustrate some of the relevant issues.

Terminology

In any discussion about race and racial injustice, language is important. It is therefore worth clarifying some terms that appear frequently in this report, including: (a) Race and Racism; (b) Legal Action; and (c) Civil Society Organisations.

RACE AND RACISM

There is no objective definition of the terms "race" and "racism" because race is a social construct rather than a scientific or biological fact.[5] However, for several centuries people have divided human beings into different categories on the basis of things like skin colour, ethnicity, or nationality. These social practices find expression in the contemporary legal definition of race, which can be found in Section 9 of the Equality Act 2010: "Race includes colour; nationality; ethnic or national origins."[6]

This definition is deceptively attractive, as the terms "race" and "racism" generally conjure up images of people being mistreated and discriminated against because of skin colour, nationality, or ethnic or national origin. Indeed, many readers will probably think of Black-skinned people like Stephen Lawrence and, more recently, George Floyd when they think of racism. Readers may also think of historical injustices such as slavery and the Holocaust, which were premised on features such as skin colour and ethnicity.

It follows that, in the United Kingdom, conversations about race and racism often involve the terms "Black and Minority Ethnic" (BME) or "Black, Asian and Minority Ethnic" (BAME) to refer to people not classed as "White", and who are perceived to be the subjects or victims of racism. However, although these terms appear frequently in official reports and academic texts, there are many reasons why these terms and the broad definition set out in the Equality Act are problematic.

First, the terms BME and BAME contribute to the belief that "Whiteness" is the norm that all other races are to be compared to, and it entrenches the view that all "non-White" people can be classed as a singular group. Put another way, the terms contribute to the very problem they seek to address.

Second, the terms do not capture the different types of racism that are suffered by the different groups of people within the umbrella terms BME or BAME. For example, Black people of African descent experience different types of racial injustices than Black people of Caribbean descent. Such terms also do not adequately capture the sorts of racism suffered by those with White skin such as Jewish people and those of Roma, Gypsy and Traveller heritage.[7]

Third, the focus on "minority" in the terms BME and BAME suggests that racial injustices occur because certain groups of people are numerically fewer in society. However, as Foluke Adebisi has explained, numbers are not the issue. After all, children of billionaires are numerically fewer than children of

5 Robert Wald Sussman, *The Myth of Race* (Harvard University Press 2016).

6 This definition aligns with the titles of contemporary literature on race and racism in the UK, which make reference to skin colour, ethnicity, and nationality. See, for example, Reni Eddo-Lodge, *Why I'm no Longer Talking to White People About Race* (Expanded edition; Bloomsbury 2018); Afua Hirsch, *Brit(ish)* (Jonathan Cape 2018); David Olusoga, *Black and British: A Forgotten History* (Macmillan 2016); Kalwant Bhopal, *White Privilege: The Myth of a Post-racial Society* (Policy Press 2018); and Nikesh Shukla (ed), *The Good Immigrant* (Unbound 2016).

7 See, for example, Kalwant Bhopal, ''What about us?': Gypsies, Travellers and 'White Racism' in secondary schools in England' (2011), 21(4) *International Studies in Sociology of Education* 315-329, 324 (quoting a teacher who explained why Gypsies and Travellers were not viewed as an ethnic group: "because they're White and so they are seen on the one hand the same as White people... they get called racist names all the time and it's not taken seriously and it's not treated the same as the racism by Black and Asian people".)

non-billionaires, yet they do not face the types of injustices that BME people face. The issue is about power, rather than numbers.[8]

Fourth, these terms do not capture instances of racism committed by one "non-White" group to another. For example, there is ample evidence of some Indians holding prejudices against Black people.[9]

Fifth, the terms do not capture the shifting political and cultural focus of racism at any given time. For example, in the 1970s, Irish people in the UK were also at the receiving end of racism, and more recently anti-Muslim racism has been on the rise.[10]

Sixth, the terms do not adequately capture the problem of intersectional discrimination, a concept that was identified by Black feminist scholars in the US in the 1980s. This concept addresses the ways in which other factors such as gender, class, age, disability, and so on can compound racial discrimination.[11] For example, Black women will experience racism in very different ways to Black men; and impoverished migrant workers will face different types of racism to wealthier migrant workers.[12] Indeed, as the cases outlined in this report illustrate, race is often just one factor, with class discrimination and economic injustices often rearing their heads too.

For these reasons, terms like BME and BAME are generally avoided in this report. Wherever possible, the term "racialised person" is used to describe somebody who has been, or could potentially be, subject to some sort of prejudice and marginalisation on the basis of perceived racial differences. While far from perfect, the term "racialised person" conveys the point that race is a category that is imposed on people, rather than a biological fact that people are born into. The term also allows for more nuance than crude terms like BME or BAME.

To get an idea of the different ways in which a person might be racialised, we can look at the variety of "ethnic groups" that were listed on the Census in 2021:

White:

- English, Welsh, Scottish, Northern Irish or British
- Irish
- Gypsy or Irish Traveller
- Roma
- Any other White background

Mixed or multiple ethnic groups:

- White and Black Caribbean
- White and Black African
- White and Asian
- Any other Mixed or Multiple ethnic background

Asian or Asian British:

- Indian
- Pakistani
- Bangladeshi
- Chinese
- Any other Asian background

Black, Black British, Caribbean or African:

- Caribbean
- African background (write in below)
- Any other Black, Black British, African or Caribbean background

Other ethnic group:

- Arab
- Any other ethnic group

8 Foluke Adebisi, 'The only accurate part of 'BAME' is the 'and'...' July 8, 2019. Available at folukeafrica.com/the-only-acceptable-part-of-bame-is-the-and.

9 See, for example, Anjalee Suthakaran, 'How can we South Asians dismantle racism in our UK communities?' *Each Other*, 27 August 2020. Available at eachother.org.uk/how-can-we-south-asians-dismantle-racism-in-our-uk-communities.

10 See, for example, Farah Elahi and Omar Khan (eds), 'Islamophobia: Still a challenge for us all' (Runnymede Trust, November 2017). Available at www.runnymedetrust.org/uploads/Islamophobia%20Report%202018%20FINAL.pdf.

11 For an outline, see Kimberlé Crenshaw, *On Intersectionality: Essential Writings* (The New Press 2017). Also see The Runnymede Trust, 'England Civil Society Submission to the United Nations Committee on the Elimination of Racial Discrimination', (The Runnymede Trust, May 2021) p.7. Available at www.runnymedetrust.org/uploads/CERD/Runnymede%20CERD%20report%20v3.pdf.

12 See, generally, Emily Grabham, Davina Cooper, Jane Krishnadas, and Didi Herman, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge 2008); Reni Eddo-Lodge *Why I'm no Longer Talking to White People About Race* (Expanded edition; Bloomsbury 2018), Chapters 5 and 6.

Other terms, like "ethno-religious groups", have been introduced to capture those who have been recognised as both religious and racial groups, such as Jews and Sikhs. Whichever terms one uses, it is clear that these definitional difficulties have an impact on the efficacy of using the legal system to tackle racial injustice.[13]

Just as there is a multitude of different "races", so there are different types of racism too, and it is important to be clear about the differences between individual racism, structural racism, and institutional racism.

Individual racism refers to acts of racism committed by one individual or a group of individuals towards another. A common example would be the person who shouts racial slurs to another while passing on the street. It can also include instances of racism committed by a person who is not overtly racist but nonetheless holds unconscious biases. An example would be the shopkeeper who keeps a more careful eye on a Black customer than they would a White customer, because that shopkeeper subconsciously associates Black people with criminality such as shop-lifting.

Structural racism refers to how these individually-held racial prejudices infect broader social structures. There have been numerous studies, for example, on how discrimination in housing leads to segregated communities, with racialised groups living in poor housing conditions and economically deprived neighbourhoods, which in turn leads to adverse impacts on health.[14]

These social inequalities have an impact on organisations and institutions within that society, and **institutional racism** refers to the practices and cultures of an organisation, such as the police force, which have an adverse effect on racialised people.[15] The phrase "institutional racism" was borne out of the failure of the legal system to help victims of individual racism. The public inquiry into the Metropolitan Police's failure to adequately investigate the racially-motivated killing of the Black teenager Stephen Lawrence in 1993 explained that institutional racism is "the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic 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."[16]

These definitions help shed light on why legal challenges to racial injustices often (but not always) involve challenges to the actions of White people. While, for example, an Indian person might hold racial prejudices against Black people, they are generally unlikely to hold a position in society that means their prejudice materially disadvantages Black people. In virtually all institutions, though, power is within the purview of White people, and when their prejudices influence how they exercise their power, we see racialised groups being materially disadvantaged when words or acts have an adverse financial, physical, or emotional impact on them because of their perceived race.[17] With these understandings of "race" and "racism" in mind, we can explore the different types of "legal action" that a CSO might engage in.

LEGAL ACTION: TYPES AND PURPOSES

For many, the term "legal action" will evoke images of lawyers in courtrooms, arguing their client's case before a judge and jury. However, there are various types of legal action that CSOs might undertake, and these actions can serve a variety of purposes.

To begin with, we should draw a distinction between policy-making on the one hand, and legal action on the other. Many CSOs use their specialist knowledge to campaign

13 Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81(4) *Modern Law Review* 598-621.

14 See Kevin Gulliver, 'Racial discrimination in UK housing has a long history and deep roots'. *LSE British Politics and Policy Blog,* 12 October 2017. Available at blogs.lse.ac.uk/politicsandpolicy/racial-discrimination-in-housing.

15 Reni Eddo-Lodge, *Why I'm no Longer Talking to White People About Race* (Expanded edition; Bloomsbury 2018) p.60-61; Howard League for Penal Reform, 'Making Black lives matter in the criminal justice system: A guide for antiracist lawyers' (2021) p.11.

16 Sir William MacPherson, *The Stephen Lawrence Inquiry* (Cmd 4262-I, 1999), para 6.34.

17 See, for example, Reni Eddo-Lodge, *Why I'm no Longer Talking to White People About Race* (Expanded edition; Bloomsbury 2018) p.89.

and persuade those in power to amend and strengthen the legal framework for tackling racial injustices. For example, the Society of Black Lawyers spearheaded a campaign which culminated in the enactment of section 95 of the Criminal Justice Act in 1991, which placed a duty on the Home Secretary to publish statistics on race matters within the criminal justice system.[18] These statistics have enhanced understanding of the ways in which the criminal justice system creates and sustains racial prejudices, and have been the source for further changes to law and policy. In her book on the role of CSOs in the development and formation of anti-racial discrimination law in England and Germany, Iyiola Solanke argues that data on ethnicity has been vital in securing progress on racial equality.[19] However, although campaigning for changes to the law is clearly an important activity, for the purposes of this report it is not one that constitutes "legal action". For present purposes, we can adopt Lisa Vanhala's approach and define "legal action" as the use of the *current* legal framework to **empower** individuals and other organisations who are feel that they are being disadvantaged; **to inform and persuade** individuals and organisations about their rights and duties under the law; and to **challenge** instances of racial injustices and **enforce** legal rights and obligations relating to racial injustice.[20]

There are four types of legal action which CSOs deploy in order to achieve these goals. The first two outlined below involve **informal** uses of the law; the last two involve more **formal** processes.

Public legal education

In some sectors, racialised people are unaware of their legal rights to be free from discrimination on the basis of race and can also be unaware that certain acts and words constitute discrimination against them. This is a particular issue for those in Gypsy, Roma, and Traveller communities.[21] Conversely, people can be unaware that their words or actions constitute racism or racial discrimination. CSOs can play a vital role in educating the public about the sorts of acts that constitute racial discrimination, and the sorts of steps that a person can take to remedy cases of racial injustice. Public legal education can therefore play a vital role in **informing** people of the problem and the avenues for addressing these problems, and they can **empower** individuals to feel confident in asserting their rights.

Non-judicial casework

A number of CSOs will act as a conduit between the racialised person and the organisation or service-provider that has been accused of racial discrimination. The CSO will **inform** the organisation or service-provider of their duties under anti-racial discrimination legislation; will **challenge** problematic actions; and will **persuade** them to change their behaviour without formal legal proceedings. This informal type of legal action is perhaps the most common type of legal action that CSOs undertake, since it does not require the work of a qualified legal professional.

Litigation and representation

Informal uses of the law are not always successful, and on occasion CSOs consider formal legal proceedings to be necessary so that they can formally **challenge** racial injustices and **enforce** legal rights and duties. Providing legal representation and engaging in litigation can be time-consuming and expensive, but success can bring a feeling of vindication, and remedies such as compensation.

Strategic litigation

Strategic litigation refers to litigation which **challenges** laws and practices, and which has an impact beyond the parties to the case. An example would be the challenge to the law on joint enterprise. The law on joint enterprise, as it previously stood, meant that a person (A) could be convicted of a crime that someone else (B) committed, so long as certain criteria were fulfilled. When individuals convicted under the law on joint enterprise challenged their

18 See societyofblacklawyers.co.uk/our-achievements.

19 Iyiola Solanke, *Making Anti-Racial Discrimination Law: A Comparative History of Social Action and Anti-Racial Discrimination Law* (Routledge 2009) (noting that "[t]he progress made on racial equality in Britain… demonstrates the importance of ethnic data in formulating an effective legal response to racial violence." At p.128).

20 Lisa Vanhala, 'Framework for Better Use of the Law by the Voluntary Sector' (The Baring Foundation, 2016) pp.4-5.

21 Interview with Sarah Mann, Director of Friends, Families, and Travellers (16 June 2021).

convictions, CSOs joined the legal action with the aim of securing a ruling that would revise this criteria and so help other people convicted under joint enterprise appeal their convictions, and prevent other people from being convicted in future.[22]

CIVIL SOCIETY ORGANISATIONS

The World Bank describes Civil Society Organisations as:

"the wide array of nongovernmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others based on ethical, cultural, political, scientific, religious, or philanthropic considerations. CSOs therefore refer to a wide of array of organizations, including community groups, nongovernmental organizations (NGOs), labor unions, indigenous people's organizations, charitable organizations, research centers, faith-based organizations, social movements, professional associations, and foundations."[23]

CSOs can therefore vary considerably in size; resources; strategies; membership; and focus of attention. This report focuses on those CSOs which are engaged in matters relating to racial injustice, and which have engaged legal action in their efforts to address racial injustices. It is not possible to list all the CSOs in the UK that are concerned with racial injustice, for there are simply too many of them. The Runnymede Trust, for example, notes that 79 CSOs contributed to its submission to the United Nations Committee on the Elimination of Racial Discrimination in July 2021, though there are many more that work in the field of racial injustices.

The extent to which these CSOs engage in legal action varies. It is helpful to draw on once again on Lisa Vanhala's work here to illustrate how different CSOs might approach legal action:[24]

Strategic law organisations

These are organisations that consider law and legal action to be central to their work. They will often have lawyers at the front and centre, and they will generally focus their attention on strategic litigation. There are no strategic law organisations that focus solely on racial injustices, though there are several organisations which address racial injustices as part of their work. An example is Just for Kids Law, whose work encompasses racial inequalities in the criminal justice system and education in particular.

Law advice organisations

These organisations also consider legal action to be an important part of their mission and will therefore likely have lawyers working within the organisation. They differ to Strategic Law Organisations in that they will generally focus on providing legal advice or assistance to individuals whose cases will not necessarily have broader societal effect. Law Centres, such as the Suffolk Law Centre, fall under this category, but again they do not focus exclusively on racial justice.

Law-literate organisations

Law-literate organisations are those which understand the legal framework and the utility of legal action, but which do not consider formal legal action to be central to their work. They may help individuals with disputes without having recourse to formal proceedings, and they may also engage in research and policy work and public education, drawing on the law when doing so. These organisations may or may not have a lawyer on staff, but legal action will be considered incidental to their work, rather than central.

There are many CSOs which fall under this category and whose focus of work is racial justice. Organisations such as Friends, Families, and Travellers (FFT), Race Equality First (REF), and Stand Against Racism & Inequality (SARI) are "law-literate" in the sense that they are not legally trained and are not legal advocates, but when faced with a service user who has a legal issue, they "set about galvanizing,

22 Just for Kids Law and Joint Enterprise Not Guilty by Association intervened in this case. For the role that Just for Kids Law played in proceedings, see 'Joint Enterprise' (*Just for Kids Law*, undated). justforkidslaw.org/what-we-do/fighting-change/strategic-litigation/past-cases/joint-enterprise.

23 World Bank, 'World Bank - Civil Society Engagement: Review of Fiscal Years 2010-12' (World Bank, 2013) p.1.

24 Lisa Vanhala, 'Framework for Better Use of the Law by the Voluntary Sector' (The Baring Foundation, 2016) pp.8-10.

co-ordinating, making [legal action] happen" by liaising with lawyers and helping the individual navigate their way through the process, even if they do not provide representation.[25] Sy Joshua, of Race Equality First, explains how they will help individuals write letters of complaints to service providers, for example, and will help the individual navigate their way through mediation and other processes.

Although these CSOs recognise the importance of legal action, the costs of having lawyers in-house can be prohibitive. Sarah Mann, Director of Friends, Families, and Travellers, specified costs as the reason why FFT do not have in-house lawyers even though they would like to have a lawyer embedded in their organisation.

Law-hesitant organisations

These organisations will never, or will very rarely, engage in legal action. They may be focused on grassroots campaigning, political campaigning, and research, but will not be involved in legal work.

25 Interview with Alex Raikes, Director of Stand Against Racism & Inequality (16 June 2021).

Law and racial justice: the pre-1990 context

To understand how CSOs have used legal action to challenge racial injustices since 1990, it is necessary to understand the historical context. This is because legal rules are "not only a bundle of concepts and technical instructions, but are also a confluence of culture, history and politics".[26] One reason why racial justice advocates struggle to secure legal redress is because the law has historically, culturally, and politically been a tool of racial oppression.

The law's paradoxical relationship with race was evident as far back as the late 1600s, when courts in England adopted inconsistent approaches to the question of whether people from Africa being held in slavery could be classified as "property". In 1677, the Court of King's Bench ruled in *Butts v Penny* that since people from Africa were routinely bought and sold, they could be classed as "merchandise".[27] Over the following decades, though, the judiciary adopted a more ambiguous position. Lord Chief Justice Holt in particular issued a series of opinions which cast doubt on the legitimacy of slavery in England.[28]

In response to Holt's judgments, a group of merchants asked the Attorney General and the Solicitor General to provide an opinion on the legality of slavery. In 1729, Sir Phillip Yorke and Charles Talbot issued their conclusion that an enslaved person's status does not change when they arrive in England from a colony of the British Empire; that an enslaved person could be compelled to return to the colony under their owner's orders; and that slavery was legally permissible.[29] While this was not a formal legal ruling, it nonetheless gave an indication of what the two most senior law officials in the country at the time believed the law to be.

Opponents of slavery believed it necessary to bring a case to court in which they could formally challenge the legality of slavery. Such a case came to light in 1771, when James Somerset escaped from his "owner" Charles Stewart, who had brought him to England a couple of years earlier. Stewart recaptured Somerset and attempted to remove him from England, but a group of anti-slavery activists, including abolitionist campaigner Granville Sharp, persuaded lawyers to take legal action. They hoped that this action would not only free Stewart, but also assist other enslaved people. This early form of "strategic litigation" culminated in the landmark decision in *Somerset v Stewart*, decided in 1772.

The arguments that Somerset's lawyers advanced are instructive for today's lawyers. Francis Hargrave put forward what we would today call "the human rights" argument, which was the most anti-racist of the arguments put forward on Somerset's behalf. John Alleyne advanced the argument that slavery is permissible in the colonies, but not in England. William Davy developed this point by arguing that if slavery was legally permissible in England, then the country would soon be overwhelmed by the presence of black people. Davy's argument, then, was decidedly not

26 Iyiola Solanke, *Making Anti-Racial Discrimination Law: A Comparative History of Social Action and Anti-Racial Discrimination Law* (Routledge 2009) p.197.

27 *Butts v Penny* 2 Lev. 201, 83 Eng. Rep. 518 (K.B. 1677). See William M. Wiecek, 'Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World' (1974) 42 *The University of Chicago Law Review* 86, 89-90 for discussion.

28 See William M. Wiecek, 'Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World' (1974) 42 *The University of Chicago Law Review* 86, 90-93 for discussion.

29 For a copy of the Yorke-Talbot Opinion, and discussion, see Nicholas Leah, 'Confronting the Yorke-Talbot Slavery Opinion and its legacy within English law' (Gatehouse Chambers, July 2021). Available at gatehouselaw.co.uk/confronting-the-yorke-talbot-slavery-opinion-and-its-legacy-within-english-law.

anti-racist, as he effectively endorsed the view that it is undesirable to have black people in England.[30]

Lord Mansfield held in favour of Somerset, but on narrow grounds. He declared that a slaveowner cannot seize a formerly enslaved person and remove him from England against that person's will, and that the formerly enslaved person can take legal action to prevent removal. Although the judgment suggests that Mansfield played a role in bringing about the end of slavery in Britain, a closer reading suggests that Mansfield should not be regarded as anti-racist. He explicitly stated that setting free thousands of Africans in England would be "much disagreeable in the effects it threatens".[31] The decision in *Somerset*, therefore, did not mean that the legal system was now unequivocally anti-racist, and subsequent judicial decisions favoured slaveowners.[32] However, the slavery abolitionists' use of the law as one of many tools to advance their cause is one of the earliest forms of legal action by organised social justice activists to challenge racial injustice.[33]

During the age of Empire, the law was routinely used to legitimise the subjugation of colonised people. The experience of colonial rule in Kenya is an example. In 1895, the British Government proclaimed a protectorate over East Africa, and in 1920 an Order of Council was issued which established the Colony of Kenya.[34] These laws formalised the forcible transfer of land from indigenous persons to British settlers, and gave legal sanction to the subjugation of the people of Kenya, who were forced to work for British settlers. The resistance to colonial rule, which included violent struggle, was countered by a declaration of a State of Emergency which gave armed forces legal authority to detain, torture, and execute those considered to be "rebels".[35]

The racism of the law did not only rear its head in the colonies. In 1948, the SS Empire Windrush brought 802 people from the Caribbean to live and work in Great Britain, to help rebuild the country after the Second World War.[36] To establish the right of people from the colonies to live and work in Britain, Parliament passed the British Nationality Act in the same year, which effectively gave Commonwealth citizens the same right to residence as "British" citizens.[37] Tensions soon developed between those who already lived here, and those who had moved from the colonies. Explicit acts of racism were commonplace during the 1950s and 1960s, with Black people being refused service in pubs; and impoverished racial minorities being exploited by landlords, for example.[38] The government could have responded by enacting the Race Discrimination Bill that Labour MP Archibald Fenner Brockway had proposed in 1960, which would have outlawed acts of racial discrimination. However, the government instead enacted the Commonwealth Immigrants Act in 1962, which restricted the rights of colonial subjects to reside in Britain. Once again, what the law gave with one hand (the British Nationality Act), it took away with another (the Commonwealth Immigrants Act).

Racial injustices continued throughout the 1960s, and resistance to these injustices grew stronger. One such campaign was the "Bristol Bus Boycott", which had a profound

30 For an in-depth discussion and analysis of the legal arguments put forward in *Somerset v Stewart*, see: Matrix Chambers webinar, 'The Black must go free': How a legal ruling on 'Windrush Day' in 1772 is as relevant as ever on Windrush Day 2021' (22 June 2021) Available at www.matrixlaw.co.uk/resource/webinar-the-black-must-go-free-how-a-legal-ruling-on-windrush-day-in-1772-is-as-relevant-as-ever-on-windrush-day-2021. Listen in particular to the discussion by Matthew Ryder QC at 00:34 – 00:41.

31 *Somerset v Stewart* (1772) 98 ER 499, 509.

32 See, for example, James Walvin, *The Zong: A Massacre, the Law, and the End of Slavery* (Yale University Press, 2011).

33 See Vanhala Framework for reference to Pressure Through law, Harlow and Rawlings.

34 Kenya (Annexation) Order in Council, 1920, S.R.O. 1902 No. 661, S.R.O. & S.I. Rev. 246.

35 See David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (Orion, 2005).

36 The exact number is the subject of some dispute, but this figure is from an analysis of the ship's records conducted by the BBC. See Lucy Rodgers and Maryam Ahmed, 'Windrush: Who exactly was on board?' (*BBC News*, 21 June 2019) Available at www.bbc.co.uk/news/uk-43808007.

37 Reni Eddo-Lodge, *Why I'm no Longer Talking to White People About Race* (Expanded edition; Bloomsbury 2018) p.22.

38 Reni Eddo-Lodge, *Why I'm no Longer Talking to White People About Race* (Expanded edition; Bloomsbury 2018) p.23.

effect on the development of the law. In 1963, a small group of activists called the West Indian Development Council organsed a citywide boycott of the bus service in Bristol in response to the Bristol Omnibus Company's refusal to employ racialised people. The boycott attracted national and international attention, and in 1965 the company relented and announced that it would no longer discriminate against prospective employees on the basis of race. The boycott is largely credited for the introduction of the first Race Relations Act in 1965.[39] For the first time, discrimination in public places on the basis of race was contrary to statutory law. Although the Act was a bold attempt to challenge racial injustices, it was limited in scope. It did not outlaw racial discrimination in shops or private housing, and it provided limited sanctions to those who discriminated against racialised persons. A Race Relations Board was set up to monitor incidents of racism, but the Board only had authority to facilitate mediation between the individual making the complaint, and the body accused of racial discrimination.[40]

Some of the shortcomings of the Act were addressed three years later, with an amendment extending the Act's protection to housing and employment. In 1976, the Act was amended further, and established the Commission on Racial Equality (CRE) which had authority to provide legal assistance to individuals bringing claims. But once again, just as the law was steadily being developed to tackle racial injustices, it was simultaneously being used to perpetuate racial injustices. Throughout the 1970s, police forces relied on the 1824 Vagrancy Act to stop, search, and arrest anyone they suspected might engage in criminal activities. Black people were stopped and searched at a disproportionate rate, because the police considered them to look more suspicious than White people. This inevitably fractured relations between Black communities and the police, and eroded these communities' faith in the legal system. Although these laws were ended in 1981 after vociferous protests,[41] new stop and search powers were introduced in 1984 under the Police and Criminal Evidence Act, which is still in force today. However, even though the police are now expressly prohibited from stopping people on the basis of their skin colour, research has consistently shown that Black people and other racialised persons are far more likely to be stopped and searched than White people.[42]

This brief account of the historical dual role of the law in both perpetuating and challenging racial injustices in the United Kingdom provides the context for understanding the use of legal action to challenge racial injustices post-1990.

39 For a more detailed account of the boycott, see Madge Dresser, 'The Bristol Bus Boycott: A watershed moment for Black Britain' (undated). Available at www.bristolmuseums.org.uk/stories/bristol-bus-boycott.

40 Iyiola Solanke, *Making Anti-Racial Discrimination Law: A Comparative History of Social Action and Anti-Racial Discrimination Law* (Routledge 2009) p.115 (discussing the limitations of the Board, and its early experiences).

41 Protests took place in Brixton after the Metropolitan Police commenced Operation Swamp 81, which involved the stopping and searching of over 1,000 people over just five days. An inquiry into the operation and the resulting protests was conducted by Lord Scarman, who found evidence of the disproportionate targeting of Black people by the police. See Maureen Cain and Susan Sadigh, 'Racism, the Police and Community Policing: A Comment on the Scarman Report' (1982) 9(1) *Journal of Law and Society* 87-102; BBC News, 'Q&A: The Scarman Report' (*BBC News*, 27 April 2004). Available at http://news.bbc.co.uk/1/hi/programmes/bbc_parliament/3631579.stm.

42 The latest figures from the Home Office reveal that from April 2019 to March 2020, there were 6 stop and searches for every 1,000 White people, compared with 54 for every 1,000 Black people. See Home Office, Stop and Search, February 22, 2021. Available at www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest.

Law and racial justice: the post-1990 context

Individual, structural, and institutional racism has continued to affect all sectors of life in the UK over the last 30 years. To understand how CSOs have engaged in legal action to tackle these injustices, it is necessary to briefly outline how racism still rears its head in a variety of public and private spaces. The following chapter addresses racism in the criminal justice system, education, employment, and the healthcare sector. This should not be taken to underplay the prevalence and seriousness of racism in other sectors such as immigration, housing, the arts, sports, street-level harassment and violence, and so on.

RACIAL INJUSTICE IN THE CRIMINAL JUSTICE SYSTEM

Racism has long affected every aspect of the criminal justice system.[43] In some cases, the substantive criminal law which regulates individual behaviour and conduct is racially discriminatory. For example, the proposed Police, Crime, Sentencing and Courts Bill will criminalise Gypsy, Roma, and Traveller (GRT) communities' way of life. The Director of Friends, Families and Travellers is concerned that GRT communities will be essentially criminalised for existing.[44] Even criminal laws that are not explicitly directed at a racialised group have the potential to affect those groups disproportionately. For example, Black youths are disproportionately convicted under the law on joint enterprise, even though the law is facially race-neutral.[45]

Discrimination affects other stages of the criminal justice system too. According to data from the Home Office, in 2019-20 members of "BME" groups were four times more likely to be stopped and searched by the police than members of White ethnic groups, with Black people being nine times more likely to be stopped and searched than White people.[46] Earlier this year, the United Nations High Commissioner for Human Rights criticised police in the UK for the excessive use of force against "people of African descent".[47] Racism also affects the trial process and sentencing. For example, the odds of receiving a prison

43 Although the outline provided here is necessarily brief, readers are directed to the 2017 report by David Lammy MP which provides more detailed analysis of racism in the criminal justice system. See, David Lammy MP, 'The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System' (2017). Also see Alexandra Wilson, *In Black and White: A Young Barrister's Story of Race and Class in a Broken Justice System* (Endeavor, 2020).

44 Interview with Sarah Mann, Director of Friends, Families, and Travellers (16 June 2021). For an outline of how the Bill will affect Gypsy, Roma, and Travellers, see Abbie Kirkby, 'Briefing on new police powers for encampments in Policing, Crime, Sentencing and Courts Bill: Part 4' (24 March 2021). Available at www.gypsy-traveller.org/wp-content/uploads/2021/03/Briefing-on-new-police-powers-PCSCBill-and-CJPOA-24th-March-FINAL.pdf.

45 Patrick Williams and Becky Clarke, 'Dangerous associations: Joint enterprise, gangs and racism' (Centre for Crime and Justice Studies, January 2016) Available at www.crimeandjustice.org.uk/publications/dangerous-associations-joint-enterprise-gangs-and-racism.

46 The Runnymede Trust, 'England Civil Society Submission to the United Nations Committee on the Elimination of Racial Discrimination', (The Runnymede Trust, May 2021) p.17. Available at www.runnymedetrust.org/uploads/CERD/Runnymede%20CERD%20report%20v3.pdf.

47 UN High Commissioner for Human Rights, 'Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers' (Human Rights Council 47th Session, 21 June 2021 – 9 July 2021) Available at undocs.org/A/HRC/47/53. Also see Adam Elliott-Cooper, ''Britain is not innocent': A Netpol report on the policing Black Lives Matters protests in Britain's towns and cities in 2020' (Network for Police Monitoring, 2020) (finding that "excessive use of force being disproportionately targeted at black and other racially minoritized protesters, reflecting wider patterns of institutional racism in policing", p.4).

sentence for drug offences are around 240% higher for those classified as "BAME" than for those who classify themselves as White.[48]

Black people and other racialised persons are not only subjected to the criminal law and criminal processes at a greater rate; they are also denied the full protection of the criminal law. As noted above, the inquiry into the failure of the police to adequately investigate the murder of Stephen Lawrence affirmed the presence of "institutional racism" in the police service.[49] The failure of the police and other agencies to provide appropriate services to people because of their colour, culture or ethnic origin also reared its head in the Bijan Ebrahimi case. Ebrahimi was murdered in 2013 by one of his neighbours after being subjected to sustained racial harassment and violence over a period of time, which the police routinely ignored.[50]

RACIAL INJUSTICE IN EDUCATION

Racism within education also takes many forms. Although written before 1990, Bernard Coard's 1971 text titled "How the West Indian Child Is Made Educationally Subnormal in the British School System: the Scandal of the Black Child in Schools in Britain", is still relevant today. Coard's study revealed the extent to which children with a West Indian heritage were being referred to schools for the "educationally subnormal", and explored why Black children were struggling in the school system. His findings included: the use of teaching materials that entrenched racial stereotypes and prejudices; and teachers' low expectations of Black children. Coard noted that many Caribbean children had only recently arrived in England, having been separated from their parents for a number of years. The emotional disturbance of this, and the upheaval caused by a move to a different environment, were the most likely explanations for why some children struggled. Rather than help these children adjust, though, schools labelled them as "educationally subnormal" and funnelled them to schools for those considered to be intellectually deficient.[51]

The racial injustices identified by Coard continue to this day, even when such children are born and brought up in the UK. Current issues in education include: (a) admissions policies which discriminate against racial groups; (b) disproportionate rate of exclusions of racialised students, especially Black Caribbean students and GRT children; and (c) racist incidents within schools that are not being addressed adequately by schools or local authorities.

Data from the Department for Education reveals that in 2018-19, the fixed-term exclusion rate for Black Caribbean students was 10.4% nationwide, while for White British students the rate was just 6%. Moreover, in some parts of the country, Black Caribbean students are up to six times more likely to be excluded than White students.[52] Those who work in the field explain that there are many reasons why some groups are more prone to exclusions, and these reasons echo the findings of Coard in 1971. Angela Jackman QC (Hon), a lawyer who specialises in challenging school exclusions, explains how racist tropes of Black people being challenging, lazy and of low ability might influence the decision to exclude Black pupils: "Is there just this automatic assumption that it's disciplinary measures that need to be applied for African-Caribbean pupils? Is it low expectations? Is there a mixed issue of special educational needs not being identified... sometimes it's just easier to use the disciplinary routes, rather than actually putting in the resources and understanding and specialisms to recognise that it's special educational needs of some form".

48 David Lammy MP, 'The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System' (2017) p.33.

49 Sir William MacPherson, *The Stephen Lawrence Inquiry* (Cmd 4262-I, 1999) para 6.34.

50 See David McCallum, 'Safer Bristol Partnership: Multi-Agency Learning Review Following The Murder of Bijan Ebrahimi', Safer Bristol Executive Board, January 17, 2014 (updated October 25, 2017). Available at www.bristol.gov.uk/documents/20182/35136/Multi-agency+learning+review+following+the+murder+of+Bijan+Ebrahimi.

51 Bernard Coard, 'Why I wrote the 'ESN book' *The Guardian*, February 5, 2005. Available at www.theguardian.com/education/2005/feb/05/schools.uk.

52 Niamh MacIntyre, Nazia Parveen, and Tobi Thomas, 'Exclusion rates five times higher for black Caribbean pupils in parts of England' *The Guardian,* March 24, 2021. Available at www.theguardian.com/education/2021/mar/24/exclusion-rates-black-caribbean-pupils-england.

It is also important to note that racism in education intersects with racism in the criminal justice system. In her report for the Institute of Race Relations, Jessica Perera discusses the "pupil referral unit-to-prison pipeline", referring to the ways in which Black children who have been excluded from school find themselves caught up in the criminal justice system.[53] Other organisations have also identified how children who "are outside of mainstream education are more vulnerable to becoming the victim of childhood criminal exploitation".[54]

RACIAL INJUSTICE AND EMPLOYMENT

Race discrimination in the workplace has been a long-standing problem too, and the McGregor-Smith Review into Race in the Workplace in 2017 revealed striking "underemployment and underpromotion of people from BME backgrounds".[55] While the employment rate for White workers was 75.6%, it was just 62.8% for racialised people. And while the unemployment rate for White workers was 11.5%, it was 15.3% for those from a BME background. Similarly, while "[a]ll BME groups are more likely to be overqualified than White ethnic groups... White employees are more likely to be promoted than all other groups."[56]

The McGregor-Smith Review recommended changes to the law to help secure equality in the workplace. It recommended, for example, that legislation be passed to ensure that all companies and businesses which employ more than 50 people publish workforce data broken down by race and pay band.[57] The Review also shed light on what employees and employers think about the role of Government in supporting progression of racialised employees in the workplace. Respondents to the Call for Evidence most commonly replied that "the Government's role was to ensure enforcement of the legislation".[58] However, in response, the Government said that "we believe that in the first instance, the best method is a business-led, voluntary approach and not legislation as a way of bringing about lasting change. We believe the case you have made in your report is compelling and expect businesses will want to comply. We therefore believe a non-legislative solution is the right approach for now, but will monitor progress and stand ready to act if sufficient progress is not delivered."[59]

Racialised persons are also at greater risk of mistreatment in the workplace. Jamila Duncan-Bosu, a lawyer with Anti-Trafficking and Labour Exploitation Unit (ATLEU), notes that racism plays a part in the mistreatment of foreign workers. People who enter the UK to work as domestic workers, for example, are sometimes mistreated by their employers in a range of ways – from having their passport taken, their wages withheld, and being subjected to physical abuse. Duncan-Bosu and her colleagues were initially helping such workers by going through the Employment Tribunal. As she says, though, "what became overwhelmingly clear is that the reason most of these workers were being mistreated is because they weren't British nationals. Because no UK national would put up with the idea of their passport being taken away from them". The phenomenon of racism in the workplace is a striking example of the intersectionality of race, class, and power. As Duncan-Bosu explains in the context of human trafficking, anti-discrimination laws "name the disease because really what is going on here is [the employer saying]: 'who can I get to exploit? I can get this foreign worker'".

RACIAL INJUSTICE IN HEALTHCARE

The outbreak of the Covid-19 pandemic in 2020 exacerbated existing healthcare inequalities. Prior to Covid-19, various studies had shown, for example, higher rates of heart disease among South Asian groups than White people; higher rates of mental health issues and mental illness among Black Caribbean and Black African people; and higher rates of maternity

53 Jessica Perera, 'How Black Working-Class Youths are Criminalised and Excluded in the English School System' (Institute of Race Relations 2020), in particular Section 2.

54 4in10 and Just for Kids Law, 'Race, poverty, and school exclusions in London' (2020) p.5.

55 Baroness McGregor-Smith CBE, 'Race in the Workplace: The McGregor-Smith Review' (2017) p.6.

56 Baroness McGregor-Smith CBE, 'Race in the Workplace: The McGregor-Smith Review' (2017) p.6.

57 Baroness McGregor-Smith CBE, 'Race in the Workplace: The McGregor-Smith Review' (2017) p.16.

58 Baroness McGregor-Smith CBE, 'Race in the Workplace: The McGregor-Smith Review' (2017) p.78-9.

59 Department for Business, Energy & Industrial Strategy, 'Government response to Baroness McGregor-Smith' (undated) p.3.

deaths among Black and Asian women when compared to White women.[60] Gypsy, Roma, and Travellers have also historically struggled to access healthcare because GP surgeries have refused to register them.[61]

During the pandemic, it quickly became clear that people from BME groups were not only more likely to catch Covid-19, but they were also more likely to become seriously ill or die from the virus. Research by the Runnymede Trust found that socioeconomic conditions as well as race discrimination contribute to these disparities.[62] People of BME backgrounds are more likely to be in jobs that require them to be outside the house; they are more likely to be in insecure work or low-paid jobs, meaning that they cannot afford to not work; they are likely to work in the NHS and thus face greater exposure to the virus; and they are likely to live in overcrowded housing. As explained by the Runnymede Trust and the University of Manchester, "structural and institutional racism shape the inequalities faced by BME people by leading to their disproportionate representation in insecure and low-paid employment, overcrowded housing, and deprived neighbourhoods",[63] in turn exposing them to greater health risks.

60 The Runnymede Trust, 'England Civil Society Submission to the United Nations Committee on the Elimination of Racial Discrimination', (The Runnymede Trust, May 2021) p.41. Available at www.runnymedetrust.org/uploads/CERD/Runnymede%20CERD%20report%20v3.pdf.

61 Interview with Sarah Mann, Director of Friends, Families, and Travellers (16 June 2021).

62 James Nazroo and Laia Bécares, 'Ethnic inequalities in COVID-19 mortality: A consequence of persistent racism' (Runnymede Trust, January 2021). Available at www.runnymedetrust.org/uploads/Runnymede%20CoDE%20COVID%20briefing%20v3.pdf

63 Zubaida Haque, Laia Bécares, and Nick Taylor, 'Over-exposed and Under-protected: The Devastating Impact of COVID-19 on Black and Minority Ethnic Communities in Great Britain' (Runnymede Trust 2020). Available at www.runnymedetrust.org/uploads/Runnymede%20Covid19%20Survey%20report%20v3.pdf.

Legal action: opportunities and challenges

The preceding section provided a snapshot of racism in the UK today, and it should be little surprise to find that, since 1990, CSOs have continued to use the law both formally and informally to empower individuals and organisations; to inform and persuade power-holders and policy-makers; and to challenge racial injustices and enforce legal rights and obligations. This section sets out the contemporary legal framework, and outlines some of the experiences of CSOs of both formal and informal uses of this framework.

THE EQUALITY ACT 2010

The panoply of Race Relations Acts which were designed to tackle race discrimination did not develop in a vacuum. In 1975 the Sex Discrimination Act was passed, as was the Disability Discrimination Act in 1995. In an attempt to harmonise and simplify the anti-discrimination legislative framework, the Labour Government introduced the Equality Act in 2010. Race is now one of nine "protected characteristics" under the Act. The main features of the Act, as it relates to race discrimination, are as follows:

Definition of "race"

As noted above, Section 9 of the Act provides a succinct definition of race that broadly reflects popular understandings: "Race includes colour; nationality; ethnic or national origins." The case of *Taiwo v Olaigbe* (2012), initiated by the Anti-Trafficking and Labour Exploitation Unit (ATLEU), illustrates the problems with this definition. In *Taiwo*, ATLEU argued that the mistreatment of the foreign domestic workers in question was contingent on their vulnerable immigration status, which was intrinsically tied to nationality and thus amounted to discrimination on grounds of race given the definition under the Equality Act. The Supreme Court held, though, that the Act did not include "immigration status" under the definition of "race", and that the claim could therefore not succeed. This illustrates the struggles that CSOs might face in bringing race discrimination claims under the Equality Act: the legislation does not include immigration, despite its nexus to nationality and race in non-legal parlance.[64] On the other hand, in 2014 ATLEU successfully argued that the issue of caste comes under the ambit of "ethnic origins" for the purposes of s.9(1). The Employment Appeal Tribunal held that the term "ethnic origins" "had a wide and flexible ambit, including characteristics determined by 'descent'", such as caste.[65]

Definition of "discrimination"

Section 13 prohibits "direct discrimination", and Section 19 prohibits "indirect discrimination". The former occurs when a person treats another "less favourably" than others because of their race, and aligns with the idea of overt discrimination. The latter occurs when there is a policy that applies to all persons, but in practice the policy disadvantages a person or group of people because of their race. The benefits and drawbacks of both these concepts are illustrated by legal challenges to racial injustices in the field of education.

Direct discrimination

These concepts existed before the 2010 Equality Act, and in 2009 the UK Supreme Court held that the policy of the Jewish Free School to give preference to students who were recognised as Jewish by the Office of the Chief Rabbi (OCR) was directly discriminatory,

64 On race and immigration, see Nadine El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester University Press 2020). On nationality, see Devyani Prabhat, *Britishness, Belonging and Citizenship: Experiencing Nationality Law* (Policy Press 2018).

65 *Chandhok & Anor v Tirkey* [2015] IRLR 195.

contrary to s.1 of the Race Relations Act 1976. The school gave preference to (a) students whose mothers were Jewish by birth; (b) students whose mothers had converted to Judaism in line with principles of Orthodox Judaism; and (c) students who had themselves converted in line with Orthodox Judaism. The Supreme Court was starkly divided, with a 5-4 majority reluctantly holding that this policy contravened the s.1 duty to not discriminate on grounds of ethnic origin. Lord Phillips made it clear that the court "has not welcomed being required to resolve this dispute" because although the statute compelled him to rule against the school, he considered this to be a case where "giving preference to a minority racial group" is justifiable. He was at pains to make it clear that although the Court was ruling that the school's policy was directly racially discriminatory, "[n]othing that I say in this judgment should be read as giving rise to criticism on moral grounds of the admissions policy...., let alone as suggesting that these policies are "racist" as that word is generally understood."[66] This case is a good illustration of how the language of the law does not always map onto popular understandings of the term "racist".

Indirect discrimination

In 2010, there was a successful legal challenge to a school's uniform and appearance policy. The school in question prohibited boys from wearing their hair in a "cornrows" style, and an 11-year-old boy of African-Caribbean heritage was subsequently prevented from attending the school while he kept his cornrow hairstyle. The boy and his mother challenged the policy on the grounds that it was indirectly discriminatory against African-Caribbean boys in particular. An expert educational psychologist commissioned on behalf of the pupil provided an explanation of why cornrows had cultural and ethnic significance for certain racialised groups such as Black Caribbeans, and the High Court upheld the claim that this policy was indirectly racially discriminatory. While the policy applied to all students, it clearly had a disproportionate impact on certain racialised groups. Although the claim was successful, the case provides a cautionary tale for civil society organisations who seek to rely on expert reports when intervening in cases. The Equality and Human Rights Commission had intervened in this case, but they withdrew from the claim and in a scathing comment in the judgment, Mr Justice Collins wrote: "those advising the [Equality and Human Rights Commission] showed a decided lack of judgment in serving Professor John's report and producing written arguments based upon it."[67] The provision of expert evidence by CSOs was also an issue in *Diedrick v Chief Constable of Hampshire Constabulary and others*,[68] discussed in the next section on the Public Sector Equality Duty.

The Public Sector Equality Duty (PSED)

Section 149 of the Equality Act places a duty on public authorities such as NHS hospitals, the prison service, and so on to have "due regard" to the need to eliminate discrimination; advance equality of opportunity; and foster good relations with racialised persons, when developing and implementing policies and practices.

CSOs have had mixed experiences when challenging policies and practices on this ground, with a challenge to police powers of "stop and account" providing a useful example of how CSOs have struggled. Prior to 2011, police officers were required to record the ethnicity of anyone they stopped on the street to account for themselves. An amendment to the law in 2011 removed this requirement, leaving such recording to the discretion of Chief Constables. In *Diedrick*, the claimant argued that this change was contrary to the public sector equality duty. Removing the requirement to record ethnicity, it was argued, would hinder efforts to ensure that stop and account powers were not exercised in a racially discriminatory manner, and would damage relations between ethnic minorities and police officers. As an interested party, the organisation StopWatch submitted a report that detailed how stop and account is applied in a racially discriminatory manner. In refusing leave for judicial review, Parker J laid bare the limits of the public sector equality duty. The Secretary of State, he noted, only had to have "due regard" to the needs and concerns of racialised groups, but did not necessarily

66 *R (on the application of E) v JFS Governing Body* [2009] UKSC 15 [8]-[9].

67 *G v Head Teacher and Governors of St Gregory's Catholic Science College* [2011] EWHC 1452 (Admin) [5].

68 *Diedrick v Chief Constable of Hampshire Constabulary and others* [2012] EWHC 2144 (Admin).

have to adopt the course of action that would actually address those needs and concerns. Parker J also dismissed the statistical evidence provided by StopWatch,[69] and rejected the claim that the Secretary of State had not provided enough time for consultation before amending the law. Noting that StopWatch (and Liberty) had provided "substantial responses" to the consultation, Parker J wrote: "The material filed by Stopwatch in these proceedings may well be more extensive and detailed, but there is no doubt that the SSHD, during the consultation, was fully alive to the central grounds of Stopwatch's objection to the amendments and to the basic material upon which it relied."[70]

The case of *R(Bapio Action Ltd) v Royal College of General Practitioners* provides a more promising tale for CSOs.[71] The claim was focused on the Clinical Skills Assessment, which prospective doctors are required to take when qualifying. In this sense, the case lay at the intersection of healthcare, education, and employment. There was considerable statistical evidence that certain racialised groups failed the assessment at a greater rate than non-racialised groups. In light of this, the British Association of Physicians of Indian Origin (BAPIO) argued that the Royal College of General Practitioners and the General Medical Council "failed to fulfil the public sector equality duty imposed on them by s 149 of the Equality Act 2010 and that the differences in outcome described are, in whole or in part, the result of that failure and establish against the Royal College alone that it has discriminated, directly or indirectly, against South Asian and BME doctors."[72] Judge Mitting ruled against BAPIO on the grounds that, during the course of proceedings, the Royal College had identified ways to address the concerns raised, and that therefore the College should be given the opportunity to implement those measures.[73] Mitting J also rejected the claims of direct and indirect discrimination. However, although the court found against BAPIO, the judge noted that the action had compelled the Royal College to take appropriate steps and "that the bringing of this claim is likely in the end to produce something of benefit for the medical profession and so for the public generally".[74] As such, in Mitting J's view, "[t]his claim has served a useful purpose and the Claimant has achieved, if not a legal victory, then a moral success."[75] As noted on BAPIO's website, "[s]ince 2014, when BAPIO led a legal challenge against the Royal College of General Practitioners there has been a seismic shift in transparency and reporting of the differential attainment data for all examinations and specialty progression reports by the UK GMC."[76] Although BAPIO acknowledges that there is still much work to bridge the attainment gap, the case is illustrative of the benefits that even failed legal action can bring.

Liberty have had more success with challenges using the PSED, but even this experience highlights problems with legal action to challenge racial injustices. In August 2020, the Court of Appeal agreed with Liberty's submissions that the use of facial recognition technology by South Wales Police (SWP) was unlawful in part because the "SWP have never sought to satisfy themselves, either directly or by way of independent verification, that the software program in this case does not have an unacceptable bias on grounds of race or sex."[77] Louise Whitfield, Head of Legal Casework at Liberty, highlights though that the claimant in this case was actually a White man and so they were quite limited in the arguments they could run. Following that case, Liberty have resolved to consider potential race discrimination issues much earlier in cases, "so that we don't get a really long way down the road with a quite significant piece of litigation and [racial injustice] hasn't even been on our radar." Whitfield attributes this to a lack of experience and expertise on the part of lawyers generally, and says that one of the main challenges to

69 *Diedrick v Chief Constable of Hampshire Constabulary and others* [2012] EWHC 2144 (Admin) [39].
70 *Diedrick v Chief Constable of Hampshire Constabulary and others* [2012] EWHC 2144 (Admin) [43].
71 *R(Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin).
72 *R(Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin) [9].
73 *R(Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin) [32].
74 *R(Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin) [51].
75 *R(Bapio Action Ltd) v Royal College of General Practitioners* [2014] EWHC 1416 (Admin) [51].
76 See www.bapio.co.uk/differential-attainment-in-healthcare-professionals.
77 *R(Bridges) v South Wales Police* [2020] EWCA Civ 1058 [199].

using the law successfully lies in the "lack of expertise within the legal profession" which means that discrimination arguments are often not as front and centre of litigation efforts as they could or should be.

Racial harassment

The Equality Act also addresses the issue of racial harassment in the context of employment (s.40(1)); the provision of services (s.29(3)); education (s.85(3); premises (s.33(3)); and associations (ss.101(4) and 102(3)). The Act stipulates that "A harasses B when A engages in unwanted conduct which is related to a relevant protected characteristic [such as race]; and which has the purpose or effect of violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for B" (s.26(1)).

Assessment of the Equality Act

Although the Equality Act has many strengths, it is not as comprehensive as it could be. For example, although Section 14 of the Act recognises the problem of intersectional discrimination, the section has not been brought into force. While lawyers like Jamila Duncan-Bosu report having success in bringing race discrimination claims alongside other grounds, such as sex discrimination, this approach does not allow formal legal recognition of the unique harms caused by combined grounds of discrimination.[78]

The Act has also exacerbated divisions between England on the one hand, and Scotland and Wales on the other. The latter two nations enacted the Public Sector Equality Duty for socioeconomic inequalities in 2019 and 2021 respectively, but England has not. As the Runnymede Trust has written, "[g]iven the racialised nature of socioeconomic inequalities in England, as a result of which BME people are more likely to live in poverty,... enforcing this duty is vital to eradicating inequalities in accessing public services."[79]

Another drawback of the Equality Act is the lack of funding for the commission charged with ensuring that the Equality Act is abided by. The Commission on Racial Equality, set up under the Race Relations Acts, was disbanded in 2007 and their work subsumed by the Equality and Human Rights Commission (EHRC), which was set up by the Equality Act of 2006 (which was something of a precursor to the 2010 Equality Act). While the CRE had a budget of £90 million to address racial injustices exclusively, the EHRC currently has a budget of just £17.1 million to cover its work on all nine protected characteristics, of which race is just one. While the EHRC can bring legal action, it does not have the same legal remit as the CRE did.[80]

THE EUROPEAN CONVENTION ON HUMAN RIGHTS, AND THE HUMAN RIGHTS ACT 1998

The European Convention on Human Rights (ECHR) sets out well-known human rights such as the rights to life, liberty, and freedom from torture. Article 14 of the Convention states that the "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." In other words, people of all races are entitled to have their Convention rights respected. The Human Rights Act, which was passed in 1998 and came into force in 2000, allows individuals in the UK to rely on the provisions of the ECHR in domestic courts.

Article 14 has been described as a "parasitic" right because it can only be invoked when another Convention right has allegedly been breached, thus negating its power.[81]

78 See, for example, Lisa Bowleg, 'Once you've blended the cake, you can't take the parts back to the main ingredients': Black gay and bisexual men's descriptions and experiences of intersectionality' (2013) 68 *Sex Roles* 754-767.

79 The Runnymede Trust, 'England Civil Society Submission to the United Nations Committee on the Elimination of Racial Discrimination', (The Runnymede Trust, May 2021) p.7. Available at www.runnymedetrust.org/uploads/CERD/Runnymede%20CERD%20report%20v3.pdf.

80 Oral Evidence of David Isaac and Rebecca Hilsenrath to the Joint Committee on Human Rights, *Black People and human rights*, 20 July 2020. Available at committees.parliament.uk/oralevidence/744/html.

81 Joan Small, 'Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights' (2003) 6 *European Journal of Discrimination and the Law* 45, 47.

However, in recent years, the European Court of Human Rights has arguably taken a broad approach when considering Article 14.[82] Regardless of the debates about the strength of Article 14, human rights laws have proven useful when challenging racial injustices, and the case of *Gillan and Quinton v United Kingdom* (2010) is a good example of how a CSO successfully used the ECHR to challenge racially discriminatory laws and practices, even without invoking Article 14. The applicants in this case had been stopped and searched by the police under powers pursuant to sections 44-46 of the Terrorism Act 2000, which permitted officers to stop and search people even without reasonable suspicion that such persons were engaged in acts related to terrorism. The applicants argued that this law, and the way in which it was implemented, constituted violations of numerous human rights such as the right to liberty (Article 5 of the ECHR) and the right to private life (Article 8 of the ECHR). Domestic courts rejected the claims, but the European Court of Human Rights held that because the "individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search", the powers violated the right to private life.[83] Under Article 8(2) of the Convention, governments are permitted to interfere with the right to private life if the interference is conducted "in accordance with the law" and when such interferences are "necessary in a democratic society" and serve one of a set of enumerated purposes such as "the interests of national security", "the prevention of disorder or crime" or "the protection of the rights and freedoms of others."[84] The European Court of Human Rights held that although the police powers were authorised by a legal instrument, they were not "in accordance with the law", and thus were not permissible under Article 8(2). This was, in part, because the absence of any requirement for reasonable suspicion created a risk that the police would stop people on the basis of skin colour. The Court's analysis was particularly interesting because the applicants in this case were White people. In the Court's words: "While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration.... The available statistics show that black and Asian persons are disproportionately affected by the powers".[85] The lesson from *Gillan*, then, is that the issue of race discrimination can be raised in cases that do not themselves involve instances of race discrimination.

HATE CRIME LAWS

"Hate crime" refers to crimes that are committed against people because of who they are, and this includes crimes against people on grounds of their actual or perceived race. The term "hate crime" encompasses a wide range of behaviour, such as violence against the person; criminal damage against a person's home or against places of worship; verbal abuse and harassment; and the dissemination of materials that are designed to incite violence or hatred against racialised persons.[86]

Hate crimes are particularly egregious because of the double impact on the victim – they suffer not just the physical or verbal abuse, but also the attempted degradation of who they are as a person. Hate crimes also cause wider "secondary harms" to those who share the same characteristics as the victim.[87] Examples of hate crimes against racialised persons are all too common, but perhaps the most notable are the killings of Stephen Lawrence (1993), Anthony Walker (2005), and Bijan Ebrahimi (2013).

Although the Race Relations Act 1965 addressed "incitement to commit racial hatred" (as amended by the Public Order Act 1986), it was the murder of Stephen Lawrence in 1993, and the media attention

82 Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) *Human Rights Law Review* 273-301.

83 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 [64].

84 In full, Article 8(2) reads: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

85 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 [85].

86 Law Commission, *Hate crime laws* (Law Comm No 250, 2020) para 1.1.

87 P Iganski, 'Hate hurts more' (2001) 45(4) *American Behavioral Sciences* 626.

that this case attracted, which initiated the development of legislation to tackle crimes committed against people because of their racial background. The law has developed in a piecemeal fashion, but it is now possible to identify three avenues for using the law to tackle violence and harassment that is directed at persons because of their actual or perceived racial background.

Aggravated criminal offences

In 1998, the newly elected Labour Government introduced the Crime and Disorder Act. Sections 28-32 of this Act set out 11 offences that can be prosecuted as "racially aggravated" if "(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group." The 11 offences include various types of assault, criminal damage, and harassment and stalking, and they carry harsher sentences than if committed without evidence of racial aggravation. For example, conviction of actual bodily harm usually attracts a maximum sentences of five years imprisonment, but if it is racially aggravated as per the Crime and Disorder Act, the maximum penalty is seven years.

Enhanced sentences

The Criminal Justice Act 2003 requires judges and magistrates to "enhance the penalty" of a person convicted of any crime that is aggravated by racial hostility, and which is not covered by ss.28-32 of the Crime and Disorder Act 1998. In other words, the person might not be convicted of a racially aggravated offence, but any racial animosity demonstrated by the commission of the offence will be reflected in harsher penalties (ss.145 and 146).

Hate speech offences

There is a range of statutory provisions that cover what is commonly referred to as "hate speech". These include the Public Order Act 1986, Pts 3 and 3A of which criminalise the "stirring up" of hatred on the basis of race; section 3 of the Football (Offences) Act 1991 which prohibits racialist chanting during football games; and section 127 of the Communications Act 2003, which makes it an offence to use public electronic communications networks to disseminate materials or words that are likely to stir up racial animosity.

Assessment of hate crime laws

Racial justice advocates have noted that while the legislative framework is admirable, it can prove difficult to secure convictions because: (a) some victims do not realise that they are victims, or are reluctant to initiate legal action; (b) there are problems with evidence-gathering and the high burden of proof; and (c) lawyers are overworked.

Sarah Mann, of Friends, Families and Travellers, highlights the importance of legal education when she notes that clients have not reported incidents of hate crime because they believe such incidents are part of everyday life, and have to be accepted. Mann also notes that people sometimes do not report hate crimes because they are concerned that they will be prosecuted instead, especially if the perpetrator of the hate crime is viewed by the police as more credible than the victim.[88]

Sy Joshua, of Race Equality First, laments that all too often police fail to record accusations of hate incidents, and notes that if the police do not investigate the allegation seriously and gather evidence appropriately, then this can jeopardise the chances of the case progressing. This view aligns with the findings set out in the report "Hate Crime and the Legal Process", in which the authors note that although the police are getting better at identifying race hate crimes, there is still room for improvements in communication between the police and the Crown Prosecution Service, and that these failures of communication lead to cases collapsing.[89]

88 Interview with Sarah Mann, Director of Friends, Families, and Travellers (16 June 2021).

89 Mark A. Walters, Susann Wiedlitzka, and Abenaa Owusu-Bempah with Kay Goodall, *Hate Crime and the Legal Process: Options for Law Reform* (University of Sussex, 2017) pp.81-87.

Alex Raikes MBE DL, the Director of Stand Against Racism & Inequality, explains that having a good relationship with the local police means that they have been able to make significant “traction and progress” with criminal cases against people who have committed race-based crimes, but she notes that there is a paucity of “criminal lawyers who have specialist knowledge and understanding about hate crime and racism, and who have the capacity and empathy to give your client the service they need.” This is largely because of the strains on criminal lawyers: “It’s not the lawyer’s fault. They haven’t got the resources, they’re not paid enough and there are not enough Black and Minority Ethnic solicitors and legal advocates who understand these issues.”

The legal framework, and CSOs experiences of using this framework, highlight several issues that warrant further consideration. These are explored in the next section.

Issues for consideration

The previous section outlined the development of the legal framework for tackling racial injustices, and provided some examples of CSOs' experiences of using the law. In this section, various issues relating to the use of legal action by CSOs are addressed, with a view to setting out proposals for further research. These issues are as follows: (a) the limitations of formal legal action; (b) the need for CSOs and lawyers to critically reflect on what it means to be anti-racist; and (c) the prevailing political and cultural context in which legal action takes place.

THE LIMITATIONS OF FORMAL LEGAL ACTION

Formal legal action can be very effective. Jamila Duncan-Bosu, for example, says that one of ATLEU's major achievements has been their success in establishing that foreign domestic workers have rights, and she notes that "anti-discrimination legislation was key to be able to do that". However, some case studies in this report, albeit limited in number, highlight problems with the formal use of law to challenge racial injustices. These problems are, broadly, twofold: practical and principled. The practical problems include the time and costs associated with legal action. The principled problems include the adversarial nature of the legal process, and the way in which such processes tend to treat incidents of racism as isolated, one-off incidents, rather than incidents that have a lifelong impact on the victim.

Practical limitations of the law

Those involved in social justice law have long expressed concerns with access to justice.[90] This broadly refers to the ability to receive legal assistance, and to have one's claim heard by relevant authorities. Two barriers to accessing justice can be identified: financial constraints, and time limits.

For many years, successive governments have imposed greater restrictions on access to legal aid. The Legal Aid, Sentencing, and Punishment of Offenders Act 2012 excluded certain areas of law from the scope of legal aid, including employment law and non-asylum immigration law. The Law Society has reported that these changes have resulted in vulnerable groups being unable to access free legal advice, noting that "the level of need arises from the nature of the client, rather than the category of law involved."[91] We have already seen that racialised people often lack power and fall into lower socioeconomic classes. It follows that they suffer more than others when there are cuts to legal aid.

The field of employment law provides an example. While the substantive law under the Equality Act is arguably suitable, the problem lies with accessing the system in the first place. Jamila Duncan-Bosu notes that the hurdles put in place now by the Legal Aid Agency means that ATLEU's anti-discrimination work has slowed down considerably. Alex Raikes of SARI says "it's terrible that people can't access affordable or free advocacy, from the time they feel they can't cope on their own with discrimination at work". Raikes describes the process as "wholly inadequate" since the legal process is too convoluted for people to navigate by themselves, especially when they are stressed with the abuse they have been facing at work. Audrey Ludwig, a discrimination lawyer who is Director of Legal Services at the Suffolk Law Centre, also notes that "legal aid is too bureaucratic. About a third of the time doing a legal aid case is completing legal aid forms and further documentation, often having to repeat information previously provided."

90 See, for example, Jon Robins and Daniel Newman, *Justice in a Time of Austerity: Stories from a System in Crisis* (Bristol University Press 2021).

91 The Law Society, 'Access Denied? LASPO four years on: a Law Society review' (June 2017), p.6.

Sarah Mann, Director of Friends, Families and Travellers, says that lack of funding is one of their primary reasons for not engaging in legal action. In the context of people of Gypsy, Roma, and Travellers heritage, Mann notes that it can also be difficult to acquire the information needed to apply for legal aid.

In the context of school exclusions, Angela Jackman notes that if a parent believes that their child has special educational needs, there is only limited funding available: "The problem with the funding for special needs is that it doesn't automatically cover all aspects of representation that's required for appeal hearings, so it doesn't cover the legal cost of having someone represent you at the hearing. It also doesn't cover the cost of having your expert witnesses attend hearings".

The cuts to legal aid provide an example of how class intersects with race: those of a lower socio-economic background are going to struggle to access the law, whereas those from a more affluent background might be able to use the law to their advantage. Even when a person is able to access legal assistance, they still must make sure that they are initiating legal action within certain time limits. In certain employment law matters, for example, claims need to be made within three months. However, one of the key problems for racialised people is dealing with the emotional trauma of suffering race-based discrimination and injustices. It can take time for a person to gather their strength and feel confident enough to initiate legal proceedings. The tight time limits are therefore particularly problematic in racial discrimination cases.

The practical problems with the legal system are summarised by Audrey Ludwig when she says that the Equality Act itself is fine, and that the "barriers to [racial justice] are not actually the legislation, the barriers are much more to do with the justice system, access to justice, the funding of litigation."

Principled problems with the use of legal action

Even when a person is able to access the legal system in good time, formal legal processes are not always the most appropriate venue for resolving disputes. CSOs and lawyers must be aware – and must inform concerned individuals – of the ways in which the adversarial nature of formal legal action might actually be counterproductive to the goal of racial justice.

The adversarial nature of legal action can be unhelpful for at least three reasons. First, it can exacerbate tensions between people. Second, formal legal processes have limited effect on social attitudes. Third, legal processes tend to treat the incident in question as a one-off incident, whereas for the victim it will be a "life incident".[92] These are considered in turn.

Exacerbating tensions

Legal challenges to school exclusions illustrate how formal legal action can exacerbate tensions between racialised people and the individual or organisation accused of racial injustice. Even if the relevant authorities disagree with a school's decision to exclude a pupil, those authorities can only recommend or direct reconsideration by the governing body that the pupil be reinstated, but they cannot order reinstatement. And even if the headteacher relents and reinstates the pupil, the adversarial nature of the process can damage the relationship between the pupil and the school. As Angela Jackman says, "it's a very difficult situation that many pupils will be going into, and that's even more challenging when you're thinking about young people, powerless to a large extent and really dependent upon the experience at the school, determining what their qualifications are going to be. So, the whole lack of a level playing field has always been a challenge really in exclusions." The adversarial nature of these processes can also stymy measures that would be effective in achieving racial justice. In many cases, mediation which results in remedial outcomes such as an apology and genuine learning on the part of the perpetrator can be

92 Interview with Sy Joshua, Service Manager with Race Equality First (16 July 2021).

more effective in the long term than litigation that results in compensation and tension. As explained by Jackman, "the family might be looking for a genuine apology from the school that it got it wrong, and sometimes that can be the hardest thing to get from a school because they're just so determined and adversarial that they are simply not prepared to give a genuine apology". This lack of reconciliation, exacerbated by the adversarial process, may make matters worse for the pupil.

The same is true in many employment cases. Alex Raikes, of SARI, says that "The advice often is to people: if you are getting discriminated against at work, and in a really horrible culture, get out and find a decent culture, because if you fight them, people get absolutely exhausted, they get victimised, they get a blight on their record" which affects their future working life.

Limited effect on social attitudes

Legal judgments also do not tend to address the social systems that generated or facilitated the act of discrimination, or the psychology or cultural values of the person or persons who advertently or inadvertently acted in a racially discriminatory manner. The cycle of racism therefore continues as these social attitudes weave themselves back into the institutions such as the criminal justice system; the schooling system; and so on. Louise Whitfield describes the Equality Act as "flawed" in part because it focuses largely on financial remedies, which often forces people to settle claims without resolving all the issues within the dispute, and does little to incentivise the organisation that has acted discriminatorily to act better in future. Angela Jackman notes that despite winning the "cornrows exclusion" case, there are still occasions at the beginning of the academic year when schools have tightened their uniform and appearance policy in a way that could potentially discriminate against racialised persons.

The lifelong impact of racist incidents

Legal processes also tend to treat the incident in question as a one-off incident, whereas the person who suffered the racial injustice carries the emotional toll of racism for the rest of their lives. Having said this, Jamila Duncan-Bosu notes that anti-discrimination law "gives you a chance to get injury to feelings. It is a good way of compensating for all the different harms. It was somebody recognising that actually, this affects you emotionally. So discrimination legislation in the trafficking field became a really important tool for us [ATLEU]". Notwithstanding Duncan-Bosu's positive experiences of using the law, it is clear that legal action must be accompanied by efforts to support the person emotionally. With this in mind, it is imperative for CSOs and lawyers to adopt a holistic approach, and to fully understand the multifaceted effects of racism. For example, it is widely accepted now that because of historical injustices, racialised people are likely to distrust the legal system. CSOs and lawyers contemplating legal action must therefore invest in building trust before engaging in legal action. Just For Kids Law, and Commons Law Community Interest Company both provide holistic support to those caught up in the criminal justice system. As stated on Commons' website, a "specialist Crisis Navigator works in parallel with our lawyers to help clients who require support with a range of issues such as debt, employment, family or housing instability or mental illness."[93] Sy Joshua, of Race Equality First, provides an example of how they adopt a holistic approach. When helping individuals through employment disputes, he says, "we also look at that situation holistically for that person. So if that person is, like, 'I'm struggling to get into work and struggling to get motivated and I feel my productivity is failing', then we would also look at options to support that person in terms of either a referral to health and wellbeing services, counselling. Again, speaking to the employee's HR Department on that person's behalf to say 'look this individual is suffering, are there any changes to their work arrangements you can make to make this easier for them' so we'll do all that work as well."

93 'Crisis Navigation' (*Commons Law Community Interest Company*, undated). Available at commons.legal/crisis-navigation.

Adopting a holistic approach is part and parcel of being anti-racist, and it is important for CSOs and lawyers to adopt an anti-racist approach to their work, in the ways set out in the next section.

REFLECTING ON WHAT IT MEANS TO BE ANTI-RACIST

The slavery abolitionists of the eighteenth and nineteenth century were not necessarily anti-racist, in the sense that they did not always consider Blacks and Whites to be equals.[94] Likewise, we should not assume that today's activists and lawyers who challenge racial discrimination necessarily understand what it means to be "anti-racist".[95] When CSOs and lawyers are contemplating legal action to challenge racial injustices, then, the first task is for them to reflect on any prejudices they have which might affect the efficacy of legal action.

To explain this, it is worth providing some examples. On October 12, 2020, a report was released which revealed instances of racial discrimination at Amnesty International, which is widely regarded as the world's pre-eminent human rights organisation.[96] This was not an isolated incident of an NGO that fights against racial injustices being called out for racism. In June 2020, the Association of Chief Executives of Voluntary Organisations (ACEVO) and Voice4Change England published a report that began with the bald assertion: "The charity sector has a problem with racial and ethnic diversity. Black, Asian and Minoritised Ethnic (BAME) people are under-represented in the sector and those who are in charities can be subject to racism and antagonism not faced by white colleagues."[97] The problem of racism within the charity sector is acute enough to justify the existence of an organisation called #CharitySoWhite whose sole purpose is to tackle racism within the sector.[98]

Just as CSOs are not immune to racial prejudices, so lawyers can fail to recognise their own prejudices. Louise Whitfield, of Liberty, notes that "the sector that does this kind of litigation is predominantly middle class white women", and that lawyers may therefore not understand the issues from the perspective of a racialised person. Moreover, lawyers are trained to believe that the law is impartial. If lawyers accept this portrayal of the law, though, they might fail to see how the law constructs and entrenches racial inequalities. As the Howard League for Penal Reform has explained in the context of racism in criminal justice, "legal training in England and Wales... does not equip lawyers to be antiracist."[99] Indeed, there is a danger that if lawyers do not fully understand how the legal system creates and perpetuates the myth of race, then "lawyers might become complicit in that racism"[100] by adopting strategies and tactics that entrench racialised discourses.

In addition to recognising their own biases and prejudices, CSOs and lawyers also need to recognise gaps in their knowledge. For example, a lawyer not trained in discrimination might not recognise how seemingly race-neutral laws can have a racially disproportionate impact. This is particularly the case for lawyers who are not embedded with CSOs and so do not see racial injustice issues on a daily basis. If lawyers

94 For example, many White anti-slavery activists dismissed the concerns of Black people who opposed the Sierra Leone Resettlement Scheme. When many Black Londoners refused to join the scheme, anti-slavery activists such as Granville Sharp questioned the character of black people and blamed the high death rate of those who joined the scheme on "disorders brought with them, which appear to have been aggravated by excessive drinking and other debaucheries" (quoted in Michael Siva, 'Why did the Black Poor of London not Support the Sierra Leone Resettlement Scheme?' (2021) 1(2) *History Matters Journal* 25-47, 45)

95 For a fuller account of what it means to be "anti-racist", see Ibram X. Kendi, *How to be an Antiracist* (Bodley Head 2019).

96 Nazia Parveen, 'Amnesty International has culture of white privilege, report finds' *The Guardian*, April 20, 2021. Available at www.theguardian.com/world/2021/apr/20/amnesty-international-has-culture-of-white-privilege-report-finds.

97 Sanjiv Lingayah, Kristiana Wrixon, and Maisie Hulbert, 'Home Truths: Undoing racism and delivering real diversity in the charity sector' (Voice4Change England and the Association of Chief Executives of Voluntary Organisations (ACEVO) 2020) p.9.

98 See charitysowhite.org.

99 Howard League for Penal Reform, 'Making Black lives matter in the criminal justice system: A guide for antiracist lawyers' (2021) p.5.

100 Howard League for Penal Reform, 'Making Black lives matter in the criminal justice system: A guide for antiracist lawyers' (2021) p.5.

do not identify or understand the issues of racial injustice in a particular case, then an opportunity to challenge that injustice might be missed. Examples include the criminal defence lawyer who does not recognise when police officers are engaging in subtle types of racial stereotyping when interviewing a Black person. Audrey Ludwig, of the Suffolk Law Centre, describes the racism she sees in disability discrimination cases as "organic, or under the surface", in the sense that the prejudice does not manifest itself overtly.

CSOs and lawyers can check their own prejudices, and fill their own knowledge gaps, by becoming more cognizant of what it means to be "anti-racist". This can be achieved through a combination of means. The charity Birthrights seeks to achieve this by including a person with lived experience as co-chair of their inquiry into race and maternity. Although having "lived experience" does not automatically equate to being anti-racist, it can bring an important perspective to bear. In June 2021, the Howard League for Penal Reform and Black Protest Legal Support published a guide for lawyers so that they can understand why it is important to adopt an anti-racist approach to lawyering, and what this approach entails, in the context of the criminal justice system.[101] There is scope for developing similar guides in other fields such as healthcare, employment, and education. Organisations can also reflect on how racial prejudices might affect their internal working processes. Martha Spurrier, the Director of Liberty, announced on the organisation's website in June 2020 that anti-racist work includes "looking at ourselves [and carrying out] a deep and critical analysis of [our] culture and ways of working." This includes a commitment to carrying out race equality assessments for every project to ensure that any strategies adopted take into account "equity and inclusion". Although the Board includes racialised persons, Spurrier acknowledges that the Senior Management Team is white, and has committed to "redesigning our recruitment process, reviewing our policies and working on processes and structures to include greater diversity of experience and expertise and to create a genuinely inclusive organisational culture."[102] It is too early to tell whether these initiatives will positively impact Liberty's anti-racist work and approach to legal challenges, but it is an initiative that other civil society organisations could consider adopting.

Other suggestions for ensuring that CSOs and lawyers are able to challenge racial injustices effectively through the legal system include the development of an organisation that focuses exclusively on racial injustice, led by racialised people. The Joint Committee on Human Rights has stated that the "Office for Civil Society must consider what can be done to support the further development of independent Black-led voluntary and community sector organisations".[103] This recommendation came about because over the course of its inquiry into racial injustices, it emerged that "there is no organisation dedicated to race in this country that has staffing of more than five or six people, one or two of whom at any one time will be interns."[104]

These are just some suggested steps for CSOs and lawyers who work with, or alongside, CSOs, to help ensure that they do not just treat the visible symptoms of the racial injustice, such as the exclusion from school or the denial of promotion, but also address the underlying illness and make sure that less visible wounds are addressed, such as the mental trauma of suffering a racial injustice, and the prospect of having to engage with the perpetrators of racial injustice in future.

THE PREVAILING POLITICAL AND CULTURAL CONTEXT

At the time of writing, perhaps the most significant obstacles facing racial justice advocates who wish to use legal action

101 Howard League for Penal Reform, 'Making Black lives matter in the criminal justice system: A guide for antiracist lawyers' (2021).

102 Martha Spurrier, 'We stand in solidarity with Black Lives Matter' June 11, 2020. Available at www.libertyhumanrights.org.uk/issue/we-stand-in-solidarity-with-black-lives-matter.

103 Joint Committee on Human Rights, *Black people, racism and human rights: Eleventh Report of Session* 2019-21 (2020, HL 165, HC 559) para 108.

104 Joint Committee on Human Rights, *Black people, racism and human rights: Eleventh Report of Session* 2019-21 (2020, HL 165, HC 559) para 107 (quoting evidence of David Lammy MP). See also Iyiola Solanke, *Making Anti-Racial Discrimination Law: A Comparative History of Social Action and Anti-Racial Discrimination Law* (Routledge 2009) p.136.

are the limits to accessing legal services. However, there are graver obstacles on the horizon. First, the withdrawal of the UK from the European Union poses questions for the extent to which relevant EU Directives on race will help racialised persons in the UK. Second, the government has announced plans to curtail the scope of judicial review further. Third, there is currently a review of the UK's human rights law framework, including membership of the European Convention on Human Rights, and the Human Rights Act.

The potential changes to the legal framework are compounded and exacerbated by the developing narratives around racial justice in the UK today. The Black Lives Matter protests during the summer of 2020 attracted significant attention from the media and public. In response, Prime Minister Boris Johnson established a Commission on Race and Ethnic Disparities (CRED) to examine the problem of racial injustices in the UK today. The Commission published its report in March 2021, and was positive about racial justice in the UK. The authors stated: "The country has come a long way in 50 years and the success of much of the ethnic minority population... should be regarded as a model for other White-majority countries."[105] According to the Commission, there is no evidence of institutional or structural racism in the UK, and "most of the disparities..., which some attribute to racial discrimination often do not have their origins in racism." The report suggested that racial inequalities are not always due to racial prejudices, and that there are "other reasons for minority success and failure, including those embedded in the cultures and attitudes of those minority communities themselves. There is much evidence to suggest, for example, that different experiences of family life and structure can explain many disparities in education outcomes and crime."[106] Put another way, the Commission was suggesting that disparities in education and crime, for example, can be attributed to the family in question, rather than to institutional or structural barriers to equality. The report was widely criticised by racial justice advocates, with the United Nations Working Group of Experts on People of African Descent stating that "it is stunning to read a report on race and ethnicity that repackages racist tropes and stereotypes into fact, twisting data and misapplying statistics and studies into conclusory findings and ad hominem attacks on people of African descent."[107] Notwithstanding these criticisms, it is clear that lawyers and CSOs are working in an environment in which the very existence of racism is in doubt. Rather than debating the most appropriate means for addressing and correcting racial injustices, CSOs are having to first convince others that disparities in education and crime and other areas of life are due to racism in the first place.

The CERD report is indicative of the lack of political will currently to address racial injustices. A BBC "Reality Check" in June 2020 highlighted that although the Government has ordered numerous reviews into racism, it has generally declined to act on the findings and recommendations set out in those reviews, as illustrated by the it's response to the McGregor-Smith Review of Race in the Workplace, for example.[108] A commitment to taking action, rather than just issuing reports, was the cornerstone of the recently announced intention of the Welsh Government to implement a Race Equality Action Plan,[109] but while this will benefit CSOs in Wales, there is no equivalent elsewhere in the United Kingdom.

105 Commission on Race and Ethnic Disparities, 'Commission on Race and Ethnic Disparities: The Report' (March 2021) p.9.

106 Commission on Race and Ethnic Disparities, 'Commission on Race and Ethnic Disparities: The Report' (March 2021) p.11.

107 'UN Experts Condemn UK Commission on Race and Ethnic Disparities Report', Statement of independent experts of the Special Procedures of the United Nations Human Rights Council, April 19, 2021. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27004&LangID=E.

108 Alice Aitken and Ben Butcher 'Black Lives Matter: Have racial inequality reviews led to action?' *BBC Reality Check*, June 25, 2020. Available at www.bbc.co.uk/news/53053661.

109 See 'An Anti-Racist Wales: The Race Equality Action Plan for Wales' (2021). Available at gov.wales/sites/default/files/consultations/2021-03/race-equality-action-plan-an-anti-racist-wales_2.pdf.

Conclusions

The law can be a powerful tool for fighting racial injustices, with Jamila Duncan-Bosu stating that in the field of employment rights, discrimination legislation has been helpful because it helps her "really name that evil". However, for a number of reasons, civil society organisations have struggled to use the legal system to challenge racial injustices. The rise of populism and racially-charged discourses; restrictions on access to the courts; the judiciary's understanding of racism; and the limited scope of the substantive law such as the public sector equality duty are just a few reasons why formal legal action in particular has had limited success. Plans to curtail judicial review and human rights laws only add to the difficulties of challenging racial injustices through formal legal processes. In some ways, cuts to legal aid do not just prevent racial injustices from being corrected; they also actively contribute to racial injustice being suffered as they leave individuals feeling even more disempowered.

Even when formal legal action is a possibility, CSOs and lawyers ought to be mindful that such action might have limited effect because racial injustices cannot be addressed solely through adversarial processes. While perpetrators must be held to account, efforts must simultaneously be made to enhance learning, and to provide continuous support to victims of racism outside the courtroom. In this sense, informal legal action is vital. The language of the law can be used to inform individuals and organisations of their rights and duties, and to persuade those accused of racial discrimination to change their behaviour, but without the pressures or stigma associated with formal legal processes. Liberty provide a good example of how formal and informal legal action can be more effective when run alongside other activities, such as campaigning and policy-oriented work, and investigative journalism. Louise Whitfield describes the legal team there as "part of that integrated advocacy approach".

When contemplating legal action, therefore, lawyers and CSOs need to bear in mind the following points in particular:

1. Formal legal processes might be inappropriate. The adversarial nature of the process, and the time and costs involved, might be counterproductive to the aim of helping the victim of racial injustice.

2. Although there are limits to the substantive legal framework, such as the courts' refusal to include immigration status within the definition of "race", the BAPIO case illustrates that even failed legal action can have longer term benefits.

3. Informal legal processes, such as using the language of the law to persuade organisations and service providers to end racially discriminatory practices without having recourse to formal legal procedures, can be effective in that it saves time and money, and avoids the emotional stress associated with formal legal processes.

4. It is important for CSOs and lawyers to take a holistic approach when working with racialised people who have been subjected to racism. This is because incidents of racism often involve more than the one-off incident. They can have broader effects on mental well-being; financial stability; life chances; and relationships. Similarly, victims of racial injustice might be sceptical of legal action because the law has historically and culturally been associated with causing racial injustices, and a holistic approach is helpful to ensure that victims' emotional needs are addressed.

5. Public legal education serves numerous purposes, and is therefore vital to efforts to challenge racial injustices. One of the most significant hurdles for successful legal action

lies at the pre-legal stage, when evidence needs to be gathered and stored. This is true of criminal investigations into alleged hate crimes, and building claims of discrimination in the workplace, for example. Lawyers and CSOs must engage in efforts to educate the broader public of the things they need to do in order to ensure legal action is effective. Education can also ensure that potential perpetrators of racial injustices understand their duties to not discriminate.

AREAS FOR FURTHER RESEARCH

This report has not addressed all aspects of how civil society organisations have used legal action to challenge racial injustices, and topics that require further research include:

- the potential impact of Brexit on the legal framework, and the extent to which CSOs might be able to draw on European discourses of racial injustice;
- variations in the experiences of CSOs tackling racial injustice in Wales, Northern Ireland, Scotland, and England;
- more detailed research on legal action in specific sectors, such as immigration, housing, criminal justice, education, employment. A comparative study which explores whether CSOs have had more success in some sectors than others would also be valuable;
- a longitudinal study of whether judges' views have evolved as they have been exposed to refined legal arguments by CSOs;
- differences of interpretations of Article 14 of the European Convention on Human Rights by judges in UK courts, and judges in the European Court of Human Rights.

List of interviewees

NAME	ROLE	ORGANISATION	AREA OF WORK
Jamila Duncan-Bosu	Solicitor	Anti-Trafficking and Labour Exploitation Unit	Employment; Immigration
Sarah Mann	Director	Friends, Families, and Travellers	Assorted
Alex Raikes MBE DL	Director	Stand Against Racism & Inequality	Assorted
Shauneen Lambe and Aika Stephenson	Co-founders and Legal Director	Just for Kids Law	Assorted (but primarily education and criminal justice)
Audrey Ludwig	Director of Legal Services	Suffolk Law Centre	Assorted
Louise Whitfield	Solicitor and Head of Legal Casework	Liberty	Assorted
Sy Joshua	Service Manager	Race Equality First	Assorted (but primarily employment; hate crime)
Angela Jackman QC (Hon)	Lawyer	Unaffiliated	Education

Legal milestones

A TIMELINE OF KEY MOMENTS IN RACE AND LAW IN THE UNITED KINGDOM

1772 *Somerset v Stewart*

1833 Slavery Abolition Act

1948 SS Empire Windrush docks, bringing 802 people from the Caribbean to work in the UK

1965 Bristol Bus Boycott

1991 Criminal Justice Act, s.95

1993 The murder of Stephen Lawrence

1998 Human Rights Act

1998 Crime and Disorder Act

1998 MacPherson Report of the Stephen Lawrence Inquiry

2000 Race Relations (Amendment) Act

2000 European Union directives on race and employment

2006 Racial and Religious Hatred Act

2017 Race Disparity Audit set up, to investigate how racialised persons are treated across a range of sectors including health, education, employment, and the criminal justice system

2017 The McGregor-Smith Review into race in the workplace

2019 Windrush Compensation Scheme set up

2020 Windrush Lessons Learned Review

2020 Black Lives Matter protests, and the removal of the statue of Edward Colston

Pre 1990

Post 1990

1965 Race Relations Act

1968 Race Relations (Amendment) Act

1969 UK ratifies the International Convention on the Elimination of All Forms of Racial Discrimination

1970 The trial of the "Mangrove Nine", the first judicial acknowledgement of racism within the Metropolitan Police

1972 *Ealing v Race Relations Board* (House of Lords)

1976 Race Relations (Amendment) Act, setting up the Commission for Racial Equality

1981 Operation Swamp 81; the Brixton Riots, and Lord Scarman's report into disproportionate use of stop and search powers against Black people

2006 Immigration, Asylum, and Nationality Act ss. 15 and 21

2007 Equality and Human Rights Commission set up

2010 Equality Act

2014 Immigration Act s.33

2017 The Lammy Review into ethnic minorities and the criminal justice system

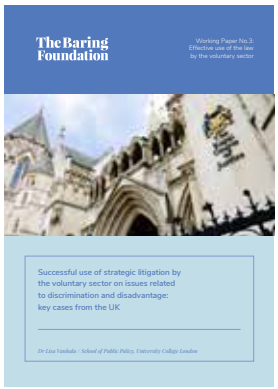
2017 The Angiolini Review into deaths in police custody

2021 Police, Crime, Sentencing and Courts Bill

2021 Report of the Commission on Race and Ethnic Disparities

Selected Baring Foundation resources

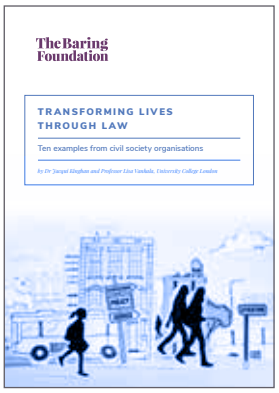
All resources can be found on our website **www.baringfoundation.org.uk**



Successful use of strategic litigation by the voluntary sector

Dr Lisa Vanhala

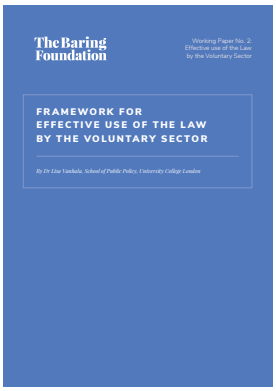
2017



Transforming Lives through Law: Ten examples from civil society organisations

Dr Jacqui Kinghan and Professor Lisa Vanhala, UCL

2019



Framework for effective use of the law by the voluntary sector

Dr Lisa Vanhala

2016

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