



Discrimination Law Association

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The Sewell report and the meaning of institutional racism

Oliver Lawrence, barrister at No5 Chambers, examines the approach taken by the Sewell report to the concept of institutional racism. Drawing on the MacPherson definition, he explores the meaning of the term and the ambiguities within it in order to clarify the findings of the report and the controversy it created. Using the Equality Act 2010 definitions of direct and indirect discrimination, he explains how the Sewell report uses the term to refer to discriminatory reasons whereas many of its critics use the term to refer to discriminatory outcomes. He concludes that without a clear and unambiguous definition of institutional racism, there will inevitably be widespread disagreement about the extent of the problem in the UK.

The definition of terms is the beginning of wisdom.¹ When Socrates said this, he might have added that an undefined term is the beginning of a disagreement. The subject of institutional racism has made headlines recently after the publication of a report (the Sewell report) by the Commission on Race and Ethnic Disparities (the Commission). The Sewell report has been controversial. In particular, the statement by the chair of the Commission that there was no evidence of institutional racism in the UK has been heavily criticised. In one respect this criticism is unsurprising. The term 'institutional racism' is often used to mean different things. People will inevitably disagree about whether and to what extent institutional racism exists, if they disagree on the meaning of institutional racism in the first place. This article explores the various ambiguities which reside within the meaning of the term in an attempt to clarify the findings of the report and the controversy surrounding them. The different concepts of discrimination contained in the Equality Act 2010 (EA) inform this analysis. This article is decidedly neutral as to the merits or shortcomings of the Sewell report. The question whether the report misunderstands the meaning of institutional racism is left entirely up to the reader.

The findings of the Sewell report

The report is an examination of race and ethnic disparities in education, employment, crime and policing and health in the UK. Its aim is to identify any disparities between ethnic groups, why they exist, and what can be done to address them. It gathers data on how different ethnic groups are faring in these areas and then controls for certain variables in an attempt to establish the underlying causes of any disparities. In its opening remarks, the report is careful to emphasise that racism is still a 'real force' in the UK:

We do not believe that the UK is yet a post-racial society which has completed the long journey to equality of opportunity. And we know, too many of us from personal experience, that prejudice and discrimination can still cast a shadow over lives. Outright racism still exists in the UK, whether it surfaces as graffiti on someone's business, violence in the street, or prejudice in the labour market. It can cause a unique and indelible pain for the individual affected and has no place in any civilised society.

Nevertheless, the thrust of the Sewell report is that geography, family influence, socio-economic background, culture and religion have a more significant impact on life chances than the existence of racism.² It expresses this conclusion in the following way:

Put simply we no longer see a Britain where the system is deliberately rigged against ethnic minorities. The impediments and disparities do exist, they are varied, and ironically very few of them are directly to do with racism. Too often 'racism' is the catch-all explanation, and can be simply implicitly accepted rather than explicitly examined.

It is worth noting some of the criticisms levelled at the Sewell report which are outside the purview of this article. First, that the data does not support the overarching conclusions of the report. This argument raises the difficult question of when a generalisation is justified by particular facts. Although not quite a contradiction, there is an obvious tension between the conclusion that racism is a real force in the UK and the conclusion that the UK is not institutionally racist. Second, that the report strays into subjective territory in warning against 'fatalistic' and 'unduly pessimistic'

¹ Socrates, as quoted in Plato's Apology

² The Sewell report, page 8

narratives. The report advocates optimism, partly on the basis of its analysis of the data, but also in order to ‘highlight minority self-reliance and resilience’.³ That consideration is clearly more ideological than scientific. Third, that the data sets in the report are flawed. As one critic argues: ‘Statistics are shaped by the assumptions, theories and interests of authors. They aren’t neutral, and they can introduce unintended biases.’⁴

The focus of this article is the approach of the Sewell report to the concept of institutional racism. In the section titled ‘The Language of Race’, the Commission expresses its concern with what it perceives to be the use of imprecise language around race and racism in mainstream discourse: ‘The linguistic inflation on racism is confusing, with prefixes like institutional, structural and systemic adding to the problem.’⁵ The report argues that the term ‘institutional racism’ should not be used too casually as an explanatory tool and in particular, should not be used to describe any circumstances in which differences in outcomes between racial and ethnic groups exist in an institution. Instead, the term should be applied only when ‘deep-seated racism can be proven on a systemic level’.⁶ This explanation of the term aligns with the central message of the report that disparities themselves do not entail discrimination.

The Sewell report adopts the definition of institutional racism given by Sir William MacPherson in the Stephen Lawrence Inquiry, which is as follows:

*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.*⁷

Having adopted the MacPherson definition, the Sewell report then appears to construe the words ‘because of’ narrowly. Institutional racism, in its view, happens when people are treated unfavourably because of their race. The race of the victim acts as a reason for the unfavourable treatment, often by operating on the minds of members of the organisation, consciously or unconsciously, and affecting their decisions or their policies. The report makes this position clear:

3 The Sewell report, page 31

4 Kalwant Bhopal – ‘The Sewell report displays a basic misunderstanding of how racism works’ – <https://www.theguardian.com/commentisfree/2021/mar/31/sewell-report-racism-government-racial-disparity-uk>

5 The Sewell report, page 34

6 The Sewell report, page 8

7 The Stephen Lawrence Inquiry; report of an inquiry by Sir William MacPherson of Cluny; February 1999 (the MacPherson report) paragraph 6.34

If accusations of ‘institutional racism’ are levelled against institutions, these should – like any other serious accusation – be subject to robust assessment and evidence and show that an institution has treated an ethnic group differently to other groups because of their ethnic identity.

Not everyone agrees with this interpretation of the term. For example, this is the submission made by the Commission for Racial Equality to the Stephen Lawrence Inquiry:

*Institutional racism has been defined as those established laws, customs, and practices which systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions.*⁸

This difference of interpretation raises certain questions with regard to the definition of institutional racism. Does the term only refer to the consequences of institutional action? What causal role does race play? To answer these questions, it is necessary to examine the MacPherson report itself and the context in which the definition was formulated.

The MacPherson report

The landmark MacPherson report, published on February 24, 1999, found that the police investigation into the murder of Stephen Lawrence was ‘marred by a combination of professional incompetence, institutional racism and a failure of leadership by senior officers’.⁹ The report made 70 recommendations aimed at ‘the elimination of racist prejudice and disadvantage and the demonstration of fairness in all aspects of policing’.¹⁰ While the Inquiry focused on the Metropolitan Police Service (MPS), the report concluded that institutional racism also existed in other police services and other institutions countrywide. It was a watershed moment for race relations in the UK.

The MacPherson report engaged with the meaning of institutional racism at some length. It emphasised that its aim was not to produce a definition that was ‘cast in stone’ but just so that its application of the term could be broadly understood. There are three interwoven concepts of racism which appear throughout the analysis: racism, institutional racism and unwitting racism. First, there is the general concept of racism, which is defined in the following way:

Racism in general terms consists of conduct or words or practices which disadvantage or advantage people because

8 The MacPherson report, paragraph 6.30

9 The MacPherson report, paragraph 46.1

10 The MacPherson report, Recommendation 2

of their colour, culture, or ethnic origin.

Racism can be subtle or overt. Institutional racism is described as a subtle form of racism and its conceptual relationship to racism appears to be that of a sub-concept. Racism consists of conduct, words or practices. Institutional racism consists of the collective failure of an organisation to provide an appropriate and professional service, a failure which presumably manifests itself through conduct, words or practices. Unwitting racism is another sub-concept of racism. The key element of the concept is the lack of intent to treat a person disadvantageously because of their race. Here is the full explanation of the term in the MacPherson report:

Unwitting racism can arise because of lack of understanding, ignorance or mistaken beliefs. It can arise from well-intentioned but patronising words or actions. It can arise from unfamiliarity with the behaviour or cultural traditions of people or families from minority ethnic communities. It can arise from racist stereotyping of black people as potential criminals or troublemakers. Often this arises out of uncritical self-understanding born out of an inflexible police ethos of the “traditional” way of doing things. Furthermore such attitudes can thrive in a tightly knit community, so that there can be a collective failure to detect and to outlaw this breed of racism. The police canteen can too easily be its breeding ground.¹¹

The MacPherson report based its finding that the MPS was institutionally racist on the many instances of unwitting racism within that organisation. The two concepts appear to have a close relationship. Unwitting racism on the part of many members of an institution is an example of institutional racism, although the concept of institutional racism may extend beyond this. At one point, the report describes institutional racism as ‘*unwitting racism on the organisational level*’.¹²

The MacPherson report draws a clear distinction between the institutional racism of the MPS and conscious acts of discrimination by ‘rotten apples’ within the service. Members of an institutionally racist organisation do not necessarily know not what they do. They may possess degrees of unconscious bias towards different racial groups. Not all of them may be guilty of racism.¹³ Institutional racism shows itself in the implementation of policies and in the actions of members acting together. The prefix ‘institutional’ identifies the source of the differential treatment, which lies in some sense within the organisation rather than with the individuals who represent it. The culture of the workplace, for example, is the product of individual

actions but it is also something that is more than the sum of its parts. It can induce individuals to act in ways which are advantageous or disadvantageous to certain racial groups. ‘Institutional racism’ does not single out particular individuals; it singles out the net effect of what they do.¹⁴

MacPherson heard various submissions with regard to the definition of institutional racism. These submissions differed with respect to whether the determinant of institutional racism is the reason why institutional action disadvantages certain racial groups. Some submissions argued that the reason was important:

*Institutional racism...permeates the Metropolitan Police Service. This issue above all others is central to the attitudes, values and beliefs, which lead officers to act, albeit unconsciously and for the most part unintentionally, and treat others differently solely **because of their ethnicity or culture**...¹⁵ (emphasis added)*

*I define institutional racism as the racism which is inherent in wider society which shapes our attitudes and behaviour. Those attitudes and behaviour are then reinforced or reshaped by the culture of the organisation a person works for. **In the police service there is a distinct tendency for officers to stereotype people**.¹⁶ (emphasis added)*

Other submissions focused on outcomes:

Organisational structures, policies, processes and practices which result in ethnic minorities being treated unfairly and less equally, often without intention or knowledge.¹⁷ If the result or outcome of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred.¹⁸

MacPherson’s findings of institutional racism were in part based on the fact that race played a causal role in the disadvantageous treatment specified. The Inquiry found that the MPS had failed to undertake an adequate investigation because of the race of the victim, the race of his family and the race of the witness of the murder.¹⁹ Similarly, the Inquiry found that institutional racism was apparent in the countrywide disparity in ‘stop and search’ figures, not because of the disparity itself, but because there was a ‘*clear core conclusion of racist*

¹¹ The MacPherson report, paragraph 6.17

¹² The MacPherson report, paragraph 6.15

¹³ The MacPherson report, paragraph 6.25

¹⁴ The MacPherson report, paragraph 6.28

¹⁵ The MPS Black Police Association – The MacPherson report, paragraph 6.27

¹⁶ Chief Constable John Newing, President of the Association of Chief Police Officers – The MacPherson report, paragraph 6.50

¹⁷ The Commission for Racial Equality – The MacPherson report, paragraph 6.30

¹⁸ Dr Benjamin Bowling – The MacPherson report, paragraph 6.33

¹⁹ The MacPherson report, paragraph 6.45

stereotyping'.²⁰ Elsewhere however, the report implies that institutional racism is a question of outcomes:

*It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.*²¹

Reading the MacPherson report as a whole therefore, it is safe to say that its definition of institutional racism embodies different conceptual elements which reflect the different ways in which the term is used today. The definition itself encapsulates these ambiguities. Institutional racism is stated to be the collective failure of an organisation to provide an appropriate and professional service to people because of their race. On one interpretation, race is the reason why the failure takes place. On a different interpretation, racial impact is the reason why the service is a failure.

Direct and indirect discrimination in the Equality Act 2010

The EA captures this distinction between discriminatory reasons and discriminatory outcomes with the concepts of direct and indirect discrimination. Direct discrimination means treating someone less favourably than others because of a protected characteristic such as age, sex or race.²² The SC clarified the meaning of 'because of' in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* 2010 IRLR 136, Briefing 555. There are two ways in which direct discrimination can be established. The first is where, whatever the motive and whatever the state of mind of the alleged discriminator, the decision or action was taken on a ground which was 'inherently' discriminatory and the second is where the decision or action was taken on a ground which was 'subjectively' discriminatory. An example of inherently discriminatory treatment was a case in which a local authority allowed pensioners free entry into its swimming pools at a time when the state pension age was 60 for women and 65 for men.²³ The courts held that this policy therefore constituted the application of a criterion which was gender-based and unfavourable to men.

The reason for the less favourable treatment is less obvious in cases of subjectively discriminatory treatment. Here, it is necessary to explore the mental

processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind. What matters is the reason why the alleged discriminator acted as he or she did. The fact that the race or sex of the claimant was part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it forms part of the reason for that treatment. The EAT made this point clearly in *Martin v Lancehawk Ltd (t/a European Telecom Solutions)* EAT 0525/03. In that case, M, a female employee was having an affair with L, her male managing director. Problems eventually arose in the relationship and M decided to tell her husband about the affair, despite having told L that she would not do so. L dismissed M as a result. The ET upheld the unfair dismissal claim but dismissed the sex discrimination claim. On appeal, M argued that the reason L had an affair with her was that she was a woman, as he would not have had an affair with a heterosexual man. Therefore, 'but for' her sex there would have been no relationship and consequently no dismissal. The EAT rejected that argument. The reason for the dismissal was not based in any way on the sex of the claimant but on the breakdown of their relationship. The 'but for' test did not capture the important point, which was the reason why L treated M in the way that he did. The sex of the claimant merely formed part of the circumstances in which the dismissal occurred.

The Sewell report interprets the MacPherson definition of institutional racism in a way that is loosely aligned with the concept of subjective discriminatory treatment: race operating on the minds of members of an institution, consciously or unconsciously, inducing them to treat ethnic minorities less favourably than others. This interpretation of institutional racism is difficult to test evidentially. The approach of the Sewell report is to gather data on different racial groups and then control for certain variables in an attempt to identify any disparities that exist between different racial groups 'by coincidence'. For example, the report looks at whether there are any significant disparities between members of different racial groups who are also members of the same socioeconomic bracket, or between members of different racial groups who live in the same area. This approach has been criticised for artificially treating socioeconomic status and race as distinct factors when in fact they are causally interwoven. Historic discrimination created a causal link between race and socioeconomic status which still lasts today. The same could be said of race and geographical location. These factors are themselves products of racism and are not just part of the circumstances in which racism can occur.

²⁰ The MacPherson report, paragraph 6.45

²¹ The MacPherson report, paragraph 46.27

²² Section 13 EA

²³ See *James v Eastleigh Borough Council* [1990] 2 AC 751

This point is also relevant to how institutional racism should be defined. A definition of institutional racism which is aligned with direct discrimination may capture unfavourable treatment by reason of race, but it does not capture the extent to which the consequences of historic discrimination are still yet to be remedied.

A definition of institutional racism which focuses on outcomes, on the other hand, bears certain similarities to the concept of indirect discrimination. Indirect racial discrimination is the application of a provision, criterion or practice (PCP) which puts, or would put, someone at a particular disadvantage when compared to people of a different race, and which is not a proportionate means of achieving a legitimate aim.²⁴ According to the MacPherson definition, institutional racism can occur as a result of the processes of an organisation. The word 'processes' points away from discriminatory reasons and towards discriminatory outcomes. Processes can be unbiased and their implementation may require little or no human input, but they can also have consequences which affect racial groups differently.

An outcome-based conception of institutional racism appears to underpin the criticism of the Sewell report which was advanced by Shelter, the housing and homelessness charity. Shelter made the following argument in response to the Sewell report:

*Immigration policy is a key area in which institutionally racist practices persist, and will be contributing to racial exclusions and inequalities within our housing system. Immigration controls principally target a 'global poor' in a way that closely corresponds with people who come from 'former colonies' and therefore people of colour.*²⁵

This argument posits that immigration controls are institutionally racist not because of any intent lying behind them but because they create a disparity in outcome. Immigration controls target a non-racial category of people (the global poor) but have a disproportionate effect on a racial category of people (people of colour) because of what Shelter describes as the 'close correspondence' between the two categories. An outcome-based definition of institutional racism is implicit in the argument.

Institutional processes can be indirectly discriminatory on a much smaller scale. Pimlico Academy, a central London secondary school, presented one such example. In March 2021, pupils at Pimlico Academy made headlines by staging a protest against the school's strict new uniform policy, which stated that hairstyles that 'block the views of others' would not be permitted and

hijabs should not be 'too colourful'. The pupils accused the school's management of racism, claiming that the new policy would penalise Muslims and those with afro hairstyles. In other words, the concern of the pupils was the disparity in outcome between different racial groups.

Institutional processes can lead to both direct discrimination and indirect discrimination. Stop and search is a controversial example. As noted by the MacPherson report, the power to stop and search gives police officers the opportunity to treat people unfavourably by reason of their race through racist stereotyping. There is an on-going debate about whether stop and search leads to this form of discrimination. The Sewell report's analysis of stop and search data presents one worrying statistic in this regard, which is that certain ethnic minority groups are far more likely to be the subject of a stop and search which does not lead to an arrest.²⁶ Racial profiling is not the only concern, however. Even if the implementation of stop and search was racially unbiased, the process could still create a disparity in outcome between racial groups depending on the racial demographics of the areas where most crime occurs, and where stop and search is used most as a result.

Conclusion

The Home Affairs Select Committee reviewed the legacy of the MacPherson report in 2009. Trevor Phillips, the chair of the Equality and Human Rights Commission at the time, gave evidence to the Committee that as far as the definition of institutional racism was concerned, 'rather than continuing a debate about linguistics, what we need to do is get back to the evidence'. Unfortunately, the controversy following the Sewell report shows that the linguistic debate is still important. Language matters here because the definition of institutional racism determines what constitutes evidence of institutional racism. There must be agreement as to what institutional racism means before people can agree that it exists and, as the MacPherson report warns, 'there must be unequivocal acceptance that the problem of institutional racism actually exists as a prerequisite to addressing it successfully'.²⁷ Currently, the term is often used in a way which is ambiguous as to whether it refers to reasons or outcomes. Unfortunately, how this ambiguity should be cured depends on one's view as to which is the more important problem to address: subjectively racist treatment or disparity in outcome between racial groups. That is a political question which is proving difficult to resolve.

²⁴ Section 19 EA

²⁵ <https://blog.shelter.org.uk/2021/04/the-sewell-report-an-example-of-institutional-racism/>

²⁶ The Sewell report, page 154

²⁷ The MacPherson report, paragraph 6.52

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