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LIBERALISING DISCRIMINATION LAW

Why the Equality Act is unfit for purpose

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Summary

- Over the past six decades our political, philosophical and legal approaches to discrimination have evolved, moving from a laissez-faire attitude to complex legislation that addresses both 'direct' and 'indirect' discrimination.
- Some argue now for the complete abolition of anti-discrimination legislation, reverting to free market principles. On the other hand, others argue that we need to go further in attacking indirect discrimination through the law.
- This paper makes the case that while liberals can accept outlawing direct discrimination under the concept of equality before the law, or a laissez faire approach, going further than these approaches will invariably lead to bad outcomes.
- Progressive structural and anti-racist approaches that treat individuals differently due to their race in order to equalise group outcomes amplify divisions and promote illiberal agendas. Such approaches fail minority individuals who are genuinely disadvantaged and overturn the principle of equal treatment for all individuals before the law.
- The Equality Act should return to the roots of earlier legislation, by outlawing direct discrimination ocused on individuals rather than remove or reduce gaps between groups. The rest of the Act should be removed from the statute books.
- This would be a genuinely liberal but strong anti-discrimination agenda.

Introduction

This essay discusses the major shifts in the way the United Kingdom has approached the issues of discrimination and individual freedom. It focuses on how some laws have reflected these changes and the consequences that these changes have had. It sets out a template which shows how the UK appears to have moved through four distinct stages in its cultural and legislative approach towards discrimination in the past seven decades.

The four broad approaches and associated legal frameworks are set out below:

1. Laissez-faire. The belief that there is no role for legislation to stop discrimination.

2. Stopping direct discrimination. Banning direct discrimination towards individuals.

3. A structural approach to racism. A belief that systemic or institutional, or indirect discrimination had to be combatted at a system-wide level.

4. Anti-racism activism. The belief that all gaps between different groups are the result of present and historic systemic prejudice, to be eradicated by active discrimination.

While these four stages are necessarily fuzzy and imprecise, there is sufficient intellectual and legal coherence in this framework for it to be useful in understanding how the UK's approach has changed over time. In addition, the intellectual framework of

these four stages can largely apply to other Western countries, particularly the USA.

While this paper largely uses the issue of racial discrimination as the prism to examine how legal and wider approaches to discrimination have changed, the concepts presented can be extended to other groups as well. Similar changes have also applied to issues around biological sex and, to a lesser extent, areas such as homophobia and other forms of prejudice. The shift from laissez-faire attitudes to banning direct discrimination, to defining and opposing systemic or institutional (and so indirect) discrimination, and finally the call for constant activism and the elimination of all gaps between different groups (interestingly, often excluding socioeconomic class), can be traced across various areas of public policy.

This essay argues that a liberal approach to tackling prejudice and discrimination is confined to the first two approaches, while the second two approaches *necessarily* involve overturning liberal values around individual freedoms and market mechanisms. In addition, it discusses how the first two approaches are aligned with the views of those who argue for a strong but small and focused state, whereas the second two approaches call for an increasingly interventionist approach, which culminates in disregarding all principles (e.g. freedom, privacy) and simply focusing on removing all gaps between different identity groups.

The shift from seeing discrimination as consisting of individual acts of discrimination in the first two approaches towards the second two approaches of systemic/institutional/structural racism and anti-racist activism that seek to eliminate all gaps between different ethnic or racial groups has major problems. Among these are:

1. Sacrificing other liberal principles. Ending racism or other forms of prejudice is a good thing. But particularly in a modern society

where prejudice is low and diminishing, the idea that the only or even main objective of society is to end all forms of prejudice ends up verging on the totalitarian. This is because no other liberal principle (fairness, privacy) is allowed to stand in the way of those who declare themselves in favour of ending prejudice or discrimination. Conflicting values are simply overturned.

2. The impossibility of a top-down implementation of 'fairness'. Redressing past injustice may seem fair in theory. But who determines the current and past cost of prejudice to a gay man or lesbian versus a black man or woman versus a working-class white man raised by a single mother? How do we account for a mixed-race individual versus an African migrant with a PhD? What should be done about more subtle prejudices (e.g. ageism)?

3. The risk of minority scapegoating (e.g. anti-Semitism) and anti-white racism. Often gaps between groups are seen as acceptable if white people as a group are worse off than other groups. This sometimes amounts to little more than anti-white racism. To be fair to some anti-racism activists, they would extend this focus on removing gaps to other groups, but this then often shades into minority scapegoating (e.g. collectivist and left-leaning anti-Semitism).

4. Ignoring complexity and culture. Progressive approaches ignore real-world complexity. Migrants to the UK may have lower wealth as they have yet to build up capital, rather than racism. Different group outcomes may reflect different cultural variables (e.g. family breakdown), not racism. The children of ethnic migrant groups that have high earnings usually do better than the children of ethnic migrants with less affluent parents, just as among native Britons, meaning that gaps between such ethnic groups in subsequent generations reflect other issues, not just majority group prejudice.

This essay argues that given the difficulties raised by these questions then, if legislation is seen as necessary at all, the only compatible approach with a liberal philosophy is opposing direct discrimination in legislation, as set out by the second path. Legislation should therefore be framed around such an approach. Where our legislative and intellectual framework has gone beyond this, it should be reined in and reversed.

Ending direct discrimination in the public sphere (where discrimination is defined as an act by an individual against another individual) creates at least notional equality between private citizens, and enforcing it creates at least a level of toleration between different groups. It creates the necessary legal framework for systemic change *without* top-down direction, as by removing direct barriers to individuals, it allows for individual agency to deliver change.

Such an approach does not seek to get into issues of redistribution or accept that all gaps between groups are the result of systemic prejudice. It merely focuses on the old liberal idea of equality before the law, so that you cannot serve 'the public' only to then rule out a category of individuals due to characteristics such as race, ethnicity, sex or even sexuality, nor explicitly act on prejudice when making choices in key areas like employment.

This approach is an attempt to enforce toleration between UK citizens and then hope that people can largely be trusted, rather than create an ever-expanding set of bureaucrats to control and dictate on issues around race, sex, sexuality and other characteristics. Some liberals may argue the first approach is preferable given important freedoms of association or contract – and this essay does not seek to argue against that liberal case. But this paper sets out why the second approach is also broadly liberal and why going beyond both the first *and* second approaches is definitively flawed and illiberal.

This essay concludes by touching on – although not dealing comprehensively with – the 2010 Equality Act, the main existing legal framework for these issues. The Equality Act combines elements of approaches 2 and 3, and even 4, and could therefore be seen as supporting the more progressive and aggressive approaches. To move back to approach 2, simply halting direct discrimination, then the Equality Act itself will need to be substantially revised, since it goes well beyond simply banning direct discrimination.

This approach will not satisfy those who seek to override individual-based liberalism in favour of group identities and progressive state action in order to right perceived injustices. But it will provide a liberal anti-discrimination framework. Progressive ideology, by proposing constant identity-based activism as the only way to combat discrimination, ignores our complex reality and other values and issues that are important in a free society. It fails to help those who are genuinely disadvantaged.

To achieve a liberal anti-discrimination approach would require revision and reappraisal of our existing legal and philosophical framework, and a great deal more work than this essay alone can achieve. But grasping the core arguments set out in this essay and why we are currently in the wrong place is key if such a liberal anti-discrimination approach is to succeed.

1. The laissez-faire approach

The first and most hands-off approach to discrimination was applied prior to 1965. Broadly, private businesses in Britain were free to discriminate in the provision of goods and services and recruitment practices on whatever grounds they pleased. However, unlike the United States, mainland Britain had no history of racial segregation promoted either by the state or any mainstream ideology. In part, tensions were perhaps low, as prior to the 1950s, there were probably never more than 100,000 non-white residents in the UK, largely concentrated in London, Liverpool and a few other ports (Daniel 1968: 9). But with the rapid increase in immigration from non-white colonies and former colonies such as India, Pakistan and the West Indies, tensions rose.

Amongst the first to press for state intervention to prevent discrimination in the provision of goods, services, employment and housing was the radical Labour MP Fenner Brockway. In June 1956, Brockway began what would be the first of eight attempts in parliament to '*make illegal discrimination to the detriment of any person on the grounds of colour, race and religion in the United Kingdom*'. All eight bills were rejected by parliament.

Overwhelmingly, opponents of a statutory ban on racial discrimination were eager to make it clear that they opposed the discriminatory practices Brockwell sought to ban. But they typically argued it was better to treat the root cause of discrimination through education and persuasion, not the coercive power of the law. Conservative MP Bernard Braine made this argument when making the case against one of Brockwell's Bill in the Commons (Hansard 1957):

> *discrimination is contrary not merely to the spirit of our people but to the Christian religion... I oppose the Bill, therefore, not because I am in favour of any form of racial discrimination, but because the Bill is the wrong way to set about tackling the problem... Where racial prejudice does exist—and unhappily it does exist in our midst—it calls for education, sympathy and knowledge, but it certainly does not call for legislation.*

In the US, where at that time calls for legislative action to prevent racial discrimination were more advanced, Milton Friedman supplied a critique of government intervention in his 1962 book, *Capitalism and Freedom*. In it, he argued that while he found discrimination against African Americans in the labour market morally repellent, the government did not have a right to make such interventions in a business's affairs. Friedman (1962: 109-110) further argued that in a market, competition would ultimately marginalise the business that prioritised prejudice over profit:

> *A businessman or an entrepreneur who expresses preferences in his business activities that are not related to productive efficiency is at a disadvantage compared to other individuals who do not. Such an individual is in effect imposing higher costs on himself than are other individuals who do not have such preferences. Hence, in a free market, they will tend to drive him out.*

While there was a general 'laissez-faire' attitude, in the famous case of *Constantine v Imperial Hotels Ltd* [1944], a judge awarded limited damages based on direct discrimination that led to an individual being treated unfairly. This case centred on a famous cricketer (Learie Constantine), who was refused a pre-booked stay in a hotel, with the staff in addition treating Constantine rudely (including use of racial epithets), in part because of American guests (used to segregated hotels) in the hotel.

The sum awarded was five guineas, around £200 in today's money, since Constantine had been able to find another hotel and so could not show major damages (and he had sued under tort law that requires evidence of damage) – this £200 was simply down to the hurt caused by the act of discrimination.[1] The judgment also did not set out that a hotel had to treat individual guests equally, but only that in this case the hotel had behaved badly, and Learie Constantine deserved limited damages given that. This case did make it clear that people who were racially discriminated against could sue and win under certain circumstances. In addition to the precedent from this case, it was unlawful for common carriers to refuse transportation on grounds of race as part of their general inability to refuse to take a paying passenger (Hepple 1966: 306-314). But there were no general legal prohibitions against direct racial discrimination.

Two events later shifted the debate much more strongly towards comprehensive legislation: the Bristol bus boycott and the election of a Labour government in 1964. The Bristol bus boycott, also known as the Bristol bus strike, was a civil rights protest that occurred in Bristol, in 1963. The boycott was organised by the West Indian Development Council and was sparked by the Bristol Omnibus Company's refusal to hire black or Asian drivers or conductors. The boycott lasted for four months, from August to December 1963, and ultimately ended in success, with the company reversing its policy.

The Bristol Omnibus Company was out of step with much of the rest of Britain. It was noted at the time of the boycott that non-white bus conductors and drivers were already a common sight in London, Birmingham and Bath. However, the boycott, along with awareness of the growing civil rights movement in America,

1 5 guineas were £5.25, which, using the Bank of England's online inflation calculator, is currently worth roughly £200 in today's money.

would play a role in placing pressure on Labour – who would go on to win the 1964 election – to commit to legislating against direct racial discrimination in their 1964 manifesto (Dresser 1986: 56). This meant an end to this first laissez-faire approach.

2. The ‘stopping direct discrimination’ approach

The 1965 Race Relations Act was the first statute in British history to deal with the question of discrimination committed by private bodies. The Act banned discrimination on racial grounds in ‘places of public resort’ such as restaurants, pubs, theatres and hotels. The then Home Secretary, Frank Soskice, emphasised that the bill was designed to prevent the sorts of disorder that had occurred in both Notting Hill and Nottingham in 1958 (Hansard 1965),

> *Basically, the Bill is concerned with public order. Overt acts of discrimination in public places, intensely wounding to the feelings of those against whom these acts are practised, perhaps in the presence of many onlookers, breed the ill will which, as the accumulative result of several such actions over a period, may disturb the peace.*

There were significant limits to the scope of the Act. Housing and employment, two areas of major contention, were not included, and it remained lawful for shopkeepers to refuse service on explicitly racist grounds (though there is no evidence that this was a widespread occurrence). However, the Act did establish the Race Relations Board with a remit to investigate cases of racial discrimination and report on the state of race relations in Britain. This would be the first in a series of organisations set up and funded by the government that would play a significant role in lobbying for the expansion of their powers and the strengthening of anti-discrimination law.

Within a year of being established, the Race Relations Board had commissioned the think tank Political and Economic Planning (PEP) to write a report on the discrimination faced by migrants and minorities in the areas excluded by the 1965 Act. The PEP report was published in April 1967 under the heading *Racial Discrimination in Britain,* and it found that in areas unaffected by the 1965 Act, such as employment, housing and the provision of insurance, there remained significant discrimination on both grounds of race and national origin. For example, in the private rental market, the researchers found that West Indians were only one-third as likely to receive a positive response as white Britons (Daniel 1968: 13).

In employment the situation was even more stark. As an experiment the researchers sent three actors – a white English, a Hungarian immigrant and a non-white immigrant – to apply for jobs at 40 firms accused in surveys of immigrants of discriminatory employment practices. Despite identical qualifications, in 37 out of 40 cases the non-white applicant was told there were no vacancies, compared to 23 out of 40 cases for the Hungarian and just 10 for the white Englishman (Daniel 1968: 76-77).

PEP's Report helped to push the Wilson government to pass a more robust law. The new Race Relations Act extended the ban on racial discrimination to virtually all areas of economic life – including the crucial areas of housing and employment, setting out, for example, that, '*It shall be unlawful for an employer or any person concerned with the employment of others to discriminate against any other person.*'

Discrimination was defined in the Act (Race Relations Act 1968) in the following way: '*a person discriminates against another if on the ground of colour, race or ethnic or national origins he*

treats that other... less favourably than he treats or would treat other persons.'

This definition is what would now be called direct discrimination; discrimination directly related to an individual being treated differently by another person on account of a specific characteristic, such as their race.

Jim Callaghan, then Home Secretary, made it clear when introducing the 1968 Race Relations Act to the Commons that the government did not believe that legislation on its own could transform human nature or eliminate prejudice overnight (Hansard 1968):

> *Of course, legislation cannot make us love one another. Nor can it change our hearts. One cannot legislate prejudice out of existence, but legislation can ensure that prejudice does not show itself overtly in acts of discrimination which provide a favourable breeding ground for resentment and bitterness.*

The goal here was therefore to limit public expression of discrimination, and to stop individual acts of discrimination from occurring. The hope was that if overt discrimination was no longer allowed, prejudice would diminish over time, and that over time discrimination would fall away, while removing the understandable resentment that overt discrimination would lead to.

Two liberal approaches to discrimination

The approaches under 1 and 2 might broadly be termed liberal. The first is the old-fashioned laissez-faire view that, over time, prejudice will be reduced as people meet others of different races, or, in private business, they lose out through these prejudices. The

second view goes further towards ending direct discrimination in the public sphere. This makes discrimination involving a public act by an individual against another individual illegal. It enforced at least notional equality between private citizens, and attempts to enforce at least a level of toleration between different groups, not least in order to maintain a sufficiently cohesive society and the rule of law.

The first approach is clearly liberal, as it allows for almost no government action. But so is the second. There is a liberal argument that in public spaces all citizens should be treated equally (including public job applications). Equality under the law means that you cannot serve 'the public' or request applications from 'the public', only to then rule out a category of individuals for particular characteristics such as race, ethnicity, sex or even sexuality. This gives all people the right to be treated as equal citizens in public spaces (subject, of course, to having sufficient money to pay, often ignored in the high-flown rhetoric on discrimination – anyone can be discriminated against on economic grounds).

Some may argue that the second approach is not liberal. They would argue that allowing direct discrimination is part of the freedoms of contract and association. This essay notes instead that the idea of equality before the law and the idea of all citizens being equal in the public sphere are also important liberal principles. Given this, both of these approaches could broadly be considered within the liberal tradition, even if they give different weight to different liberal principles.

The second approach could also be considered within the Rawlsian or Dworkinian liberal moral frameworks, which argue that liberalism requires us to imagine how we would shape society if we did not know the circumstances of our birth. Both make a liberal, albeit not libertarian, case for moderate

intervention. If we did not know our circumstances, we would probably agree that we would not want a society that allowed direct discrimination.

The second approach does not seek to legislate for hearts and minds or claim it would stop every single case of discrimination – not because it argues discrimination is good but – because it is felt this could not work. One interpretation would be that it is hoped that over time discrimination will decline, while other factors such as privacy or a lack of government intrusion are important considerations for legislators, which means they do not want to go further. In this sense, the second approach seeks to balance the benefits of reducing prejudice such as racism and sexism and treating individuals equally within the law with other factors a liberal society should value, such as privacy or freedom, and being wary of an overbearing government.

3. The structural approach to racism

This approach shifted fairly swiftly into what might be termed a structural approach to racism, moving beyond the idea of individuals being treated unfairly. The limits of the 1968 Act caused frustration for those pressing for a more radical approach to race relations. This led to the 1976 Race Relations Act.

While part of the 1976 Act was about tidying up the previous acts around direct discrimination, it also fundamentally departed from the previous Race Relations Acts with the introduction of the notion of *indirect* discrimination. This concept of 'indirect discrimination' had been entrenched in American jurisprudence following the Supreme Court's 1971 ruling in *Griggs v Duke Power Co*. This stated that even if an employer had no intent to discriminate, if part of a recruitment process had a 'disparate impact' on the success chances of different racial groups, this could constitute 'indirect' discrimination. 'Indirect discrimination' went beyond an individual deliberately discriminating (or designing a system that discriminated) to any factor that might make it harder for members of that group to compete.

This concept of indirect discrimination was already embedded in the UK by the Equal Pay Act 1970. This required that groups of men and women had to be treated equally when pay scales were being drawn up, as determined by judges. The argument was made successfully that pay scales could indirectly discriminate against women as a group, and therefore legal action to remove this discrimination was necessary. This was the first major

acceptance of indirect discrimination by the UK state. This extended it to matters of race, as well as sex discrimination.

Then Home Secretary Roy Jenkins made this clear while justifying the need for new legislation in the Commons (Hansard 1976),

> *The Bill covers not only deliberate and direct discrimination on racial grounds but also unjustifiable indirect discrimination. A particular practice may look fair in a formal sense, or at least neutral in its original intent, but may be discriminatory in its operation or effect and have no obvious or reasonable justification.*

What is interesting here is that indirect discrimination could be seen partly as an attempt to stop hidden *deliberate* direct discrimination (where barriers were being introduced to deliberately stop particular groups), but also as the idea that discrimination could be present *unconsciously or without intent*. This also came to be known as structural or systemic racism (or sexism or homophobia etc.) where an *individual* was not discriminating because of some variable (e.g. race or sex or sexuality), but the *system* was making it harder for particular individuals within groups to achieve the same results as others.

The Act was also significant in that it allowed 'positive action' to be used for the first time. This followed criticism from various bodies and individuals, such as the progressive legal scholar Bob Hepple, who criticised the 1968 Act for making positive discrimination in favour of ethnic minorities unlawful (Hepple 1969: 252). After 1976, organisations were allowed (not compelled) to offer training schemes to workers of particular ethnic groups if they could provide evidence that these groups were underrepresented. But they were still not permitted to make recruitment or promotion decisions on the basis of race. Roy Jenkins remained opposed to the use of 'reverse

discrimination' to increase the employment prospects of women and ethnic minorities (Sooben 1990). This differed greatly from the US, which adopted extensive 'Affirmative Action' schemes in government from the 1960s, and which were then increasingly imposed on the private sector by requiring businesses to adopt positive discrimination if they wished to secure government contracts (Sooben 1990: 2).

The 1976 Act was thus a major intellectual departure from previous laws. It is not always understood that the concepts of indirect discrimination and positive action to close gaps between different groups entered the UK's political and legal frameworks much earlier than is often thought. This is in part because the 1976 Act was the last major act of parliament to touch on the issue of racial discrimination for some time, as from 1979 on, the Conservative government of Margaret Thatcher was in power. The Conservatives had broadly supported all of the previous Acts, but while restating her party's opposition to racism, Thatcher displayed little interest in the anti-discrimination legislation of the 1960s and 1970s.

Thatcher believed that the colour-blind nature of the market and capitalist competition were the most effective means of ensuring fairness. Additionally, she was suspicious of what she considered to be left-wing attempts to divide citizens by allocating rights to identity groups rather than to individuals (Thatcher 1995: 406):

> *It was part of my credo that individuals were worthy of respect as individuals, not as members of classes or races; the whole purpose of the political and economic system I favoured was to liberate the talents of those individuals for the benefit of society.*

Under Thatcher and her successor, John Major, there was no attempt to repeal or reform the notion of indirect discrimination.

Indeed, in terms of sexual equality, following an EEC court case against the UK (*Commission of the EU v UK, Equal pay for men and women, case 61/81*), the government amended the Equal Pay Act so that it now applied directly to individuals rather than groups of women and men. This change would allow a much more expansive legal set of interventions based on indirect discrimination, where in the coming decades the courts would start to intervene and set the 'market' rate of pay, arguing that this is what the pay would be in the absence of discrimination (The Equal Pay regulations 1983).[2]

The key idea of indirect discrimination was steadily expanded by state bodies over time. Local government in Labour-dominated areas used the provisions of the 1976 Act to target services at minority groups and, in some cases, introduce *de facto* affirmative action (Ashcroft and Bevir 2019: 33). In many state-backed institutions, ideas once part of the radical fringe in the late 1960s and the 1970s went mainstream. Teacher training became increasingly progressive, especially after the Swann Report in 1985. Similarly, social work became more progressive, with the Central Council for Education and Training in Social Work observing society as a network of oppression from the late 1980s onwards (Pierson 1999).

While this creeping expansion of what constituted discrimination continued deep in the machinery of government, pushes by various official bodies in charge of anti-discrimination were largely ignored at a national level. The Commission for Racial Equality, established by the Race Relations Act 1976, published numerous reports calling for greater powers and an expansion

2 See also, *Commission of the EU v UK, Equal pay for men and women*, case 61/81, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0061. The financial difficulties of Birmingham Council in 2023 were related to a series of typical interventions by the courts on what pay 'should' be, in the eyes of judge.

of the scope of the law. For example, the 1981 Scarman Report (which took much of its evidence from the Commission for Racial Equality) recommended positive discrimination as 'a price worth paying' to reduce 'racial disadvantage'. A 1992 report made 31 recommendations, including calling for the extension of anti-discrimination law to cover religious discrimination (Commission for Racial Equality 1992). These were not implemented.

One exception to this stalling of legislation was in the 1986 Public Order Act, which created a crime of inciting racial hatred or behaving in a way that was likely to stir up racial hatred (Public Order Act 1986). Initially designed to just cover clearly extremist rhetoric, this Act would over the years expand to cover individual instances of what could be seen as badly phrased speech and investigate individuals who were merely present, rather than being the speaker (e.g. the police investigated Darren Grimes, a presenter, after David Starkey made comments to him in an interview that saw formal complaints made). The principle of having a high bar around free speech would be steadily eroded under this legislation.

The institutional radicalism of the 1980s and 1990s and expanding the concept of indirect discrimination at a sub-national level laid the intellectual groundwork for the expansion of anti-discrimination law under New Labour. Herman Ouseley, chair and chief executive of the Commission for Racial Equality (CRE) from 1993 to 2000, told the Institute of Race Relations News (Runnymede Trust 2015):

> *During my stint at the CRE, we were not afraid to use the 1976 Act in a very elastic way to support individuals in the tribunals and courts, to challenge employers and public bodies, to undertake formal investigations fearlessly into bodies such as the MoD and generate support to fund public*

> *awareness advertising campaigns focused on the effects of racism.*

The landslide Labour victory in 1997 paved the way for the new, more expansive approach. The introduction of a 1998 report from the Commission for Racial Equality (1998) summarised the more ambitious mood:

> *Britain faces a unique challenge as we approach the next Millennium. We have it in our power as a society to eliminate racial discrimination, to ensure equality of opportunity, to reject prejudice and xenophobia and to embrace tolerance and inclusivity.*

The shift towards ever greater focus on indirect discrimination also gathered strength after the release of the Macpherson Report (1999) on the bungled investigation of the racist murder of Stephen Lawrence, which branded the Metropolitan Police as 'institutionally racist'. This argued that institutions were capable of 'indirect discrimination' against groups, which required fundamental change to how these institutions worked to reverse such discrimination.

The Race Relations (Amendment) Act 2000 extended the existing local authority responsibility to promote equality of opportunity to almost all public bodies, and made chief inspectors of police vicariously liable for discrimination carried out by their subordinates. Jack Straw used the language provided by the Macpherson Report to justify amending the law (Hansard 2000): '*The Bill would not be necessary if there were not institutional racism in a wide variety of public bodies.*'

Over the next decade, as this institutional theory spread, various public bodies were accused not just of institutional racism but

also institutional sexism (The Fawcett Society 2009), institutional homophobia,[3] and institutional Islamophobia.[4]

Between 2000 and 2007, a series of acts extended the number of protected characteristics under British anti-discrimination law from four (race, sex, marital status and disability) to nine, adding religion or belief, sexual orientation, age, pregnancy and maternity, and gender reassignment. At times these were driven domestically, at other times by the EU or other supranational bodies or laws (e.g. on issues relating to gender reassignment, this was driven by ECJ and ECHR case law that had to then be incorporated into UK law).

A final 2010 Equality Act in the last days of the 1997-2010 Labour government was the culmination of the post-1997 push by Labour to transform society. Consolidating all outstanding legislation into a single act, including legislation on both direct and indirect discrimination and all relevant EU laws, made a major change in that it would also bind all levels of government with a new Public Sector Equality Duty. The new Public Sector Equality Duty required public bodies, in their actions and decision making, to have 'due regard' to preventing unlawful discrimination and to foster equality of opportunity between members of all groups with protected characteristics. Harriet Harman, the then minister responsible, argued (Hansard 2008) that,

> *The whole point of the public* [equality] *duty is that it overrides and infuses the approach to everything. We do not have to put in a public sector duty, Bill by Bill, Act by Act, because it is there and it runs through everything that*

3 Hugh Muir, Officers Homophobia hampered murder investigations, *The Guardian*, 15 May 2007 (https://www.theguardian.com/uk/2007/may/15/gayrights.ukcrime)

4 BBC News website, 31 May 2004, UK institutionally Islamophobic (http://news.bbc.co.uk/1/hi/uk/3763049.stm)

> *is done. That is how the public duty works. We do not need to change legislation, as all public authorities will have to have due regard.*

A second major change was that the 2010 Equality Act expanded the definition of positive action to allow organisations to use protected characteristics such as gender, race, and sexuality in employment and promotion decisions when faced with two similarly qualified candidates as a means of increasing representation of an underrepresented group. This was termed 'positive action' and distinguished from positive discrimination as an employer (in theory) could not issue a quota or select less qualified members of an underrepresented group just to boost numbers, although this was a difficult distinction in practice to enforce.[5]

The Equality Act was passed just before the defeat of Labour in the 2010 general election. Theresa May passed the necessary commencement order in September 2010, and it was thus put into law by the incoming Cameron government. Throughout the 2010s, in areas such as stop and search under Cameron's government, in the new requirements passed by Theresa May's government on gender pay gap reporting and much else, governments tended to largely use a systemic or structural approach in their analysis and announcements. In this sense, arguments for systemic and institutional racism became firmly embedded in the government during the period from 1997 until around 2020.

5 See, for example, a discussion of this in Jarrett 2011.

4. Anti-racist activism

By the late 2010s, systemic and institutional racist arguments were now being discarded as insufficient by activists. A new approach based on an extreme version of this structural or systemic view emerged, terming itself anti-racism. This approach was based on constant activism to address the impact of past prejudice and was popularised by a new figurehead, Dr Ibram X. Kendi.

Kendi, a professor of African American History at Boston University, is far from a marginal figure either in the United States or the UK. The cover of the UK edition of his bestselling book, *How to be an Anti-racist*, includes praise found in the *Guardian*, the *Observer* and from Lord Ouseley, the former Chair of the Commission for Racial Equality (1993-2000). It topped the bestseller lists in the wake of the Black Lives Matter movement in 2020.[6] His bestselling book showed how arguments made in a few fringe university departments from the 1970s onwards were now very much at the heart of the debate.

Whereas arguments around systemic and institutional racism were focused on developing the *possibility* of indirect discrimination if gaps between different racial groups existed, anti-racism turned this on its head. Instead, gaps between different racial groups were *in and of themselves* proof of racism, with no further proof required. As Kendi (2019: 20) puts it, '*Anti-*

6 Leah Asmelash, His book is among Amazon's best selling on race, and now he's headed to Boston University to launch an anti-racist institute, CNN, 7 June 2020 (https://edition.cnn.com/2020/06/07/us/ibram-x-kendi-boston-university-trnd/index.html)

racist ideas argue that racist policies are the cause of racial inequities.'

For Kendi the idea that policy might be race-neutral is a fantasy. Every law, procedure or action taken by the government is either racist or anti-racist because it either increases or decreases the gaps between racial groups (which Kendi terms inequity or equity). To quote Kendi (2019: 18) again, '*There is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every community in every nation is producing or sustaining either racial inequity or equity between racial groups.*'

Thus, there is no possibility of a race-neutral law because any law that does not reduce existing inequalities in outcomes between different ethnic groups is, by Kendi's definition, racist because it either extends or perpetuates existing gaps between different groups.

Kendi differed from the approach sometimes displayed by believers in systemic prejudice in that he is not opposed to discrimination per se. Indeed, he makes clear that discrimination can always be justified (and is in fact the duty of any good anti-racist to support) if racial discrimination can reduce inequalities of outcome between different racial groups in the name of 'equity' (Kendi 2019: 19): '*The defining question is whether the discrimination is creating equity or inequity. If discrimination is creating equity, then it is anti-racist. If discrimination is creating inequity, then it is racist…*'

Or put another way, in his own words (Kendi 2019: 20): '*The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.*'

Thus, treating an individual differently and worse because of their skin colour, if, for example, they are white in the USA, is a positive thing to do.

Kendi's is a totalising ideology in which every law, every guideline, every political decision must be examined and judged to determine which of the two categories it falls into: racist or anti-racist. In Kendi's view, anti-racist policies include reparations to African Americans, Affirmative Action, student debt forgiveness, cannabis legalisation and Medicare for All (this last one is 'deeply anti-racist').[7] Racist policies include cutting the top rate of income tax,[8] the use of standardised testing in schools (Kendi 2019: 101), a 'do-nothing' approach to climate change (Kendi 2019: 21), opposing lockdowns[9] and supporting capitalism ('*capitalism is essentially racist; racism is essentially capitalist'* (Kendi 2019: 163)).

Kendi advocates a constitutional amendment in the USA to ban public officials from holding racist ideas (as defined by his version of racism), as well as racial inequality above a certain threshold. To enforce this, he argues for a Department of Anti-racism (DOA), which would be staffed by 'formally trained experts on racism' who would stand above the political system.[10] In this view, nothing – not even democracy – is more important than stopping racism (as defined in his expansive anti-racist definition).

This approach is, of course, the logical endpoint of the arguments for systemic or institutional racism. If the only or primary goal is

7 Owen Jones, Ibram X Kendi on why not being racist is not enough, *The Guardian*, 14 August 2019 (https://tinyurl.com/247yfm39)

8 *New York Times*, Transcript: Ezra Kline interviews Ibram X Kendi, 16 July 2021 (https://www.nytimes.com/2021/07/16/podcasts/transcript-ezra-klein-interviews-ibram-x-kendi.html)

9 Ibram X. Kendi, We're still living and dying in the slaveholders' republic, The Atlantic, May 4 2020 (https://www.theatlantic.com/ideas/archive/2020/05/what-freedom-means-trump/611083/)

10 Ibram X. Kendi, Pass an anti-racist constitutional amendment, Politico website, 26 September 2019 (https://tinyurl.com/4nnjrsm3)

to end different outcomes between different racial groups, and indirect discrimination can occur without anyone doing this overtly or deliberately, then Kendi is being perfectly rational. Kendi dismisses those who argue for a racially blind system, which he argues merely perpetuates existing or past injustices (though this assumes racial groups can now be held accountable for past historic injustices, which some might term racist). In this sense, this idea of constant anti-racist activism is the natural endpoint of a belief in widespread systemic, institutional or structural racism.

The progressive approaches to discrimination

These final two versions of anti-discrimination are best thought of not as liberal but instead as *progressive*. Instead of discrimination consisting of individual acts based on individual actors, different outcomes for groups are the products of racism or other prejudices and require action where individuals are treated *not as individuals but as members of particular groups*. Progressives seek to justify action on the grounds of marginalised groups rather than seeking to support individuals.

The link between the third and fourth approaches outlined is clear. The third assumes that individuals should *potentially* be treated differently because of their race or ethnicity where there are gaps or differences in group outcomes, so as to help create more equal outcomes between groups. The fourth assumes that individuals *must* be treated differently because of their race or ethnicity where racial gaps in outcomes exist, so as to create absolutely equal outcomes between groups. Both draw on the same intellectual root.

In both of these versions, *not* treating individuals differently due to their race or ethnicity is either potentially racist or, in Kendi's anti-racist formulation, actively racist. Thus, direct discrimination can actually be a positive in this formulation if applied to the right individuals (i.e. applied to individuals who belong to groups with better overall outcomes). White people are usually singled out, though other ethnic minorities who have above average outcomes (e.g. in the USA, Asian minorities) can also be directly discriminated against as individuals in order to achieve 'equity' for groups.

The problems with the progressive approaches

The benefits of tackling racism and other embedded prejudices are obvious. But there are serious and fundamental objections to the progressive approaches above. While tackling racism and other forms of prejudice is a positive for liberals, they are not the only worthwhile objectives in a society or economy. Nor should we accept that discrimination against *individuals* in order to achieve better outcomes between *groups* is acceptable. This fundamentally goes against the liberal notion of individual freedom and responsibility. There are many issues with these progressive approaches, some of the more serious of which are discussed below.

1. Sacrificing other (liberal) principles. In the world of progressive anti-racism, no other principle can stand in the way of eradicating prejudice. Privacy, for example, for anti-racists, is a barrier that needs to be torn down in order to expose racism and other forms of prejudice. This was the justification for recent Scottish hate legislation that criminalised speech in a private home. The idea that even debate on these topics should be allowed is, in the final analysis, objectionable to many progressives (hence

the Reni Eddo-Lodge essay and later book (2018) entitled *Why I am no longer talking to white people about race*), since this is simply a debate about legitimising racism and therefore serves no purpose other than to oppress black and other minority ethnic groups.

The kind of society this would create for a liberal, however, is not a healthy society, but one in which people of different races, sexes, and sexualities are nervous about engaging with each other in case a particularly fragile (some might argue passive-aggressive) member of a minority group takes offence, or even a majority member takes offence on others' behalf. Moreover, it is one where unpleasant victimisation and bullying under the guise of 'educating' is likely to arise. It is no surprise that the rise of so-called 'cancel culture' has gone hand in hand with this progressive thinking, where a single mistake, even if made years beforehand, leads to calls for the economic ostracisation and effective impoverishment of a particular individual.

The obsession with group differences also leads to every policy being seen through the prism of race, or sex, or gender. It leads, for example, to SAT examinations being attacked as racist in the USA by the National Education Association, the main union in education, because there are differences in group average scores between different racial groups.[11]

The idea that the *only* objective of society is to end all forms of prejudice is totalitarian. No other principle can stand in the way of those who declare themselves in favour of ending prejudice. This echoes past totalitarian ideologies where legitimate points are warped into extreme ideologies. The cruelty of the

11 Rosales John and Walker Tim, The Racist beginnings of Standardised Testing, neaToday, 20 March 2021 (https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing)

pre-welfare capitalist system gave birth to communism, while legitimate points around the nation state and the need for social belonging gave birth to fascism. Ultimately, no one single principle can be the ideal against which every single policy is judged. If it is, this will invariably remove the possibility of a pluralistic, tolerant society.

2. Impossibility of top-down implementation of 'fairness': Liberals should not concede on the argument that racism consists of different outcomes between different groups rather than treating someone differently because of their race (similar arguments can be made around sexism and so on). The reason racism is so abhorrent to liberals, and many others, is because it is *unfair*. It offends our moral sense to treat people differently if they behave in the same way, and this feeling has helped reduce prejudice over time.

But in the new definition, treating people differently is not racism if done to individuals from certain groups. This is unfair and unjust, not least because we cannot be sure what weight to give to the different identities that someone has. Nor is it fair to ignore how people behave as individuals.

Who determines the current and past cost of prejudice to a gay man versus a lesbian woman? What about a black man or woman who is a very high earner versus a working-class white person who lives in a deprived town in the north of England? How disadvantaged should we judge a black UK-born individual with a poor education versus an African migrant with a PhD? How should more hidden disadvantages (e.g. coming from a single-parent family, or ageism) be accounted for? The more we think about the multiple ways someone can be disadvantaged the more difficult this becomes.

In addition, in at least race, ethnicity and sexuality, there are various spectrums, which make this even more complicated. For example, how should a heterosexual versus a bisexual versus a heteroflexible (someone predominantly but not exclusively heterosexual) be treated? How should a mixed-race individual be treated – are we going to start trying to work out the 'purity' of racial disadvantage and score people accordingly? What about white people from poorer ethnic groups or less advantaged groups (e.g. an unskilled Eastern European migrant in a deprived town with no wealth or family ties in the UK)?

Activist groups continue to lobby for ever longer lists of protected characteristics, with some calling for including obesity, accent, and socioeconomic class. But given that most people at this point will have at least one protected characteristic (if not more), how can we weigh any particular factor against another? This is why Kendi's call for a government-led activist army to judge everyone's claims becomes necessary. But the idea that we can simply outsource evaluating the moral worth of one human being versus another to government-appointed activist experts is repellent to liberal thinking.

3. The risk of minority scapegoating and anti-white racism. This issue of fairness also comes into play when we consider how this actually works in practice for groups. It sometimes seems to anti-racists that if whites are the worst group in terms of outcomes, i.e. if white people are at the bottom, this is acceptable, but other groups should be supported to move ahead of white people as a group. For example, entry rates into university among state school pupils are now the lowest amongst whites by a significant margin (UK Government 2022a). No anti-racist activists seem to suggest we should simply require white people to be admitted to university at the expense of the minorities that do well. Yet the idea that white people are at the bottom of society is fine, but other groups should be helped to move up is simply anti-white

racism, as is the idea that if white people are at the bottom of any particular metric, the government should relax, but no other group is allowed to 'do worse' than whites.

The obverse of this is that where activists are consistent, rather than engaging in anti-white racism, there is often an element of scapegoating of some minorities, an equally unpleasant outcome. For example, the left's obsession with race and racial outcomes has often led to anti-Semitism, since in many countries Jewish households are more educated and affluent than others. But this anti-Semitism should not be seen as some strange detour. Anti-racist thinking is logically either anti-white, in that white people are seen as being an acceptable group to fall to the bottom, or else encompasses minority scapegoating (the thought that minority group X, which is doing 'too well', needs to be punished and its outcomes worsened). This is the inherent and obvious danger of obsessing about group outcomes.

4. Ignoring complexity and culture: The final main objection revolves around complexity and culture. As is set out above, this area is complex. How do we measure these issues in order to intervene? For example, why not have quotas for those from single-parent households as much as race, given evidence that coming from single-parent households tends on average to disadvantage individuals? In addition, the idea that gaps are due to racism ignores the historical context of different groups. Today, British Indians are more than twice as likely as white Britons to have a weekly household income of over £2,000, while white Britons are slightly below the national average in terms of household income (UK Government 2022b). Yet, in part, this is because British Indian migrants tend to be higher-income earners or professionals (or successful entrepreneurs such as Ugandan Asians). Should we therefore penalise Indians because their 'group' is successful? But what about different types of Indian communities – where different religions or ethnicities

within the Indian community have different outcomes? How far should we break this down?

Data obscures as much as it illuminates. For example, if some minority groups in the 1960s and 1970s were more likely to be unskilled labourers (for example, those who became bus conductors in Bristol), we'd expect their children to do as well as the average children of other unskilled labourers, not society as a whole. Kendi argues that cultural reasons for different outcomes are simply racism in another guise, but this seems false. But if we are to see all group outcomes as requiring equalisation, any difference between groups (e.g. between those who have affluent parents, stable families, who live in different parts of the country and so on) is illegitimate, and should be tackled with the same vigour as differences in outcomes between racial groups. But this is not what anti-racists argue – something that seems at best inconsistent.

Often, there seems to be a self-serving element in much activism, where privileged members of a collectively disadvantaged group push their own self-interest while claiming this benefits the less disadvantaged members of their group. For example, giving special privileges to the child of a stable, middle-class professional household because they come from a particular ethnicity does not help those from the same ethnicity who are *genuinely* disadvantaged. It is not clear that a quota for lawyers that gives a good job to a privately educated black person who comes from a stable family background with two parents, rather than a state-school white person from a deprived area. It benefits the privately educated black individual, but this is hardly fair. Even if you accept structural or systemic racism is a serious problem, the state-educated white person may have had a more difficult life when considered overall than the privately educated black person (e.g. if the white individual came from a difficult area or had a troubled family life).

In addition to all this, the structural or systemic approach ignores the fact that, over time, change can come about through complex individual actions and agency. The progressive approaches essentially deny change can arise in any way other than a top-down approach. Yet the actions of individuals from both the supposed 'oppressor' and 'oppressed' groups can drive change. While there are still issues for many groups, the idea that in the past 60 or 70 years the position of ethnic minorities, LGBT people, or women in the UK, has not improved substantially is clearly false. And much of this change was not top-down, but bottom-up.

The 2010 Equality Act – a case study in the legal framework

The Equality Act 2010 is thus an interesting case study and piece of legislation, as it consolidated previous legislation. The law as it stands mixes all parts of strands 2-4 above within it, particularly direct discrimination and indirect or systemic/structural discrimination, but even aspects of what is now termed anti-racist activism.

The Equality Act 2010 stops direct discrimination, which is covered by various sections where direct discrimination is banned on a very explicit basis (that you cannot treat someone differently because of specific characteristics). The language on direct discrimination is very clear, as for example in Part 2, Chapter 2, Section 13 (1), '*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*'

But other parts of the Act are more similar to progressive approaches 3 and 4. For example, on indirect discrimination, it states in Part 2, Chapter 2, Section 19, that anything that puts

those from eight groups at a disadvantage due to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation, and which is not '*a proportionate means of achieving a legitimate aim*,' is outlawed.

Another example of a more progressive aspect of the law would be Section 158, which deals with 'positive discrimination', which allows for 'proportionate' action to reduce disadvantage for particular groups – clearly borderline between approaches 3 and 4. In addition, the structural approach 3 is applied by the Act, as it is clear that different pay for different work that is judged to be '*of equal value*' by the courts will see market pay rates overturned.

Approaches 3 and 4 are also embodied by the Public Sector Equality Duty, which requires that public sector bodies or any private sector body engaged in a public function must '*have due regard to the need to ... advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it'*. Within this, the Duty also requires a corporate body to '*encourage persons who share a relevant protected characteristic to participate in public life or any other activity in which participation by such persons is disproportionately low*.'[12]

This is actually a weak version of Kendi's arguments that all policies are either racist or anti-racist, whether they increase or reduce racial inequalities. However, unlike Kendi's argument where this is a core goal, it states that only 'due regard' is necessary, making it a weak version of argument 4 rather than his full-on version.

12 Equality Act 2010, Part 11, Chapter 1, Paragraph 149 (https://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf)

Of course, in the current environment, abolition of the Equality Act might result in even more aggressive positive discrimination or similar 'anti-racist' approaches by progressives that treat some people worse due to the colour of their skin, or sex etc. However, a revision of the Equality Act that removes the sections on positive and indirect discrimination but keeps the elements around direct discrimination would not allow this. What would be desirable from a liberal perspective is a slimmed-down Equality Act that would remove the ability to treat people differently due to the characteristics above, explicitly focused on stopping direct discrimination. It should be made clear that the only version of 'indirect discrimination' that is illegal is when it is clearly hidden direct discrimination.

This would enshrine equality in public spaces for different groups while jettisoning the progressive approaches the Equality Act sometimes applies. It would set out a clear rationale for how to approach these difficult issues.

This would allow people and companies to seek out talent from different areas, e.g. those who might not otherwise apply due to background and life factors. This would encourage a genuinely individual-centred approach – it would allow companies to take on those who had excelled in a difficult school or set up a company despite lacking a formal education – rather than pre-judging people on the basis of skin, sex, sexuality, class etc and setting targets or quotas and so on. This would actually help those who are genuinely disadvantaged within particular ethnic groups, rather than more privileged members within them. It would allow for a genuinely anti-discrimination approach without dismantling key principles such as privacy, meritocracy and fairness.

Conclusion

The last sixty years have been characterised by a series of marked shifts in the state's approach to discrimination on racial, gender and other grounds, from a laissez-faire position, which eschewed all government intervention, to the 1965 and 1968 Race Relations Acts, which focused on individual direct discrimination, to an increasing legislative focus on indirect discrimination, whereby treating people equally could be seen as discriminatory, to – almost inevitably – the view that gaps in outcomes are the result of discrimination and so should automatically lead to government action.

For some on the free market right, the current situation is dissatisfactory and they argue – on principle – for a complete abolition of anti-discrimination legislation, returning to Milton Friedman's position from his 1962 essay. But it is hard to see this being acceptable in the modern age. In addition, as this essay sets out, many liberals would argue that direct discrimination in the public sphere is unacceptable, and ending it is simply enforcing equality before the law, a key liberal tenet. Further, abolishing anti-discrimination legislation totally would allow companies and organisations to introduce quotas and other discriminatory measures along the lines Kendi and others propose. This will ratchet up tensions and ideological strife. This would be particularly likely in the public and charity sectors, where the profit motive cannot act as a break on ideological excess.

Thus, we should return to the concept of discrimination being about treating individuals unfairly, and reset our conceptual and legal framework in line with this. The Equality Act should be fundamentally revised in line with this approach. This would

move us to an approach that can be sustained and defended fairly easily on liberal grounds – that we should focus on individuals rather than groups. This should also not rule out measures to support those who are disadvantaged, but always done as individuals (e.g. trying to widen the pool of talent in a job hunt rather than setting targets and quotas for specific groups).

The government should thus revise the existing legislation to move us back to the liberal anti-discrimination approach originally proposed. Without a clear set of liberal principles to rally around, it is likely that the next few years will see increasing levels of illiberal and aggressive progressive activism, activism that largely benefits the most privileged within minority groups rather than the genuinely disadvantaged. To achieve this, we need a clear conceptual understanding that guides us towards a genuinely liberal anti-discrimination agenda, which this essay hopefully starts to set out.

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