"*Race and UK Public Law*"

Introduction to Themed Analysis Section [2048 words]

Dr Vidya Kumar[1]

Our collection seeks to address a persistent blind-spot in UK constitutional theory and scholarship by offering a diverse series of contributions underscoring the importance and relevance of race, racialisation and racism in UK constitutional law and theory. The majority of scholars included in this collection are non-White racialised scholars based in the UK working in the field or in adjacent fields of UK public law. We have noticed that when conversations about race or racism do occur in UK constitutional law scholarship or discourse, it is often only in a comparative constitutional way - where race and racism is relevant or important "somewhere else" - i.e. in the United States, Australia, Canada, and Israel. The sidelining of the discussion and consideration of race and racial oppression in the UK generally, and in public law in particular, is a part of a widespread and problematic tendency of "facile postracism", a term coined by Paul Warmington to describe *inter alia* the dual process of disavowal and rearticulation of racism.[2] This involves the seeing and unseeing of racism and is embodied in the idea that notwithstanding the evidence of proven and entrenched racial inequalities in Britian, race is no longer a useful or important lens to understand relations of domination in the UK (rather, it is merely a function of a few "bad apples").[3]

By focusing on race and racism, including its presence, absence, neglect or permanence within the field of UK public law, this Themed Analysis Section challenges the facile postracialist idea that "racism is essentially external to our social structures and institutions and mainly a product of prejudice of malevolent or ignorant individuals."[4] Our two starting points are *first* that race, racialisation and systemic/institutional racism is something which affects and disadvantages non-White racialised people[5] - especially

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[1] I would like to thank Tom Frost, Satvinder Juss, Mazen Mazri, Sujith Xavier, Tanzil Chowdhury, Tshepo Madlongozi, Gina Heathcote, Vanja Hamzic, Eddie Bruce-Jones and Farnush Ghadery for their encouragement and support in the establishment of the *Race and UK Constitution Association* (@RUKCA_ and @raceukconstitution.bky.social) which is the catalyst for this Themed Series. I also want to thank each of my co-contributors of this Special Themed Analysis for their contributions (Shreya Atrey, Tom Frost & Suhraiya Jivraj) as well as the helpful reviewers and the editors of this Journal for accepting our proposal and for their careful feedback and comments. A companion set of blogs to go along with these Themed contributions will be announced by *Race & the UK Constitution Association* in 2025. This Themed Section has been organised by the *Race and the UK Constitution Association* (*RUKCA*), co-founded by Dr Vidya Kumar (SOAS) and Dr Tanzil Choudhury (QMUL), and some of the contributions below have been raised and presented at the inaugural conference of *RUKCA* at School of Law, Gender and Media, SOAS, University of London in April 2022.

[2] Paul Warmington, *Permanent Racism: Race, Class and the Myth of Postracial Britian* (Bristol, UK: Policy Press, 2024).

[3] Warmington, *Permanent Racism* at 7.

[4] Warmington, *Permanent Racism* at 6.

[5] Although not all racism is colour-coded (i.e. racism against gypsy, Roma and travellers and anti-semitism), this Series highlights how colour-coded racism affecting non-White people is something neglected in the field of UK public law. Moreover, it notes that processes of racialisation affect both *when*

Black people - in the UK.[6] Second, our focus on concept of race, the legal process(es) of racialisation, and the operation of a (global) system of racism in this collection does not mean these should be viewed separately from the operation of wider intertwined "relations of domination"[7] that include capitalism, patriarchy, ableism, heteronormativity, islamophobia, anti-semitism, homo-/trans-phobia, caste-ism and other global social, political and economic oppressions. For example, focusing on these entwined systems of oppression can help explain why Britain's' communities of colour have been discursively erased from the social class matrix (they are *contrasted with* working class communities), from being gendered (they are *contrasted with* women), and/or from being British (they are *contrasted with* citizens).[8] Accordingly, understanding these broader connections can help us unpack legal reasoning and public laws and policies which rely upon or replicate the disaggregation of these interlocking power relations and this in turn can help us to understand the role *and capacity* of law and legal systems to deliver racial justice.[9]

The question which is rarely asked or answered in the field of UK public law is: *What role does constitutional governance - defined broadly as public law theory/scholarship, teaching, adjudication and institutions - play in the creation, continuation or exacerbation of racism in the UK?* We seek to answer this question in a way which moves beyond the limited silo of conventional anti-discrimination law.[10] Material understandings of how racism affects social, political and economic inequality are rarely explicitly or directly discussed by UK public lawyers, in part because the field is still predominantly White (and male). Although the male-dominated aspect of the field is increasing being challenged, the "race ceiling" is still not seen as an (equally) important barrier to dismantle, with UK constitutional law conferences, panels and keynotes still being almost exclusively White.

That said, the lack of racial diversity is, as we know, only *one* problem with the field, although (like calls for more female representation on panels etc..) it may be the easiest to remedy in liberal constitutional orders. More difficult is moving the conversation about

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and how race becomes relevant in material social relations and *who gets "racialised" in adverse ways and who does not*. Law – including legislation, legal discourse and debates, and legal reasoning - often plays a decisive role in these processes.

[6] Al Jazeera, UN committee slams UK over racism, incitement affecting minorities: Committee responsible for combatting discrimination calls on government to address hate speech and institutional racism (23 August 2024): https://www.aljazeera.com/news/2024/8/23/un-committee-slams-uk-over-racism-incitement-affecting-minorities; Equality and Human Rights Commission, 'The Submission of the EHRC to the UN Committee on the Elimination of Racial Discrimination (July 2024)' (7 August 2024): https://www.equalityhumanrights.com/human-rights/submission-united-nations-committee-elimination-all-forms-racial-discrimination-july; House of Commons and House of Lords Joint Committee on Human Rights (JCHR), 'Black People, Racism and Human Rights Eleventh Report of Session 2019–21' (11 May 2020): https://committees.parliament.uk/publications/4646/documents/46926/default/ .

[7] Susan Marks, *The Riddles of All Constitutions* (Oxford: OUP, 2000).

[8] Warmington, *Permanent Racism* at 6.

[9] Shreya Atrey, *Intersectional Discrimination* (Oxford: OUP, 2019).

[10] Shreya Atrey, 'Structural Racism and Race Discrimination' (2021) 74 *Current Legal Problems* 1.

obtaining racial justice *beyond* representational measures to substantive, material, systemic and structural solutions that are more likely to produce *collective* racial justice outcomes in contrast to individual advancement. Can public law scholars, students and practitioners provide (*or seriously consider*) potential solutions to racial injustice in the UK which move beyond the plethora of failed "process-oriented" or "equality of opportunity" approaches to tackle deeply-embedded and intractable, if not permanent racism in the UK? In order to do so, studies examining the role of race and racism in the field of public law are *essential*. [11]

This intervention of ours is meant to challenge and (partly) correct the "colour-blind" approach of the field and to encourage all public law scholars to take race and racism seriously in their analysis of the field. Our submission, in different ways, examines how systemic/institutional racism is produced in or facilitated by public law reasoning, pedagogy, theory, scholarship, case law and institutions in the UK. Specifically, we examine how and whether racial (in)justice is treated in public law introductory texts and debates (Vidya Kumar); in the common law (Shreya Atrey); in the public law concept of British citizenship (Tom Frost); and last, in UK legal curricula and pedagogy (Suhraiya Jivraj).

Kumar's piece offers three ways students and scholars of public law can be attentive to race, racialisation and systemic/institutional racism in the United Kingdom. First, by examining public law's past(s), they can consider and reflect upon the disappearance of race from public law discussions and scholarship. Second, by examining public law's present, students and scholars can note and scrutinise the putative irrelevance of race in current and persistent debates preoccupying the field of public law in the UK. Last, they can interrogate public law's future(s) by exploring the reasons for racism's persistence and ostensible permanence in the UK and the role of public law in light of this.

Atrey's piece explores the extent of protection of racial equality at common law. It locates the references to racial equality which are subsumed within other grounds of judicial review. It shows that while statutory law in the UK prohibits racial discrimination, there is no such equivalent protection of racial equality at common law. Thus, in addition to the now-known absence of a broader constitutional principle of equality in the UK, the paper confirms the absence of anything like a commitment to racial equality at common law. This absence reveals a missed opportunity for engaging common law purposefully where statutory law may be ineffective or inapplicable.

Frost's article considers the racialised underpinning of British citizenship, using citizenship deprivation powers as a primary focus. He shows how racial difference lay at

[11] Aside from the contributions in the wonderful *Diverse Voices of Public Law*, there has been little engagement with race, racism, colonialism and empire in UK public law textbooks. Se-Shauna Wheatle and Elizabeth O'Loughlin (eds), *Diverse Voices in Public Law* (Bristol: Bristol University Press, 2023).

the heart of the British Empire, and at the heart of modern citizenship law. His piece examines how different classes of British subjects have experienced and still experience different standards of law and justice. It argues British citizenship remains ill-defined, with Parliament ultimately deciding on who a British citizen is and what rights and duties this status has. It offers a view of the racialisation of modern citizenship laws that goes beyond the unequal and racialised use of the powers of citizenship deprivation, to interrogate the entire structure of subjecthood and citizenship and its history as racialised.

Finally, Jivraj's piece outlines and contextualises the legal requirements and materiality of why we as public lawyers need to address pedagogical inequalities in general, as well as more specifically within law. She draws on her empirical work and experience of being the academic lead and mentor for a student initiative that became a student-staff collaborative project, which produced an accessible resource entitled *Towards Anti-Racist Legal Pedagogy*. She discusses a few examples from the resource and a context specific artefact of a guided audio walk put together by a former student on the subject of "Decolonising Locke" revolving around the physical Locke building on campus. Given Locke's significance to public law scholarship, she reflects on this artefact as an example of how aspects of public law can be brought to life in the locality in which students study and live. She offers final remarks on our pedagogical duty to play our part in addressing the ways in which racialisation, colonialism and its legacies remains largely invisibilised within the curriculum.

The call for UK academics and intellectuals more broadly to take race seriously has come before,[12] yet it persists today, and is currently being made in other social science disciplines in addition to law.[13] Our contributions here not meant to tackle *all* or even the main questions related to the broad theme of "*Race and UK Public Law,*" but to offer both an introduction to, and a taster of, diverse public law issues and approaches which engage with and foreground race, racialisation and racism. We also hope (and strongly believe) our public law undergraduate students in the UK, many of whom are of colour (and British) will find these contributions helpful as an aperture through which the relationship between race and UK public law can be seen.

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[12] Paul Gilroy, *'There Ain't No Black in the Union Jack': The Cultural Politics of Race and Nation* (London: Routledge, 2002).

[13] For similar calls in politics and international relations see: Sadiya Akram, 'Dear British politics – where is the race and racism?' (18 October 2024): https://blogs.lse.ac.uk/politicsandpolicy/dear-british-politics-where-is-the-race-and-racism/ ("Race plays a central role in British political life, as recent events like the 2024 riots, the Grenfell tragedy, the Windrush scandal, and policy discussions around immigration reveal. Despite that, the discipline of British politics tends to ignore race as a significant factor of analysis.") and Amitav Acharya, 'Race and Racism in the Founding of the Modern World Order' (2022) 98 *International Affairs* 23.

Public Law Special Series (2024)

Race and the UK Constitution: *On the Disappearance, Irrelevance and Permanence of Race and Racism in UK Public Law*

Dr Vidya Kumar[14]

"...in human history, race is everything."[15]

Introduction

How can one study public law in a way which is attentive to race, racialisation and systemic/institutional racism in the United Kingdom? My contribution to this Special Series of Public Law is addressed to students of public law in the United Kingdom, past and present. I say "past and present" as it is my view that public law scholars, academics and practitioners are, in an important sense, still students of public law. This is because no one really finishes learning about the different ways public law can (and should) be understood, taught and practiced. As a scholar and teacher of public law with over a decade of experience, I consider myself a perennial student of public law as well, one who is constantly developing (and changing) her ideas about public law, its aims and objectives, its foundations, its strengths and weaknesses, its relationship to history, politics, theory and international law, and perhaps most importantly, its operation in public life in the United Kingdom. In this piece, addressed primarily to students of public law, I want to share what I have learned as a non-White scholar with an interest in not only how public law can achieve racial justice, but also with an understanding of (and

[14] I would like to thank Nicole Stybnarova, Nicolas Barber, and Tarun Khaitan for inviting me to deliver a paper discussing some of these themes on a plenary panel at the Bonavero Institute of Human Rights, University of Oxford, UK for the "Public Law as Infrastructure of Imperial Governance" Conference in March 2023 (https://www.law.ox.ac.uk/content/event/public-law-infrastructure-imperial-governance); I would also like to thank Tom Frost, Satvinder Juss, Mazen Mazri, Sujith Xavier, Tanzil Chowdhury, Tshepo Madlongozi, Gina Heathcote, Eddie Bruce-Jones and Farnush Ghadery for their encouragement and support in the establishment of the *Race and UK Constitution Association* (@RUKCA_ and @raceukconstitution.bky.social) which is the catalyst for this Special Series; finally I want to thank each of the co-authors of this Special Series for their contributions (Shreya Atrey, Tom Frost & Suhraiya Jivraj) as well as the reviewers and editors of this Journal for their careful feedback and comments. A companion set of blogs to go along with this Series will be announced by *Race & the UK Constitution Association* in late 2025. All errors and omissions remain my own.

[15] John Knox, *The Races of Man: A Fragment* (London: Henry Renshaw, 1850) at 2.

desire to unpack) how public law re/produces racial injustice along with other intertwined forms of injustice (i.e. class, gender, sexuality, disability, nationality etc...).

This short piece is intended only as a taster of a longer piece I am developing on how race, racialisation and racism is addressed in introductory or general public law texts and textbooks in the United Kingdom.[16] In this piece, *I will argue that there are three ways students and scholars of public law can be attentive to race, racialisation and systemic/institutional racism in the United Kingdom*. *First*, they can consider and reflect upon the disappearance of race from public law discussions and scholarship. This will entail paying attention to the colonial and imperial history of the British constitution and offers an answer to the question I posed at the beginning of this piece[17] that interrogates UK public law's past(s). *Second*, they can note and scrutinise the putative irrelevance of race in current and persistent debates with which the field of public law in the UK is preoccupied. This constitutes an answer which interrogates public law's present, a present I argue characterised in part by "facile postracialism". [18] *Finally*, they can note the intractability of racism in the UK, that is to say, they can try to understand the reasons for its permanence in the field of public law, the ways in which racial injustice – which is intertwined with other systems of oppression[19] - is sustained by both the operation and conceptualisation(s) of UK public law, and begin a discussion as to how - and whether - this may be overcome. This constitutes an answer which engages with public law's future.

1. Race and UK Public Law's Pasts: On Disappearance of Race

Has the discussion of race, racialisation and racism disappeared from scholarship produced by public law scholars? The short and undeniable answer is yes. As shown below, it is clear that race was indeed discussed and theorised by eminent UK public law

[16] This longer piece is with the author and is being revised for publication.
[17] How can one study of public law in a way which is attentive to race, racialisation and systemic and institutional racism in the United Kingdom?
[18] Paul Warmington, *Permanent Racism: Race Class and the Myth of Postracial Britian* (Bristol, UK: Policy Press, 2024) at 6.
[19] My analysis can be described as feminist, Marxist, decolonial, material and/or intersectional in that it holds that the concept of race, the global system of racism and the processes of racialisation cannot be separated from the operation of relations of domination which include capitalism, patriarchy, ableism, heteronormativity, islamophobia, anti-semitism, homo-/trans-phobia, casteism, and other global social, political and economic oppressions.

scholars as a component of public law (not separate from it) when the British constitution was an imperial constitution that governed a large number of colonies and mandates. Why was this the case? At its peak, the British Empire and constitution governed over 120 colonies and/or dominions, territories, and protectorates. Scientific racism – namely the belief or ideology that biologically different "races" of people existed which could be differentiated in terms of their inferior or superior ability to govern themselves and/or others[20] - undergirded the British Empire (its colonialism and institution of slavery) during most of this period.[21] This scientific racism was anything but benign. It both justified imperial laws to allow, and imperial officials to order and carry out, horrifying acts of violence on colonised peoples[22] as well as the exploitation of the wealth and resources from the colonial peripheries to Britian (the metropole).[23] Although the UK constitution no longer governs such a vast Empire, it remains an imperial constitution governing 13 British Overseas Territories.[24] The difference between scholarship today and that of past is that - unlike the scholarship of the 18th, 19th and early 20th centuries - there is little attention paid to race, racialisation or racism in UK public law scholarship.[25] Race - as a question of general constitutional governance - has almost altogether disappeared from mainstream constitutional discourse about the UK constitution.

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[20] Kay Anderson and Colin Perrin, "Thinking with the Head" (2009) 2 *Journal of Cultural Economy* 83.

[21] Douglas A Lorimer, Chapter 4: Race, Popular Science and Empire in *Science, Race Relations and Resistance: Britain, 1870-1914* (Manchester, Manchester University Press, 2013) at 108.

[22] Caroline Elkins, *Legacy of Violence: A History of the British Empire* (London: The Bodley Head, 2022).

[23] Zhiyan Jiang, "An Analysis of the Financial Gains from Colonialism of Great Britain" (2023) 49 *Advances in Economics, Management and Political Sciences* 88; Maxine Berg and Pat Hudson, *Slavery, Capitalism, Slavery and the Industrial Revolution* (London, Polity 2023).

[24] "As a matter of constitutional law, the UK Parliament has 'unlimited power' to legislate for the territories." https://lordslibrary.parliament.uk/uks-relationship-with-its-overseas-territories/ [accessed 14 August 2024]

[25] A recent and rare exception to the numerous existing books and edited collections on Public Law which ignore race is the collection *Diverse Voices in Public Law* (Bristol, Bristol University Press, 2023) edited by Se-Shauna Wheatle and Elizabeth O'Loughlin (see especially the authors' introduction and the chapters by Ben Bowling & Shruti Iyer, Tufyal Choudhury, Devyani Phabhat, and Kanika Sharma). Other exceptions include: Shreya Atrey, 'Structural Racism and Race Discrimination' (2021) 74 *Current Legal Problems* 1; Tanzil Chowdhury, ''Executive Robbery': UK Public Law, 'Race' and Regimes of Dispossession in the Chagos Archipelago' (2024) 51 *Journal of Law and Society* 57; Hakeem Yusuf & Tanzil Chowdhury, 'The Persistence of Colonial Constitutionalism in British Overseas Territories' (2019) 1 *Global Constitutionalism* 157; Suhraiya Jivraj, "Public Law" Chapter in *Towards Anti-racist Legal pedagogy: A resource*, (University of Kent 2020) at 28-29; and the groundbreaking work of Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester: Manchester University Press, 2020) and Kojo Koram, *Uncommon Wealth: Britain and Aftermath of Empire* (London: John Murray, 2022).

It is curious that most[26] contemporary public law scholarship does not discuss race or British colonialism in any *sustained* way. This is so because if you pick up virtually any text written in the late 19th century dedicated to the British constitution (whether written by jurists, clergymen, or historians) – one would find sustained discussions of imperialism, colonialism and/or race all over the place.[27] As noted by Mark Walters,

> there was a time, not very long ago, when leading scholars and jurists in Britian wrote about the law of empire as it mattered to the British constitution….although scholarly work on the imperial dimensions of constitutional law has continued in former colonies,….this kind of scholarship as all but disappeared in Britian itself.[28]

Many of these older accounts of British Constitutional Law characterised the British constitution and Empire as interlocking and inseparable.[29] These discussions were of

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[26] I say "most" here because, perhaps unsurprisingly, the exceptions which deal *directly/primarily* with race and racism in a *sustained* manner come mostly from racialised non-White scholars in the field (see note 8 above) or from scholars writing in fields considered to be "adjacent" to that of mainstream public law, such as im/migration, asylum, policing, healthcare, administrative justice, and refugee law (e.g. Satvinder Juss, "The West and the Muslim refugee: legitimacy, legality and loss" in *The West and the Muslim refugee* (2021); Adrienne Yong & Sabrina Germain, "Covid-19 Highlighting Inequalities in Access to Healthcare in England: A Case Study of Ethnic Minority and Migrant Women" (2020) *Feminist Legal Studies* 301; and Robert Thomas, *Administrative Law in Action* (London: Bloomsbury 2022), esp on Windrush and the Hostile Environment). The treatments of race in these ostensibly "sub" fields of public law are often not generally considered in mainstream public law textbooks, edited collections, or assigned as *required* reading in most public law courses in the UK. There are also racialised White scholars who examine *race* and *racism* in UK Public Law in detail (e.g. Tom Frost, in this collection, and Katherine Langley, "Racism, Reporting and the 'New Plan for Immigration', An Analysis of UK Media and Legal and Practical Implications" (2024) 38 *Journal of Immigration, Asylum & Nationality Law* 50 and Conor Gearty, *Homeland Insecurity: The Rise and Rise of Antiterrorism Law* (London: Polity, 2024). More recently, although with less of a focus on race/racialisation/racism, some public law scholars have begun to examine the colonial and imperial legacies of the British constitution in ways which are *critical* of these legacies (see: Colin Murray & Tom Frost, "The Chagos Islands Cases: the Empire Strikes Back" (2015) 66 *Northern Ireland Legal Quarterly* 71; Dylan Lino (see note 14); Harshan Kumarasingham's "Chapter 1: The Historical Constitution" and Coel Kirby's "Chapter 41:The Making of Empire" in the *Cambridge Constitutional History of the UK Kingdom* (Cambridge: Cambridge University Press, 2023) as well as Paul Scott's excellent edited collection on the "Constitutional Legacies of Empire" in Volume 71 of the *Northern Ireland Legal Quarterly* (2020). I discuss these later works in the longer piece mentioned in note 2.)

[27] See Creasy at page 36: Edward Shepard Creasy, historian and jurist, writing in 1872 on *Imperial and colonial Constitutions of the Britannic Empire Including Indian Institutions* (London: Longmans, Green and Co, 1872) at 36.

[28] See his 2017 Review of Thomas Poole's *Reasons of State, Prerogative and Empire* (CUP 2015): Mark Walters (2017) 80 *Modern Law Review* 164 at 165.

[29] Howard J Masterman's *History of the British Constitution* (London, Macmillian, and Co, 1920) written in 1920 is a good example. In addition to delineating in detail the constitutional role of the legislative, executive and judicial bodies in maintaining the British Empire, he ends his analysis with the observation that the problem facing the British Empire is how to combine imperialism with democratic governance. In the end, he states that "imperialism and democracy are both founded on the same call to service, with true imperialism based on the idea that the Anglo Saxon race has a contribution to make and can only make fully if it holds together"…"while democracy is a system of government which seeks to elicit from every man his only special contribution." Here the importance that imperialism places on the Anglo Saxon race solves the tension between democracy and imperialism.

course largely conducted in the vein of how to best sustain, defend or protect the British Empire. Indeed, the most famous and arguably the most important British Public Law introductory text, is a prime example – and here I am of course talking about A V Dicey's *Introduction to The Study of Constitutional Law.* [30]

Although excerpts from Dicey's famous *Introduction* are ubiquitous in 21st century public law introductions (and in university public law lectures), his strong commitment to the Empire[31] and his discussions *of the importance of race* (both of which underline much of his legal reasoning about the supremacy of the Imperial Parliament), are never mentioned but they certainly cannot be denied. It's there in black and white when Dicey proudly proclaims, in his staggeringly long one hundred page "Introduction" to his *Introduction*: "I yield to no man in my passion for the greatness, the strength, the glory, and the moral unity of the British Empire."[32] Likewise, his discussions of race are peppered throughout his treatment of the (English) constitution. Indeed, for him, "the Colonial problem" facing the British Empire referred to ability of the British constitution to meet the task of balancing the competing tendencies of the Empire to lurch between centralisation and disintegration.[33] He concludes that, notwithstanding these opposing forces, the Empire got this balance right because of "the political instincts of our race" (here, he is referring to the "Anglo-Saxon-" or "English" race).[34] Race, for Dicey, was the article of faith by which the Empire stands or fails.[35] This is but one example of Dicey's reliance on race to describe not only *how the Empire* was held together, but also *how the*

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[30] A V Dicey, *Introduction to The Study of Constitutional Law (first published by Macmillan in 1885) (8th Edition,* Indianapolis: Liberty Fund Inc, 1915).

[31] See Dylan Lino's excellent work this aspect of Dicey: Dylan Lino, "Albert Venn Dicey and the Constitutional Theory of Empire" (2016) 36 *Oxford J of Legal Studies* 751 at 767 (where he notes that for Dicey the central dynamic of the imperial constitutional order was balancing British constitutional principles with imperial unity). See also Dylan Lino, "The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context" (2018) 81 *Modern Law Review* 739 at 744-748 (on the rule of law as a civilisational achievement). That said, although Dicey's commitment to Empire is underscored in Lino's work and that of others, Dicey's specific deployment of *racial* ideology and *race* categorisations (features I only briefly touch on in this piece) are used to buttress some of his civilisational arguments about colonial constitutional governance, and these have not been given adequate treatment in legal literature on Dicey. One important exception to this is Kanika Sharma, "The Rule of Law and Racial Difference in the British Empire" in (eds) Se-Shauna Wheatle and Elizabeth O'Loughlin (*Diverse Voices in Public Law*. Bristol: Bristol University Press, 2023) at 15-34.

[32] AV Dicey, *Introduction*, ibid, note 17 at ciii.

[33] AV Dicey, *Introduction*, ibid, note 17 at li.

[34] AV Dicey, *Introduction*, ibid, note 17at li.

[35] AV Dicey, *Introduction*, ibid, note 17 at li. ("This is, here at home and throughout the Dominions, the life-blood of our polity. It is the *articulus stantis aut cadentis Imperii*.")

constitution held the Empire together. There are many more examples of his race-inflected reasoning and ideology that shaped Dicey's thought - such as where he discusses the Cherokee as savages.[36] Or where he discusses the "theoretically equal political rights" of all British Subjects, regardless of race in Britain,[37] to hold the position of cabinet minister and even that of the Prime Minister, but where he also contends that "of course… is extremely improbable that these offices will be filled by men who are not in reality Englishmen by race". [38] I cannot overview all of the instances where race comes into both his understanding *and theorisation* of the operation of British constitution in this brief analysis. But Dicey wasn't alone to connect race with the nature and operation of the (English) constitution. Other influential constitutional scholars have done so before him, including the author of (now very outdated) *The English Constitution*, Walter Bagethot. Bagethot's displayed, in separate writing, views imbued with Herbert Spencer's Social Darwinism and the discrete evolution of civilised and uncivilised races, where racial progress relied in part on the ability of barbarian races to imitate and mimic superior races.[39] He connected racial stratification to the British constitution and was admired by Dicey for his knowledge and wisdom.[40] If Dicey and Bagehot offered views linking race to the operation and nature of the British constitution, what does the omission of these views from contemporary Public Law introductions reflect? Paying attention to the colonial and imperial history of the British constitution, tells us that public law's past(s) were racial and colonial in nature.

2. Race and UK Public Law's Present: On the Irrelevance of Race

A second way to study public law in a way which is attentive to race, racialisation and systemic/institutional racism in the United Kingdom is to note and scrutinise the putative irrelevance (or neglect) of race in current and persistent debates with which the field of

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[36] AV Dicey, Introduction, ibid note 17 at cxxx.

[37] Though not in the Dominions.

[38] AV Dicey, *Introduction*, ibid note 17 at liv and lv (see his footnote 43).

[39] Walter Bagehot, "Nation-Making" (1869) reprinted in ed Barbara Harlow and Mia Carter*, Archives of Empire Volume II: The Scramble for Africa* (Durham and London: Duke University Press, 2003) 189 at 190-193 [originally published in his *Physics and Politics: or, Thoughts on the Application of the Principles of Natural Selection and Inheritance to Political Society* (1869, New York: Alfred Knopf, 1948 at 104) .

[40] AV Dicey, *Introduction*, ibid note 17 at cxxxvii: In his *Introduction*, Dicey would go on to describe Bagethot's *The English Constitution* as "so full of brightness, originality and wit, that few students notice how full it is also of knowledge, wisdom and insight."

public law is preoccupied. This entails interrogating the disappearance of race in public law's present, which I argue can be explained in part because of the field's "facile postracialism".[41] What are these debates? Two significant and seemingly perennial debates in particular which public lawyers and scholars have been preoccupied with include: *first*, whether the UK should have a written (fully codified and entrenched) constitution; *second*, whether legal or political constitutionalism is the better way to describe or organise the UK constitution. Given the word limitations of this Special Series, I can only provide abridged overviews of these debates.[42]

Debate 1: A Written or Unwritten Constitution for the UK?

The debate about whether the UK should adopt a single written (fully codified and entrenched) constitution is at the forefront of contemporary debates about the UK constitution. Advocates of a written constitution argue that we need a written constitution because the existing constitution has *inter alia* the following flaws: a lack of clarity and certainty; a failure to properly protect fundamental rights (in contrast to the EU Charter[43]); a failure of fundamental laws to be written by "the people";[44] and an inadequate devolution settlement.[45] Advocates of the status quo UK constitution argue *inter alia* a written codified and entrenched constitution would give too much power to the judiciary;[46] would remove the flexibility of constitution; offers an uncertain mix of codification and reform,[47] and is unnecessary as the existing constitutional features

[41] Paul Warmington, *Permanent Racism: Race Class and the Myth of Postracial Britian* (Bristol, UK: Policy Press, 2024) at 6.

[42] Students of Public Law can find a very short summary here of this debate here: https://constitution-unit.com/2020/01/08/do-we-need-a-written-constitution/ [accessed 1 September 2024] and here: Sionaidh Douglas-Scott and Adam Tomkins, *Does Britain need a proper constitution? A vital measure to stabilise Britain's governance—or an unnecessary addition to politics that would do more harm than good?* (2 April 2019): https://www.prospectmagazine.co.uk/essays/42443/does-britain-need-a-proper-constitution [accessed 12 November 2023]

[43] Charter of Fundamental Rights of the European 2012/C 326/02 text: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

[44] Jeff King, "Chapter 15: The Democratic Case for a Written Constitution", in eds Jeffrey Jowell and Colm O'Cinneide, *The Changing Constitution*, (9th edition) (Oxford, OUP, 2019) at 424.

[45] Sionaidh Douglas-Scott ibid (note 26). See also Mark Elliot and Robert Thomas, *Public Law* (4th edition, oxford, OUP, 2020) at 92-94, at 93: "Codification on this view, represents an unprecedented opportunity for major reform that might (among other things) address concerns about the scale of executive power, the adequacy of arrangement for holding the executive to account, the unelected nature of the House of Lords, the electoral system, and the lack of entrenched protection for human rights."

[46] Nick W Barber, Against a Written Constitution (2008) *Public Law* 1 at 2.

[47] Nick W Barber, Against a Written Constitution (2008) *Public Law* 1 at 1.

(especially legislation and the common law) already adequately protect fundamental rights. [48]

Debate 2: Whether the UK constitution should embody more of a legal or political constitutionalism?

The debate between legal and political constitutionalists is by now well worn. The debate turns upon the following question: *who should hold the exercise of political power to account?* Political constitutionalists argue "for those who exercise political power to [be held to] account, for the most part, through political processes and in political institutions."[49] This view holds that political actors – politicians and Parliamentarians – are best to hold power to account. In contrast, legal constitutionalists argue that the actors best placed to hold political power to account are the courts and judges: through judicial review, law and legislation should be used to constrain political power.[50] This political vs legal constitutionalism debate is still ongoing, with constitutional scholars in academia and warring think tanks fighting it out.[51]

The Irrelevance of Race/Racialisation/Racism to these Debates

It may seem obvious to point out that neither debate is framed in a way which views race, racialisation or systemic/institutional racism as relevant to the arguments at issue. Both debates offer colourblind approaches to the questions before it, where the problems being addressed – whether problems attached to a written or unwritten constitution, or problems associated with the adoption of legal or political constitutionalism – are general in nature and do not deal with any particular race-related social, political or legal issue, harm or injury.

What has race/racism to do with whether the UK adopts a fully written and entrenched constitution, or maintains an (substantially) unwritten constitution? And what has

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[48] Adam Tomkins ibid (note 2).6

[49] Graham Gee and Grégoire C. N. Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273. See also: J.A.G Griffith, 'The Political Constitution' (1979) 42 *MLR* 1.

[50] TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford, OUP: 1994); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, OUP: 2003); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: OUP, 2013).

[51] Academics who can be described as political constitutionalists expressing distrust of judges and the judiciary can be found at the "Judicial Power Project" of the influential think tank *Policy Exchange* (https://policyexchange.org.uk/judicial-power-project/).

race/racism to do with a public lawyer's preference for legal or political constitutionalism? I argue that paying attention to the absence of race, racialisation and systemic/institutional racism in each of these debates can teach students and scholars of public law about existing and larger blind-spots of field,[52] blind-spots demonstrated by the limited frameworks and foci of the debates, blind-spots which have the effect of making it seem that public/constitutional law has nothing to do with sustaining and/or producing racial injustice.

***Legal/Political Constitutionalism Debate*:** The absence of race, racialisation and systemic/institutional racism tells us that for these scholars, race and racism may not matter materially as to how these arguments ultimately get resolved. For example, it may not matter to a political constitutionalist if a piece of legislation has *the effect* of racialising non-white people in the UK in ways which are harmful or damaging to them or if that legislation has *the effect* of disadvantaging non-white people in the UK,[53] as long as the processes of political constitutionalism govern the operation of the UK constitution. The constitution will be functioning "properly" to a political constitutionalist if this is the case. In contrast, it may matter enormously to people of colour in the UK if this legislation has this racist effect, regardless of whether the law has come about through the appropriate political processes.

For example, the *Illegal Migration Act 2023*[54] *(IMA 2023)* and the *Safety of Rwanda (Asylum and Immigration) Act 2024*[55] *(SRA 2024)* were viewed by many constitutional scholars as problematic because of reasons which had little to do with race or racism,[56]

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[52] These blind-spots – specifically the procedural and abstract nature of these debates which ignore the question of constitutional outcomes – have similar implications for the interrelated oppressions of gender, sexuality, disability and class with racial oppression.

[53] This is framed as only a question of indirect racial discrimination, not one about what kind of constitutional governance (legal, political, etc…) do we have that is regularly producing the indirect racial discrimination in a way which creates a status quo of racial domination.

[54] *Illegal Migration Act 2023* (c. 37) (hereinafter *IMA 2023*): (https://www.legislation.gov.uk/ukpga/2023/37/contents)

[55] *Safety of Rwanda (Asylum and Immigration) Act 2024* (c.8) (hereinafter *SRA 2024*): (https://www.legislation.gov.uk/ukpga/2024/8)

[56] See the following prominent public law blog discussions and reports on the Illegal Migration Act: https://binghamcentre.biicl.org/documents/161_bingham_centre_report_on_safety_of_rwanda_bill_for_hl_2r_29_january_2024.pdf (hereinafter Bingham Report_; https://ukconstitutionallaw.org/2023/05/23/stephen-tierney-and-alison-l-young-the-house-of-lords-constitution-committee-reports-on-the-illegal-migration-bill/ ; https://ukconstitutionallaw.org/2023/03/10/aileen-kavanagh-is-the-illegal-migration-act-itself-illegal-the-meaning-and-methods-of-section-19-hra/ Although the issues addressed concerning the Act/Bill

but it is undeniable that race and racism formed the motivating legal and political background for the debate of these *Acts,* and that their enactment is very likely to produce disproportionately harmful effects on vulnerable people of colour (by excluding them from migrating or claiming asylum in the UK).

Legal constitutionalist arguments[57] focused on the fact that that the *IMA 2023* undermined a previous 2023 UK Supreme Court decision[58] by deeming Rwanda to be a safe country for the UK to send its asylum seekers. The *Act's* "legal fiction" of Rwanda as a safe country would thus undermine the judiciary's ability to determine otherwise as a question of law. Other arguments by legal constitutionalists decried the fact that the s.1(5) of the *IMA 2023* and s.3(2)(b) *SRA 2024* would disapply the interpretive obligation of s.3 of the *Human Rights Act 1998*[59] *(HRA 1998)* that requires courts to "so far as it is possible to do so" read legislation compatibly with the relevant European Convention on Human Rights (ECHR) incorporated under the *HRA 1998*.[60] By removing this interpretive obligation requirement, these *Acts (IMA 2023 and SRA 2024)* can be said to undermine the role of courts to protect human rights which are threatened by conflicting aims of legislative majorities.[61] That said, these *Acts*[62] may also become acceptable to legal constitutionalists if the courts were not ousted in overseeing the determination of what constitutes a "safe country" to remove asylum seekers to, or if courts were allowed to undertake their usual interpretive obligations under s.3 of the *HRA 1998*. If the courts' role was not curtailed in these ways, these *Acts – including their aims* - perhaps would not be so objectionable.

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addressed in these blogs/reports were primarily legal in nature, the irrelevance of race and racism motivating and animating legislation itself appeared irrelevant to the legal construction or debate.

[57] The legal and political constitutionalist arguments about the *IMA 2023* and *SRA 2024* surveyed here are examples of arguments that were made (or could be made) about these pieces of legislation – they are not meant to be exhaustive.

[58] That decision held Rwanda not to be a safe country: R (on the application of RM (Iran)) (Respondent) v Secretary of State for the Home Department (Appellant) [2023] UKSC 42 [para 73]. (https://www.supremecourt.uk/cases/uksc-2023-0095)

[59] Human Rights Act 1998 c.42 (hereinafter HRA 1998): (https://www.legislation.gov.uk/ukpga/1998/42/contents)

[60] Although the Public Law Project itself is not a legal constitutionalist organisation, many of the arguments they make which deal with the judiciary could be characterised as supportive of legal constitutionalism: https://publiclawproject.org.uk/blog/how-the-illegal-migration-bill-threatens-our-constitution/

[61] *Bingham Report, note 40.*

[62] *IMA 2023 and SRA 2024.*

Political constitutionalist arguments by contrast note that although s.3 of the *HRA 1998* is disapplied in both *Acts (IMA 2023 and SRA 2024)*, s.4 of the *HRA 1998* is not, so courts are always able to issue a "declaration of incompatibility" with respect to their legislative provisions. Accordingly, the political processes of Parliament in enacting these pieces of legislation can be shown to strike the right balance between, on the one hand, court oversight of the management of asylum and immigration populations, and on the other, the so-called legitimate concerns expressed by Parliament[63] to "stop the boats" or "control the borders" i.e. the overarching political motives animating these *Acts*[64]. Courts should not unnecessarily frustrate the legislative purposes and processes of Parliament when these are functioning "properly," as these *Acts*[65] illustrate.

Although these *Acts'*[66] likely racist motivations and likely racist effects were not mentioned in their assessments by most mainstream constitutional scholars and practitioners (whether legal or political constitutionalists), the anti-asylum, anti-immigration, and anti-refugee rhetoric which undergirded this legal debate[67] was subsequently condemned by the United Nations and identified as one of the contributing causes for the UK race riots in July/August 2024.[68] Missing from the constitutional critiques of these pieces of legislation was any discussion of what many people of colour in Britian noticed, but most White constitutional scholars neglected: namely that the targets of the legislation were predominantly people of colour (men, women and children) from African and Arab backgrounds fleeing war, conflict, authoritarianism, neo-colonialism and environmental disasters, whilst navigating racist migration policies of the UK and EU.[69] Race or racism rarely featured *expressly* in any of the public law assessments (or condemnations) of this legislation. Also missing was any condemnation of racist tropes in the media and in public law debate used to described Rwanda (and by

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[63] And by influential think tank academics supportive of the then Conservative government's agenda on asylum and immigration, see: Richard Ekins & Stephen Laws, How to legislate About Small Boats (London: Policy Exchange, 2023) (https://policyexchange.org.uk/publication/how-to-legislate-about-small-boats/)
[64] *IMA 2023 and SRA 2024*.
[65] *IMA 2023 and SRA 2024*.
[66] *IMA 2023 and SRA 2024*.
[67] https://www.runnymedetrust.org/publications/creating-a-crisis-immigration-racism-and-the-2024-general-election
[68] UN Committee on the Elimination of Racial Discrimination Report Committee on the Elimination of Racial Discrimination (Concluding observations on the combined twenty-fourth to twenty-sixth periodic reports of the United Kingdom of Great Britain and Northern Ireland) CERD/C/GBR/CO/24-26
[69] https://www.theguardian.com/commentisfree/article/2024/sep/11/europe-migration-asylum-seekers

implication, Rwandans). In other words, the political processes that created both the racist catalysts for and likely racist effects of the legislation , were missing from the public law debate or the debate among political constitutionalists.

Similarly, it may not matter to a legal constitutionalist if judicial decisions have (singly or cumulatively) disproportionately adverse impacts on non-White racialised communities and people in the UK. Perhaps for a legal constitutionalist, young Black women should be subject to more scrutiny and suspicion on buses as long as it is done by progressive, feminist or liberal judges who favour of diversity.[70] As demonstrated, whether one is a political constitutionalist or a legal constitutionalist, in either case, race and racism does not fundamentally matter as to how these arguments ultimately get resolved. The legal constitutionalists want to restore power to the judiciary taken away by legislative acts, and the political constitutionalists want to curtail the power of the judiciary to limit or amend legislation produced by Parliament. The *effect* of these pieces of legislation discussed above (*IMA 2023* and the *SRA 2024*) on the mainly non-White racialised people subject to them - is certainly not central to either analysis.

The problem with the political versus legal constitutionalism debate as framed presently is that - once race and racism is deemed important or relevant – the debate ultimately reads as one fundamentally about *who should have the legitimate and ultimate power to disadvantage people of colour in the UK: judges or legislators?* This framing prevents us from looking at - or even decrying - the *effects* of both forms of constitutionalism in reproducing and sustaining racial injustice in the UK. By paying attention to race, racialisation and racism, we can instead think about teaching our students that perhaps *neither* political or legal constitutionalism is desirable if it continues to produce - or does nothing to end - racial injustice in the UK. This would add "*agnostic constitutionalism"* to the mix as a competing form of constitutionalism to legal and political constitutionalism when we teach our students to write and think about UK constitutionalism. *Agnostic constitutionalism* would allow us to say that *neither* of the two dominant forms of

[70] See Roberts, R (on the application of) v Commissioner of Police of the Metropolis and another [2015] UKSC 79 (17 December 2015): https://www.bailii.org/uk/cases/UKSC/2015/79.html and https://ohrh.law.ox.ac.uk/minorities-suffer-as-the-supreme-court-supports-suspicionless-stop-searches/ [accessed 15 September 2022].

constitutionalism is better at redressing racial injustice in the UK.[71] Adding race into this debate exposes the limits of contemporary debates to offer an account of constitutionalism which takes into account the interests of people of colour and others have in ending both discrete and systemic forms of racism in the UK and in living a life free from racial oppression.

Written/Unwritten Constitution Debate: The absence of race, racialisation and systemic/institutional racism tells us that for scholars in this written/unwritten debate, race and racism may not matter materially as to how these arguments ultimately get resolved. Not only do advocates and opponents of a written constitution alike omit any discussion of race or racism in their deliberations, even those who are ostensibly agnostic do not see its relevance.[72] Interestingly, the discussion of race and written constitutions can assist one in determining whether "written-ness" makes a difference to remedying unequal racial relations in the UK. Such a discussion may lead us to turn to the codified Canadian constitution in order to learn that it has been extremely poor in producing cases or case law which remedies racial injustice in Canada, as argued powerfully by Sonia Lawrence.[73] Such a discussion may also lead us to observe that South Africa's celebrated and codified "conquest constitution" has also been roundly criticised for not making much of a dent in the legacy of apartheid, 30 years after that constitution's adoption.[74] But these observations would not however lead us to say that the UK's existing (primarily unwritten) constitution is any better, as it has also failed people of colour,[75] especially Black people, a point the joint report of the House of

[71] With thanks to Michael Gordon, Peter Oliver, Rohit De and Donal Coffey for being a helpful soundboard which allowed me to further develop my argument here.
[72] Jo Eric Khusham Murkens, "A Written Constitution: A Case Not Made" (2021) 41 *Oxford Journal of Legal Studies* 965–986. https://academic.oup.com/ojls/article/41/4/965/6262073
[73] "Even taking into account the different timelines, Canada has a very slim body of race jurisprudence compared to the U.S. despite having constitutional protections against racial discrimination since 1982. *Where are the cases?* Even the existence of Human Rights codes, tribunals and commissions cannot fully explain why there are no section 15 (equality) cases on race from the Supreme Court of Canada, with the exception of a few recent cases which treat (I would say very wrongly) band membership as a racial categorization." Sonia Lawrence, "Lost and Found" (2013) 31 *Windsor Y B Access Just* 97 at 98 (emphasis added).
[74] Joel M. Modiri, Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence (2018) 34 South African Journal on Human Rights 300.
[75] https://publiclawproject.org.uk/latest/public-law-and-race-why-more-can-and-should-be-done/

Commons and the House of Lords acknowledges.[76] When race and racism is brought into the debate about the desirability of written versus unwritten constitutions (like the debate about legal and political constitutionalism), it transpires that *neither form* of the UK constitution (written or otherwise) can be said to make the lives of people of colour in Britain better.

Facile Postracialism: Until debates about rival forms of constitutionalism or about constitutional written and unwritten-ness take seriously the starting point of racial injustice in the UK (along with other related and intertwined forms of injustice), UK public law discourse, scholarship and practices will continue to reproduce 'facile postracialism'. The concept of 'facile postracialism' is coined by Paul Warmington is useful in describing understandings of race and racism in the predominantly White field of UK public law. Facile postracialism's key assumptions include: first, that there is clearly still some racism in society but it is declining generation on generation and is largely a hangover of the past; second, that this racism is essentially external to our social structures and institutions and mainly a product of prejudice of malevolent or ignorant individuals; third, since racism is defined as an individual act or acts of "a few bad apples", institutional and structural racism becomes unintelligible (and unworthy of study).[77] By making race, racialisation and racism irrelevant, these two public law debates manifest the first assumption of facile postracialism: namely that race and racism is a thing of the past and has no bearing on how current constitutional debates are evaluated or concluded.

In addition to viewing race and racism as a thing of the past, these debates like the preponderance of constitutional debates about the UK constitution, are fundamentally about the *process* of the constitution, what are the ways in which the constitution should operate *in principle* (i.e. what are the operative rules, norms and values of the constitution?). Rarely do these debates address *the effect or impact of the operation of the constitution on peoples' daily lives*. The debates in public law are almost exclusively

[76] House of Commons and House of Lords Joint Committee on Human Rights (JCHR), Black people, Racism and Human Rights Eleventh Report of Session 2019–21 https://committees.parliament.uk/publications/4646/documents/46926/default/

[77] Paul Warmington, *Permanent Racism: Race Class and the Myth of Postracial Britian* (Bristol, UK: Policy Press, 2024) at 6.

procedural in nature (eg asking 'what is the *form* the constitutional should take?' or 'who should decide important constitutional questions of the day?). Given that people of colour are subject daily to racial oppression in the UK, although these procedural issues are important, constitutional debates in the UK must also address constitutional *outcomes*. The alternatives argued for in these debates will affect peoples' lives, including whether the constitution produces and reproduces specific forms of relations of domination. By being attentive to race, racialisation and racism in contemporary public law debates, we see in public law's present, the *erasure* of race and racism as apt measures to determine how well the constitution is doing to create *outcomes* which redress and end racial injustice.

3. Race and UK Public Law's Future: On The Permanence of Race

The final way in which one can be attentive to race, racialisation and racism in the UK constitution is simply to recognise the intractability of structural systemic and institutional racism in the field of UK Public Law and in the UK more generally. In other words, given that race, racialisation and racism have not disappeared after the end of British Empire and the triumph of democratic liberalism in the UK over decades, it is important try to explore and understand the reasons for the permanence of racial injustice in the UK and in the field of public law. It is also important to understand the ways in which racial injustice is sustained by the operation and conceptualisation(s) of UK public law, and also to begin a discussion as to how - and whether - this may be overcome. This constitutes an answer which engages with public law's future.

To do this, public lawyers, scholars and practitioners must start to teach and think about public law in ways which take responsibility for the fact that racial injustice (an injustice which cannot be disentangled from capitalism, patriarchy, ableism, trans/homophobia among other systems of oppression) is at present intractable and persistent. Scholars, students and practitioners must come to a sober acknowledgement of their and the constitution's role in producing the state of permanent racial injustice, including when

they make recommendations for constitutional reform which ignores perennial problem of racial injustice in the UK.[78] The future relevance of UK public law depends on it.

There are no blueprints on offer here, other than an entreaty to begin a mapping exercise exploring further links between: 1) the disappearance of the discussion of race, racialisation and racism in the discipline; 2) the discipline's attempts to make race-related issues irrelevant to legal debates about the nature and the operation of the UK constitution; and finally, 3) the permanence of racism in the 21st century, in the UK and globally. Although there are many places to begin this mapping exercise, a good starting point would be to think about the extent to which public law as a discipline – including public law debates, scholarship, and elites - have embraced and continue to embrace a form of "reactionary democracy" which has wittingly or unwittingly accepted the mainstreaming of both racism and the far-right in our democracy and have been reluctant to offer a strong critique or vision of public law that explicitly rejects this and articulates instead a constitutional roadmap for racial justice.[79] This seems to be exactly the place the current discipline of Public Law is right now, from the perspective of a woman who is racialised as non-White, an immigrant, now British. I recently went to an important Public Law conference at a top Russell Group University where the invited keynote speaker - who it was suggested was very close to both this new government and the last Conservative government - argued without any idea that there may not be a consensus in the room: "Maybe we should wait and see if the Rwanda legislation will work before we think about repealing it?" Though I regret I didn't, I wanted to ask, "Work *for whom*?" There are, I hope, other futures of public law which can be envisioned, which cannot be discussed here for reasons of space, but whether race, racialisation and racism will be central to them will likely determine if the permanence of UK racism withers away or becomes a feature of the UK constitution itself.

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[78] For approaches to constitutional reform and constitutional futures which continue ignore (*inter alia*) calls for racial justice in the UK and which evince no people of colour as authors, see: Meg Russell, Hannah White and Lisa James, Joint Report by the Constitution Unit and the Institute for Government Rebuilding and Renewing the Constitution: Options for Reform (July 2023): https://www.ucl.ac.uk/constitution-unit/news/2023/jul/new-report-rebuilding-and-renewing-constitution; Jess Sargeant, Steph Coulter, Jack Pannell, Rebecca McKee, Milo Hynes, *Review of the UK Constitution: Final Report* (Cambridge; Institute for Government and the Bennett Institute for Public Policy, 2022).

[79] Aurelien Mondon and Aaron Winter, *Reactionary Democracy: How Racism and the Populist Far Right Became Mainstream* (London: Verso, 2020).