



Kent Academic Repository

Ashiagbor, Diamond (2021) *Race and Colonialism in the Construction of Labour Markets and Precarity*. Industrial Law Journal . pp. 1-26. ISSN 1464-3669.

Downloaded from

<https://kar.kent.ac.uk/91381/> The University of Kent's Academic Repository KAR

The version of record is available from

<https://doi.org/10.1093/indlaw/dwab020>

This document version

Publisher pdf

DOI for this version

Licence for this version

CC BY (Attribution)

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal* , Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

Race and Colonialism in the Construction of Labour Markets and Precarity

DIAMOND ASHIAGBOR*

Acceptance Date September 15, 2021; Advanced Access publication on November 5, 2021.

ABSTRACT

This article explores the interconnections and continuities between racial inequalities in the contemporary labour market and the legacies of colonialism and racial distinctions woven into the evolution of market economy. It argues that race is embedded in the legal form by which labour is regulated. In its focus on the legal relations between individual subjects, namely, the contract of employment, the dominant legal form for governing work relations, the standard employment relationship, erases from view the broader social and economic structures within which the bilateral relationship exists—that is, the unpaid work of social reproduction and the colonial extraction which make paid work possible. The article identifies a number of ways in which race, racism and the legacies of colonialism are implicated in the evolution of market economy and latterly in the construction of the postwar welfare state and contemporary labour market institutions. First, in the racial capitalism of slavery. Second, in the colonial extraction and commodification of labour power from the global South for the benefit of markets in the global North. Third, in relation to migrant labour and racialised segmentation of the labour market.

1. INTRODUCTION

Even prior to the Coronavirus pandemic, informalisation of work and the decline of the social wage had been having a particularly dramatic impact on racialised workers. Existing racial inequalities in the UK

*University of Kent, Canterbury, United Kingdom, email: d.ashiagbor@kent.ac.uk. Many of the ideas in this article have emerged in conversation with colleagues over the years. I owe many thanks to Adelle Blackett, Ruth Dukes, Shaun McVeigh, Kerry Rittich; to the participants in the University of Glasgow ‘Work on Demand’ online seminars June 2021; and also to the reviewers of the ILJ for their comments. The usual disclaimer applies.

labour market, in particular the racialised ‘clustering’ into non-standard work—zero-hours contracts, agency work, casual work and low paid self-employment—have been brought into sharp focus by the pandemic. These inequalities are starkly manifested in the disproportionate number of deaths from COVID-19 among Black and minority ethnic workers who dominate the occupational categories defined as ‘key workers’ and thus required to continue working outside the home during ‘lockdowns’. This article examines racialised inequalities in the contemporary labour market, tracing their origins not only to individualised discrimination or even institutional racism, but to the ways in which race is constitutive of the labour market and present in the legal form by which labour is regulated. The broader conceptual framing for this enquiry draws on economic sociology of law, namely, the taking of sociological approaches to legal and economic phenomena. The article adopts a Polanyi-influenced economic sociology of law;¹ in contrast to the more Weberian-inspired economic sociology of law, as developed by Ruth Dukes.² Economic sociology, in particular, a Polyanian critique of political economy, has facilitated an understanding of markets as social and political constructs.³ To this, economic sociology of law, in undertaking a sociological analysis of the role of law in economic life,⁴ enables us to appreciate law’s constitutive role in markets and other forms of economic activity. What is missing, however, from either economic sociology of law approaches or labour law scholarship more broadly, is an analysis of the role of colonialism, race or racial capitalism in the construction of (labour) markets of the global North.

This article explores not only the historical precursors of the racialised segmentation of the contemporary labour market, but also the ways in which race is embedded in the legal form by which labour is regulated:

¹S. Frerichs, ‘Re-embedding Neo-liberal Constitutionalism: A Polyanian Case for the Economic Sociology of Law’ in C. Joerges and J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011) 65–84; D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris (eds) ‘Special Issue: Towards an Economic Sociology of Law’ (2013) 40(1) *Journal of Law & Society* 1–171.

²R. Dukes, ‘The Economic Sociology of Labour Law’ (2019) 46(3) *Journal of Law and Society* 396–422.

³K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 (1944)).

⁴R. Swedberg, ‘The Case for an Economic Sociology of Law’ (2003) 32 *Theory and Society* 1–37, 1.

namely, the racial constitution of labour markets, or how markets may be ‘raced’.⁵ The dominant legal form for governing work relations which has evolved in a number of national contexts including the UK, the standard employment relationship, provides a historically specific mode of capturing and encoding social and economic relations of labour within market economy. However, these economic relations can only be ‘seen’ by legal discourse when they take the form of legal relations between individual subjects, in this case, the contract of employment governing a bilateral relationship between worker and employing entity.⁶ Much else—the inequality of bargaining power between the parties, the broader structures within which the bilateral relationship exists, the unpaid work of social reproduction or the colonial extraction which makes the paid work possible—is invisible for the purposes of legal form. Thus, the aim of this article is to foreground these broader structures, to show how race and racism operate at a macro- and meta-level. The argument is that to understand political economy of labour markets, the institutions which are constitutive of the labour market, and the rationalities underpinning regulation of work, we also need to understand the role of race, racism and the legacies of colonialism.

2. ECONOMIC SOCIOLOGY OF LAW AND ‘RACISM’ AS A REGIME AND A RATIONALITY

Economic sociology of law is a useful lens through which to view market economy, since it enables us to appreciate how legal form and legal concepts construct the market, reflect and shape economic activity.⁷ This framing offers a potential corrective to the typically ‘oversocialised’ views of social action offered in ‘law and society’ and the ‘undersocialised’ analyses of social

⁵L. Tilley and R. Shilliam, ‘Raced Markets: An Introduction’ (2018) 23(5) *New Political Economy* 534–43.

⁶See Z. Adams, ‘Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform’ (2021) 50(3) *ILJ* 434–466 <https://doi.org/10.1093/indlaw/dwaa024>. At 445: ‘Legal discourse can only “see” social relations as interpersonal relations between formally equal individual subjects; and it is their actions, and decisions, rather than the structures framing and explaining those actions and decisions, which are decisive for the purposes of law’. See also R. Knox, ‘Marxism, International Law, and Political Strategy’ (2009) 22 *Leiden Journal of International Law* 413–36.

⁷See I. Miola and S. Picciotto, ‘On the Sociology of Law in Economic Relations’ (2021) *Social & Legal Studies*, First Published 23 March 2021, 1–21; <https://doi.org/10.1177/09646639211002881>.

action offered by ‘law and economics.’⁸ Polanyi refers to ‘the economy as instituted process’⁹ meaning that market economy is institutionalised through the power of the state and through (state) law. Writing within the emerging tradition of economic sociology of law, both Frerichs and Perry-Kessaris describe how social life, including its economic and legal aspects, can usefully be conceptualised as operating on four, mutually constitutive, levels: actions or actors, interactions, regimes and rationalities.¹⁰ At the micro-analytical level, the focus is on *actors* and theories of action; at the meso-analytical level, the focus turns from actors to relations or *interactions* involving two or more actors.¹¹ ‘Actions’ and ‘interactions’ is a useful way to understand how most race discrimination in employment is conceptualised within law, for instance, as prejudice or harassment between individuals or within institutions. Within legislative enactment in the UK, the focus on ‘less favourable treatment’ and the language of ‘protected characteristics’¹² suggests that ‘race’ is, at least superficially, conceived as a matter of individual-level demographic characteristics.¹³ By this account, racism exists at the micro-level of social action, and is the product of acts or beliefs of individuals or groups of individuals. However, legislative acknowledgement of the role of institutions in racialised ordering—for instance, the recognition of the disparate, i.e. indirectly discriminatory, impact of facially-neutral organisational rules—suggests legal provisions can also be underpinned by a more complex understanding of inequality and a conception of race or racism operating at the meso-level of social action. This moves beyond the individual animus of prejudice, to encompass interactions between individuals and institutions.

⁸Ashigbor, Kotiswaran and Perry-Kessaris, n.1, 3; M. Granovetter, ‘Economic Action and Social Structure: the Problem of Embeddedness’ (1985) 91 *American Journal of Sociology* 481–93.

⁹K. Polanyi, ‘The Economy as an Instituted Process’ in K. Polanyi, C. M. Arensberg and H. W. Pearson (eds), *Trade and Markets in the Early Empires* (Glencoe: The Free Press, 1957), 243–70; reprinted in M. Granovetter and R. Swedberg (eds) *The Sociology of Economic Life*, 3rd edn (Boulder: Westview Press, 2011), 3–21.

¹⁰Frerichs n.1. A. Perry-Kessaris, ‘Approaching the Econo-socio-legal’ (2015) 11 *Annual Review of Law & Social Science* 57–74, 59: ‘Like all typologies, this one is idealized and should be treated not as a map of social life but rather as a device for clear thinking and communicating about social life. Furthermore, these levels are mutually constitutive’.

¹¹Frerichs, n.1, 68; Perry-Kessaris, n.10, 60.

¹²Equality Act 2010, Chs 1 and 2.

¹³D. Hirschman and L. Garbes, ‘Toward an Economic Sociology of Race’ (2021) 19(3) *Socio-Economic Review*, 1171–1199, online 19 December 2019, <https://doi.org/10.1093/ser/mwz054>.

Furthermore, to the extent that there is an awareness in state law and policy of systemic or structural racism in labour markets, not solely discrimination at the level of an organisation, this comes closer to the recognition, as sociologists of race have identified, that racism structures societal institutions and that 'race is inscribed and reinscribed in markets and other economic structures'.¹⁴ This way of conceptualising racism can be seen as mapping on to the macro-level of analysis of the social scale envisaged within economic sociology of law, i.e. race or racism can be understood as a social '*regime*'.

The fourth, meta-level of analysis of society, economy and law turns to the *rationalities* behind a given regime or social order, i.e. modes of reasoning, or 'ways of apprehending the world'.¹⁵ According to Frerichs, 'while regimes refer to the institutional structure/culture that makes up society, rationalities comprise the basic principles located in the "deep"; beyond the surface, structure/culture of society'.¹⁶ Polanyi's focus, and my interest in this exploration of the racial underpinnings of the labour market, is on the regimes and rationalities, at the macro- and meta-level, that constitute market society at large.¹⁷ I wish to interrogate economic exchanges, and the regulation governing them, by exploring their embeddedness within racialised social systems ('regimes') and by reference to the dominant rationalities behind any given regime or social order.¹⁸

In other words, underpinning this exploration of race in contemporary labour markets is a conceptualisation of race and racism as a rationality, namely, an epistemic category that organises our perceptions and evaluations of reality.¹⁹ A productive way to characterise this rationality is through the language of 'racial capitalism' which, in Cedric Robinson's account, explains how race permeates the social structures emergent from capitalism.²⁰ Racial capitalism is thus the dominant rationality, or way of seeing the world, which I argue underpins the market economy and the racialised inequality of the contemporary labour market.

The reason this focus on race and colonialism is important is as follows: if we accept the foundational and persistent importance of race in economic

¹⁴Ibid., 9.

¹⁵Perry-Kessaris, n.10, 60.

¹⁶Frerichs, n.1, 68.

¹⁷Ibid.

¹⁸Hirschman and Garbes, n.13, 10.

¹⁹Frerichs, n.1, 68.

²⁰C. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (London: Zed Press, 1983/Chapel Hill: University of North Carolina Press, 2000), 2.

life,²¹ and also appreciate that, while it is a social construction, race is not a separate and secondary aspect of social life,²² then as legal scholars interested in labour within a market economy, it is important to consider not only the causes of the racialised segmentation of contemporary labour markets and welfare state regimes, but also the broader question of the extent to which the contemporary forms of work may owe their legal infrastructure, legal rules and organisational forms to histories of racial thinking.

I identify a number of ways in which race, racism and the legacies of colonialism are implicated in the evolution of market economy and latterly in the construction of the post-war welfare state and contemporary labour market institutions, i.e. operate as social regimes and as dominant rationalities. First, in the racial capitalism of slavery. Second, in the colonial extraction and commodification of labour power from the global South for the benefit of markets in the global North. Third, in relation to migrant labour, and racial differences in labour market location and racialised segmentation of the labour market in jurisdictions such as the UK. In my view, all three ways in which race is constitutive of contemporary labour markets are connected; while it is not entirely possible to separate out the racial capitalism of slavery, the focus of this article will be on the last two. With regard to the first—forms of ‘unfree’ labour such as slavery, indenture and sharecropping—key elements are the central role of Atlantic slavery in particular, as being *generative* in the construction of market economy and contemporary labour markets,²³ and ‘front and center’ of the spectacular pattern of economic development of both the US and the UK.²⁴ However, these are questions that necessitate exploration in greater depth and are beyond the scope of this article.²⁵

²¹Hirschman and Garbes, n.13.

²²A. Kundnani, ‘The Racial Constitution of Neoliberalism’ (2021) 63(1) *Race and Class* 51–69, 54.

²³R. Shilliam, ‘The Atlantic as a Vector of Uneven and Combined Development’ (2009) 22(1) *Cambridge Review of International Affairs* 69–88, 77. Atlantic slavery ‘was generative in the construction of a new cultural and political grammar of New World identity’.

²⁴S. Beckert and S. Rockman ‘Introduction: Slavery’s Capitalism’ in S. Beckert and S. Rockman (eds), *Slavery’s Capitalism: A New History of American Economic Development* (Philadelphia: University of Pennsylvania Press, 2016), 27.

²⁵See, however, a research project with Kerry Rittich: D. Ashiagbor and K. Rittich, ‘Historicizing Labour in Development: The Colonial Origins of Contemporary Labour Law’ forthcoming in R. Buchanan, L. Eslava and S. Pahuja (eds), *The Oxford Handbook of International Law and Development* (Oxford: OUP, 2022).

3. ENCLOSURE AND THE TURN TO WAGED LABOUR

I want to explore classical political economy understandings of the origins of the modern labour market and the move to waged labour, before turning to the role of colonial extraction and the extent to which race and colonialism complicate the story of how we might best conceptualise the origins of the legal form which governs contemporary work organisation. Here, it is helpful to look to the analysis offered by two theorists, Polanyi and Federici, who begin with the Marxist theory of primitive accumulation and of the emergence of capitalism, and then depart from Marx in significant ways.²⁶ Both Polanyi and Federici begin with the labour/land nexus: exploring the enclosure of the commons, of previously common land (during both the Tudor period, 1485–1603, and the Industrial Revolution of the eighteenth century in England) and the resultant dispossession of peasants, whose exclusion from access to productive resources necessitated a turn to waged labour.

Karl Polanyi acknowledges the important role of enclosure and the creation of private property in land, in dispossessing the now landless peasantry such that they were required to sell their labour power.²⁷ In seeking to understand the institutional nature of a market economy, Polanyi points to the significance of the concept of the commodity—objects produced for sale on the market.²⁸ Labour, land and money are essential elements of industry and, accordingly, must be organised in markets. But ‘labour, land and money are obviously *not* commodities’; nevertheless, it is with the help of this *fiction* that the actual market for labour, land and money are organised.²⁹ The commodity fiction is crucial to the functioning of the market economy. However:

To allow the market mechanism to be sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society.³⁰

Accordingly, Polanyi notes, social history in the nineteenth century was marked by a double movement: ‘the extension of the market organisation in respect of *genuine* commodities was accompanied by its restriction in respect

²⁶Polanyi, n.3; S. Federici, *Caliban and The Witch: Women, the Body and Primitive Accumulation* (New York: Autonomedia, 2004).

²⁷See J. D. Chambers, ‘Enclosure and Labour Supply in the Industrial Revolution’ (1953) 5(3) *Economic History Review, New Series* 319–43.

²⁸Polanyi, *The Great Transformation*, 75.

²⁹*Ibid.*, 75–76; emphasis added.

³⁰*Ibid.*, 76.

of *fictitious* ones.³¹ This openness to the idea of de-commodification leads to an openness to ‘reformist’ interventions ‘of a type that Marx suggested were not consistent with capitalist social relations, which he argued were ‘tightly coupled’ to the logic of the capital-labour relation.³² ‘[P]roduction and distribution in a capitalist system are simply too “tightly-coupled” to allow reforms in the area of “distribution” without the transformation of relations of production.’³³

In contrast, Polanyi’s contention is that, as the market system expands, this movement is met by a counter-movement, checking the growth of the market in order to protect society. In other words, rules and institutions to restrain ‘free’ markets.³⁴ This ‘double movement’ relates to a political, regulatory response to the spread of markets, to the commodification of labour power and of land (the environment): the forces of *laissez-faire* economic liberalism are offset by principles of social protection.³⁵ In an argument derived from Polanyi, postwar welfare states—but also, the presence of trade unions, collective bargaining, labour regulation and social welfare law—can be understood as a form of de-commodification.³⁶ In historicising the evolution of social rights, Judy Fudge observes their role in the decommodification of labour ‘through the existence of a social safety net and labour standards that ameliorate the harshness of the market.’³⁷ Here, it is necessary to recognise the important role of trade unions in industrialised economies of the global North, institutionalising the gains of the labour movement in the form of such safety nets and labour standards. Indeed, Asbjørn Wahl argues that the welfare state was

³¹Ibid., 79; emphasis added.

³²G. K. Bhambra and J. Holmwood ‘Colonialism, Postcolonialism and the Liberal Welfare State’ (2018) 23(5) *New Political Economy*, 574–87, 577.

³³J. Holmwood, ‘Moral Economy Versus Political Economy: Provincializing Polanyi’ in C. Karner and B. Weicht (eds), *The Commonalities of Global Crises: Markets, Communities and Nostalgia* (London: Palgrave Macmillan, 2016).

³⁴F. Block, ‘Karl Polanyi and the writing of The Great Transformation’ (2003) 32 *Theory and Society*, 275–306, 297.

³⁵Polanyi, *The Great Transformation*, at 79–80, 136, 138–9. Polanyi gives, as examples of the protective counter-movement, trade union law and anti-trust legislation, as well as legislation relating to public health, factory conditions, workmen’s compensation, municipal trading, social insurance, public utilities and trade associations: *The Great Transformation*, 153–7.

³⁶Bhambra and Holmwood, n.32, 575 and 577; G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990); G. Esping-Andersen, *Social Foundations of Postindustrial Economies* (Oxford: OUP, 1999).

³⁷J. Fudge, ‘The New Discourse of Labor Rights: From Social to Fundamental Rights?’ (2007) *Comparative Labor Law and Policy Journal* 29–66, 34.

a concession (perhaps an unstable compromise) won by workers against capital through decades of struggle,³⁸ and won at least in part as a result of external pressure generated by the Cold War and fear of the potential appeal of socialism.³⁹ As Esping-Andersen notes, welfare states weaken the cash nexus, and hence weaken the dependency on the wage, by granting entitlements independent of market participation.⁴⁰ A more direct contribution of the labour movement to this decommodification, institutionalising social rights and protecting workers *within* the labour market rather than *from* the market, was through the institution of collective *laissez faire*, namely, legal support for autonomous collective bargaining.⁴¹ Collective bargaining—the joint regulation of pay and other terms and conditions of employment, premised on a commitment to redistribution—served to counterbalance the inequality of bargaining power within individual employment relationships.⁴²

However, there are a number of crucial steps missing from the story about the role of the social in ameliorating the market, and the role (albeit an important one) of the labour movement in the global North in this amelioration. This analysis does not fully interrogate or disaggregate the

³⁸A. Wahl, 'Class Struggle Built the Welfare State' (2021) *Jacobin* 2 May 2021, <https://www.jacobinmag.com/2021/05/welfare-state-class-struggle-confrontation-compromise-labor-union-movement> (last accessed 31 July 2021); A. Wahl, *The Rise and Fall of the Welfare State* (London: Pluto Press, 2011).

³⁹Eric Hobsbawm explains the advance of such social Keynesianism, New Deal policies and 'corporatism' as a response to the fear of regime competition from the Soviet Union: E. Hobsbawm, 'Goodbye To All That' (1990) *Marxism Today*, October, 18–23; see also H. Obinger and C. Schmitt, 'Guns and Butter? Regime Competition and the Welfare State during the Cold War' (2011) 63(2) *World Politics* 246–70.

⁴⁰Esping-Andersen (1999), 43. 'If individuals do not have access to non-market guarantees, their capacity to be free, unconstrained, market agents is reduced, even nullified. A first principle in free exchange is that the actor has the possibility of withholding the product until the 'price is right'. However, this is not possible if basic existence is at stake. The labour market can therefore only be a real market when, paradoxically, it has been distorted, reduced, and tamed; when participants have access to sources of welfare other than earnings' (Ibid., 38).

⁴¹S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: OUP, 2005), 201. For a discussion of collective bargaining as a form of 'new governance'; see D. Ashiagbor, 'Evaluating the Reflexive Turn in Labour Law' in A. Bogg, C. Costello, A. C. L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford: Hart Publishing, 2015) 123–48.

⁴²K. Klare, 'Countervailing Workers' Power as a Regulatory Strategy' in H. Collins, P. Davies and R. Rideout (eds) *Legal Regulation of the Employment Relation* (London: Kluwer Law International, 2000).

category of labour. Earlier versions of the decommodification thesis failed to take into account gender and unpaid female household labour;⁴³ and the analysis to a great extent continues to omit that commodification is in itself racialised.

What is missing from the broader analysis is an exploration of the role of colonialism, race or racial capitalism, first, in the initial construction of markets of the global North, and in the transition from feudalism to capitalism; and second, in the construction of postwar welfare states and labour law regimes. Thinking with the notion of racial capitalism enables a re-assessment of the ‘implied boundedness’ of the European nation during formation of market economy.⁴⁴ According to Cedric Robinson and others including Ellen Meiksins Wood and Immanuel Wallerstein,⁴⁵ capitalism has always been transnational, or rather, it should be viewed as a world system. Robinson criticises ‘the mistaken use of the *nation* as a social, historical and economic category; a resultant and persistent reference to national labour “pools” (e.g., “the English working class”):⁴⁶ Further, dispossession did not only occur within the boundaries of the nation-state.

Recent work by historians of empire, building on Eric Williams’ groundbreaking study of the centrality of slavery in financing British industrial development,⁴⁷ shows that it is not possible to understand the spectacular pattern of economic development of both the US and the UK without appreciating the role of racially organised slavery in providing the initial ‘free’ capital (and financialisation) which enabled the extraordinarily successful industrialisation of both economies.⁴⁸

⁴³For feminist correctives, see: J. Lewis, ‘Gender and the development of welfare regimes’ (1992) 2(3) *Journal of European Social Policy* 159–73; A. S. Orloff, ‘Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States’ (1993) 58(3) *American Sociological Review* 303–28; R. Ciccio and D. Sainsbury, ‘Gendering Welfare State Analysis: Tensions between Care and Paid Work’ (2018) 1(1–2) *European Journal of Politics and Gender* 93–109.

⁴⁴G. Bhattacharyya, *Rethinking Racial Capitalism Questions of Reproduction and Survival* (London: Rowman and Littlefield International Ltd, 2018), 10.

⁴⁵E. M. Wood, *The Origin of Capitalism* (New York: Monthly Review Press, 1999)/*The Origin of Capitalism: A Longer View* (London: Verso Books, 2002); I. Wallerstein, *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974).

⁴⁶Robinson, n.20, 23; emphasis in the original.

⁴⁷E. Williams, *Capitalism and Slavery* (Chapel Hill: The University of North Carolina Press, 1944/1994).

⁴⁸Bhattacharyya, n.44, 107; N. Fraser ‘Roepke Lecture in Economic Geography—From Exploitation to Expropriation: Historic Geographies of Radicalised Capitalism’ (2018) 94(1) *Economic Geography*, 1–17, 5; Beckert and Rockman, n.24.

To return to the fictitious commodity of labour: enslaved peoples are not selling their labour; it is not their labour power that is being commodified, but they themselves are the commodities. Nancy Fraser puts this in terms of a distinction between expropriation and exploitation. Those who, dispossessed from land, have the legal status of free individuals, are able to sell their labour power in return for wages. These free subjects of exploitation can be contrasted to dependent, racialised, subjects of expropriation outside the wage nexus.⁴⁹ What Fraser refers to as expropriation, David Harvey describes as dispossession or ‘accumulation by dispossession’,⁵⁰ and it is a dispossession which continues after the end of slavery, in the context of settler colonialism and classic (extractive or trade) colonialism.

Relatedly, a neo-Polanyian approach to embeddedness (and to decommodification in the postwar era) does not engage with the extent to which the circulation of colonial resources has been key to capitalist development and to the amelioration of market society.⁵¹ Even post-abolition, there is a significant role played by colonial and neo-colonial extraction and commodification of labour power from the global South in the process of decommodification in the global North. An observation to which I shall return in Part 4 of this article is that decommodification is racialised; with racialised workers traditionally excluded from the industrial citizenship or social citizenship of the postwar welfare state.⁵²

Turning to Silvia Federici: in her study of the transition from feudalism to capitalism, Federici describes the separation of workers from the land, from their means of subsistence and their new dependence on monetary relations in the emergent money-economy.⁵³ Whereas Marx examines primitive accumulation from the viewpoint of the waged male proletariat and the development of commodity production, Federici examines the changes introduced in the social position of women and the production of labour-power, in other words, social reproduction.⁵⁴ Federici argues that:

Women were also more negatively impacted by the enclosures because as soon as land was privatised and monetary relations began to dominate economic life, they

⁴⁹Fraser, n.47.

⁵⁰D. Harvey, ‘The “New” Imperialism: Accumulation by Dispossession’ (2004) 40 *Socialist Register* 63–87.

⁵¹For a discussion of the limitations of *The Great Transformation*, see K. Klare, ‘Karl Polanyi’s *The Great Transformation* in Retrospect’ June 2021, unpublished paper on file with the author.

⁵²See also M. Dias-Abey, ‘Migrant Workers and Labour Markets: A Legal Institutional Reappraisal’ in this volume.

⁵³Federici, n.26, 75.

⁵⁴*Ibid.*, 12.

found it more difficult than men to support themselves, being increasingly confined to reproductive labor at the very time when this work was being completely devalued.⁵⁵

This rethinking of the development of capitalism from a feminist viewpoint is central to my concern to bring race and colonialism into the analysis. For Federici, ‘colonial exploitation is the parallel process to the invisibilisation of women and their work.’⁵⁶ Federici’s project helps in the important work of connecting enclosure within the confines of the nation-state, and what this means for the move to waged labour, with overseas or colonial enclosure and dispossession and what this means for raced or racialised markets. Labour or labour power accumulated through colonialism and the slave trade made possible a mode of production which could not be achieved solely within Europe.⁵⁷ In a similar vein to Federici, Maria Mies’ analysis of the erasure of women’s work,⁵⁸ connects the non-wage labour of women with that of other non-wage workers—enslaved people, contract or indentured workers, peasants in the colonies, arguing that ‘[w]ithout the ongoing subsistence production of non-wage labourers (mainly women), wage labour would not be “productive”’.⁵⁹

The point I wish to emphasise here is that non-wage work, colonial expropriation, migrant work and the work of racialised ‘others’ was key to fuelling the industrial revolution. To return to Robinson’s observation as to the transnational nature of capitalism, ‘[t]here has never been a moment in modern European history (if before) that migratory and/or immigrant labour was not a significant aspect of European economies.’⁶⁰ Labour markets are thus ‘raced’ and gendered. But the elements which enable the global reproduction of capital are not acknowledged in the standard narrative. This narrative tells a story of division of labour—between waged work done by men and women’s unpaid work; between the work of the ‘English working class’ and the racialised others outside the nation. Whereas, it is argued, gendered work, and racialised work outside the territorial boundaries of the nation, is closely integrated into the production of a waged proletariat domestically.⁶¹ Race is thus constitutive of these early labour markets but, like

⁵⁵Ibid., 74.

⁵⁶Bhattacharyya, n.44, 41.

⁵⁷Federici, n.26, 103.

⁵⁸Bhattacharyya, n.44, 13.

⁵⁹M. Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (New Jersey: Zed Books, 1986/London: Bloomsbury Publishing, 2014), 48.

⁶⁰Robinson, n.20, 23.

⁶¹Federici, n.26, 104–5.

women's unpaid work, is invisibilised and not explicitly foregrounded in the legal form which emerges with industrialisation.

The emergence of the legal institution of the contract of employment during industrialisation served to entrench the sexual division of labour and determine how women's work is valued and regulated.⁶² But, more broadly, this conceptualisation of the boundaries of work and the employment relationship during the period of industrialisation neglects the more variegated understanding of work and the ways in which race and colonialism are constitutive of the labour market. The question of how race is constitutive of contemporary welfare states and labour markets is one to which I shall now turn.

4. RACIAL CAPITALISM, WELFARE STATES AND CONTEMPORARY LABOUR MARKETS

This section continues the exploration of the central role played by colonial extraction and commodification of labour power from the global South in the process of industrial development in the global North, in order to illuminate the implications of this regime or rationality of racial capitalism for contemporary social welfare and labour market institutions. Gurminder Bhambra describes how most theorists of capitalism fail to acknowledge the ways in which capitalist development globally was fundamentally dependent upon colonial exploitation and appropriation.⁶³ What is important, following the earlier analysis of the role of colonialism, race or racial capitalism in the initial construction of markets of the global North, is to now consider their role in the construction of postwar welfare states and labour law regimes. The welfare state maps on to the nation-state, but in the case of the UK, that state was also a colonial and an imperial one.

Published in 1944, Eric Williams' *Capitalism and Slavery* argued that the plantation system fuelled the industrial revolution, through the accumulation of vast fortunes by plantation owners, shipbuilders and merchants connected with the slave trade.⁶⁴ Post-abolition, as scholars from the global South have shown, western European powers appropriated economic

⁶²S. Fredman and J. Fudge, 'The Contract of Employment and Gendered Work' in M. Freedland (ed), *The Contract of Employment* (Oxford: OUP, 2016), 231–52.

⁶³G. K. Bhambra, 'Colonial Global Economy: Towards a Theoretical Reorientation of Political Economy, (2021) 28(2) *Review of International Political Economy* 307–22, 313.

⁶⁴E. Williams, *Capitalism and Slavery* (Chapel Hill: University of North Carolina Press, 1944/1994).

surplus from their colonies, and this materially and substantially aided their own industrial transition from the eighteenth century onward.⁶⁵ The concept of ‘colonial drain’ or drain of wealth refers to how the forcible extraction of surplus from the economies of colonies made possible Britain’s growing accumulation of capital. Such surplus extraction and transfer required the establishment of property rights over the local population, but this, as economist Utsa Patnaik explains, could take differing forms. In India it took the form of the sovereign right of tax collection; in the West Indies, the plantation economy and slavery resulted in the extraction of surplus by means of ‘slave-rent’; in Ireland, absentee landlords extracted surplus by means of land rent as well as taxes.⁶⁶ India was an example of an economy where this colonial drain was multidimensional: an internal dimension, wherein economic surplus was extracted from Indian producers through rent and taxes, in particular land revenue. The external dimension saw the designation of a substantial part of India’s tax revenues as ‘expenditure abroad’ in the budget; the country’s financial gold and foreign exchange earnings from its commodity export surplus were appropriated and taken into British control.⁶⁷ The sheer scale of these transfers is phenomenal. Patnaik, drawing on nearly two centuries of detailed data on tax and trade, calculated that Britain drained a total of around £9.2 trillion from India during the period 1765–1938.⁶⁸

In a final example, from sub-Saharan Africa,⁶⁹ economic historian Gareth Austin’s explanation of colonial extraction and its legacies is worth quoting at length:

Colonial extraction in Africa could be seen most decisively in the appropriation of land for European settlers or plantations, a strategy used not only to provide European investors and settlers with cheap and secure control of land, but also to oblige Africans to sell their labour to European farmers, planters or mine-owners...

⁶⁵U. Patnaik and P. Patnaik, ‘The Drain of Wealth Colonialism before the First World War’ (2021) 72(8) *Monthly Review*, February 2021.

⁶⁶U. Patnaik, ‘Revisiting the “Drain”, or Transfer from India to Britain in the Context of Global Diffusion of Capitalism’ in S. Chakrabarti and U. Patnaik (eds), *Agrarian and Other Histories: Essays for Binay Bhushan Chaudhuri* (New Delhi: Tulika Books, 2017), 282.

⁶⁷Patnaik and Patnaik, n.64.

⁶⁸Patnaik, ‘Revisiting the “Drain”’. To put this in context, Britain’s 2018 GDP estimate was roughly £2.3 trillion, meaning that the scale of British impoverishment of colonial India was so vast, that an accurate reparations of the amount drained would collapse the modern UK economy several times over.

⁶⁹See also W. Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L’Ouverture, 1972/London: Verso, 2018).

Even in the ‘peasant’ colonies, i.e. where the land remained overwhelmingly in African ownership, we will see that major parts of the services sector were effectively monopolised by Europeans. Then there was coercive recruitment of labour by colonial administrations, whether to work for the State or for European private enterprise.⁷⁰

In other words, the resources to be fought over between labour and capital in the metropole, the concessions won by workers against capital and the resultant redistribution which made possible the social welfare state and industrial citizenship within the UK, owe a great deal—even after abolition, and even after formal independence—to colonial drain from countries of the global South. Kwame Nkrumah describes welfare states of the global North which offer high living standards as in effect exporting problems of internal inequality, and ‘transferring the conflict between rich and poor from the national to the international stage.’⁷¹

Turning to postwar and contemporary labour markets, I wish to explore what happens to these colonial workers in the ‘periphery’ when they (or, rather, their descendants) become racialised workers in the ‘core’ or metropole. Labour law scholars in industrialised countries have, historically, neglected questions of labour migration, although migrant labour has long been a significant aspect of European economies,⁷² and migrant work significantly reshapes employment law in receiving economies. This lacuna in scholarship is being remedied.⁷³ In particular, we need to pay more attention to questions such as the migrant share of the labour force; the ways in which immigration law structures the entry of migrants into the host labour market and institutionalises precarious norms;⁷⁴ the segmentation of the host labour market e.g. into immigrant and non-immigrant sectors and the opportunism by employers taking advantage of migrants’ weaker bargaining power and

⁷⁰G. Austin, ‘African Economic Development and Colonial Legacies’ (2010) *International Development Policy | Revue internationale de politique de développement*, Online since 11 March 2010: <http://journals.openedition.org/poldev/78> (last accessed 31 July 2021).

⁷¹K. Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (New York: International Publishers, 1966), 255.

⁷²Robinson, n.20, 23.

⁷³See M. Dias-Abey, in this volume, for an important corrective. See also C. Costello and M. Freedland (eds) *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: OUP, 2014).

⁷⁴J. Fudge, ‘Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers’ (2012) *Comparative Labor Law and Policy Journal*, 101–37.

lack of collective organisation;⁷⁵ the shift in labour migration policy within many industrialised countries from migration for permanent settlement to temporary migrant worker programmes.⁷⁶

Given the significance of colonial extraction for resourcing the postwar welfare state and related labour market institutions in the UK, how inclusive was that welfare state settlement of racialised others—non-white colonial subjects migrating to work in the metropole? Legislation passed in 1946–48, implementing the Beveridge Report,⁷⁷ introduced a welfare system which formally eschewed the Poor Law-era distinction between the ‘deserving’ and the ‘undeserving’ poor,⁷⁸ in favour of a system premised on universality: i.e. tax-funded, redistributive social support and flat-rate benefits.⁷⁹ In the same year, the British Nationality Act 1948 ushered in the new legal status of ‘Citizen of the United Kingdom and Colonies’,⁸⁰ which had the effect (if not the intention) of granting a right to enter and remain in the UK to all those born in the UK, in a British colony or an independent Commonwealth state. However, full access to the labour market and to the benefits of the welfare state was not in practice universally granted to racialised subjects.

⁷⁵C. Barnard, ‘Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals’ and A. Bogg and T. Novitz, ‘Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers’ both in C. Costello and M. Freedland (eds), n.72.

⁷⁶J. Howe and R. Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Oxford: Hart Publishing, 2016); T. Novitz, ‘Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks’ in D. Ashiagbor (ed) *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart Publishing, 2019).

⁷⁷*Social Insurance and Allied Services. Report by Sir William Beveridge* (London: HMSO, 1942). Implementing legislation comprised the National Insurance Act 1946; the National Health Service Act 1946, which came into force in 1948; and the National Assistance Act 1948.

⁷⁸Simon Deakin and Frank Wilkinson trace the ‘many continuities’ from the original Elizabethan poor laws to contemporary social security. A key turning point was the Poor Law Amendment Act 1834, with its aim of deterring claims for relief so as to ‘avoid “artificial” interference with the market rate for wages’: S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: OUP, 2005), 111; see generally Chapter 3. Subsequently in the early twentieth century, the practice of requiring the ‘undeserving’ able-bodied poor to be incarcerated in workhouses in order to obtain relief, was abandoned in favour of means-tested assistance—cheaper than organising relief through the workhouse, but still stigmatised and discouraged. The Beveridgean welfare state for the most part abolished means-testing: N. Whiteside, ‘The Beveridge Report and Its Implementation: A Revolutionary Project?’ (2014) *Histoire@Politique. Politique, culture, société*, No 24, septembre-décembre 2014, 24–37.

⁷⁹Whiteside, n.77, 24.

⁸⁰See Dias-Abey, in this volume.

Across Europe and North America, postwar welfare states more broadly failed to fully benefit women, racial minorities, guest workers, or immigrants, or actively excluded them from education, healthcare, housing support, government-backed financial services and pension schemes.⁸¹ Poornima Paidipaty and Pedro Ramos Pinto pose the oft-asked question of whether such regimes were exclusionary by design or whether existing forms of discrimination and prejudice prevented the extension of more universal coverage, acknowledging that this is perhaps a false dichotomy.⁸² The postwar welfare state was grounded on universality, but full belonging or citizenship required participation in the labour market, and ideally within the primary labour market. Racialised and migrant workers in the UK, contracting for work under what we would now call atypical or non-standard terms and receiving lower hourly pay than British workers, would be liable to pay lower social insurance contributions—and thus disadvantaged when seeking to access welfare benefits in the event of unemployment, illness or accident.⁸³ At the broader conceptual level it is also the case that migrants were considered less ‘deserving’ of social security and welfare, with ‘universal’ welfare implemented through the prism of a racialised response to labour migration from the colonies and Commonwealth.⁸⁴ While grounded on universality, the architecture of the welfare state was based on a ‘culturally specific, heteronormative understanding of the nuclear family’,⁸⁵ which meant that full social or industrial citizenship was deemed to reside in male breadwinners engaged in full-time work; work which could then support the dependency of the female caregiver within the traditional household. Furthermore, non-traditional households, for instance, large joint families or ones in which migrant labour and remittances were central to household budgets,⁸⁶ were less ‘legible’ to welfare state policy-makers. Thus, as Shilliam argues, the deserving/undeserving distinction was preserved by means of

⁸¹P. Paidipaty and P. Ramos Pinto, ‘Revisiting the “Great Levelling”’: The Limits of Piketty’s Capital and Ideology for Understanding the Rise of Late 20th Century Inequality’ (2021) 72 *British Journal of Sociology*, 52–68, 56.

⁸²Ibid.

⁸³F. Williams, *Social Policy: A Critical Introduction: Issues of Race, Gender, and Class* (London: Polity Press), 7; M. O’Brien, ‘The Beveridge Report: Its Impact on Women and Migrants’ (2010) 2(2) *Socheolas: Limerick Student Journal of Sociology*, April 2010, <https://ulsites.ul.ie/sociology/node/27971>, 33 (last accessed, 31 July 2021).

⁸⁴R. Shilliam, *Race and the Undeserving Poor: From Abolition to Brexit* (London: Palgrave, 2018), 82.

⁸⁵Paidipaty and Ramos Pinto, n.80, 58.

⁸⁶Ibid.

informal ‘colour bars’ in the labour market, in housing and in the welfare state, with Black and Asian workers disproportionately channelled into low-skilled or low paid sectors.⁸⁷

The social solidarity engendered by and deemed necessary for the project of postwar reconstruction arguably built on a war-time sense of national unity: to what extent did this conception of nationhood carry an imperialist or racist rationality into the labour market context? As Satnam Virdee shows, race and racism were historically a structuring force within the working class in the UK, but the working class had not wholly embraced a national identification of Britishness, and was indeed a multi-ethnic formation from the moment of its inception, comprising Irish Catholic, Jewish, Asian and African diaspora workers.⁸⁸ Virdee uncovers a long tradition of cooperation and solidarity ‘that often transcended racial and ethnic boundaries.’⁸⁹ But simultaneously, in the context of the welfare state settlement, there was hostility on the part of trade unions and the ‘white working class’ to racialised others and migrants.⁹⁰

Relatedly, how inclusive of racialised workers and colonial subjects are the labour market institutions that comprise the foundation for industrial citizenship?⁹¹ Simon Deakin and Frank Wilkinson outline the ‘partial and uneven’, ‘fragile and incomplete’ quality of regulation through collective bargaining during the collective *laissez faire* period.⁹² As with access to the benefits of the welfare state, collective bargaining coverage was partial, and that unevenness has, historically, been gendered and racialised.

⁸⁷Shilliam, n.83, 81 et seq.

⁸⁸S. Virdee, *Racism, Class and the Racialized Outsider* (London: Palgrave, 2014).

⁸⁹Ibid., 22. Virdee refers to ‘internationalism in the age of imperialism’: 66 et seq.

⁹⁰Ibid. ‘The radicalisation of British nationalism was not new ... but what distinguished this period above all was the extent to which the state, employer and worker came to adhere to a common belief in British nationalism underpinned by a shared allegiance to whiteness.’

⁹¹Judy Fudge refers to industrial citizenship as entailing ‘the collective use of civil rights in order to assert claims for social justice’; Ruth Dukes and Wolfgang Streeck adopt a broader meaning ‘to refer to the entirety of “status” rights instituted to neutralise the market power differential between workers and employers in that they enable them to negotiate collective contracts, or agreements, on a level playing field’: Fudge, n.37, 47; R. Dukes and W. Streeck, ‘From Industrial Citizenship to Private Ordering? Contract, Status, and the Question of Consent’ Max-Planck-Institut für Gesellschaftsforschung, Köln MPIfG Discussion Paper 20/13, November 2020, 5.

⁹²Deakin and Wilkinson, n.41, 272. Deakin and Wilkinson are here referring to how, even in well-organised, well-unionised industries, national bargaining proved patchy; with wide variations in terms and conditions across comparable firms.

In terms of gender, Sandra Fredman and Judy Fudge remind us that the counterbalancing of the inequality within individual employment relationships by collective action is an option which has until recently been far less available to women workers than to men, with women located in work which has been challenging for trade unions to organise; but also subject to male trade unions' hostility to women's involvement.⁹³ Similarly, with regard to racialised workers, Satnam Virdee traces the racist exclusionary practices of white trade unionists, restricting and even excluding altogether the employment of racialised labour in the 1950s and 1960s.⁹⁴

While class analysis has re-emerged in the post-Brexit and post-Trump era, it has taken a distinctive form, namely by focusing principally on the *white* working class, and more on their cultural or social exclusion than on how structural inequalities deny the working class (white or otherwise) access to opportunities, resources and power.⁹⁵ In the UK, the 'white working class' analysis tends to sidestep or even erase the existence of the 'black working class' historically,⁹⁶ and also downplays the ongoing exclusion of the black working class particularly in terms of higher risks of unemployment, low earnings and poor intergenerational social mobility. The Brexit referendum campaign was marked by divisive, anti-immigrant and xenophobic rhetoric, with prominent political figures playing a significant role in normalising such discourse in a way that emboldened hate speech, hate crime and violence. While much of that was directed at those perceived to be east European migrants, it had an inevitable spill-over effect into hatred towards ethnic or ethno-religious minority communities and people who are visibly different.⁹⁷ The argument, articulated for example by David Goodhart, that high rates of immigration and greater diversity erode social-democratic solidarities and undermine the institutions underpinning the welfare state fall apart, in particular, when one considers the colonial

⁹³Fredman and Fudge, n.61, 234.

⁹⁴S. Virdee, 'A Marxist Critique of Black Radical Theories of Trade-Union Racism' (2000) 34(3) *Sociology*, 545–65, 551–2. Virdee also documents black self-organisation and 'inter-racial' working class solidarity.

⁹⁵O. Khan and F. Shaheen, 'Introduction: Analysing and Responding to Racial and Class Inequalities' in O. Khan and F. Shaheen (eds), *Minority Report: Race and Class in post-Brexit Britain* (London: Runnymede Trust, 2017).

⁹⁶See, on the multi-ethnic proletariat, Virdee, n.87, 26 et seq.

⁹⁷Committee on the Elimination of Racial Discrimination (CERD), Concluding observations, August 2016.

formation of European welfare states.⁹⁸ John Holmwood puts this well: ‘The point is not that immigration has now begun to undermine solidarities, but that solidarities were formed on a racialized politics of colonial encounters’⁹⁹ To return briefly to the analysis of Utsa Patnaik and Prabhat Patnaik: the welfare state settlement and industrial citizenship were, in effect, ‘bribery in the form of higher wages for its labour aristocracy, which led to the latter’s support of the British Empire.’¹⁰⁰

5. LEGAL FORM, THE STANDARD EMPLOYMENT RELATIONSHIP AND PRECARIETY

An overarching claim of this article is that race is embedded in the legal form by which labour is regulated; that contemporary forms of work owe their organisational form to histories of racial thinking. What became, in the mid-twentieth century, the dominant legal form for governing work relations in a number of national contexts including the UK, namely the standard employment relationship (SER), is the culmination of a historical process.¹⁰¹ Structured around a normative model of employment premised on a gendered division of labour which had initially emerged during industrialisation, the contemporary gender contract underpinning the SER is that of male breadwinner in receipt of a family or social wage, and female caregiver. To this, we may also add that this normative model is premised on white male employment in the primary labour market. The particular form which regulation takes is shaped by the broader socio-historical context, the country-specific path taken towards industrialisation and also by the balance of power between workers, employers and different segments in the labour market.¹⁰² Following Zoe Adams, I use the term juridical or legal

⁹⁸D. Goodhart, *The British Dream: Successes and Failures of Post-war Immigration* (London: Atlantic Books, 2013). See S. Mulley, ‘Immigration: Consensus and contention on the left’ *Juncture* 20.1: Summer 2013, <https://www.ippr.org/juncture-item/immigration-consensus-and-contention-on-the-left> (last accessed 31 July 2021).

⁹⁹J. Holmwood, ‘Moral Economy Versus Political Economy: Provincializing Polanyi’ in C. Karner and B. Weicht (eds), *The Commonalities of Global Crises: Markets, Communities and Nostalgia* (London: Palgrave Macmillan, 2016).

¹⁰⁰Editorial, *Monthly Review*, February 2021 (Volume 72, Number 8).

¹⁰¹S. Deakin, ‘Addressing Labour Market Segmentation: The Role of Labour Law’ ILO Working Paper No. 52 (Geneva: International Labour Office, 2013), 5.

¹⁰²Z. Adams and S. Deakin, ‘Institutional Solutions to Precariousness and Inequality in Labour Markets’ (2014) 52:4 *British Journal of Industrial Relations* 779–809; J. Fudge, ‘The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory’ (2017) 59(3) *Journal of Industrial Relations* 374–92, 379.

form to refer to ‘the historically specific form which social relations assume in the context of capitalism’.¹⁰³ With respect to the SER, that legal form takes the shape of the contract of employment governing a bilateral relationship between worker and employing entity. The law can only ‘see’ labour relationships when structured as a legal relation between (two) subjects.¹⁰⁴ This means that when those social or economic relations between capital and labour such as economic dependence, subordination, ‘control’—referred to in the common law ‘tests’ for determining the existence of a contract of employment—exist in a non-standard configuration (e.g. in a triangular employment relationship or without the parties’ formal agreement) the social or economic labour relationship falls outside the SER and outside the contract of employment. Similarly, with respect to the SER, its legal form does not ‘see’, does not factor into the equation, the unpaid work of social reproduction which made possible the paid work at the heart of the relationship; or the global reproduction of capital enabled by the labour of racialised others outside the territory of the nation. Thus, race is constitutive of the legal form by which labour is regulated, but is invisibilised.

This section goes on to explore in more detail the interaction between this legal form and racial differences in labour market location, namely, exclusion from the labour market, but more particularly, disadvantage within it: the clustering of racialised (ethnic minority) workers in informal and precarious work falling outside the scope of employment protection law.

The legal form at the heart of the standard employment relationship, the contract of employment, is unable to recognise the existence of structural elements—at the level of regime or rationality—which cannot be expressed in the formal agreement or individual action between the parties. As Zoe Adams argues, the legal tests for determining ‘dependent’ or ‘subordinate’ working relationships, i.e. the existence of a contract of employment, ‘ought to be informed by an analysis of the worker’s class position, and the social function of his work—the structural context which explains why the relationship between the parties came to be’.¹⁰⁵ However, in practice, the focus is on the parties’ agreement and the extent to which there is dependence, subordination by the worker to the employer’s common law powers of direction and control, and mutuality of obligation (‘mutual promise of future

¹⁰³ Adams, n.6, 444.

¹⁰⁴ *Ibid.*, 453.

¹⁰⁵ *Ibid.*, 450.

performances’).¹⁰⁶ Hence the gendered and racialised origin of the SER is erased, and the legal form itself systematically excludes certain groups from the scope of labour law.¹⁰⁷

Which groups are excluded, and through which mechanisms? The standard employment relationship co-evolved alongside vertically integrated firms, industrial trade unions and the welfare state.¹⁰⁸ Thus, workers within an SER are able to enjoy employment protection legislation, the partial job security arising from the internal labour market or vertical integration, collectively bargained standards and entitlements within the Keynesian welfare state.¹⁰⁹ However, those workers who are perhaps most in need of this form of social protection, in particular, the protection of labour law, are most likely to be excluded from its scope: for instance, workers subject to non-standard arrangements which lack the ongoing promise of future work (e.g. casual or ‘zero hours’ contracts); or which are on a discontinuous basis; or mediated via a third party (e.g. agency work or personal service work),¹¹⁰ or which take place within the ‘household workplace’.¹¹¹ The binary distinction between an ‘employee’, employed under a contract of service and an ‘independent contractor’ cuts across regulatory regimes, such that the growing body of non-standard workers fall outside of the scope of collective bargaining, employment protection rights and the national insurance system, ‘without having the genuine economic independence of the entrepreneur’.¹¹²

There is little evidence to suggest that, during the heyday of the standard employment relationship, racialised workers were any more likely to fall outside its scope than white workers; more that they were excluded from full access to the other regimes of industrial citizenship (collective bargaining and the welfare state). My interest here is, whether with the retreat of the standard employment relationship, racialised workers are more greatly

¹⁰⁶M. Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976), 21–2; M. Freedland, *The Personal Employment Contract* (Oxford: OUP, 2003), 91–2.

¹⁰⁷Adams, n.6, 455.

¹⁰⁸Adams and Deakin, n.101, 783.

¹⁰⁹L. F. Vosko ‘Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity’ in L. F. Vosko (ed), *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen’s University Press, 2006) 6–9; Fredman and Fudge, n.61.

¹¹⁰See E. Albin, ‘The Case of *Quashie*: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work’ (2013) 42(2) ILJ 180–91.

¹¹¹See A. Blackett, *Everyday Transgressions: Domestic Workers’ Transnational Challenge to International Labor Law* (Ithaca: Cornell University Press, 2019).

¹¹²Fredman and Fudge, n.61, 239.

exposed to precarity and exclusion from employment protection legislation. There is considerable variation in the representation of non-white groups in the public sector in the UK, but on the whole, racialised workers exhibit a slightly higher tendency to work in this ‘public administration, education and health’ sector compared to white workers.¹¹³ When employed within the ‘primary’ labour market of the public sector, for instance in the NHS, racialised workers experienced vertical segregation into lower status, lower-paid roles.¹¹⁴ But the key factor is that they were employees within the standard employment relationship. Similarly, having been denied access to skilled manual and white-collar jobs due to the racism of the postwar welfare settlement, racialised minorities were, by the early 1980s, over-represented in parts of the manufacturing sector—but with the security, mutualisation of risk and access to employment protection law of the standard employment relationship.¹¹⁵

However, a number of inter-related factors—privatisation of the public sector, deindustrialisation, the rise of the service economy, decline in trade union power and employer preferences for flexibility—have meant a shift towards work which departs sharply from the standard for all workers. The shift towards non-standard and more flexible contracting for work has in large part been facilitated by state deregulation of labour markets in the public sector and encouragement of labour market flexibility in the private sector. Employers and holders of capital are increasingly organising production through distancing strategies such as subcontracting, franchising, concessions and outsourcing, where the ‘employer’ contracts out work rather than using its own workforce so that work is done not by traditional full time, permanent employees, but by atypical or non-standard workers. This shift is manifest across all industrial sectors, but particularly prevalent in the service sector: retail workers, catering and hospitality workers, home care workers, delivery drivers, security officers—most of whom are working non-standard arrangements, some of which are precarious, many exploitative, the majority without full access to employment rights.

This retreat from the standard employment relationship has had differential impacts. Both the process of industrial restructuring during and in the wake of the Thatcher years, and the deepening of the marketisation of the

¹¹³K. Clark and W. Shankley, ‘Ethnic Minorities in the Labour Market in Britain’ in B. Byrne, C. Alexander, O. Khan, J. Nazroo and W. Shankley (eds), *Ethnicity, Race and Inequality in the UK: State of the Nation* (Bristol: Policy Press, 2020), 143.

¹¹⁴Shilliam, n.83, 91.

¹¹⁵Clark and Shankley, n.113, 129–30.

public sector, disproportionately affected racialised groups.¹¹⁶ As Kundnani contends, ‘the privatising of public life that neoliberalism engenders has racially disparate consequences due to the past history of racially differentiated and discriminatory treatment.’¹¹⁷ Black and Asian workers are moving into more insecure forms of employment at higher rates than White workers: they were twice as likely (4.3%) to be in involuntary temporary employment compared with White workers (2.1%), more than twice as likely to be in agency work,¹¹⁸ and more likely to be on zero-hours contracts—1 in 24 BME workers, compared with 1 in 42 white workers.¹¹⁹ In terms of labour market segmentation, Office for National Statistics data show that 41% of workers from the combined Pakistani and Bangladeshi ethnic group were in the 3 least skilled types of occupation (‘elementary’, ‘sales and consumer services’ and ‘process, plants and machine operatives’ jobs); 18% of Black workers were in ‘caring, leisure and other services’ jobs, the highest percentage out of all ethnic groups.¹²⁰

As for access to the labour market, Black and minority ethnic workers suffer deeper disadvantage during recession and economic crisis, with rates of employment slower to recover during times of economic growth. Yaojun Li and Anthony Heath’s analysis of the UK Household Longitudinal Study shows that ethnic minority groups (in particular, Black African, Black Caribbean, Pakistani and Bangladeshi) face much higher risks of unemployment and have much lower levels of earnings than do their white British counterparts over the life course.¹²¹ ‘Ethnic penalties’ i.e. disadvantages

¹¹⁶Virdee, n.87, 148. Virinder Kalra observes how South Asian workers migrating to the UK prior to the 1980s were employed in industries which were in long-term decline, and how the employment experience of men from this group was a journey from ‘textile mills to taxi ranks’: V. Kalra, *From Textile Mills to Taxi Ranks: Experiences of Migration, Labour and Social Change* (Aldershot: Ashgate Publishing, 2000).

¹¹⁷Kundnani, n.22, 58.

¹¹⁸Equality and Human Rights Commission, *Healing a Divided Britain: The Need for a Comprehensive Race Equality Strategy* (London: EHRC, 2016), 22.

¹¹⁹Office for National Statistics, Labour Force Survey Q4 2018, Published 12 April 2019, available at <https://www.ons.gov.uk/releases/uklabourmarketstatisticsapr2018> (last accessed 31 July 2021); TUC, ‘BME workers far more likely to be trapped in insecure work, TUC analysis reveals’, <https://www.tuc.org.uk/news/bme-workers-far-more-likely-be-trapped-insecure-work-tuc-analysis-reveals> (last accessed 31 July 2021).

¹²⁰Office for National Statistics, Employment by occupation, Published 15 May 2020; available at <https://www.ethnicity-facts-figures.service.gov.uk/work-pay-and-benefits/employment/employment-by-occupation/latest>.

¹²¹Y. Li and A. Heath, ‘Persisting Disadvantages: A Study of Labour Market Dynamics of Ethnic Unemployment and Earnings in the UK (2009–2015)’ (2020) 46(5) *Journal of Ethnic and Migration Studies* 857–78.

which persist irrespective of socio-demographic characteristics (such as low English language fluency or poor educational attainment), mean that racialised minorities are more likely to face unemployment, and to carry more enduring scars in terms of reemployment and pay.¹²²

In terms of continuity with the colonial era, when racialised workers were geographically located in the ‘periphery’, postwar patterns of labour migrant have meant a relocation to the ‘core.’ But there are points of continuity to note. As discussed above,¹²³ race typically remains ‘outside’ the liberal welfare state, rather than understood as integral to its construction. The solidarity inherent in the welfare state was premised on an understanding of industrial citizenship which did not extend to all, excluding women and racialised migrants. In contemporary labour markets, we can observe a racialised ‘clustering’, wherein Black workers, minority ethnic workers and those of migrant origin are increasingly subject to precariatization, dominating the occupational periphery even when located in the geographic core. For racialised workers, this growing exclusion from the standard employment relationship compounds the past history of racialised exclusions from institutions of social citizenship. Labour law thus fails to socialise economic risk and uncertainty for racialised workers in the ‘periphery’ of the labour market.

6. CONCLUSION

This article outlines and develops a research agenda for understanding the role of race and colonialism in the evolution of the legal form which governs contemporary work organisation. Moving away from a focus on racism as individualised discrimination or prejudice, the article demonstrates how race and racism operate at the level of social system or regime, and also as a dominant rationality, to structure societal institutions such as the standard employment relationship, industrial trade unionism and the postwar welfare state. Taking the long view of the broader socio-historical context of the evolution of the labour market and the standard employment relationship, reveals the extent to which race and the legacies of colonialism are present in structuring contemporary work relationships, even when not ‘visible’ within the legal form. An historical approach also reveals parallels between

¹²² *Ibid.*, 871 et seq.

¹²³ See Shilliam, n.83.

the way in which paid work in the market economy is made possible by the unpaid labour of women in the context of social reproduction, and the constitutive role of race and colonial extraction in the contemporary labour markets of the global North. Learning from the colonial past of work to understand its present, this article argues that the contemporary racialised division of labour and labour market segmentation is just one legacy of how racial subordination, and the resources it generated, were integral to labour markets and, latterly, to labour law.