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Judicial Production of Racial Injustice in *Taiwo v Olaigbe:* Decolonising the Incomplete Story on Race and Contracting

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Abstract
In *Taiwo*, one of the most recent landmark cases on racial justice, the Supreme Court rejected race discrimination claims of two domestic migrant workers, ruling that discrimination on the basis of 'immigration status' should not be equated to discrimination on the basis of 'race'. This article presents an argument for decolonising judicial decision-making, using *Taiwo* as an example to reimagine a much more favourable outcome for victims of racial injustice. This argument is explored through three propositions for decolonial judgment: (a) challenging racial bias in judicial reasoning and legal doctrine; (b) challenging legal frameworks as sites of racial oppression and inequality; and (c) accounting for contextual diversity of experiences of racialisation, avoiding essentialist arguments and categories of racial discrimination. Drawing on these, the article retells the stories in *Taiwo* to challenge the dominant, traditional race equality paradigm and expose the varied and multi-layered ways in which people are racialised differently across historical and socio-cultural contexts and communities. It also opens the potential for an epistemic shift away from the liberal paradigm of 'freedom of contract' and towards the analysis of racial contracting that is co-constituted by multi-layered and context-situated structures of oppression and domination.

Keywords
Decolonial judging, race discrimination, racial contracting

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> It is impossible to talk about the single story without talking about power. There is a word, an Igbo word, that I think about whenever I think about the power structures of the world, and it is 'nkali'. It's a noun that loosely translates to 'to be greater than another'. Like our economic and political worlds, stories too are defined by the principle of nkali: how they are told, who tells them, when they're told, how many stories are told, are really dependent on power.
>
> The single story creates stereotypes, and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make one story become the only story.
>
> Chimamanda Ngozi Adichie

Introduction

Chimamanda Ngozi Adichie warns against the dangers of reducing complex narratives to a 'single story.' These incomplete stories can become the only ones we hear, a risk that applies to legal cases as well. *Taiwo* is a good example of that (Taiwo v Olaigbe [2016] UKSC 31). According to the Supreme Court, the case of *Taiwo* is fairly clear: Nigerian employers in the UK exploited fellow Nigerians (Taiwo and Onu) for domestic work, preying on their immigration status to control and mistreat them. Accordingly, the motivation for the employers to bring the Nigerian domestic workers to the UK was rooted in the ability to exploit their precarious immigration status. By recruiting fellow Nigerians under specific visas that tied their legal residence to their employment, the employers were able to exert significant control over the workers. This control enabled them to impose harsh working conditions, low pay, and long working hours, knowing that the workers' vulnerability and dependence on their employment for legal residence would make them unlikely to challenge their mistreatment. At the most basic level, according to the Court, the abuse suffered by the Nigerian domestic workers in the UK can be attributed to their vulnerability, which was exacerbated by their precarious immigration status. Everyone involved was Black and Nigerian,[1] and in one of the cases, the claimant and their employer belonged to the same ethnic group in Nigeria. Therefore, according to the Court, race, and by extension the Equality Act, were not relevant factors in explaining the mistreatment or abuse.

Since the judgment was made, this single story has largely held firm. While some academic commentary has criticised the court for not adopting an intersectional approach to consider how precarity, race, and gender contribute to immigration vulnerability, the fundamental idea that racism played no role in the mistreatment, abuse, or initial recruitment has remained unchallenged. This is significant because there is an important distinction between these two claims in the depth and nature of the critique they offer against the Court's judgement. When scholars argue for an intersectional approach that considers race, gender and precarity as contributing factors to the vulnerability of the workers, they are essentially adding layers of complexity to the Court's 'single story' of immigration status. This approach suggests that while immigration status is important, it is not the only factor that makes these workers vulnerable to exploitation. Race, gender, and other social categories intersect with immigration status to create a more complex picture of vulnerability. However, this approach does not fundamentally challenge the Court's basic narrative that the exploitation was primarily, if not solely, due to the workers' immigration status.

This article aims to depart from the single story of *Taiwo* narrated so far and present a radical critique of its judgment. We examine judicial reasoning in *Taiwo* to demonstrate how ethnocentric, false universalisations and binary judicial thinking about race supressed heterogeneity and the complexity of race relations in Nigeria and so denied racial justice to the claimants. We demonstrate how the Supreme Court's judicial reasoning in *Taiwo* fundamentally missed the broader internal or intra-ethnic racialisation dynamics at play, which were deeply rooted in the social structures of Nigerian society. In Nigeria, racialised social structures influence not just who gets recruited for work but also how they are treated once employed. These structures are based on complex social hierarchies that categorise certain ethnic subgroups as more or less suitable for specific types of work. Consequently, the terms of the employment contracts, such as pay rate and working conditions, were not random but influenced by these racialised elements. Thus, by failing to consider the Nigerian context, the Court overlooked these dynamics of racialisation that significantly shaped the employment contracts. This oversight led the Court to mischaracterise the case as solely an issue of immigration status, missing the opportunity to recognise intra-ethnic racialisation as a primary influence on the recruitment, treatment, and experiences of Ms Taiwo and Ms Onu. As a result, the Court failed to see that the case should have been considered within the framework of the Equality Act as a matter of racial discrimination.

This failure to consider the Nigerian context and its racialised social structures suggests that the Court lacked the appropriate framework to fully understand the complexities of the case. In light of this, a decolonial framework becomes essential. By adopting a decolonial lens, we can re-center the Nigerian context and its dynamics of racialisation, thereby placing the case in its proper context and offering a more nuanced understanding that captures the full scope of the workers' experiences. This approach not only corrects the Court's oversight but also provides a more comprehensive framework for addressing similar race discrimination cases in the future. The retelling of legal stories of *Taiwo* and re-examination of context-specific practices of racialisation in Nigeria, are used here to offer a broader argument for decolonising judicial decision-making in race discrimination cases. Decolonial approach allows us to challenge racial bias in judicial reasoning, legal doctrine and the wider legal frameworks as sites of racial oppression and inequality, at the same time, accounting for contextual diversity of experiences of racialisation. More specifically, we argue that, first, the decolonial perspective of *Taiwo* challenges the dominant, traditional race equality paradigm by exposing the varied and multi-layered ways in which people are racialised differently across historical and socio-cultural contexts and communities. Second, the decolonial rethinking of *Taiwo* allows for an epistemic shift away from the liberal paradigm of contract law and towards the analysis of racialised contracting that is contextually produced, situated and determined.

This article is structured as follows. The 'Decolonial judicial approach to race discrimination' section maps out what a decolonial judgment on race discrimination might look like, drawing insights from decolonial, critical race and law literature. The 'Revisiting judicial approach to race discrimination in Taiwo v Olaigbe' section presents the decolonial re-reading of *Taiwo*. The 'Decolonial judging on "freedom of contract"' examines opportunities that a decolonial re-reading of *Taiwo* offers for rethinking the vanishing

freedom thesis. Finally, the 'Conclusion' section reflects on the decolonial judicial decision-making in race discrimination cases.

Decolonial Judicial Approach to Race Discrimination

Extensive decolonial scholarship on law has taught us that the search for the *decolonial* calls for the need to lose the status of the periphery to someone else's metropolitan centre (see: Jivraj, 2020; Jivraj et al., 2020; Garland et al., 2015; Noble, 2015; Tapia, 2022; Auerbach, 2012); it is to 'deny and defy' (Chan, 2021), 'reject and reimagine' (Adébísí, 2023) or 'deconstruct and reconstruct' (Dawuni, 2019) the law. To decolonise judicial practice is to actively and continuously seek out, and give voice to, diverse yet often silenced perspectives and experiences across varied settings and contexts. Perhaps most importantly, to decolonise judicial decision-making is to remedy racial injustice and promote racial equality (Kurtiş and Adams, 2017). While existing decolonial legal literature does not set out a strict theory or structure for decolonial judicial decision-making, it does provide some helpful tools, concerns, and assumptions to consider.[2] We draw on these to primarily inform and guide our decolonial analysis of *Taiwo,* but also to suggest these could be used more broadly by researchers approaching judicial decision-making through the decolonial lens.

First, a decolonial judicial approach should be able to see and acknowledge a long history of racial bias in judicial reasoning (for more on this, see: Rabin, 2022; Brewer, 2021). Research in legal history has shown how the judiciary contributed to creating and supporting the colonial rule of the British Empire. In his book *Race, Jail or Bail,* Bobb-Semple linked current institutional racism in magistrates' courts that resulted in harsher treatment of Black defendants to a much longer history of the British Empire (Bobb-Semple, 2012). As he explains, '[t]hroughout the British plantation system, it was customary for the planters to become magistrates. They were the people responsible for constant whipping and other forms of torture of enslaved Africans, in addition to performing their roles as justices. After emancipation, the planters continued to act as magistrates and dispensed justice, sometimes very harshly' (Bobb-Semple, 2012: 37). The courts' historical task of constructing and managing otherness extended beyond criminal law, including social relations of the Empire's subjects in relation to land, property, family and business (Brewer, 2021; Mawani, 2018; Rabin, 2022). Historian Ibhawoh, in his study of Privy Council decisions within the African context, has offered an illuminating account of the ways in which local, customary laws and traditions of the colonies were adapted to British justice. In *Imperial Justice: Africans in Empire's Court,* Ibhawoh explains how London-based judges and barristers worked on cases involving the most diverse legal customs and traditions, from the Napoleonic Code to Muslim and Buddhist laws. Although local assessors were sometimes brought in to assist in translating local legal customs and traditions, these were often accepted only to the extent that they did not contradict or oppose British rule (Ibhawoh, 2013). In his other work, Ibhawoh documents how growing discontent with the lack of indigenous judges on the Privy Council played a key role in the decolonisation process (Ibhawoh, 2014).[3]

While historically judicial racism was overt and explicit, the current judicial bias largely resides covertly in the policies, approaches, procedures, practices and culture

of courts. A recent report into *Racial Bias and the Bench* (Monteith et al., 2022), produced by academics and legal practitioners in response to the *Judicial Diversity and Inclusion Strategy (2020–2025),* found extensive evidence of institutional racism in the justice system presided over by judges (Monteith et al., 2022). The report names a number of problems, such as the lack of diverse representation amongst the judiciary, the lack of racial bias training, low racial literacy of judges, ineffective procedures that handle complaints of racism, and the appointment of judges that seems to be very much dependent on race and ethnicity. The report largely documents the experiences of judicial bias within the criminal law system, noting instances where judges trivialise the pain and suffering of Black communities, treat the evidence of witnesses from other cultures, countries and backgrounds with scepticism, or approach and speak to them in a condescending manner (Monteith et al., 2022).

Judicial bias, although not termed as such, was also found to be prevalent in Employment Tribunal cases on race discrimination. For example, Lustgarten has argued that Employment Tribunals, when adjudicating on cases of direct race discrimination, tend to take an 'unsympathetic' view toward claimants. He has noted that the unwillingness of the tribunals to draw inferences that would support complainants' claims 'is a matter of political and personal predilection, not of legal incapacity' (Lustgarten, 1986: 72). Lustgarten explains how racial bias can quite patently seep into judicial decision-making:

> In principle, cases of direct discrimination, adverse treatment on racial grounds, raise no novel issues for the function of legal adjudication. Facts must be found, or inferred, about specific past events involving a limited number of individuals, and in cases where the information is not directly available, the courts are accustomed to constructing presumptions or other devices so as not unduly to hinder the plaintiff's proving his case. Indeed, they have done this in discrimination cases. The real problem is the unsympathetic response of tribunals – their unwillingness to draw inferences supporting complainants' claims. In the face of the ambiguity inevitable in such cases, they tended to credit the respondents' explanations (Lustgarten, 1986: 71–72).

Other legal scholars who have studied race discrimination cases have drawn similar conclusions (see, for example, Atrey, 2021). We do not seek to make any generalised claims about judicial racism or bias in courts or map out experiences of racism of parties involved in cases of racial discrimination. Nor do we suggest that a more diverse or different composition of the judiciary will necessarily lead to a reduction in judicial racism and bias. Indeed, even diverse judicial representations have the potential to produce bias due to the inevitable limitations of representors' lived experiences. However, using *Taiwo* as an example, we want to demonstrate how racial bias enters judicial reasoning and how, if it remains unchallenged, it shapes apparently race-neutral legal doctrine. The decolonial re-reading of the facts in *Taiwo* allows us to tell its stories differently. The stories of Ms Onu and Ms Taiwo are irreducible to a single legal story on 'migrant vulnerability and exploitation', but instead act as testaments to the complexity and diversity of lived experiences of racial discrimination.

Second, a decolonial judicial approach should challenge existing legal frameworks as sites of racial oppression. For example, a decolonial approach to race discrimination

cases, particularly to those that 'inconveniently' fall outside the traditional race equality paradigm, could reduce oversimplification and misunderstanding of the ways in which contemporary racialisation takes place. Didi Herman, in her extensive work on race and law, has explained that the UK's race equality framework has long been inextricably linked to its immigration policies and practices. For example, the Race Relations Act 1965, a predecessor to the Equality Act 2010, was adopted as one of several equality measures to reduce tensions between White Britons and New Commonwealth migrants, who had increasingly demanded protection from discrimination in public and private life (MacEwen, 1995; Solanke, 2009; Solomos, 2022, 1989). The dominant story of race relations in the UK, Herman notes, has largely been narrated through a perceived tension between 'Black/Asian' and 'White' communities (Herman, 2010). Herman, however, reminds us that the concept of 'race' is not fixed, and what is considered 'White' and 'non-White' changes over time in response to historical and socio-cultural circumstances (Herman, 2010). In her work on race, Jewishness and English law, she recounts the historical racialisation of Irish, Jewish and Roma peoples in England to trouble and complicate this narrative (Herman, 2011). Her analysis of race discrimination cases brought by Jewish claimants illuminates how courts have struggled to understand and adjudicate on the status of Jews as a 'racial group' who are now deemed to be 'White' (Herman, 2010).

Judicial struggles to understand and adjudicate on racial discrimination instances that fall outside the dominant race relations paradigm have well been articulated in Myslinska's recent work on racialisation of 'White' Central and Eastern European (CEE) migrants in the UK (Myslinska, 2019). In her extensive analysis of race discrimination cases against CEE migrants, Myslinska has shown how these claims are very rarely brought to English courts and even more rarely won.[4] She attributes the noticeable absence of CEE migrants from equality discourses and policies to a much shorter history of their disadvantage and discrimination in the UK, which also does not neatly fit into the UK's historical race relations paradigm. This absence, she argues, also impacts how courts handle race discrimination claims of CEE migrants: they find it difficult to understand widespread racialisation of CEE migrants, and their experiences of disadvantage, lack of integration and lack of equal opportunities.[5] Myslinska also notes how respondents in discrimination cases argue (often successfully) that the treatment of CEE migrants was not motivated by race but rather by their 'economic vulnerability'. What is more, Myslinska explains how CEE migrants' 'whiteness' often makes discrimination and racist attacks on them less visible or open to challenge:

> At least some White Britons appear more comfortable directing explicit criticism against White than non-White migrants; and some members of the public assume that the concepts of racism and discrimination only apply to non-White victims. For example, a jury had found that an assault against a Polish mover that caused him severe head injuries did not constitute a hate crime, despite the fact that the perpetrator had used phrases such as 'Polish bastard'. Some police officers have questioned whether CEE movers deserve the same protections as visible minorities. (Myslinska, 2019: 189)

Myslinska (ibid.) does not suggest that CEE migrants do not benefit from their 'whiteness'. She explains, in fact, how Poles, for example, assert their whiteness and express

racist views towards visible ethnic minority groups themselves, in order to move up the scale of racial hierarchy. Yet Poles are also resented by other Caucasian migrant groups for dominating the UK migration market and, as a result, being well catered for, with culturally aligned products and services (Cook et al., 2011). What Myslinska and others (Samaluk, 2014b, 2016) propose is that CEE migrants' positioning within the UK's hierarchy of privilege should be reconsidered by going beyond the established 'Black' and 'White' paradigm.

We suggest that *Taiwo* presents another challenge to the UK's dominant race relations paradigm. When Nigerian women are racially discriminated against by Nigerian employers, the UK's traditional race equality framework fails to offer the tools necessary to understand and interpret race relations between the two parties. Application of the traditional equality paradigm to such cases is likely to lead to an erroneous and unsatisfactory understanding of racial discrimination. Indeed, this was the case with *Taiwo*. Noting that the employers were non-UK nationals, yet not as vulnerable as employees, Lady Hale concluded that the only possible explanation for the mistreatment was not nationality (which both employers and employees *shared*) but immigration status (which they *did not share*). The decolonial re-reading of *Taiwo* offers a different conclusion, where racial mistreatment is not dismissed but rather invisibilised by the judicial interpretation of the legal boundaries of the UK's race relations framework.

Third, and finally, a decolonial judicial approach should pay particular attention to racialisation contexts and seek to deny and defy essentialist categories, assumptions and arguments on racial discrimination. To understand 'race', 'racialisation' and race discrimination, the judicial approach must consider how 'race', 'racialisation' and race discrimination are lived and experienced differently across contexts and people. Racialisation as a process is a spectrum of social, cultural and psychological practices and ideologies that situate people within racial categories (Hervik, 2022). It is intertwined with and cuts across other forms of subordination and privilege, potentially occurring amongst all societal groups and communities. Decolonial scholarship offers a productive lens through which to conceive of and analyse 'race' and 'racialisation', fruitfully linking it to the ways in which colonialism and its legacies shaped and continue to shape practices of racialisation. Sylvia Tamale insists that racism in African societies cannot be understood in isolation from other social and cultural categories:

> Part of the colonial project was to supress heterogeneity, therefore, any serious analysis of decolonisation and decoloniality must go beyond race and pay close attention to the nuanced and complex intersections of oppressive systems based on gender, sexualities, migration, poverty, religion, etc. Colonised people are diverse and experience oppression differently … while all Africans are adversely affected by enduring legacies of colonialism and its convergence with racism, our positioning within diverse social categories based on gender, ethnicity, class, sexuality, disability, religion, age, marital status, etc. means that we experience oppression differently (Tamale, 2020: 63).

Decolonial approaches to race, racialisation and race discrimination revolt against ethnocentric, false universalisations and provide conceptual tools to understand and make visible the interconnections between race, gender, religion, immigration and other social constructs and relations (Lugones, 2010).

In this article, we argue that claims of race discrimination in *Taiwo* can only be understood if we deny, defy and decentre the dominant judicial approach to 'race' by English

courts, which continues to largely focus on and locate racial tensions between 'White' and 'non-White' groups. The traditional race equality paradigm prevents courts from seeing that shared nationality between employees and employers does not necessarily shield employees from racial discrimination, as well as understanding the context-specific socio-cultural markers of racialisation that are used to differentiate and rank people within racial groups. In cases such as *Taiwo,* a decolonial approach is needed to understand how Nigerian employees might be racialised differently by Nigerian employers than the UK's traditional race equality discourse would assume. The decolonial approach to race discrimination that we adopt here to re-examine *Taiwo* allows us to draw attention to the lived experiences of Nigerian domestic workers and the practices and processes of their racialisation by other Nigerians, while also adding a new narrative to existing scholarly conversations on racial discrimination and law in the UK.

Revisiting Judicial Approach to Race Discrimination in *Taiwo v Olaigbe*

Rejecting the Case of Taiwo v Olaigbe as the Single Story About 'Immigration'

Most scholarly accounts of *Taiwo* reflect on the limitations of existing statutory provisions in labour law, immigration law and equality law.[6] For example, Rodgers (2017), Tataryn (2020), and Kemp (2016) have reverted to the inadequacies of employment laws and regulations to explain the Supreme Court's decision and to re-engage in conversations about the striking mismatch between the empirical and legal realities of labour markets. As labour lawyers, legal scholars and activists have shown, the omission of immigration status from the list of protected characteristics in the Equality Act 2010 has in effect legitimised systemic and widespread exploitation of vulnerable migrant workers without effective recourse to remedies for the physical and mental abuse they often endure.[7]

Relatedly, migration studies have explored law's historical and contemporary racialisation of immigrants across different transnational migration roots (García, 2017; Johnson, 2004; Romero, 2008). Recounting the historical significance of the Empire and its continued legacy in the design of immigration laws in the UK, Prabhat, feminist legal scholar and constitutional law expert, in her account of *Taiwo,* sought to remind us of the intimate links between race, nationality and immigration, as well as how these interact with economic status. Immigration laws operate a highly selective system of rights and protections, where more affluent migrants are afforded greater protections and longer and more stable access to the UK than low-paid and low-skilled workers (Prabhat, 2022). Although Prabhat accepts that immigration laws and immigration pathways by design are racialised, they are not, as she has put it, 'exclusively a product of race or national origin' (Prabhat, 2022: 272).

Like Prabhat in her analysis of *Taiwo,* Atrey has brought up the significance of the history of immigration in the UK and its entanglement with slavery, colonialism and the Empire (Atrey, 2021). However, Atrey draws from intersectionality discourses to question Lady Hale's strict distinction between race and immigration. According to Atrey:

> As the Court itself acknowledged, immigrant status in this case was inherently bound up not only with nationality, but also with the status of a domestic worker which in turn is racialised, gendered and class-based. Which means that immigration status itself is a varied concept which runs along racial, coloured, national and ethnic lines, often all at the same time. The Court was however closed off to seeing how racial grounds such as nationality and other statuses such as immigration and domestic work are actually constituted in this intersectional way (Atrey, 2021: 19–20).

For Atrey, the inflexible judicial interpretation of 'race' offered in *Taiwo* was what prevented the Supreme Court from finding racial discrimination and awarding compensation for the claimants. Referring to the South African Constitutional Court decision in *Mahlangu v Minister of Labour,* where discrimination against domestic workers was found to be 'intersectional in nature because domestic workers in South Africa are predominantly Black women', Atrey (2021: 20) notes the importance of understanding 'race' intersectionally. She adds that a judicial interpretation of 'race' that takes account of its intersectional nature does not require legislative recognition of intersectionality or the recognition of new grounds, but what it does require is an ability to see how 'race' is co-constituted by racial (colour, nationality, ethnic or national origins) as well as other grounds (class, gender, nature of work) (Atrey, 2021).

While we accept that it is important to acknowledge that race, gender, and other social categories intersect with immigration status to create a more complex picture of vulnerability, we do nevertheless suggest that the intersectional approach does not fundamentally challenge the Supreme Court's basic narrative of *Taiwo* – that the exploitation was primarily, if not solely, due to the workers' immigration status. For example, imagine a situation where a female Nigerian domestic worker is being mistreated by her employers in the UK (as was the case with Ms Taiwo and Ms Onu). Her working conditions are harsh, she is paid inadequately, and she faces verbal abuse. The court's 'single story' explanation would be that she is being exploited because of her precarious immigration status, which ties her legal residence in the UK to her employment. Now, legal scholars advocating for an intersectional approach might argue that her exploitation is not solely due to her immigration status. They would point out that she is also a woman, which makes her more susceptible to certain types of abuse and exploitation in the domestic work sector. Additionally, they might highlight that she is Black, and therefore subject to racial prejudices that could further exacerbate her vulnerability. In this way, they add layers of complexity to the Court's 'single story', showing that her vulnerability is shaped by her gender, race, and immigration status intersecting with each other. However, this intersectional approach does not challenge the Court's basic narrative that the primary reason for her exploitation is her immigration status. It adds nuance and depth to the story but does not change the core argument that her mistreatment is rooted in her being an immigrant.

On the other hand, arguing that racism explains the actions of the employers is a more radical critique that fundamentally challenges the Court's narrative. This approach posits that the – or one of the – root cause of the exploitation is not immigration status but rather racial discrimination. It shifts the focus from the workers' vulnerability due to their immigration status to the employers' actions, which are seen as racially motivated. Such

reframing questions the foundational assumptions of the Supreme Court's judgment and suggests that the mistreatment should be understood not as an issue – or solely as an issue – of immigration law but as one of racial discrimination.

In this article, we offer a radical critique of the *Taiwo* judgment. While we do not deny the intersectional factors or the vulnerabilities associated with being an immigrant, we argue that these are not the primary or sole explanations for the exploitation and mistreatment experienced by both workers. The primary factor driving the exploitation and mistreatment was racialisation, which refers to the process by which individuals or groups are assigned racial or ethnic meanings, often in ways that perpetuate inequalities or social hierarchies. It is a complex interplay of social, cultural, and psychological practices that categorise people into racial or ethnic groups (Hervik, 2022). This process is not static nor is it merely about skin colour or physical characteristics. It is dynamic and can intersect with other forms of subordination and privilege, such as gender, class, and nationality, and can occur among all societal groups and communities (Jivraj and Herman, 2009). In the context of people of the same nationality or ethnic group, racialisation can operate through subcategories or subgroups within that larger ethnic or national identity. For example, within a single ethnic group, there may be various clans, tribes, or social classes that are racialised in specific ways. These subgroups can be imbued with particular stereotypes, prejudices, or social roles that contribute to a hierarchical ordering within the larger ethnic or national group. This internal or intra-ethnic racialisation can be just as potent in perpetuating inequalities as racialisation between different ethnic or national groups.

To understand and explain how contracting is racialised, and perhaps more importantly, how it can be racialised differently across national and international markets, the decolonial approach is needed. The decolonial approach helps us make visible the diversity of experiences within formerly colonised communities and avoid erroneous essentialisations of Africanity (Imam et al., 1997). The decolonial perspective can illuminate how, for example, a Nigerian female worker who migrates to the UK to undertake domestic work for a Nigerian family might experience contracting quite differently from a Ugandan worker seeking the same work with a Ugandan family. Therefore, here, we adopt the decolonial judicial approach to re-examine *Taiwo* and invite broader reflections on the contractual nature, context and circumstances of race discrimination claims. Surprisingly, however (or perhaps not), contract legal scholarship has not engaged with or offered insights on the case yet. This might largely be due to the fact that the Supreme Court, technically speaking, was not asked to directly address any 'contractual issues'. Yet the treatment complained of by both employees emerged from, and was a key part of, the contractual local and international context, i.e., how employees are recruited onto such exploitative and racialised contracts, what kind of employees are racially targeted, and how the terms of such contracts are negotiated. It is important to note that the Supreme Court did have an opportunity to engage with the normative doctrine of freedom of contract and to redraw its historically problematic epistemological and ontological boundaries. In the judgment, Lady Hale briefly referred to the limitations that the Equality Act 2010 placed on the doctrine of freedom of contract. Disappointingly, however, no attention was given to acknowledge the complex history of its normative development.

Importantly, the Supreme Court has neglected or, at best, trivialised the contractual and racialised context within which employers get to exercise their *right to contract* and to *choose* a contractual party, as well as how race relations and practices of racialisation shape, condition or determine the employer's choice. Because of this oversight (intentional or not), the Supreme Court was able to define its task narrowly as that of distinguishing grounds of 'nationality' from 'immigration'.

Here we address the silence in existing contract law scholarship and engage with the judgment's significance to the doctrine of freedom of contract. We do so by drawing attention to the local Nigerian contractual context within which racialisation practices take place to provide a different reading of the legal stories of *Taiwo;* a re-reading that would have found racial discrimination in both claims and would have resulted in a much more favourable outcome for Ms Taiwo and Ms Onu, and which we shall now present.

Taiwo v Olaigbe – A Story of Discriminatory Inclusion into Exploitative Contracts

Both Ms Taiwo and Ms Onu entered the UK on migrant domestic worker visas to work for their employers in their private households. Ms Taiwo's and Ms Onu's employment contracts were drafted by their employers. In both instances, the employees were never given or shown the written particulars of these contracts. While Ms Taiwo's written contract contained more favourable terms and conditions of employment than she had previously experienced and been forced to endure, Ms Onu's written contract included provisions suggestive of forced labour or enslavement. During their employment, both Ms Taiwo and Ms Onu were physically and mentally abused by their employers, for example by being shouted at, called names, threatened with the police, deprived of food, forced to work for the majority of their waking hours, not allowed their private space, not given annual leave or rest periods, and not paid the legal minimum wage, amongst other abuses.

Ms Taiwo and Ms Onu successfully sued their employers for the violation of several statutory employment regulations (Employment Rights Act 1996; Working Time Regulations 1998; and National Minimum Wage Act 1998) and were awarded compensation. Alongside these, they brought race discrimination claims under the Equality Act 2010 (although some of Ms Taiwo's employment was covered by the Race Relations Act 1976) to compensate for the mistreatment they had endured. In Ms Taiwo's case, the Employment Tribunal found that she was treated the way she was because 'she was a vulnerable migrant worker who was reliant on the respondents for her continued employment and residence in the United Kingdom' (*Taiwo v Olaigbe* [2011] UKET 2350075). The tribunal held that her mistreatment could not be attributed to her Nigerian nationality, as another migrant in similar circumstances (meaning whose employment and residence in the UK were governed by immigration control and by the particular employment relationship) would have been treated in the same way. In Ms Onu's case, although the Employment Tribunal held that her employers had directly discriminated against her on grounds of race (*Onu v Akwiwu* [2010] UKET 330543), the Employment Appeal Tribunal held that 'no part of the employers' treatment of Ms Onu was inherently bound up with her race but rather with her subordinate position and the

relative economic benefits of her work in the United Kingdom compared with the poverty of her situation in Nigeria' (*Onu v Akwiwu* [2012] UKEAT 0022/12/RN).

While the Employment Tribunals looked briefly at the employers' mental process to uncover what had led to such mistreatment of their employees, the mistreatment itself was interpreted narrowly. In other words, the mistreatment was largely understood as exploitative and degrading working conditions, i.e., physical and mental abuse, long working hours, lack of rest periods etc. The Employment Tribunals' analysis of the context within which such abuse and mistreatment occurred, was facilitated and became possible was very limited. It largely focused on explaining and understanding the vulnerabilities of the employees, such as the fact that they were poor, had limited written language skills and education, and were dependent on the employers for their employment in the UK. Much less attention was paid to contextualising and indeed challenging the employers' reasoning and mental process, which had created fertile ground for the abuse and mistreatment. Inevitably then, when both cases reached the Court of Appeal, the question of mistreatment and of the employers' reasoning was reduced to a narrow enquiry: Whether each employee's immigration status formed part of the reasons for treating them so badly (*Taiwo v Olaigbe* [2014] EWCA Civ 279). The Court of Appeal held that immigration status did in fact play a significant role in the mistreatment, and so the final appeal to the Supreme Court was narrowed down further to a technical issue as to whether immigration status and nationality should be equated for the purposes of race discrimination claims under the Equality Act 2010 (*Taiwo v Olaigbe* [2016] UKSC 31).

Our decolonial re-reading of the *Taiwo* judgment is purposefully separated into two distinct analyses. We argue that factually, the claims of Ms Onu and Ms Taiwo are quite distinct and should be examined separately. It is not the similarity in facts but the similarity in how the courts approached both cases that allowed the two claims to be conjoined at the Court of Appeal. All the courts involved approached both cases as stories of vulnerable female migrants who were abused and exploited because of their dependence on their employers for their continued employment and residence in the UK. If, however, we take the decolonial approach to judging and look much more closely at the employers, their reasoning for contracting and the contextual circumstances that facilitated, enabled and led to the abuse of two female workers, different stories emerge. Stories that signify the importance of nationality and ethnic difference in recruiting employees into exploitative contracts. Stories that uncover racialised contracting and racial discrimination. And stories that speak to and make visible the heterogeneous, complex and intersectional experiences of racial discrimination and disadvantage.

Ms Onu's Inclusion into Exploitative Contract

In Ms Onu's case, the Employment Tribunal upheld a claim of direct race discrimination against the employers. The Tribunal held that the employers' antagonism towards Ms Onu was not because she was Nigerian, but because of her Nigerian nationality, which meant the employers treated her as a migrant worker. The Employment Appeal Tribunal later dismissed the direct discrimination claim on the basis that the reasons for Ms Onu's treatment were not bound by her race, but rather by her economic and

migration vulnerability. As Myslinska has argued in her work on racialisation of CEE migrants, similar problematic arguments have also been used by Employment Tribunals to strike down race discrimination claims by Polish workers. Interestingly, however, in Ms Onu's case, if we examine the employers' reasons for contracting with her, it is her nationality rather than her immigration status that seemed to matter much more to the employers. Before Ms Onu came to the UK, she was employed in Nigeria by the Akwiwus family, a crucial circumstance that was a necessary precondition used by her employers to secure a UK domestic worker visa for her. More importantly, despite the fact that Ms Onu had worked in London since 2008, the employers insisted that the contract between Ms Onu and themselves was a Nigerian contract, performed in accordance with Nigerian law, customs and established practice.

This insistence explains some of the employers' behaviour towards Ms Onu. For example, the reason Ms Onu was not given written particulars of her employment contract was that it was said to be common practice in Nigeria not to give contracts of employment to domestic workers. Indeed, as Nesbitt-Ahmed has pointed out, domestic work in Nigeria is largely 'invisible', undervalued and undocumented, robbing domestic workers of effective rights and protections (Nesbitt-Ahmed, 2016). Ms Onu's contract, which was drafted by Mrs Akwiwus's mother – a lawyer in Nigeria – did not stipulate any working days and/or hours or rest periods. Again, this was in line with Nigerian law at the time, which did not require employers to mandate any specific rest periods or hours of work for domestic workers (Taran and Youtz, 2014). Additionally, Ms Onu was largely paid cash in Nigeria in the local currency, Naira. Hence, although the employers claimed that Ms Onu was paid more than the minimum wage, the reference point for this was the Nigerian minimum wage, not the UK minimum wage. The employers also admitted that they had failed to register Ms Onu with the NHS because they believed she was not entitled to be in receipt of public funds in the UK.

Despite the importance of the Nigerian contractual context and the remarkable admissions by the employers that the contract between them and Ms Onu was a Nigerian contract, and despite the absence of any evidence of an intention on the part of Ms Onu to stay in the UK, the higher courts concluded that Ms Onu's treatment was because of her 'immigration status' rather than her nationality. In fact, the employers claimed that Ms Onu had fabricated the claims against them so that she could stay in the UK and work for other employers. No evidence was found to support these claims. It is unclear why the higher courts gradually diminished the significance of Nigerian contractual arrangements between the litigants and instead shifted the emphasis to Ms Onu's immigration status. One plausible explanation is that it was difficult for the courts (as well as the legal counsel for Ms Onu) to see how a Nigerian domestic worker could be racially discriminated against by her Nigerian employers. In other words, as the counsel for Ms Onu put it in the submissions to the Employment Appeal Tribunal, because the Akwiwus were Nigerian, they could not have harboured racist thoughts towards Ms Onu as 'that would have been absurd, given their shared ethnicity and nationality' (*Onu v Akwiwu* [2012] UKEAT 0022/12/RN, para 37). This line of reasoning is problematic for at least two important reasons.

First, research on Nigerian domestic work markets has documented how historical and contemporary racialisation of domestic workers takes place. Domestic work is not new in

Nigeria. Racialisation of domestic workers is not new either, although the way in which it takes place has changed over time. In pre-colonial times, wealthy Nigerian households or captors often used workers on their farmlands (Oyeniyi, 2013). During colonialism, domestic work became a part of waged employment and was largely occupied by young Nigerian men who had travelled from rural areas for domestic work in the cities to serve mostly European households (Oyeniyi, 2013). Although some local Nigerians also employed domestic workers, this was largely restricted to elite groups until after Nigeria's independence in 1960 (Adebayo, 1981). Since then, increasing numbers of Nigerian households have relied on domestic workers to perform care duties that Nigerian women no longer want to or could perform. It is often internal migrants — the poor, the young, children and those from ethnic minority groups — who shoulder the domestic care responsibilities of middle-class families in Nigeria (Oyeniyi, 2013). Although the Nigerian Government has adopted policies and laws that seek to protect domestic workers from exploitation and abuse, domestic work is still mostly done informally, which translates into employers' unregulated and unrestricted control over and abuse of their domestic workers, such as demands for long working hours or irregular payment of wages (Nesbitt-Ahmed, 2016).

Despite the significant societal, political and legal changes in domestic work, Nesbitt-Ahmed argues that racialisation of domestic workers in Nigeria continues. Nigerian employers construct different stereotypes of domestic workers, shaped around their migration patterns, gender, ethnicity or age, which are then used to inform and influence domestic workers' opportunities and everyday experiences in terms of wages, working hours and leisure time (Nesbitt-Ahmed, 2016). For example, as is similar in global domestic work and migration, domestic workers in Nigeria are racialised through the process of internal migration. Most domestic workers migrate from rural and often poorer parts of Nigeria to cities and urban areas. This was the case for Ms Onu: She had migrated from a small village in Nigeria to work for her employers in Lagos. Oyeniyi suggests that internal migration poses particularly serious concerns regarding domestic workers' exploitation and unfair recruitment practices because the 'invisibility' of internal domestic migrants is often misattributed to other urban challenges, such as urban unemployment, urban pollution and housing issues (Oyeniyi, 2013). Internal migrants, who are often poor, female and/or children, with limited or no education, are considered to be 'naturally' fit for what has historically been identified as 'dirty' domestic work (Anderson, 2000; Palmer, 2010).

Decolonial scholarship has shown how racialised and hierarchical differentiation between domestic workers and employers in Nigeria is also constructed through cultural and social practices (Nesbitt-Ahmed, 2016). For example, employers use social distancing techniques to establish hierarchical relationships by prohibiting domestic workers from sharing common spaces. In Ms Onu's case, this translated to her not being allowed to eat with the family or to attend social gatherings and celebrations. At the same time, domestic workers are robbed of their private, individual space and presented as somewhat deficient and childlike, and therefore not worthy of dignity and respect (Nesbitt-Ahmed, 2016). Again, we know that Ms Onu was not given her own space: she had to share space and sleep with the employers' children. Moreover, when the employers had guests or friends to stay over, Ms Onu was asked to empty her drawers

and make space for the guests' needs. Female domestic workers are frequently referred to as 'girl' or 'daughter' regardless of their age and labelled as being a part of the employers' family to further obscure a highly hierarchical and exploitative relationship of subordination (Qayum and Ray, 2010). Indeed, at the Employment Tribunal, Ms Onu's employers argued, though unsuccessfully, that she was treated as a family member and included in different family activities. All of these varied social and cultural practices that Ms Onu's employers deployed to hierarchically differentiate themselves from Ms Onu convincingly point to her racialisation and racial mistreatment; that is, racialisation and racial mistreatment that often take place within the Nigerian domestic work setting.

Perhaps more importantly, the subordinate, racialised position of domestic workers within Nigerian society is constructed not only through gender, migration and poverty, but also through their ethnicity. This takes us to the second point and problem of the courts' judicial reasoning that because Ms Onu and her employers shared the same ethnicity, racial discrimination cannot explain her mistreatment. The question of Ms Onu's ethnicity, as well as that of her employers, was never litigated on or factually established. It was simply assumed. It was assumed that Ms Onu and Mrs and Mr Akwiwus shared the same ethnicity – the Nigerian ethnicity. However, it should be noted that Nigerian nationality does not equate to Nigerian ethnicity. Nigerian nationals hold multiple ethnicities — there are over 250 ethnic groups and even more ethnic sub-groups (tribes) within Nigerian society (Albeely et al., 2018). Nigerian ethnicity as such does not exist. Thus, this is a strikingly erroneous presumption to make, given the extensive diversity of ethnicities in Nigeria. Despite this, the courts approached the question of ethnicity through the lens of ethnocentric, false universalisation, supressing the diversity of ethnicities as well as the complexity of ethnic relations in Nigeria. Regrettably, because the ethnicity of the litigants was not established during the fact-finding stage of the judicial process, it is not possible to re-examine whether Ms Onu's ethnicity and that of her employers had also contributed to her racialisation, in addition to other social and cultural markers of racial differentiation, as described previously.

Ms Taiwo's Inclusion into Exploitative Contract

In Ms Taiwo's case, by contrast, the question of ethnicity was examined and, although overlooked by the courts, demonstrated quite clearly racial tension between Nigerians based on ethnic grounds.

The Employment Tribunal found that Ms Taiwo's was mistreated not because of her race but because of her vulnerability. Being a migrant worker and thus dependent on Mr and Mrs Olaigbe for her continued employment in the UK was a part of that vulnerability. While it is clear that Ms Taiwo's 'particular immigration status' contributed to her vulnerability, her Nigerian nationality and the fact that she lived in Nigeria made her a particularly vulnerable target for Mr Olaigbe's recruitment practices. We suggest that his recruitment practices cannot and should not be separated from Mr Olaigbe's reasoning and mental process that led to discriminatory contracting with Ms Taiwo.

At the Employment Tribunal, it was found that Mr Olaigbe, with the help of his parents in Nigeria, had used local connections to recruit Ms Taiwo. Mr Olaigbe's job 'opportunity' was presented to Ms Taiwo by a local pastor, who told her that the job

would involve 'assisting a couple with their young children' (*Taiwo v Olaigbe* [2011] UKET 2350075). Although the facts summarised by the Employment Tribunal do not reveal much about the role that the pastor had played in recruiting Ms Taiwo, it is likely that he played an important role, given the general influence, respectability and significance pastors have in some local communities in Nigeria (Agazue, 2014). A few months later, Ms Taiwo was contacted by Mr Olaigbe's parents to be interviewed for the job. It was clear that for Ms Taiwo, a decision to accept the job offer was not rushed: She took the time to consult her husband and eventually accepted the offer because she thought it was a good opportunity to earn extra money. Mr Olaigbe's parents arranged for Ms Taiwo's passport, which some Nigerians, particularly those from poorer, rural areas, do not readily possess. They also 'fabricated' (*Taiwo v Olaigbe* [2016] UKSC 31) her employment history for the purposes of securing a UK domestic worker visa. Ms Taiwo was asked to pretend to clean the house of Mr Olaigbe's parents while being photographed for this to be used as evidence to obtain a UK visa. Mr Olaigbe's parents also completed her visa application, paid the visa fees and took Ms Taiwo to a clinic to run tests for tuberculosis and human immunodeficiency irus before the planned travel to the UK. None of the courts considered these complex, long and resource-intensive recruitment practices as important indicators of Mr Olaigbe's intention (as well as capacity) to specifically target Nigerian women. In other words, the courts did not consider these exploitative recruitment practices as constitutive parts and enablers of Ms Taiwo's 'mistreatment'.

What is perhaps even more striking is that at the Employment Tribunal, Mr Olaigbe had acknowledged that he was looking to hire someone of Yoruba ethnicity. He explained that his reason for wanting to do so was to pass on the Yoruba cultural heritage to his children. This explanation was readily accepted by the courts and not questioned. In fact, the courts have sought to strengthen this explanation with a hypothetical example of a Ugandan domestic worker, who, had they been chosen for employment by Mrs and Mr Olaigbe, would not have been treated any differently (*Taiwo v Olaigbe* [2016] UKSC 31, para 6). The courts, however, have not examined whether the particular circumstances of Mrs and Mr Olaigbe would have allowed such recruitment to take place in Uganda. Neither did the courts engage with the question of the racialisation of Ugandan domestic workers, and the ways in which this racialisation is similar to (or different from) that seen in the Nigerian context. The judicial deployment of such a hypothetical example is irrelevant in building a better understanding of specific recruitment and contracting practices in Nigeria, unless it is grounded in essentialist conceptions of Africa and Africanity. By simply assuming homogeneity in the contractual contexts of Nigeria and Uganda, the courts supressed and invisibilised potentially important material differences in local settings. In other words, the Nigerian contractual context and Mr Olaigbe's network of support and other circumstances together played a crucial role in enabling and facilitating his recruitment practices. These were crucial circumstances, that, we suggest, could not simply be hypothesised as being the same in Uganda without actual investigation of the material reality of the local context. Although we know that Mrs Olaigbe is Ugandan, she grew up in Sweden and we do not know whether she had access to the network of support needed to recruit someone from Uganda and to secure them a UK domestic worker visa, which demands the submission of extensive evidence and documentation to the UK immigration authorities.

More problematically, the courts failed to see and address an obvious tension between Ms Taiwo's account and the reasoning provided by her employers. It was established as a matter of fact that Ms Taiwo was mocked by her employers for her 'tribal scars'. Research in Nigerian legal and political history has produced rich accounts of the meaning of 'tribal scars', as well as how affiliations to specific ethnic groups shape people's experiences of ethno-racial discrimination across wide sectors of public and private lives. Tribal marks on the face are called facialography or facial graphics (Okediji, 1998). Facialography varies from one ethnic group (Ojo and Saibu, 2018) to another (Okediji, 1998). For example, different tribes within the Yoruba ethnic group – Oyo, Owu, Egba, Egbado, Ijesa, Ife, Ya, Ijebu, Ondo – would wear different marks such as *Abaja, Keke, Gombo, Ture, Pele, Mande, Jamgbadi* and others. Within the Yoruba ethnic group, facialography can be deployed for identification purposes because each facial mark is distinct and signifies the wearer's 'ethnic affiliation, hometown, family, lineage and origin or background' (Ojo and Saibu, 2018: 146). Historically, facial marks were not only important signifiers of beauty and cultural identity, but also of citizenship. In her work on the historical development of Yoruba identity, Ojo has explained how facial marks and scarification were used to incorporate people into a community: 'Similar to modern routes to citizenship, the Yoruba usually marked people during childhood, analogous to modern-day conferment of citizenship at birth. Otherwise, scarification was carried out on those who missed out at infancy and immigrants […] by which they got citizenship through naturalisation' (Ojo, 2008: 368–369). Despite its historical and legal significance, the popularity of facialography in modern Nigeria has declined considerably (Ogundiran, 2020). The reasons for the decline are complex and varied, but health concerns, education and modernisation, globalisation and the national identification of Nigerians have all contributed to the reduced popularity of this cultural practice. However, ethno-racial discrimination is one explanation for the reduced practice of facialography in Nigeria (Ojo and Saibu, 2018). What is more, this ethno-racial discrimination often intersects with discrimination on the grounds of religion, as facial marks are largely worn by non-Christian Yoruba families, mostly Muslims and animists (Garve et al., 2017).

Racial prejudice in Nigeria manifests in systemic practices and processes that deny people access to rights, resources and even professions and occupations, based on ethnic differences. As a pluralist society, Nigeria is extremely diverse, having more than 250 ethnic groups and even more ethnic sub-groups (Albeely et al., 2018). As Albeely, Mahmoud and Yahaya explain, ethnicity and racism in Nigeria are very closely related:

> Nigeria is made up of different ethnic groups, but the three main ethnic groups include, the Hausa, Yoruba and Igbos. All these groups **even within their internal societies tend to discriminate against each other** [emphasis added]. For the Igbos, take the case of "Osu", Igbos believe that most communities in Imo state are "Osu", meaning that they are outcast, therefore, Igbos are not allowed to marry or associate with such. The mogun spell in Yoruba land prevents men from any ethnic background from sleeping with Yoruba women with the belief that they are "Cursed", and this curse is transferable to any man […] (Albeely et al., 2018: 43).

Nigerian scholar Nesbitt-Ahmed has produced extensive empirical research that documents how these discriminatory practices are extended to domestic work in Nigeria.

Focusing on Lagos as a specific case study, Nesbitt-Ahmed has shown that domestic work takes a very particular form in terms of ethnicity. It is employers' ideas and stereotypes about ethnic groups that significantly shape and determine who is hired for what kind of domestic work. It is common practice, for example, to include requirements of a particular ethnicity for domestic work in job advertisements or to determine their pay on the basis of their ethnicity. As she has noted:

> Exploring employer stereotypes of the ideal gender, age or ethnicity is important as these shape opportunities and everyday experiences in terms of wages, working hours and leisure time among other things […] This suggests that in order to understand this occupation and, more specifically, the outcomes for domestic workers in terms of their everyday lives, it is crucial to recognise the ways in which employers construct differences through their preferences (Nesbitt-Ahmed, 2016: 169–170).

This is precisely what the courts in Ms Taiwo's case failed to do. They failed to interrogate Mr Olaigbe's reasons for hiring someone of Yoruba ethnicity (an ethnicity Ms Taiwo and Mr Olaigbe *shared*); nor did the courts explore their differences in cultural heritage — and possibly also religious beliefs — (that they *did not* share). The mocking of Ms Taiwo's facial marks is clearly indicative of a hierarchical, racial relationship between Ms Taiwo and her employers. However, given that the courts readily accepted the premise of their shared cultural heritage, the mental process of Mr Olaigbe, which led to Ms Taiwo's recruitment, was left underexplored and unchallenged. The significant inconsistency in the narrative that Mr Olaigbe presented points to a much broader problem with the judgment itself. The courts, including the Supreme Court, have trivialised the Nigerian context within which exploitative and racialised recruitment of domestic workers takes place and ignored or could not see or understand locally entrenched, racial structures in Nigeria that run along complex and varied lines of ethnic and cultural affiliations. Instead, the judicial focus was placed on practices of global labour migration and the vulnerabilities to which it gives rise, which are perhaps more visible and familiar when viewed from the perspective and positionality of the 'metropole'.

Decolonial Judging on 'Freedom of Contract'

Earlier, we suggested that the current academic disengagement with *Taiwo* within contract law scholarship is not surprising. Litigated and judicially approached as a case about vulnerable migrants rather than as (or in addition to) a case of racialised workers effectively meant that the possibilities for debate on discriminatory, racialised contracting and racialised 'freedom to contract' were quelled. This silence might also be attributed to the fact that the case seems to align with and reconfirm the 'vanishing freedom' thesis. This thesis suggests that equality rights[8] have placed substantial restrictions on and narrowed the scope of the doctrine of freedom of contract (Collins, 2013). It dominates current judicial thinking and scholarly engagements with the freedom of contract doctrine, directing conversations towards exploring the extent of these restrictions (Beaudry and Nair, 2021; Collins, 2013; Varney, 2020). While the 'vanishing freedom' thesis provides an

account of the doctrine's recent developments, for example on the ways in which equality, employment or consumer protection rights have shaped the scope of contractual freedom, it suffers from what we call here a historical and contextual amnesia of structural contractual (un)freedoms.

Much has been written about the problematic judicial understanding of 'freedom of contract', which is devoid of historical and contextual background. The doctrine is founded on a liberal understanding of freedom, which assumes contractual parties' autonomy to decide on the terms of their private agreements (Keren, 2016). Contractual coercion under the liberal understanding of freedom is framed through doctrines and discourses of exception and individualism, rather than as part and parcel of contracting within the marketplace. It does not ask who has 'freedom' or why and how this 'freedom' is based on prior assignments of entitlement (Brilmayer, 1989). Under liberalism, the law of contract creates legal rights, such as 'freedom to contract' and 'freedom to choose a contractual partner', to cater for atomistic, competing individuals pursuing their economic interests and simultaneously protecting these from the interference of others (Mcclain, 1992). Even more problematically, Ugandan legal scholar Tamale argues, the law seeks to extend protection of freedom of private exchange between liberal individuals equally:

> […] equality under a *laissez-faire* system was about facilitating liberal autonomous individuals to bring their wares to the market place on equal terms with other autonomous liberals. Such conceptualisation deliberately places blinders on market participants whose social status gives them no bargaining power to compete freely, fairly and equally (Tamale, 2020: 217).

For Patrick Atiyah, the understanding of 'freedom' needs to be accompanied by an understanding of the market (Atiyah, 1979). Freedom to contract, Whyte suggests, should be judged in the light of the systemic and structural inequalities that exist in a predatory capitalist market that enables and replicates them (Whyte, 2019). Conveniently, then, for those supporting the 'vanishing freedom' thesis, equality rights seem to provide a solution to the largely unrestricted and abstracted doctrine of freedom of contract.

We argue that this solution fails to offer opportunities for the epistemic shift from the liberal paradigm of contract law. Litigating equality rights violations in the realm of contracting relations without acknowledging and addressing the historical and structural sources of these violations does little to better the lives of those who suffer them. The application of equality rights simply helps us move groups who historically have been discriminated against from what Tamale calls 'exclusion implicit in "Othering" to inclusive acknowledgement' (Tamale, 2020: 157). To put it differently, groups previously excluded from or experiencing discrimination in contracting were granted rights and legal remedies in law that were meant to acknowledge and strengthen their contracting autonomy, but only within the bounds of their private dealings. The 'vanishing freedom' thesis does not challenge or critique the broader structures of market and societal relations and the inequalities that frame and mould contracting freedom. What is more, it teaches us nothing about how race, racialisation, colonialism and their enduring

legacies have constituted structurally racialised markets and how these reproduce and perpetuate inequalities and exploitation.[9]

The decolonial judicial approach to contracting revives the potential for the epistemic shift away from the liberal paradigm of contract law on which the 'vanishing freedom' thesis is founded. The decolonial analysis of 'contracting freedom' and 'contracting autonomy' includes and pays detailed attention not only to the systems and structures of oppression but also the systems of domination, which are complex, contextual, multi-layered and intersectional. As Tamale explains, in some instances,[10] the need to supress heterogeneity was one of the key parts of the colonial project, and so any serious analysis of decolonisation and decoloniality should reach beyond race, exploring how oppression and domination are experienced differently by people (Tamale, 2020). In our decolonial engagements with false, Western, ethnocentric universalisations, it is equally important, Ayesha Imam cautions, to resist false essentialisations of Africanity, which would prevent us from interrogating and challenging oppressive relations within African communities (Imam et al., 1997).

Our decolonial re-reading of *Taiwo* judgment enabled us to drop ethnocentric, false universalisations of African claimants and to reject the courts' proposition that if Ms Taiwo had been Ugandan, she would have been treated in the same way by the employers. Instead of simply assuming sameness between different African contexts, our focus was directed towards understanding and exploring the specific, contractual, local context in Nigeria that facilitated, enabled and led to the exploitation of two women. Yet it also provided conceptual tools to see and make visible important markers of social and cultural difference that are used to racialise and hierarchically rank people within Nigerian society. Again, instead of simply assuming that Nigerians cannot racially discriminate against other Nigerians, we probed the broader social and economic structures in Nigeria to explain how racialisation and exploitation manifest and are produced and enabled within Nigerian society. It is not that Nigerians are not racialised by other Nigerians, we conclude, but that they are racialised *differently* through their varied positionings within diverse social categories such as gender, migration, class, ethnicity, religion, education and others. Thus, the Supreme Court's, as well as, previous courts' judicial assessment of whether racialised contracting was at play in *Taiwo* required them to interrogate and seriously consider these varied positionings. Unless and until these are included in the judicial decision-making process, the racialised *freedom to contract* and *to choose a contractual partner* cannot not be effectively curtailed in cases that fall outside the UK's traditional equality rights paradigm.

Conclusion

This article has presented a decolonial retelling of the stories of *Taiwo* to achieve two important objectives: first, to show how judicial production of racial injustice might happen; and second, to remedy racial injustice by offering different judicial re-readings of the legal stories of *Taiwo*. More ambitiously, the article has used *Taiwo* to map out what a decolonial approach to judicial decision-making might look like. Three core concerns, predispositions and tools found in the decolonial legal scholarship were brought together to set out the agenda for the decolonial approach to judging. We found these

predispositions extremely helpful in thinking about *Taiwo* judgment and the ways in which we could remedy the racial injustice we had observed. However, we also think that these concerns and predispositions could be used more broadly in the judicial decision-making process, particularly in cases involving racial discrimination.

To challenge racial injustice, first and foremost, a decolonial perspective aims to make racial bias visible. Racial bias can seep into both judicial reasoning as well as legal doctrine. In *Taiwo,* we had traced the courts' gradual move from the issue of 'race' and 'racialisation' to the issue of 'immigration'. We argued that the failure of the courts (as well as the claimants' counsels) to see how Nigerian domestic workers are racialised differently by their Nigerian employers eventually led the Supreme Court to erroneously rule that race discrimination claims in *Taiwo* could not have been about 'race' but rather about 'immigration'. The race implications of the *Taiwo* ruling can be observed already. The *Taiwo* judgment has been used by employment tribunals to strike down several race discrimination claims (e.g., *Chikale v Okedina* [2016] ET; *Ngwawaira v Sainsbury's Supermarkets Ltd* [2017] ET; *Corpuz v Hilbre Care Group and others* [2018] ET; *Davies and others v Veolia ES Merseyside & Halton Limited* [2018] ET). Future research might want to examine judicial reasoning in these cases as well.

Second, racial injustice might be reproduced through judicial interpretation of legal frameworks, which are founded on and embed racial categories and hierarchies. Again, challenging these is an important part of decolonial judging. Using *Taiwo* as an example, we have demonstrated the limitations of the UK's traditional equality paradigm and the ways in which it invisibilises racial injustice that fall outside its predefined categories and understandings of race and racial discrimination. Additionally, *Taiwo* provided an opportunity to re-engage with the old, and what is often presented as race-neutral, legal doctrine of freedom of contract. We challenged the 'vanishing freedom' thesis on which the understanding of the relationship between the freedom of contract doctrine and equality rights is based, arguing that it suffers from historical and contextual amnesia of structural (un)freedoms. It struggles to consider and acknowledge how colonialism and its enduring legacies shape race relations and its varied intersections with other social and cultural categories. Without the decolonial perspective on race discrimination, we suggest, the contractual (un)freedoms generated as a result of race relations that fall outside the UK's traditional equality paradigm will continue to mask and perpetuate racial inequality.

Finally, experiences of racial injustice are contextual and often intersect with other forms of oppression. The decolonial judicial approach should seek to understand the diversity of such experiences and caution us against essentialist abstractions on race and racial discrimination. In *Taiwo,* we expressed concerns over unhelpful comparisons between Nigerian and Ugandan domestic workers, where no actual evidence was brought in to validate such comparison. Also, instead of assuming the sameness in the way racialisation happens across different contexts, we re-examined the facts of both claims to place them within the broader Nigerian social and economic context and explained how racialisation is produced within Nigerian society. Importantly, we have concluded that racial injustice could be remedied if the decolonial understanding of the ways in which Nigerians are racialised differently by other Nigerians had been brought into the judicial decision-making in *Taiwo*.

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Notes

1. With the exception of Mrs Olaigbe who was Ugandan.
2. Some very important scholarly work has been carried out to map out feminist judging techniques, concerns and habits, which have been successfully used to reimagine feminist judgments. For more on this, see Hunter et al., 2010.
3. Ibhawoh looked specifically at debates on inclusion and judicial representation of indigenous judges on Privy Council in the context of Kenya and South Africa.
4. It should be notes that Didi Herman makes a similar argument in relation to discrimination cases against the Jews. See more in Herman, 2010.
5. For example, Myslinska's review of more than 200 Polish claimants' cases revealed only one successful claim of indirect discrimination, out of only five such claims asserted. For more evidence on racialisation of Eastern Europeans, see Samaluk, 2014a.
6. The Equality Act 2010 and its predecessor, the Race Relations Act 1976, the key anti-discrimination laws in the UK, have long been praised for leading the race equality movement in Europe (Fella and Ruzza, 2012; Hepple, 2011) They introduced much-needed rights for minority groups to seek redress for racial discrimination (Connolly, 2011). However, the Equality Act's limited scope of protection has now been widely acknowledged. The formal rather than substantive approach to equality has arguably been seen as its most significant weakness. The Act overlooks intersectionality, fails to impose positive duties, and does not allow for collective rights and collective remedies (Lacey, 1998). As a result, claimants who suffer multiple layers of disadvantage are particularly adversely affected by the limited ambit of the Equality Act 2010 (see MacKenzie and Forde, 2009; McDowell et al., 2009; Parutis, 2014).
7. For more on limitations of the Modern Slavery Act and the precarity of migrant domestic workers, see Fudge and Strauss, 2014; Hodkinson et al., 2021; Pavlou, 2018. In this article, however, we argue that the inclusion of 'immigration status' in the scope of the Equality Act 2010 will not necessarily result in better judicial decision-making on race discrimination cases. Rather than adding another protected characteristic to the Equality Act's list, we suggest that a decolonial approach should be adopted to judge race discrimination cases, where race and racialisation are conceived of contextually.

8. In addition to other special laws that introduced additional protections, such as for employment rights, consumer protection rights or tenancy rights.
9. For example, in her exploration of the construction of labour markets, Ashiagbor argues that 'race is embedded in the legal form by which labour is regulated'. The bilateral employment agreement that regulates employment relations, she suggests, hides broader structures of inequality, extraction and exploitation within the labour markets that are raced (see Ashiagbor, 2021). Relatedly, in his impressive empirical study of over 9,000 contract law cases in the United States, Penningroth shows how race has been treated by judges as a "free-floating doctrinal catalyst", sometimes highlighted, sometimes supressed, to allow for the preservation of the doctrinal and conceptual integrity of contract law. For example, judges used formalistic reasoning about coercion to preserve the ideal of freedom of contract within the post-slavery South's context of vast racial inequalities: "They assumed that […] former slave-owners — rich in land, equipment, and guns, and still dominating the South's state legislatures — would negotiate agreements with newly-freed Black people. Formally, those freed people were free and equal bargainers but in fact they were so poor, so cut off from the alternatives, and so obviously the weaker parties in transactions that only magical thinking could absorb them into the will theory of Classical contract law". According to Penningroth, our understanding of contract legal doctrines cannot be divorced from the integral role that 'race' played in its formation and further development (Penningroth, 2022).
10. In other cases, heterogeneity alone, or even in combination with homogeneity, were used as tools of colonialism, depending on the specific context and needs of the colonising power.

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