doi:10.1017/aju.2024.14

INTRODUCTION TO THE SYMPOSIUM ON RABIAT AKANDE, "AN IMPERIAL HISTORY OF RACE-RELIGION IN INTERNATIONAL LAW"

S. James Anaya & Adrien K. Wing***

Global efforts are underway to formulate a protocol to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) that would extend its protections to religious discrimination. With momentum coming from national and international levels, the effort seeks an intersectional approach to address what Rabiat Akande calls the "unique precarity of persons inhabiting marginalized axes of identities and experiences."[1] Many in the Global South, including governments, scholars, practitioners, and activists want to enhance ICERD's terms to explicitly cover religious minorities and consolidate the conceptualization of their status as suffering from simultaneous race and religious discrimination, rather than one or the other. The proponents seek an understanding that contemporary religious discrimination is a form of racism. Akande's article engages in a historical analysis to intervene in the contentious race-religion debate concerning this "intractable issue"[2] to show there is nothing new about it, and that the "racing of religion"[3] extends beyond Muslims, including Jews and Indigenous peoples as well.

Those opposed to the proposed protocol to ICERD have raised a variety of concerns. Some fear it would unduly privilege religion over various intersectional experiences. Others are worried about the vulnerability of internal minorities within religious groups. Some favor strengthening the protections regarding race and religion separately.

Akande specializes in legal history, law and religion, constitutional and comparative constitutional law, Islamic law, international law, and (post-)colonial African law and society. Particularly interested in the law's interplay with global inequality, she has delved into historical perspectives on European nineteenth- and twentieth-century empire, especially in its encounter with Africa and the Muslim World.[4] In her article, Akande argues that "racial and religious othering were mutually co-constitutive in the colonial encounter."[5] As part of imperialism, the "othering" prioritized "civilized" Christian Euro-America, subordinating all others as uncivilized. She highlights two early failed attempts in the twentieth century to link race and religious discrimination: in the late 1910s, during negotiations surrounding the adoption of the League of Nations' Covenant, a Japanese proposal was soundly defeated by Western powers; and in the 1960s, the efforts during the period involving the adoption of ICERD.

* *University Distinguished Professor, Nicholas Doman Professor of International Law & Former Dean, University of Colorado Law School, Boulder, CO, United States.*

** *Bessie Dutton Murray Professor of Law & Associate Dean of International & Comparative Law Programs, University of Iowa College of Law, Iowa City, IA, United States.*

[1] Rabiat Akande, *An Imperial History of Race-Religion in International Law*, 118 AJIL 1,1 (2024).

[2] *Id.* at 28.

[3] *Id.* at 5.

[4] Rabiat Akande, Entangled Domains: Empire, Law and Religion in Northern Nigeria (2023).

[5] Akande, *supra* note 1, at 6.

Proposals for linkage failed in part due to "geostrategic Cold War rivalry within Euro-America."[6] Akande explains why the efforts to obtain recognition were meaningful, even though they "foundered."[7] She considers contemporary struggles—the "enduring protection gap that continues to preclude effective recourse for racialized religious minorities in international law."[8] Akande discusses the jurisprudence of the European Court of Human Rights focusing on Muslim headscarves and veils to illustrate how the "Christian European foundations of international law continue to give life to a jurisprudence that excludes Europe's religious others."[9] She examines modern cases before the UN Human Rights Committee and CERD that use an analysis that sees race-religion interaction as merely dual, rather than acknowledging co-constitution. Akande posits that Critical Race Theory should be more thoroughly consulted as it has developed an intersectional analysis that comprehends going beyond dual.[10] She concludes that "current ICERD debates provide a unique opportunity to confront the continuing afterlife of the imperial history of race-religion othering, and to creatively imagine an emancipatory international legal response,"[11] and offers "intellectual aid to contemporary efforts to transcend the imperial past through bold reform."[12]

The symposium convenes a diverse array of scholars covering the different areas addressed by Akande's article, i.e., race/religion, colonial history of international law, and human rights mechanisms. Contributors engage with and go beyond Akande's article, focusing on Jewish, Muslim, Hindu, and Indigenous peoples' rights. One of us contributes an essay that finds shortcomings in the article's treatment of certain non-treaty sources that bend toward advancing attention to the race-religion interplay. The essays do not include all potential viewpoints, but will hopefully inspire others to write their own contributions.

The first essay, by Oded Steinberg from Hebrew University of Jerusalem, finds Akande's study of race-religion "immensely significant since she illustrates how the endurance of this constellation from the nineteenth century is formative in contemporary realities."[13] Steinberg partially validates Akande's argument concerning the emergence of race-religion in that century, and stresses Western racial discrimination against Islam and Judaism, the two "sister Semitic" religions. Steinberg mentions that the racialized-religious heritage is visible in Western discussions on the hijab, Jewish circumcision, and other practices of religious minorities. He augments Akande's analysis by showing how race-religion could be "fluid." In that state, specific groups could "enter" Western civilization. On other occasions, if race-religion was rigid, groups would be barred. Exclusion could target other "fellow Christian whites," such as the Catholic Irish and Poles. Thus, it was not only "whiteness" per se that became dominant, but a specific form of "whiteness" (e.g., Anglo-Saxon, Teutonic, Aryan) that was being constantly reimagined and redefined. Today, as a result of the Holocaust, "certain imagined categories, particularly 'Aryan,' are no longer spoken of, yet their destructive meanings linger on, still shaping attitudes and practices."[14] Steinberg concurs with Akande's idea that inner white-Christian prejudice has become marginal in comparison to the discrimination against Black-Muslim "others." As an example, he discusses recent European welcoming of white Christian

[6] *Id.* at 23.

[7] *Id.* at 27.

[8] *Id.* at 6.

[9] *Id.* at 29.

[10] *Id.* at 39. For an overview of Critical Race Theory, see Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (4th ed. 2023). For seminal work, see Critical Race Theory: The Key Writings that Formed the Movement (Kimberlé Crenshaw, Neil T. Gotanda, Gary Peller & Kendall Thomas eds., 1996).

[11] Akande, *supra* note 1, at 40.

[12] *Id.*

[13] Oded Steinberg, *Nineteenth-Century Contextualization of "Race-Religion,"* 118 AJIL Unbound 108 (2024).

[14] *Id.* at 113.

https://doi.org/10.1017/aju.2024.14 Published online by Cambridge University Press

Ukrainian refugees, that can be juxtaposed to the apathy exhibited toward drowning Christian and Muslim masses from Africa.

Samuel Moyn from Yale University draws out more explicitly Akande's point that Jews—racialized by white Christian Europeans—experienced and fought the same protection gap.[15] He writes: "Though the historical record suggests similarities in their experience of victimhood, contemporary Jews do not regularly see themselves as allies of Muslims facing racial and religious persecution. But perhaps they should."[16] Moyn cites Africanist Mahmood Mamdani's work on the Rwandan genocide for the notion that imperial histories can set up extreme violence even decades later.[17] Akande, writing in the same tradition as Mamdani, illustrates "how the limitations of international law reflect the imperial history that produced it."[18] While the era of formal empire may be over, the aftereffects continue. Moyn concludes that Akande's "ultimate lesson that international law has not allowed for setting aside the legacies of the imperial past, let alone provided compensation for its injuries, is hardly uplifting."[19] She does note "one alternative: to begin with the histories that can lead colonial victims to inflict violence themselves."[20]

Sahar Aziz from Rutgers Law School agrees with Akande's call that law incorporated "mutually constitutive discrimination on the basis of race-religion [which] applies beyond 'imperial histories' to the present day."[21] Aziz notes that Critical Race Theory is echoed in Akande's work: race was not biological, but was socially constructed to fit European historical agendas, which politically constructed "hierarchies of (dis)empowerment."[22] In the twentieth century, racio-religious hierarchies contributed to anti-Semitism and anti-Catholic discrimination. Moreover, the hierarchies *within* the social constructions of whiteness led to Protestant Northern and Western Europeans being raced as superior to Eastern and Southern Europeans, who are predominantly Jewish and Catholic. Today, Aziz argues, Muslims have been racialized and there is heightened anti-Muslim discrimination. Muslims and Arabs are seen as the "Other," i.e., terrorism supporters and presumptively anti-Semitic. They may suffer censorship, harassment, and other forms of discrimination, as is well illustrated in current Palestine-Israel discourse. Aziz sees the situation as a "mutually constitutive form of discrimination,"[23] and notes that "increased vigilance against anti-Semitism is a welcome change after centuries of discrimination, [but] Muslims (and by extension Palestinians) remain as outsiders after the transition from white Christian to white Judeo-Christian systems of power and privilege in the United States."[24]

The next two essays focus on South Africa. Ntombizozuko Dyani-Mhango from the University of Pretoria agrees with Akande that international law has been an enabler of the othering of "non-Euro-Christian" religions.[25] She illustrates how religion and racism have been intertwined, using the example of the post-colonial/settler colony and post-apartheid state. Although the 1996 South African Constitution is progressive, the colonial and post-apartheid legacies have subjugated minority religions, like Islam, in favor of Christianity. The South African

[15] Samuel Moyn, *From One Paradigm to Another: The Jewish History of Race and Religion in International Law*, 118 AJIL Unbound 114 (2024).

[16] *Id.* at 117.

[17] Mahmood Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda (2001).

[18] Moyn, *supra* note 15, at 117.

[19] *Id.*

[20] *Id.*

[21] Sahar Aziz, *Racing Religion in the Palestine-Israel Discourse*, 118 AJIL Unbound 118 (2024).

[22] *Id.* at 118.

[23] *Id.*

[24] *Id.* at 123.

[25] Ntombizozuko Dyani-Mhango, *South Africa and the "Othering" of the "Non-Euro-Christian" Religions*, 118 AJIL Unbound 124 (2024).

https://doi.org/10.1017/aju.2024.14 Published online by Cambridge University Press

government, Dyani-Mhango argues, has failed to recognize Muslim marriages for decades despite Article 15 of the South African Constitution concerning religion. Meanwhile, customary polygamous marriages of the various ethnic groups have been authorized. As the government has been complicit in the othering of "non-Euro-Christians," Dyani-Mhango calls for the government to materialize its international and constitutional obligations. In contrast, she notes that the Constitutional Court has endorsed the rights of religious minorities: in 2022, the South African court ordered "the President and Cabinet, together with Parliament, to remedy the foregoing defects in existing legislation by either amending it, or by initiating and passing new legislation within 24 months, in order to ensure the recognition of Muslim marriages as valid marriages."[26] While a bill was introduced in the Parliament, it has subsequently been withdrawn for unknown reasons.

Waheeda Amien from the University of Cape Town expands upon the prior essay's coverage on South Africa in two ways.[27] First, it focuses on the less explored Hindu religion, and second, it examines the disparate effect of the non-recognition of Hindu marriages on women. Amien agrees with Akande's observations concerning "mutually imbricated religious and racial othering."[28] Historically, Euro-Christian foundations excluded minority religions from legal protection in South Africa: heteronormativity and monogamy were embraced, and customary marriages along with Muslim, Hindu, and Jewish marriages were not legally recognized because they were potentially polygynous. Needless to say, same-sex marriages were excluded as well. In the twenty-first century, however, customary marriages and same-sex marriages have been legalized. As the prior essay illustrated, the Constitutional Court of South Africa recognizes Muslim marriages, although legislation has not been promulgated. Thus, Hindu and Jewish marriages remain without legal protection. Most Hindu women marry only through Hindu marriages, not civil marriages. Divorce is not permitted within the faith, and women who seek a divorce may not be "released from undesirable marriages."[29] The only means for divorce is through the civil law, yet the women are not recognized as married under that law. Amien calls for the unfair discrimination to be remedied by amending the existing marriage and divorce laws or adopting new legislation to include Hindu marriage.

The final essay, by S. James Anaya from the University of Colorado Law School, is aimed principally at responding to Akande's treatment of the UN Declaration on the Rights of Indigenous Peoples.[30] Akande identifies the Declaration as demonstrating "some awareness of the race-awareness interplay,"[31] but considers that awareness to be "tamed by caution"[32] and the Declaration more generally to be of questionable significance. Anaya responds to this characterization of the Declaration, starting with pointing out faulty assumptions in the characterization and incomplete use of authority. He identifies the Declaration's origins in a worldwide Indigenous movement that has sought to overcome racial and religious othering, as well as provisions of the Declaration that respond to Indigenous peoples' demands for recourse against that othering. Also included in the essay are substantial indications of the Declaration's legal significance and actual impact. The essay suggests that the critical approach employed by Akande, which apparently is reluctant to recognize positive developments other than those represented by the explicit terms of treaties or other formal international legal sources, fails to appreciate the normative power and legal significance of less formal sources, such as the UN Declaration on the Rights of Indigenous Peoples.

[26] Women's Legal Centre Trust v. President of South Africa and Others, (2022) ZACC 23 (S. Afr.).

[27] Waheeda Amien, *Race-Religious Discrimination in South Africa's Hindu Marriages*, 118 AJIL Unbound 129 (2024).

[28] Akande, *supra* note 1, at 19.

[29] Amien, *supra* note 27, at 133.

[30] S. James Anaya, *The Significance of the UN Declaration on the Rights of Indigenous Peoples*, 118 AJIL Unbound 135 (2024).

[31] Akande, *supra* note 1, at 33.

[32] *Id.*

https://doi.org/10.1017/aju.2024.14 Published online by Cambridge University Press

In all, the essays in this symposium provide a rich collection of diverse perspectives on multiple dimensions of an important topic. Akande offers "intellectual aid to contemporary efforts to transcend the imperial past through bold reform."[33] The essays take such aid and stand to stimulate further reflection and conversation. It remains to be seen if the current efforts toward an ICERD protocol that would embrace simultaneous race-religious discrimination will be successful or if the issue will be deferred once again.

[33] *Id.* at 40.

https://doi.org/10.1017/aju.2024.14 Published online by Cambridge University Press