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

SOUTH AFRICA AND THE "OTHERING" OF THE "NON-EURO-CHRISTIAN" RELIGIONS

*Ntombizozuko Dyani-Mhango**

At the heart of Rabiat Akande's inspiring article, "An Imperial History of Race-Religion in International Law," is the problematization of international law as an enabler of the othering of "non-Euro-Christian" religions.[1] Akande employs "the imperial history of international law" to demonstrate that "racial and religious othering were mutually co-constitutive in the colonial encounter."[2] She rightly points out that "the legacy of that past survives in the continuing interplay of the racial and religious of the non-Euro-Christian other."[3] The focus of my essay is the post-colonial/settler colony[4] and post-apartheid state that is South Africa. I argue that despite its highly acclaimed Constitution,[5] which values international law and human rights, colonial and apartheid legacies still exist in South Africa, and come in the form of subjugating minority religions in favor of Christianity. In particular, I focus on the failure of the South African government in 2024 to pass legislation that would legally recognize Muslim marriages despite a constitutional obligation to do so.[6] I argue that the government's non-recognition of Muslim marriages for almost three decades is a result of South Africa's colonial and apartheid legacies. South Africa's international and constitutional obligations law should be at the heart of the South African government's realization of fundamental rights when dealing with matters pertaining to religious freedom, especially as they relate to Muslim marriages.

The discussion in this essay is informed by three elements. First, South Africa is a settler-colony that gained its independence in 1994. Second, South Africa prides itself on its identity as a human-rights-oriented state,[7] with the Bill of Rights consisting of a number of fundamental rights, including the freedom of religion.[8] Third, the Constitution recognizes the applicability of international law to domestic disputes.[9] The Constitution instructs courts to prefer an interpretation of the legislation that will not offend international law[10] and to have regard

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

[2] *Id.* at 6.

[3] *Id.*

[4] *See* Joel M. Modiri, *Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence*, 34 S. Afr. J. Hum. Rts. 300, 303 (2018).

[5] S. Afr. Const., 1996.

[6] *Id.*, § 7.

[7] Makau W. Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 Harv. Hum. Rts. J. 63, 71 (1997).

[8] S. Afr. Const., *supra* note 5, §§ 9–35.

[9] *Id.*, §§ 231–232.

[10] *Id.*, § 233.

to international law conventions when interpreting the Bill of Rights.[11] South Africa is a party to several human rights treaties that protect freedom of religion globally[12] and regionally.[13]

All Religions Are Equal: A Brief Synopsis of Religions in South Africa

As with other African states, Christianity in South Africa played both an oppressive role against the colonized and a positive role in the fight against colonialism, race domination, and apartheid. Josias Tembo and Anya Topolski confirm that

> [o]n the one hand, since colonization, Christianity has been the basic framework from which Africans have been socio-politically and theoretically constructed as inferior race of human beings to be subjugated and exploited by White Christians. On the other hand, Christianity has been a source of anti-racist and anti-colonial struggles on the African continent.[14]

One may even argue that Christianity played a role in the adoption of a new constitutional order in South Africa, which came with a constitutional guarantee of religious freedom in Section 15 of the Constitution. This is not to suggest that there was no religious freedom in South Africa before 1994. However, one must understand religious freedom in the context of South Africa's colonial and apartheid past. Freedom of religion "was not constitutionally guaranteed" during those periods.[15] As Farlam puts it, Christianity was the "unofficial state religion" of apartheid South Africa.[16] As a result, other religions were discriminated against. The significance of the constitutional guarantee of freedom of religion, therefore, cannot be gainsaid. Section 15 of the Constitution provides three things. First, it guarantees the state's non-interference in one's religion, belief, or opinion.[17] This guarantee includes one's freedom not to believe.[18] Second, the provision requires that government institutions that allow religious observances in their premises or in public spaces should accommodate all religions.[19] Finally, the provision permits the government to pass legislation recognizing religious marriages that were otherwise excluded from legal recognition.[20]

On paper, all religions are equal in South Africa. The Constitution prohibits unfair discrimination on the basis of religion.[21] It also guarantees enjoyment of the right to religion within a community of believers.[22] According to the

[11] *Id.*, § 39(1).

[12] For example, the International Covenant on Civil and Political Rights, Art. 18, Dec. 16, 1966, 999 UNTS 171, S. Exec. Doc. E, 95-2 (1978), S. Treaty Doc. 95-20; 6 ILM 368 (1967), and the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(vii), Dec. 21, 1965, 660 UNTS 195, S. Exec. Doc. C, 95-2 (1978), S. Treaty Doc. 95-18.

[13] African Charter on Human and Peoples' Rights, June 27, 1981, 1520 UNTS 217, 21 ILM 58 (1982).

[14] Josias Tembo & Anya Topolski, *Exploring the Entanglement of Race and Religion in Africa*, 48 Soc. Dynamics 377, 379 (2022).

[15] P. Coertzen, *Freedom of Religion in South Africa: Then and Now 1652–2008*, 29 Verbum et Ecclesia JRG 345 (2008).

[16] Paul Farlam, *Freedom of Religion, Belief and Opinion*, *in* Constitutional Law of South Africa 41 (Stuart Woolman & Michael Bishop eds., 2014).

[17] S. Afr. Const., *supra* note 5, § 15(1). Christof Heyns & Danie Brand, *The Constitutional Protection of Religious Human Rights in Southern Africa*, 33 CILSA 53, 84 (2000).

[18] South African Constitutional Law in Context 632 (Pierre De Vos & Warren Freedman eds., 2023).

[19] S. Afr. Const., *supra* note 5, § 15(2). Religious observance "refers to the acts or rituals of a religious character usually conducted at public events such as at school assemblies, at the opening of Parliament or at the start of a soccer match." South African Constitutional Law in Context, *supra* note 18, at 633.

[20] S. Afr. Const., *supra* note 5, § 15(3).

[21] *Id.*, § 9(3)–(4).

[22] *Id.*, § 31.

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2022 Census, the population of the country is comprised as follows: 85.3 percent identify as Christians; 7.8 percent practice African religion; 1.6 percent practice Islam; 1 percent practice Hinduism; with Judaism, atheism, and agnosticism at 0.1 percent each. 2.9 percent of the population of 62 million do not indicate any religious affiliation.[23] To put this into perspective, South Africa's population consists of Africans at 81.4 percent, mixed-race persons designated as "Coloureds"[24] at 8.2 percent, whites at 7.3 percent, and persons of Indian descent at 2.7 percent.[25]

It is notable but unsurprising that the majority of Africans (81.4 percent) practice Christianity compared to the practice of African religion (9.5 percent). One may argue that since Africans are in the majority in South Africa it would make sense for the percentage of Africans who practice Christianity to be high given the role Christianity played in the oppression of other religions in South Africa.[26] It is recalled that for centuries Christianity was associated with "colon[izing] the conscience and consciousness of the colonized in ways that would make them lose their Indigenousness. It was meant to "make" or "create" the colonized in the image of the colonizer."[27] Colonization coupled with racism legacy which was about racial domination and superiority confirms the fact that the majority of the former colonized persons in South Africa still practice Euro-Christianity. The "absolute cultural superiority of the Christian," as Akande puts it, therefore, is evident.[28]

After the adoption of the Constitution, the South African Constitutional Court Justice Albie Sachs in *Lawrence* also confirmed that South Africa "acknowledges the multi-faith and multi-belief nature of the country; [and] does not favour one religious creed or doctrinal truth."[29] Despite this statement, it would be almost three decades after the adoption of the Constitution that the government was compelled by the courts to have to legally recognize Muslim marriages or marriages concluded according to Sharia Law.[30]

Judicial Enforcement of Colonial and Apartheid Era Convictions Against "Non-Euro-Christian" Religions

Discussing the General Act of the Berlin Conference on West Africa (1885), which sought to Christianize the uncivilized Africans, among other things, Akande contends that such a "Christian civilizational project found expression in law."[31] I aim to demonstrate in this section that courts in apartheid South Africa perpetuated the notion that non-Euro-Christian religions were inferior to Christianity and did so using law as an instrument. This is especially clear in relation to marriage laws.

There is no one marriage system in South Africa. Before the Constitutional Court's recognition of Muslim marriages in 2022, the law recognized civil marriages regulated by the Marriage Act 25 of 1961, customary marriages regulated by the Recognition of Customary Marriages Act 120 of 1998, and same-sex marriages or civil unions regulated by the Civil Union Act 17 of 2006. The Marriage Act 25 of 1961 is the benchmark for marriage systems as all other religious marriages are tested against civil marriage. Customary marriages are

[23] Statistics S. Afr., *Statistical Release*, P0301.4, 24 (2022).

[24] The now repealed Population Registration Act 30 of 1950, § 1(iii) (S. Afr.) classified a "coloured person" as "a person who is not a white person or a native." The term "coloured" was retained in the Employment Equity Act 55 of 1998, § 1 (S. Afr.), as a Black person (alongside Africans and Indians).

[25] Statistics S. Afr., *supra* note 23, at 25.

[26] Sibusiso Masondo, *Ironies of Christian Presence in Southern Africa*, 31 J. Stud. Relig. 209, 211 (2018).

[27] *Id.* at 210.

[28] Akande, *supra* note 1, at 8.

[29] S v. Lawrence; S v. Negal; S v. Solberg 1997 ZACC 11, para. 148 (S. Afr.).

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

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

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meant for persons who practice African religion or culture and choose to get married under that system.[32] The Constitutional Court confirmed that the Recognition of Customary Marriages Act "represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country."[33] The Civil Union Act was enacted as a result of the Constitutional Court judgment that found the Marriages Act to be in conflict with the Constitution insofar as it did not accommodate same-sex marriages.[34] Interestingly, both customary marriages and Muslim marriages have the potential to be polygamous. The former is regulated by legislation, while the latter is not. The polygamous nature of Muslim marriages is what led to their non-recognition prior to 2022.[35]

To understand the plight of persons married in accordance with Muslim Law (Sharia Law) in South Africa during the apartheid era and how courts were complicit in the subjugation of these marriages, one only has to read this passage by the pre-constitutional South African Eastern Cape High Court in *Ismail v. Ismail*:

> Within South Africa, the monogamous concept of marriage is fundamental. In the instant case the union was . . . a polygamous one even though there may have been a tacit *consensus* between the plaintiff and defendant to the effect that their marriage will be monogamous. Their tacit understanding cannot affect the inherent nature of their relationship. Under our law a marriage is regarded as polygamous if it is celebrated under the tenet which allow the husband to take another wife during its subsistence, whether he does so or not. A potentially polygamous union is equated to a de facto polygamous union.[36]

The attitude by the court in *Ismail* demonstrated intolerance of other religious marriages and perpetuated the colonial and apartheid mentality that only Christian (monogamous) marriages were acceptable.[37] To augment this point, one has only to read the criticism of *Ismail* in the Constitutional Court that "*Ismail* . . . displays ignorance and total disregard of the lived realities prevailing in Muslim communities and is consonant with the inimical attitude of one group in our pluralistic society imposing its views on another."[38] The Constitutional Court debunked the reasoning in *Ismail* that was informed by South Africa's colonial and apartheid past of othering non-Euro Christian religions.

The disregard of Muslim marriages had adverse consequences for the status of children born from these marriages,[39] widow's rights,[40] and dissolution of the marriage.[41] For example, a widow who was married for fifty years was unable to inherit from her late husband's estate because of the discriminatory nature of Section 2C(1) of the Wills Act 7 of 1953.[42] The South African Registrar of Deeds interpreted Section 2C(1) in a way that excluded

[32] The Recognition of Customary Marriages Act 120 of 1998, §§ 1, 2(3) (S. Afr.).

[33] Gumede (Born Shange) v. President of the Republic of South Africa and Others 2008 ZACC 23, para. 16 (S. Afr.).

[34] Minister of Home Affairs and Another v. Fourie and Another 2005 ZACC 19, para. 114 (S. Afr.).

[35] Najma Moosa, *Muslim Personal Law: To Be or Not to Be?*, 6 Stellenbosch L. Rev. 417, 419 (1995); *Women's Legal Centre*, *supra* note 30, para. 68.

[36] Ismail v. Ismail 1983 1 SA 1006, 1020 (S. Afr.) (emphasis in original).

[37] *See* Women's Legal Centre Trust v. President of the Republic of South Africa and Others, Faro v. Bingham N.O. and Others, Esau v. Esau and Others 2018 ZAWCHC 109, para. 6 (S. Afr.).

[38] Hassam v. Jacobs NO 2009 ZACC 19, para. 24 (S. Afr.).

[39] *Women's Legal Centre*, *supra* note 30, para. 62.

[40] Moosa NO v. Minister of Justice 2018 ZACC 19 (S. Afr.).

[41] Faro v. Bingham NO and Others 2013 ZAWCHC 159 (S. Afr.).

[42] Section 1 of the Wills Act states that "(1) If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse." Wills Act 7 of 1953, § 1 (S. Afr.).

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polygamous Muslim marriages from the definition of "a surviving spouse."[43] In *Moosa NO*, the widow challenged this interpretation on the basis that it discriminated against Muslim marriages for being polygamous while recognizing monogamous civil marriages as well as customary marriages as regulated by the Recognition of Customary Marriages Act.[44] In finding the provision to be in conflict with the Constitution, the Constitutional Court held that "[f]or the purposes of [section 2C(1)], a 'surviving spouse' includes every husband and wife of a *monogamous and polygamous* Muslim marriage solemnised under the religion of Islam."[45]

It was only in 2022, after many disputes before various courts relating to Muslim marriages,[46] that the Constitutional 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 for all purposes in South Africa and to regulate the consequences arising from such recognition.[47]

The Constitutional Court made plans for the immediate recognition of Muslim marriages under the Recognition of Customary Marriages Act until a new law is enacted or the existing legislation is amended to accommodate Muslim marriages.[48] Pursuant to the Constitutional Court judgment in 2022, a member of the South African Parliament introduced a bill "[t]o regulate the recognition, requirements, solemnisation, registration, proprietary and other consequences, dissolution and consequences of dissolution of Muslim marriages."[49] The bill has since been withdrawn from Parliament in accordance with the rules of Parliament. The rule in question stipulates that "[t]he person in charge of a Bill introduced in the Assembly may withdraw the Bill at any time before the Second Reading of the Bill is decided."[50] It is unclear why this bill was withdrawn and whether it will be re-tabled in its current form.

Conclusion

Akande is correct that religion and racism are intertwined. In this essay, I attempted to link South Africa's colonial and apartheid legacy to the current plight faced by non-Euro-Christians, in particular Muslims, as it relates to the legal recognition of their marriage. I stated that South Africa recognizes different types of religions as freedom of religion is guaranteed in the Constitution. Second, I demonstrated that apartheid courts used law as an instrument to perpetuate the subjugation of religions other than Euro-Christianity. In contrast, the Constitutional Court has championed the religious rights of minorities, in the process responding to the government's failure to uphold these rights, especially as they relate to Muslim marriages. While the Constitutional Court has reaffirmed the dignity of Muslims, it cannot be ignored that the government of South Africa remains complicit in the othering of "non-Euro-Christians" believers by failing to pass the law to recognize Muslim marriages. It is inexplicable that a state that prides itself on recognizing international human rights law prescriptions based on equality and human dignity is complicit in the ill-treatment of minority religious groups. One can only hope that the law legally recognizing Muslim marriages in all its aspects will be enacted in the very near future.

[43] *Moosa NO*, *supra* note 40, para. 10.

[44] *Id.*

[45] *Id.*, para. 21 (added emphasis).

[46] *Women's Legal Centre*, *supra* note 30, para. 1.

[47] *Id.*, Order 1.6.

[48] *Id.*, para. 65.

[49] The Registration of Muslim Marriages Bill, B30–2022 (S. Afr.).

[50] Parliament of the Republic of South Africa, Rules of the National Assembly, Rule 334 (9th ed. May 26, 2016).

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