

PUTTING RACIAL EQUALITY ONTO THE GLOBAL HUMAN RIGHTS AGENDA

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Race and Human Rights: Moving Structures

Introduction

How can it be that in its fourteen years of existence, Sur has published only two articles on racial equality? In this Essay, I propose that Sur's neglect of racial equality is neither exceptional nor an anomaly within the broader international human rights universe. Rather this neglect is characteristic of the more general marginality of racial equality within the global human rights agenda, and among those who wield power in the formation and execution of this agenda. Formal approaches to racial equality, even within the human rights system, fail to leverage the promise of the International Convention for the Elimination of Racial Discrimination ("ICERD"), notwithstanding enduring legacies of colonial-era racial subordination. And people of color on the front lines of racial oppression remain excluded from human rights decision-making and knowledge production. I argue that remedying this state of affairs requires infusing the global human rights agenda with a commit to substantive racial equality, which: (1) prioritizes a structural and intersectional approach to racial discrimination, and (2) takes seriously the role of communities of color and their advocates not only in fighting racial inequality, but also in defining the very nature of human rights.

Confronting Neglect and Marginality

The rise and spread of right-wing nationalist populism around the world has unleashed unashamed public discourses and practices of racism, xenophobia, misogyny and other forms of intolerance.¹ Today, leaders even in the highest level of political office in countries that have long viewed themselves as the vanguard of liberal constitutional democracy openly profess racist and xenophobic views as they adopt policies that entrench them. Human rights and other organizations continue to document increases in crimes and other incidents motivated by racial, ethnic, religious and related intolerance, and have done important work to expose human rights violations of this kind. United Nations ("UN") human rights mechanisms and actors have also publicly taken a stand to re-affirm principles of equality and dignity in the wake of egregious incidents of racist and xenophobic expression. In light of this seemingly renewed attention to explicit racism and xenophobia, what does it mean to say that racial equality is marginal to the global human rights agenda or within the global human rights system? And what does it even mean to speak of a global human rights agenda or system?

I want to clarify at the outset that my critique is levelled at the cast of non-governmental and multilateral actors who through different global platforms (especially the United Nations) produce global knowledge and influence norms and policy regarding what human rights are, and when and how they are achieved. These actors include, among others, human rights organizations with international and global influence; the donor and philanthropic organizations that in many cases enable

¹ Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *The Threat of Nationalist Populism to Racial Equality*, Rep. to the United Nations General Assembly, U.N. Doc [A/73/305](http://undocs.org/en/A/73/305) (Aug. 6, 2018), <http://undocs.org/en/A/73/305>.

and in some respects, determine this influence through their funding decisions; UN bodies and agencies, including such as the Office of the High Commissioner for Human Rights (“OHCHR”) or the various UN Human Rights Council-appointed Special Rapporteurs and Independent Experts central to human rights knowledge production and agenda-setting; and UN Member State representatives who in different capacities push human rights norm-development and policy in different UN fora. This list is illustrative and not exhaustive, and of course, the concerns I express here will not apply to every single person or institution that participates in the universe I describe. There are important exceptions but these exceptions do not negate the more general trend of neglect with which I am concerned. Equally important to note is that the list above aims to capture the actors who *wield power in global human rights knowledge production and agenda-setting*. Such a list is not the same as the list of actors who are doing the most to fight human rights violations on the ground, including as they relate to racial equality. Many grassroots organizations and movements such as the Black Feminist Movement in Brazil are engaged in daily struggles to push racial equality from a position of neglect to one of priority on the human rights agenda. However, my experience in different global human rights fora (and their halls of power) is that these grassroots organizations are typically excluded, especially when it comes time to make decisions.²

Although influential actors within the global human rights system have raised the alarm against visceral expressions or acts of racism and xenophobia, these actors fail seriously to engage with the historically entrenched structures of racial oppression, exploitation and exclusion that violate the human rights of many but are largely invisible even in the global human rights discourse. Consider the UN Millennium Declaration³ adopted in 2000 as the global policy framework for development, which only mentioned discrimination twice. These references concerned violence against women and the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. More recently, the General Assembly commendably adopted by consensus a full program of action for the International Decade for People of African Descent (2015-2024), which aims to strengthen the promotion, protection and fulfilment of the rights of people of African Descent. Yet implementation of the Decade remains slow, as the number of countries that have formally adopted a related program of action remains limited.⁴ No forum has as yet been established for consultations with people of African descent as required by the General Assembly resolution that initiated the Decade.⁵ Even within the UN system only the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), UN Women, OHCHR and the UN Department of Public Information have reported concrete actions related to the implementation of the Decade.⁶

² This exclusion need not be intentional, and often operates structurally—for example, the cost of traveling to Geneva to engage in human rights lobbying is arguably prohibitive for many grassroots organizations in the global south. Many likely also fall outside of the information networks without which it can be difficult to even know when lobbying opportunities present themselves at the UN.

³ G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2000).

⁴ See Michael McEachrane, Review of progress achieved concerning the implementation of the programme of activities for the International Decade for People of African Descent, Presentation at the 16th session of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action on 28 August 2018, available for download at <https://www.ohchr.org/EN/Issues/Racism/IntergovWG/Pages/Session16.aspx>.

⁵ http://www.un.org/en/events/africandescentdecade/pdf/A.RES.69.16_IDPAD.pdf.

⁶ “Actions Taken,” The International Decade for People of African Descent, 2015–2024, accessed October 29, 2018, <http://www.un.org/en/events/africandescentdecade/actions-taken.shtml>.

Where racial discrimination and intolerance feature, the emphasis of actors within global human rights system is largely on explicit racial prejudice as the problem, condemning racist acts and speeches, but paying little attention to the structural and institutional ways that racial discrimination and inequality operate. This “prejudice” approach is evident in the global human rights discourse on migration, in which leading global NGOs, UN actors and member states will speak out against extreme cases of racist and xenophobic speech,⁷ but do not similarly confront or condemn the racism of law and policy that makes no mention of race but de facto systematically discriminates against migrants of color in different parts of the world.⁸

Recalling the History of Racial Subordination as Global Project

A brief reflection on the history of global projects of racial subordination, and the legal and political institutions erected to advance these projects makes clear why the prejudice approach I mention above amounts to marginalizing racial equality as a human rights end. Until the formal decolonization of much of the world beginning the mid-20th century, international and domestic law across the world allocated what we now call human rights on a racial basis. For over three hundred centuries, European colonialism structured the globe according to implicit and explicit logics that traded on the claimed moral, cultural and intellectual inferiority of non-Europeans. The 19th Century consolidation of scientific racism supplied a technical script according to which European scientists divided human beings into different biological races, with whiteness conferring natural supremacy, and non-whiteness instead conferring inferiority. Racial discrimination and racial subordination were institutionalized even within the global order as represented by the United Nations.⁹

It was not until 1965 that UN Member States could agree on an international treaty through which they resolved:

to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination[.]¹⁰

The International Convention on the Elimination of Racial Discrimination, which is among the most widely ratified international human rights treaties, articulates the normative and legal framework for the ambitious goal of eliminating all forms of racial discrimination. But during ICERD’s brief life time, racial equality has seemingly drifted to the margins of the global human rights agenda despite efforts, including by anti-racism civil society coalitions at the 2001 World Conference Against Racism in Durban, to highlight the historical context and structural dynamics of persisting racial inequality. If we consider ICERD as initiating UN member states’ programmatic commitment to eliminating racial discrimination, this commitment is only *fifty-three* years old. This commitment, as a matter of duration, is firmly eclipsed by the over three hundred years that came before it, during which, as I have mentioned, colonialism institutionalized, sanctioned and even celebrated the racial exclusion and

⁷ E. Tendayi Achiume, “Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees,” *Georgetown Journal of International Law* 45, no. 2 (2014): 355-59.

⁸ E. Tendayi Achiume, “Governing Xenophobia,” *Vanderbilt Journal of Transnational Law* 51, no. 2 (2018): 365-390.

⁹ See e.g., Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men’s Countries and the International Challenge of Racial Equality* (New York: Cambridge University Press, 2008).

¹⁰ G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, in Preamble (Dec. 21, 1965).

subordination of non-Europeans. Recalling this history makes clear that neglecting the fight for racial equality, amounts to abandoning the urgent project of dismantling the systems of subordination and exploitation that were carefully erected in prior eras and that continue to have effect today.

Conceptualizing Race, Racial Discrimination and Racial Equality in Human Rights: An Antisubordination Approach

I use the term race to refer to “the historically contingent social systems of meaning that attach to elements of morphology and ancestry.”¹¹ Such an understanding of race unequivocally rejects the notion of biological races, but recognizes that the construction of race is informed by physical features and lineage, not because features and lineage are a function of racial variation but because societies invest them with social meaning.¹² At the same time, race is by no means merely about physical attributes such as color, nor is it merely about lineage. It is centrally about the social, political and economic meaning of being categorized as black, white, brown or any other racial designation. Perhaps as a further example of how the global human rights system has failed to raise consciousness around and commitment to racial equality, at least two European countries have taken the alarming step of removing the term “race” from their antidiscrimination legislation.¹³ Deleting the word “race” from antidiscrimination legislation does little to erase the social meaning invested in this concept over centuries. Instead, it diverts attention from the urgent legal and other interventions necessary to remedy persisting racial inequality and discrimination, and keeps discriminatory structures and institutions alive and well.

What is required instead is a substantive, structural approach to racial discrimination, which aims at dismantling racial subordination and achieving equality. As I have highlighted elsewhere, the prohibition on racial discrimination in international human rights law aims at much more than a formal

¹¹ Ian Haney-Lopez, *White By Law: The Legal Construction of Race* (New York: New York University Press, 2006), 10.

¹² Haney-Lopez, 10.

¹³ In July 2018, France removed the term race from its Constitution. Amna Mohdin, *France replaced the word “race” with “sex” in its Constitution*, QUARTZ (June 28, 2018), <https://qz.com/1316951/french-mps-removed-the-word-race-from-the-countrys-constitution>; Assembly removes word ‘race’ from French constitution, CONNEXION (July 13, 2018) <https://www.connexionfrance.com/French-news/france-assembly-votes-to-remove-race-French-constitution>. Sweden has removed race from its anti-discrimination law, from its constitution, and from all domestic law. See A/HRC/30/56/Add.2, para. 20 (discussing Sweden’s removal of all reference to race from their constitution, replacing the use of race with “ethnic origin, colour or other similar circumstance”); Solveig Rundquist, *Race To Be Scrapped from Swedish legislation*, THE LOCAL (July 31, 2014), <https://www.thelocal.se/20140731/race-to-be-scrapped-from-swedish-legislation> (discussing Sweden’s removal of the term race from all domestic law). Several other countries, including Australia, Austria, Finland, Hungary, Germany and Norway, have taken steps to remove or have considered removing mentions of race in domestic law. See David Ross and Barbara Shaw, *Indigenous Australians know removing race from constitution is pretend change*, THE GUARDIAN (Apr. 10, 2017), <https://www.theguardian.com/commentisfree/2017/apr/10/indigenous-australians-know-removing-race-from-constitution-is-pretend-change> (arguing against proposed removal of the term race in the Australian Constitution); Richard Lappin, *Should CERD Repudiate the Notion of Race?*, 28 PEACE REV. 393, 395 (2016); (mentioning Austria, Finland, Hungary, Germany and Norway’s consideration and/or steps to remove race from domestic law).

vision of equality.¹⁴ Equality in the international human rights framework is substantive, and requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat structural and institutional racial discrimination. It also requires states to take affirmative action to remedy historically-rooted racial inequality. The Committee on the Elimination of Racial Discrimination has made clear that the prohibition of racial discrimination under ICERD cannot be interpreted restrictively.¹⁵ An important aspect of achieving substantive equality under ICERD is ensuring that social groups do not become or remain oppressed underclasses on account of their race. In light of these existing human rights principles, global human rights actors must move beyond “prejudice” or “colorblind” approaches and push for true equality.

Intersectionality

Substantive racial equality is not possible without an intersectional analysis of the problem of racial discrimination and intolerance. The following definition of intersectionality from within the UN system captures well its meaning well:

The idea of “intersectionality” seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment.¹⁶

Too often, however, the power of this framing is lost when intersectionality is reduced merely to inclusion of references to gender in policy discussions or documents. Intersectionality is vital to achieving substantive equality but it requires attention to all the operational social categories that shape the experience of discrimination and intolerance: race, gender, ethnicity, national origin, class, religion, disability status, sex, sexual orientation and others. True racial equality requires taking seriously the experiences and expertise of cis and transwomen, LGBTQ persons, persons with disabilities, the poor, the undocumented and other marginalized groups. Similarly, real equality for women, for the LGBTQ persons, persons with disabilities and others can never be a reality without attention to how race structures the subordination of these groups.

“Looking to the Bottom”

Important reflection is necessary within the global human rights movement and system to understand the causes of what in other contexts has been called “racial aphasia”—a collective inability

¹⁴ Rep. of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, U.N. Doc A/HRC/38/52 (Apr. 25, 2018).

¹⁵ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, CERD/C/GC/32, (Sept. 24 2009).

¹⁶ See United Nations Division for the Advancement of Women, OHCHR and United Nations Development Fund for Women, Gender and Racial Discrimination: Report of the Expert Group Meeting (Nov. 21–24, 2000), www.un.org/womenwatch/daw/csw/genrac/report.htm.

to speak about race, a calculated forgetting or neglect of the histories and structures of racism.¹⁷ Whatever these causes might be, among them must surely be the racial demographics that characterize global human rights NGOs, and the lack of representation of people of color, especially in decision-making roles. The work of achieving racial equality is work that must be done by all, but must be led and guided in close participation with representatives of communities who suffer on the frontlines of racial discrimination, subordination and exclusion. Consider how it is that this special volume of *Sur* came to be: the Brazilian Black Feminist movement. For this movement, I would venture to say a human rights regime that does not appreciate the pervasiveness of systems of racial inequality and subordination is not only useless but dangerous. More generally, for the many people living and fighting racial injustice, racial aphasia is a deadly luxury they cannot afford. My sense is that one piece of the puzzle of the marginality of racial equality within human rights, is very much the marginality of people of color within the global organizations and institutions that wield the most power within the field of human rights.

Mari Matsuda has argued that those with direct experience with racial and other forms of oppression are essential to the production of knowledge intended to advance the emancipation of these groups. She calls this “looking to the bottom,” and explains further that “Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise” is vital to knowledge production seeking to define and achieve justice.¹⁸ In the production of human rights knowledge, whether in the context of norm creation or norm implementation, it is vital to recognize those on the front lines of living and fighting racial oppression as superior “epistemic sources” on the nature of their oppression, and on what the priorities ought to be in the approach and execution of the strategies to fight this oppression. This can happen, for example, by ensuring that racially subordinated groups are meaningfully represented and included in global human rights organizations and institutions, including in positions of leadership. Concretely this might mean auditing the representativeness of the staff and leadership of these organizations, and taking measures (including through investment in training and capacity-building) to address marginalization or exclusion of racially subordinated groups. It also requires an acceptance by these organizations and institutions that the very nature of the work they do and the way they do this work, may need to change significantly once they begin to take seriously the experiences and perspectives of racially subordinated groups. Funding models and institutional organizational models and priorities may need to change, for example, to account for the how the strategies and priorities of social movements can differ from those of bureaucratized civil society. The point is not just diversity or inclusion for the sake of ticking boxes, but rather it is to accept that the very agendas of global human rights organizations may have to shift if these organizations are to take seriously the project of looking to the bottom.

Conclusion

Although there is much human rights attention globally on explicit racism and xenophobia rooted in nationalist populist politics, racial equality remains marginal on the agendas of influential actors in the global human rights system. The long and persisting historical legacies of colonialism and contemporary global structures of racialized exclusion require a different, substantive approach to

¹⁷ Debra Thompson, “Through, Against and Beyond the Racial State: The Transnational Stratum of Race,” *Cambridge Review of International Affairs* 26 (2013): 135.

¹⁸ Thompson, 324. Mari J. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987): 325.

racial equality that addresses structural and institutionalized forms of racial discrimination. The global human rights system must reflect an intersectional approach to racial discrimination and take seriously the experiences and expertise of communities of color in the global north and south that live on the frontlines of racial subordination. What would it do to global human rights NGOs, agencies, and funding institutions if they took seriously the project of building the power of anti-racism social movements to produce human rights knowledge on racial oppression? I have found that unlike the dominant, usually legalistic formulations of discrimination and intolerance that can dominate the official human rights corpus, when movement actors and those intimate with racial oppression articulate their experiences of structural subordination as well as the interventions they believe are necessary to address them, they speak in terms of the need to change power relations, and to pay close attention to economic, political and financial structures with global dimensions. Their perspectives require stronger inclusion and representation within the global human rights system and agenda.