

March 2019

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Recommended Citation

Jeena Shah, *UDHR: Our North Star for Global Social Justice or an Imperial and Settler-Colonial Tool to Limit our Conception of Freedom?*, 31 Pace Int'l L. Rev. 569 (2019)

Available at: <https://digitalcommons.pace.edu/pilr/vol31/iss2/7>

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UDHR: OUR NORTH STAR FOR GLOBAL SOCIAL JUSTICE OR AN IMPERIAL AND SETTLER-COLONIAL TOOL TO LIMIT OUR CONCEPTION OF FREEDOM?

Jeena Shah*

bell hooks describes freedom “as positive social equality that grants all humans the opportunity to shape their destinies in the most healthy and communally productive way.”¹ This is the kind of freedom that oppressed communities are fighting for around the world: in struggles to create ecosystems of community safety and accountability without policing or prisons;² systems and practices that facilitate food sovereignty;³ participatory democratic structures not measured solely by periodic elections but rather by how deeply engaged members of a community are in critical debate and decisions on their communal well-being;⁴ solidarity economies, made up of institutions centered on mutualism, like worker-owned cooperatives and community land trusts;⁵ non-exploitative community relationships to land divorced from conceptions of

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¹ BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 117 (2014).

² *Invest-Divest*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/invest-divest/> (last visited May 19, 2019).

³ *Key Documents (Food Sovereignty)*, LA VIACAMPESINA, <https://viacampesina.org/en/what-are-we-fighting-for/food-sovereignty-and-trade/key-documents-food-sovereignty/> (last visited May 19, 2019)

⁴ Kali Akuno, *The Jackson Plan: A Struggle for Self-Determination, Participatory Democracy, and Economic Justice*, ORGANIZING UPGRADE, (July 16, 2012, 10:05 PM), <http://archive.organizingupgrade.com/index.php/modules-menu/black-organizing/item/539-the-jackson-plan>.

⁵ *Id.*

property;⁶ a world without gender or a gender binary;⁷ and much more.

These are not newly evolved conceptions of freedom. Indigenous communities around the world have or had, in various ways, long practiced such freedom. It was colonization that created oppressive constructs such as race; wealth and poverty; ownership of land; gender/gender binary; environmentally harmful means of food production; and our current understandings of policing and prisons.⁸ This is not to say that non-European societies knew nothing of relational power prior to colonization, but that the epistemology giving rise to these conceptions of freedom has long existed in various forms in many areas across the globe. When we characterize them as “newly evolved” for the sake of defending existing legal norms that fail to capture these conceptions, we are valuing only the knowledge of imperialists.

The internationally-recognized norm that should encompass these conceptions of freedom is that of self-determination. As global social justice lawyers, it is this understanding of self-

⁶ Julian Brave NoiseCat, *The western idea of private property is flawed. Indigenous peoples have it right*, THE GUARDIAN (Mar. 17, 2017, 6:00 PM), <https://www.theguardian.com/commentisfree/2017/mar/27/western-idea-private-property-flawed-indigenous-peoples-have-it-right>.

⁷ *Femifesto for Trans Liberation*, TRANS DAY OF RESILIENCE (TDOR), <https://www.tdor.co/femifesto> (last visited Apr. 19, 2019), (“[c]reated by the 2016 Trans Day of Resilience artists and organizers[.]”).

⁸ See, e.g., James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1014 (2007) (“[T]he imposition of colonial rule went hand in hand with the imposition of English rules of property, tort, and contract, which, in turn, facilitated the expansion of industrial and commercial capitalism in the East African Protectorate.”); Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM THE SOUTH 533, 533 (2000) (“The racial axis has a colonial origin and character, but it has proven to be more durable and stable than the colonialism in whose matrix it was established.”); María Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 HYPATIA 186, 186 (2007) (“[Colonialism] introduced many genders and gender itself as a colonial concept and mode of organization of relations of production, property relations, of cosmologies and ways of knowing.”); Kevin F. Steinmetz, et al., *Wicked Overseers: American Policing and Colonialism*, 3 SOC. RACE & ETHNICITY 68, 70 (2017) (“Colonized populations are ‘re-educated’ into colonial society and, when resistance is given; institutions of formal social control, such as the police, ensure compliance through force and coercion.”).

determination that should be the North Star guiding our work. Yet, paradoxically, we have long viewed the Universal Declaration of Human Rights (“UDHR” or “Declaration”)—a document that arises from, and validates, coloniality, the greatest obstacle to self-determination – as our North Star instead. As a result, we may have both reinforced the interests of imperial and settler-colonial powers and enervated our ability *as lawyers* to understand what freedom looks like outside of colonial structures, such as racial capitalism,⁹ that undergird the modern global order. The provisions of the UDHR should not serve as our goalposts, but as any other tool created by oppressors—to “creat[e] ideological and political cris[es]”¹⁰ serving to “destabilize” systems of oppression.¹¹

My point of critique of the UDHR is at three levels. First, the UDHR forms part and parcel of a continuing imperialist system of international law. Second, the context of the UDHR’s drafting demonstrates that its principal drafters were not interested in true self-determination of Third World¹² peoples. And third, the text itself serves to limit our visions of freedom by expressly affirming the foundational norms of racial capitalism.

First, the UDHR cannot be understood outside of the broader colonial project of international law. State sovereignty is a prerequisite to be an actor with full rights and responsibilities under international law. Under the guise of this principle, international law has served to transform the non-European societies of the Third World to serve Western European and North American interests.

⁹ See generally CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983).

¹⁰ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1386 (1988).

¹¹ Patricia Williams, *Alchemical Notes: Reconstructed Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410 (1987).

¹² Mutua explains: “The Third World is more truly a stream of similar historical experiences across virtually all non-European societies that has given rise to a particular voice, a form of intellectual and political consciousness. The term Third World is different from less-developed, crisis-prone, industrializing, developing, underdeveloped, or the South because it correctly captures the oppositional dialectic between the European and non-European, and identifies the plunder of the latter by the former. It places the state of crises of the world on the global order that the West has created and dominates.” Makau Mutua, *What Is TWAIL?*, 94 AM. SOC’Y INT’L L. PROC. 31, 35 (2000) (emphasis omitted).

Essentially, European standards for society, which were racialized, gendered, and capitalist,¹³ were considered “universal.”¹⁴ Accordingly, “the failure of non-[European] states to adhere to these standards denoted a lack of civilization” that both indicated their lack of legal personality under international law and “justified intervention and conquest” by European powers.¹⁵ In exercising their governance over colonized peoples, the colonizing powers established a “colonial state, one that was set up to serve, protect and advance the interests of imperial power and its entourage of corporations and banks” and that “had a monopoly over the use of violence,” through “police forces, armies and secret police” that “used force and, where necessary, violence, to protect the interests of the way in which capitalism operated in the peripheries.”¹⁶

In the subsequent process of decolonization, former colonial powers sought to ensure that formal “political sovereignty” of their former colonies “could be created to be completely consistent with economic subordination.”¹⁷ Thus, the very design of colonial structures served to co-opt local leaders by aligning their interests with those of the former colonial powers and ensuring the continued flow of natural resources to those powers.¹⁸ Consequently, independence governments of the former colonies made only “modest reforms to the colonial state,” leaving the colonial structures of the state “fundamentally intact.”¹⁹

In short, international law recognized political self-determination solely within a “state”-based framework, and only that kind of “state” that maintained colonial structures that were designed to concentrate wealth with former colonizers and their co-

¹³ See generally Quijano, *supra* note 8; Lugones, *supra* note 8.

¹⁴ Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 745 (2006).

¹⁵ *Id.*

¹⁶ Firoze Manji, Opinion, *Why have there been so many despotic governments in Africa?*, AL JAZEERA (July 29, 2014), <https://www.aljazeera.com/indepth/opinion/2014/07/despotic-governments-africa-2014728125216648975.html>.

¹⁷ Anghie, *supra* note 14, at 747.

¹⁸ Manji, *supra* note 16. See generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972).

¹⁹ Manji, *supra* note 16.

opted local elite and use violence against those who resist these structures.

Second, the context of the UDHR's drafting shows that it was not meant to serve the emancipation of colonized peoples. The Declaration was drafted in the late 1940s, in the midst of decolonization and domestic freedom struggles. Anti-colonial struggles around the world, and the Black Freedom Movement in the United States,²⁰ were clearly centered around the concept of self-determination. Yet, the UDHR makes no mention of the term.

This omission was intentional. As one scholar has observed, the Declaration's drafters sought to ensure that the conception of "human rights" to be enshrined in the post-World War II global order "would be compatible with racial and imperial domination" by "describing human rights in such a way as to preclude the appearance . . . of colonialism and racial domination as themselves violations of human rights."²¹ This decision to omit reference to "self-determination" coextensively served to reaffirm that to be "civilized," or considered a legal actor in the international community, the state must conform to a conception of human dignity held by its drafters, which included colonial powers and settler-colonial states.

One of the primary drafters of the UDHR, United States delegate Eleanor Roosevelt sought to create a document that would "position the United States as the moral leader of the free world, while the United States continued its amoral treatment of African Americans."²² Another primary drafter, French delegate René Cassin, viewed human rights as "prior to true self-determination," asserting that "the legitimacy of a state, its right to be treated as sovereign, rests on its respect for human rights."²³ Cassin's understanding of the "respect for human rights" that would serve as

²⁰ See generally BARBARA RANSBY, *ELLA BAKER & THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* (2003).

²¹ Emma Stone Mackinnon, *Declaration as Disavowal: Race and Empire in the Universal Declaration of Human Rights*, 19, 20 (Mar. 2016), http://www.wpsanet.org/papers/docs/Mackinnon_WPSA_Paper.pdf.

²² CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955*, at 133 (2003).

²³ Mackinnon, *supra* note 21, at 19–20.

a precondition for self-determination directly served imperialist interests. This was evidenced by Cassin's later defense of "France's violent repression of the Algerian resistance . . . on the grounds that the resistance represented the enemies of human rights, who had sworn off respect for international law."²⁴ Under his view, "[c]olonial violence by France was not evidence of a lack of respect for rights, but was justified given the circumstances; anticolonial violence – by a colonized people fighting for their emancipation, in contrast, was evidence of a lack of respect for rights, and so proof of the lack of a legitimate claim to self-determination."²⁵

This opposition to including reference to "self-determination" was later overcome in the UDHR's implementing Covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, each of which expressly recognizes a right to self-determination. This was not, as many understand it, *solely* because the makeup of the United Nations changed through the process of decolonization. It was also because European powers narrowed the conception of self-determination to formal political freedom from European imperial empires.²⁶ Because decolonization was considered a process that had predominantly come to an end (in the manner described above) by the time the Covenants were drafted,²⁷ this conception of "self-determination" could pose little threat to continuing racial and economic subordination from which major powers such as Great Britain, France, and the United States benefited.

²⁴ *Id.* at 21–22.

²⁵ *Id.* at 23.

²⁶ See, e.g., Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 8 (2009) ("The idea of self-determination during this time was not that all peoples had a right to self-determination but rather that all colonies had a right to be independent.") (emphasis omitted).

²⁷ For instance, "[b]y 1966, most of the African continent had gained independence." Andrew W. M. Smith & Chris Jeppesen, *Introduction: Development, Contingency and Entanglement: Decolonization in the Conditional*, in BRITAIN, FRANCE, AND THE DECOLONIZATION OF AFRICA: FUTURE IMPERFECT? 1, 1 (2017).

Third, the text of the UDHR reinforces foundational norms of racial capitalism, created to serve imperialism and settler-colonialism. For instance, colonization was carried out by excluding indigenous peoples from the lands on which they lived and globally imposing European rules of property.²⁸ Thus, by enshrining the right to property in Article 17, the UDHR served to maintain two fundamental features of colonization: the concept of property and the protection of ownership of land by European settlers in colonized territories.²⁹ Similarly, the right to food is mentioned without elaboration in the Declaration's Article 25. This right was later defined in Article 11 of the International Covenant on Economic, Social and Cultural Rights, which focuses on increasing food production. Yet, as the most recent global food crisis has demonstrated, inability to access food is not because of food scarcity but rather, the operations of international economic law (which itself reifies racial capitalism) that undermine food sovereignty.³⁰ Finally, the UDHR recognizes rights that affirm the primary enforcement mechanisms of racial capitalism—policing and prisons—by articulating rights such as freedom from only “arbitrary” arrest and detention in Article 9.

So, what does this mean for the work of global social justice lawyers? It cannot be denied that human rights language has served

²⁸ Gathii, *supra* note 8, at 1014.

²⁹ See, e.g., Dumisa Buhle Ntsebeza, Colloquium at Centre for African Studies (July 7, 2018) (transcript available at <https://www.anchoredinlaw.net/wp-content/uploads/2019/04/LAND-EQUALITY-AND-DIGNITY-Ntsebeza-SC.pdf>) (explaining that in the context of South African Constitution, upheld as prime example of the domestication of the UDHR, “the entrenchment of the provisions of the 1913 Land Act in section 25(7) of the Constitution as a marker of a cut-off date for land restitution – or “restitution of that property”, to use the words in the section – provides a virtually insurmountable hurdle to any notion of restitution of land to indigenous owners thereof, owners of land who were dispossessed of their land, disproportionately unequally, by the very enactment of the 1913 Land Act”).

³⁰ See generally Carmen G. Gonzalez, *International Economic Law and the Right to Food*, in RETHINKING FOOD SYSTEMS: STRUCTURAL CHALLENGES, NEW STRATEGIES, AND THE LAW 165–193 (Nadia Lambek, et al., eds., 2014). Thanks to efforts led by the international peasant alliance La Via Campesina, in 2018, the U.N. General Assembly recognized small farmers' right to food sovereignty. G.A. Res. 73/165, *Declaration on the Rights of Peasants and other People Working in Rural Areas*, art. 15(4), U.N. Doc. A/RES/73/165 (2019).

as “both the legitimation of power and the *praxis* of emancipatory politics.”³¹ So how do we reconcile the two? Perhaps through movement lawyering. Movement lawyers view international human rights law merely as one set of tools, among many, to support community organizing (*i.e.*, the building of collective power) to resist systems of oppression standing in the way of true self-determination. At the same time, movement lawyers work to develop a “radical imagination of law”³² beyond colonial constructs such as those offered by the UDHR, by co-struggling with oppressed communities and valuing their knowledge.³³ By following the leadership of oppressed communities, movement lawyers seek to build another world where freedom—the type of freedom bell hooks describes—exists for all.

³¹ Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 125, 126 (1998) (emphasis in original). Critical race theorists have articulated a similar “double consciousness” on the use of “rights” language by communities of color in the United States. *See, e.g.*, Crenshaw, *supra* note 10, at 1386; Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987); Williams, *supra* note 11, at 410.

³² Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

³³ *See* Amna Akbar, et al., *Movement Visions for a Renewed Left Legalism*, LAW & POL. ECON. (Mar. 5, 2019), <https://lpeblog.org/2019/03/05/movement-visions-for-a-renewed-left-legalism/>.