

The CERD Treaty and U.S. Civil Rights Law¹

Americans are rightly proud of their civil rights laws, adopted in the 1960s in response to a broad based domestic Civil Rights Movement and increasing international pressure to undo officially sanctioned discrimination and segregation. As part of that same international movement, in 1965 the U.N. adopted a broad human rights treaty to address racial discrimination – the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). CERD was initially signed by the U.S. in 1966 and later ratified by the Senate in 1994. It is one of only three international human rights treaties that have been ratified by the U.S., and it is binding on the states and the federal government under the Supremacy Clause of the Constitution.

Because the U.S. has a strong civil rights legal tradition, many public officials assume that we are automatically in compliance with CERD. But this is not the case. The CERD treaty goes well beyond the requirements of U.S. law in several important ways, and several recent decisions by the U.S. Supreme Court have further diluted our civil rights protections, calling into question our compliance with our CERD treaty obligations.

How do our civil rights laws comply or fall short?

The CERD treaty prohibits policies that have a discriminatory impact on people of color, even where there is no intent to discriminate. This is also true of several key U.S. laws, including Title VII (fair employment), Title VIII (fair housing), and Title VI (non-discrimination in government-funded programs and activities). However, in the 2001 *Sandoval* case, the Supreme Court eliminated the private right of action to bring Title VI discriminatory impact claims in court, requiring private parties to instead pursue administrative remedies.² This has made it much harder to bring claims of structural discrimination in health care, education, environmental justice, transit funding, and other areas, and is in violation of the CERD treaty's insistence that victims of discrimination should have a judicial enforcement mechanism available.³

The CERD treaty applies to all levels of government – federal, state and local. But Title VI of the Civil Rights Act of 1964 has never been enforceable against the federal government – it can only be used to address discriminatory practices by state and local government grantees.

¹ Prepared for the National CERD Implementation Task Force, a joint committee of the U.S. Human Rights Network and the Human Rights at Home Campaign.

² *Alexander v. Sandoval*, 532 U.S. 275 (2001). Title VI racial impact claims may still be brought to court by the U.S. Department of Justice.

³ International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966). 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969

The CERD treaty embodies an obligation not just to avoid policies with a discriminatory impact, but also to affirmatively take action to address racial disparities in outcomes for people of color, both within government programs and in society at large. This principle of affirmative obligations to redress past discriminatory practices and present day outcomes is largely absent from federal civil rights law (with the notable exception of the Fair Housing Act, which calls on the government to “affirmatively further” fair housing).

The CERD treaty requires its signatories to use carefully tailored race-conscious measures to redress past racial discrimination and continuing racial disparities. But the U.S. Supreme Court has recently been undermining this basic principle of our civil rights law by making it harder for government to use race as a factor in student assignment to promote voluntary racial integration.⁴

The CERD Committee has recommended a government-wide “Plan of Action” to implement CERD, and a central agency or commission to educate the public and monitor treaty compliance. No such mechanisms exist in the U.S.

Extending beyond the usual single-issue approach of U.S. anti-discrimination law, the CERD Committee has also recognized the interdependence of race with other social principles such as gender and class. In a special recommendation in 2000, the Committee acknowledged the *gender-related dimensions of racial discrimination*, thereby underscoring the fact that racial discrimination is not always experienced by women and men equally or in the same ways. With this recommendation, the Committee challenges signatories to address the complex, intersectional causes of disparate racial effects.

Civil rights enforcement vs. human rights compliance: the Obama Administration has done a good job of reviving the dormant civil rights enforcement units within each federal agency that are responsible for investigating complaints of discrimination by state and local recipients of federal funds,⁵ and the revived Civil Rights Division of the U.S. Department of Justice is once again at the forefront of civil rights enforcement.⁶ But civil rights enforcement is only a part of compliance with the CERD treaty – the federal government is also supposed to be addressing racial disparities and impacts in the way it spends its own money and runs its domestic programs (including federal programs affecting health, education, labor, environment, criminal justice, housing, transportation, etc). The federal government is still falling short of its CERD obligations in this area.

⁴ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)

⁵ In spite of overall progress, some federal agencies are lagging behind in this area – for example, the Department of Treasury still has no anti-discrimination regulations as required by Title VI.

⁶ In regard to the compliance record of other divisions of the Department of Justice, see generally, Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination*, 72d Sess., U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).