

“EQUAL TREATY RIGHTS,” RESIDENT STATUS & *FORUM NON CONVENIENS*

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In an essay appearing earlier in the Texas Bar Journal,¹ I addressed the meaning of the phrase “equal treaty rights” utilized in the Texas Open Forum Act.² Since then, the Supreme Court of Texas has rightly ruled with respect to the International Covenant on Civil and Political Rights³ (International Covenant) that

Article 14(1) requires all signatory countries to confer the right of equality before the courts to citizens of the other signatories The Covenant not only guarantees foreign citizens equal treatment in the signatories’ courts, but also guarantees them equal access to these courts [T]he language of the Covenant provides for equal access to courts and equal treatment in civil proceedings . . . [and thus] satisfies the . . . initial burden of establishing ‘equal treaty rights’ [within the meaning of the Texas legislation].⁴

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1. See Jordan J. Paust, “*Equal Treaty Rights*” Under the Texas Open Forum Act, 60 TEX. B. J. 214 (1997).

2. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Vernon Supp. 1995) (repealed 2003).

3. International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter International Convention].

4. Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82-83 (Tex. 2000) (partially quoting Human Rights Committee, General Comment No. 13. *Id.* at 82). The Texas Supreme Court also rightly recognized that “treaties are to be construed broadly, the treaty need not provide explicitly for equal court access; it need only imply it.” *Id.* at 80; see also, e.g., Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal

Indeed, Articles 2, 3, 14, and 26 of the International Covenant absolutely require an equality of treatment, access to our courts, and that there be no “distinction of any kind, such as . . . national origin, . . . or other status.”⁵ Additionally, Article 50 of the International Covenant mandates: “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”⁶

Furthermore, the Supremacy Clause of the U.S. Constitution mandates that “all . . . Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall

spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *United States v. Payne*, 264 U.S. 446, 448-49 (1924) (“Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do”); *De Geofroy v. Riggs*, 133 U.S. 258, 272 (1890) (“[W]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879) (“Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.” (citing *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830) (“If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?”)); *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809) (“Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.”).

5. *E.g.*, International Covenant, *supra* note 3, at 173; *see also id.* at 176 (“All persons shall be equal before the courts”); *id.* at 179 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall . . . guarantee to all persons equal and effective protection against discrimination on any ground such as . . . national or social origin, . . . or other status.”); General Comment No. 15, U.N. GAOR, Hum. Rts. Comm., 23d Sess., Supp. No. 40, Annex VI, at 117, ¶ 7, U.N. Doc. A/41/40 (1986) (“Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any . . . rights and obligations in a suit at law Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.”); General Comment No. 13, U.N. GAOR, Hum. Rts. Comm., 21st Sess., Supp. No. 40, at 143, U.N. Doc. A/39/40 (1984) (¶ 1, “All of [Article 14’s] provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law”; ¶ 2, “[A]rticle 1 applies . . . also to procedures to determine their rights and obligations in a suit at law”; ¶ 4, “The provisions of [A]rticle 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized”).

6. International Covenant, *supra* note 3 at 185.

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁷ Thus, the International Covenant, as treaty law of the United States, and the Supremacy Clause of the U.S. Constitution require that Texas law not be interpreted or applied in any manner that would foster a denial of equal access to courts because of the national origin or residential status of a claimant or in any way impair or subtract from U.S. treaty obligations and policy concerning such equality of treatment and freedom from discrimination on the basis of national origin or other status.⁸ Any other interpretation, threshold, or limitation is simply beyond the power of the State and is controlled by supreme law of the land and, as the Supreme Court has ruled, federal policy evident therein.⁹

One problem with the present legislative scheme in Texas is that section 71.051 of the Texas Civil Practice and Remedies Code contains a significant distinction on the basis of resident status¹⁰ that would deny equality of treatment and equal access to courts. Thus, the scheme set forth in section 71.051 denies certain foreign nationals and other non-residents equal treatment and equal access to courts and it is unavoidably violative of the International Covenant, not to mention several other treaties of the United States.¹¹ Particularly relevant is the

7. U.S. CONST., art. VI, cl. 2.

8. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *United States v. Pink*, 315 U.S. 203, 230-31 (1942) (“[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement”); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941); *Asakura*, 265 U.S. at 341; *Ware v. Hylton*, 3 U.S.(3 Dall.) 199, 282 (1796).

9. See, e.g., *Pink*, 315 U.S. at 230 *passim*.

10. For example, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) precludes *forum non conveniens* inquiry “if the plaintiff is a legal resident of this state” but permits such inquiry for others under subsection (b). TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (Vernon 2002). A previous scheme had utilized the residence distinction contained in subsection (e) and had also set forth distinctions between (a) “a plaintiff who is not a legal resident of the United States,” and (b) “a plaintiff who is a legal resident of the United States” but not of Texas. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon Supp. 1995) (current version at § 71.051).

11. But see Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 349 (1994) (assuming in error that because “[t]he statute is keyed to residence rather than citizenship... [it will] avoid violating

prohibition of distinctions regarding national or social origin or "other status," which covers resident status.¹² As noted, the Supremacy Clause of the U.S. Constitution and Article 50 of the International Covenant mandate that the treaty-based rights to equal treatment and equal access to courts prevail. Therefore, what the Texas law provides to its residents must also be provided to non-residents who are entitled to equal treatment and equal access to courts by treaties of the United States.

With respect to impermissible discrimination based on "other status," the phrase, like other provisions relevant to treaty-based rights,¹³ is to be interpreted broadly.¹⁴ For example, the Human Rights Committee created under the International Covenant has recognized that the Covenant's requirement of non-discrimination applies to all persons who are within a state's territory regardless of their resident status.¹⁵ Moreover,

numerous treaties under which the United States has reciprocally promised foreign countries that their citizens will have equal access to United States courts with our citizens."). Of course, distinctions on the basis of resident status can result in a functional denial of equality of access for non-citizens and a significant pattern of de facto denial must have been foreseeable. In any event, by creating distinctions "keyed to residence," the Texas legislature unavoidably denied equal treatment and limited access on the basis of distinctions in resident status, which is also proscribed by the International Covenant's phrase "other status."

12. Lexis demonstrates consistent alignment of the terms "resident" and "status" in U.S. cases, thus demonstrating common acceptance of the fact that resident status is a formal status, label, or categorization and fits easily within the International Covenant's phrase "other status." *See also infra* notes 14-15. For example, within Lexis/States/Courts a recent search for Texas and "resident status" or "status as a resident" or "non-resident status" or "nonresident status" or "status as a non-resident" or "status as a nonresident" produced 149 cases. A similar search in Lexis/Genfed/Courts and qualified by date after 1990 found 864 cases. A search with earlier dates overwhelms the computer search. Common parlance also conjoins resident and status.

13. *See, e.g., supra* note 4.

14. *See, e.g.,* Anne Bayefsky et al., *Protection Under the Complaint Procedures of the UN Treaty Bodies*, in HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS: A GUIDE TO INTERNATIONAL MECHANISMS AND PROCEDURES 53 & n.95 (Joan Fitzpatrick ed., 2001).

15. *See Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., at 57, Supp. 40, vol. I, U.N. Doc. A/50/40 (1996). ("[H]uman rights of resident non-citizens are guaranteed, in accordance with article 2, paragraph 1, of the Covenant"); *Id.* at 89-97, Supp. 40, vol. II, U.N. Doc. A/50/40 (noting the views of the Commission regarding Communication No. 516/1992, Alina Simunek, *et al.* re: Czech Republic (19 Jul. 1995) (discrimination on the ground of "other status" includes residence status), U.N. Doc.

the European Court of Human Rights has recognized that with respect to the same phrase contained in a different human rights treaty impermissible discrimination can occur if a non-resident is treated differently than a resident.¹⁶

Thus, distinctions on the basis of resident status that are found in current Texas legislation are violative of treaty law of the United States and cannot prevail under the Supremacy Clause of the U.S. Constitution. Texas courts should provide non-residents the same treatment and equal access to Texas courts as Texas residents.

CCPR/C/54/D/516/1992 (31 Jul. 1995), at paras. 11.5, 12.2); *see also* General Comment No. 23, U.N. GAOR, Hum. Rts. Comm., 50th Sess., at 38, U.N. Doc HRI/gen/1/Rev.1 (1994) (concerning Article 27 and rights of minorities, “[j]ust as they need not be nationals or citizens, they need not be permanent residents.”).

16. *See Darby v. Sweden*, 13 Eur. Ct. H.R. 774 (1990) (constitutes a violation of European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 14 (“or other status”)).