

## “EQUAL TREATY RIGHTS”: A RESPONSE TO PROFESSOR PAUST

*Russell J. Weintraub\**

### I. THERE IS NO AUTHORITY THAT BASING *FORUM NON CONVENIENS* DECISIONS ON PLAINTIFF’S RESIDENCE VIOLATES U.S. TREATIES

Professor Jordan J. Paust published an article in this Journal contending that Texas Civil Practice and Remedies Code section 71.051 is “violative of treaty law of the United States and cannot prevail under the Supremacy Clause of the U.S. Constitution.”<sup>1</sup> The opinions that Professor Paust cites from the European Court of Human Rights and the United Nations Human Rights Committee do not support his contention but, on the contrary, refute it.

According to Professor Paust, the fatal defect in section 71.051 is that it permits a *forum non conveniens* stay or dismissal of a suit brought by a plaintiff who is not a Texas resident but forbids such a stay or dismissal “if the plaintiff is a legal resident of this state.”<sup>2</sup> Professor Paust asserts that discrimination on the basis of who is a “legal resident,” which the statute defines as the equivalent of domicile,<sup>3</sup> violates

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1. Jordan J. Paust, “*Equal Treaty Rights*,” *Resident Status & Forum Non Conveniens*, 26 HOU. J. INT’L L. 405, 409 (2004).

2. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (Vernon 1997).

3. *Id.* § 71.051(j)(1):

“Legal resident” means an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences, without regard to the individual’s country of citizenship or national origin. The term does not include an individual who adopts a residence in the specified political subdivision in bad faith for

numerous U.S. Friendship, Commerce, and Navigation treaties that promise to afford citizens of other countries access to U.S. courts equivalent to the access of U.S. citizens.<sup>4</sup> Moreover, he contends that residence is a “status” within the meaning of Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR),<sup>5</sup> which contains one of the basic undertakings of the ICCPR parties:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.<sup>6</sup>

Because residence is a “status,” Professor Paust asserts that any discrimination based on residence violates Article 2(1).

## II. NATIONAL TREATMENT

Professor Paust characterizes an article that I published in 1994 as “assuming in error”<sup>7</sup> that, because section 71.051 discriminates on the basis of residence and not citizenship, it does not violate U.S. treaties that guarantee citizens of foreign countries equal access to U.S. courts with U.S. citizens.<sup>8</sup> My position in 1994 and today is that if a treaty guarantees citizens of other countries equal access to our courts with U.S. citizens, a court that would deny access to a non-resident U.S. citizen is

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purposes of avoiding the application of this section.

*Cf.* TEX. ELEC. CODE ANN. § 1.015(a) (Vernon 2003) (“In this code, ‘residence’ means domicile, that is one’s home and fixed place of habitation to which one intends to return after any temporary absence.”)

4. Paust, *supra* note 1, at 407.

5. *Id.* at 406–09.

6. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2, 999 U.N.T.S. 171, 173 (entered into force on Mar. 23, 1976) (emphasis added) [hereinafter ICCPR]. The words “other status” appear in one other Article of the ICCPR, Article 26, which entitles all persons “to the equal protection of the law” without discrimination on the same grounds as recited in Article 2. *Id.* at 179.

7. Paust, *supra* note 1, at 407 n.11.

8. Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 349 (1994).

free to deny access to a non-resident citizen of another country. The Second Circuit has recently agreed with the statement that I made nine years previously:

Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum. This was precisely the level of deference the district court assigned plaintiffs' choice of forum: it gave them the same initial deference in choosing a United States court as it would a United States citizen discounted by the fact that plaintiffs are not residents of the United States.<sup>9</sup>

Justice Marshall's majority opinion in *Piper Aircraft Co. v. Reyno*<sup>10</sup> states that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum."<sup>11</sup> When the plaintiff does not sue at home, the plaintiff's choice of forum "deserves less deference."<sup>12</sup> Federal circuit courts discriminate on the basis of a U.S. citizen's residence when deciding whether to grant a *forum non conveniens* dismissal, because a forum in another country is more appropriate. This discrimination occurs even when the U.S. plaintiff resides in the United States but outside of the district where the plaintiff has sued. In *Gemini Capital Group, Inc. v. Yap Fishing Corp.*,<sup>13</sup> the Ninth Circuit affirmed a *forum non conveniens* dismissal of a California corporation's suit in the District of Hawaii, stating that the trial court properly gave plaintiff's choice of forum "less deference" than would have been given to a Hawaiian company suing in its home state.<sup>14</sup> In *Iragorri v. United Technologies Corp.*,<sup>15</sup> the Second Circuit, sitting en banc, took a more nuanced approach to when a district judge should give less deference to the choice of forum by a plaintiff who resides in the United States but outside the district:

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9. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004).

10. 454 U.S. 235 (1981).

11. *Id.* at 255.

12. *Id.* at 256.

13. 150 F.3d 1088 (9th Cir. 1998).

14. *Id.* at 1091.

15. 274 F.3d 65 (2d Cir. 2001) (en banc).

It is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district. Rather, the court must consider a plaintiff's likely motivations in light of all the relevant indications. We thus understand the Supreme Court's teachings on the deference due to plaintiff's forum choice as instructing that we give greater deference to a plaintiff's forum choice to the extent that it was motivated by legitimate reasons, including the plaintiff's convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant, and diminishing deference to a plaintiff's forum choice to the extent that it was motivated by tactical advantage.<sup>16</sup>

The reason why residence is an important factor when a trial judge rules on a *forum non conveniens* motion is the common sense suspicion that a plaintiff who could sue at home but chooses not to is forum shopping. As Justice Jackson explained, "[a]n advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them."<sup>17</sup>

In ruling on *forum non conveniens* motions, trial judges consider two sets of factors. One set focuses on "the private interests of the litigants."<sup>18</sup> The private-interest factors determine whether, if forced to defend in the forum that the plaintiff has chosen, the defendant will be unduly inconvenienced by difficulties in obtaining evidence and witnesses from afar.<sup>19</sup> The other set of factors focuses on the public cost of burdening local courts with the litigation and whether the forum has sufficient interest in the matter to justify that cost.<sup>20</sup> For Justice Jackson, it was these public factors that were more important, because they assisted a forum in controlling access to the scarce resource of its courts:

But the judges, with lawyerly indirection, have not

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16. *Id.* at 73.

17. *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, 706 (1942) (Jackson, J., concurring).

18. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

19. *Id.*

20. *Id.*

avowed the interest of the judiciary in orderly resort to the courts as a basis for their decision, and have cast their protective doctrines in terms of sheltering defendants against vexatious and harassing suits. This judicial treatment of the subject of venue leads Congress and the parties to think of the choice of a forum as a private matter between litigants, and in cases like the present obscures the public interest in venue practices behind a rather fantastic fiction that a widow is harassing the Illinois Central Railroad.<sup>21</sup>

### III. "OTHER STATUS"

Professor Paust reasons thusly. Article 2 of the ICCPR requires all ICCPR signatories to ensure ICCPR rights, including equal court access, to all individuals in the territory of the signatory "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>22</sup> Residence is a "status." Therefore, in deciding whether to grant a defendant's *forum non conveniens* motion and deny a foreign citizen court access, a court may not consider residence.

First of all, common sense dictates that when the general words, "other status," follow specific words, the general words should be construed to refer to a status such as those enumerated, which bear no rational relationship to a decision to deny a forum and reflect irrational bias. This is the doctrine of *ejusdem generis*, which courts have long applied to construing statutes<sup>23</sup> and treaties.<sup>24</sup> As Lord McNair stated in his classic work on treaties:

There is a useful doctrine or presumption, well recognized and frequently applied in English, Scots, and American law, to the effect that general words when following [(and sometimes when preceding)] special words are limited to the *genus*, if any, indicated

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21. *Miles*, 315 U.S. at 706.

22. ICCPR, *supra* note 6, art. 2(1).

23. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

24. See *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 201 (D. S.D. 1958).

by the special words. This is usually described as the *eiusdem generis* doctrine . . . . The doctrine has received some degree of recognition in the jurisprudence and literature of international law and requires discussion here; but, quite apart from its position in municipal systems of law, the doctrine would require consideration on grammatical grounds in the interpretation of international documents.<sup>25</sup>

The decision of the European Court of Human Rights in *Darby v. Sweden*<sup>26</sup> is fully consistent with permitting courts that are ruling on a *forum non conveniens* motion to consider the plaintiff's residence. You would never guess this, however, from Professor Paust's description of that case. Professor Paust states: "Moreover, the European Court of Human Rights has recognized that with respect to the same phrase ["other status"] contained in a different human rights treaty impermissible discrimination can occur if a non-resident is treated differently than a resident."<sup>27</sup> He then cites *Darby* as holding that discrimination on the basis of residence "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')."<sup>28</sup>

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention) contains language almost identical with that in Article 2 of the ICCPR,<sup>29</sup> including the concluding reference to "or other status":

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>30</sup>

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25. LORD MCNAIR, *THE LAW OF TREATIES* 393 (1961).

26. *Darby v. Sweden*, 13 Eur. Ct. H.R. 774, 781 (1990).

27. Paust, *supra* note 1, at 408–09.

28. *Id.* at 409 n.16.

29. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221 [hereinafter Human Rights Convention]; see *supra* note 6 and accompanying text.

30. Human Rights Convention, *supra* note 29, at 232.

This was the language that the European Court of Human Rights was construing in *Darby v. Sweden*.<sup>31</sup>

Dr. Peter Darby was a Finnish citizen who lived and worked in Sweden during the week but returned to his family in Finland on weekends. The Swedish authorities required Darby to pay a tax to the Church of Sweden to finance its religious activities. Darby was not a member of the Church. Under Swedish law, non-members of the Church were excused from paying the tax if they were formally registered as residents in Sweden. Sweden denied Dr. Darby this exemption, because he was not formally registered as a Swedish resident. The Court held that this discrimination violated Dr. Darby's rights under Article 14, not because it was discrimination based on residence, but because it was irrational. The Court stated that discrimination based on one of the grounds stated in Article 14 is not *per se* a violation of the Human Rights Convention. It is a violation only if the discrimination does not serve a legitimate end:

However a difference in the treatment of one of these individuals will only be discriminatory if it "has no objective and reasonable justification," that is if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised."<sup>32</sup>

The Swedish government conceded that the discrimination against Dr. Darby based on his residence did not serve any legitimate purpose.<sup>33</sup>

*Darby* does not militate against taking residence into account in ruling on a *forum non conveniens* motion but, on the contrary, supports it. In the context of a *forum non conveniens* ruling, the fact that the plaintiff is a nonresident who has not brought suit in a forum available at home triggers the suspicion of forum shopping and supports dismissal in the light of the public factors on which the decision is based.

Professor Paust also states that "the Human Rights

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31. *Darby*, 13 Eur. Ct. H.R. at 780.

32. *Id.* at 781 (quoting *Inze v. Austria*, 10 Eur. Ct. H.R. 394, 406 (1988)).

33. *Id.* ("In fact, the Government stated at the hearing before the court that it did not argue that the distinction in treatment had a legitimate aim.").

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."<sup>34</sup> He cites two Committee documents that, from the brief description that he provides,<sup>35</sup> appear to support his contention that a U.S. court may not take residence into account when making a *forum non conveniens* ruling. Again the documents do not support his contention.

The first Committee document concerns claims against the Czech Republic for confiscation of property.<sup>36</sup> The alleged victims had left Czechoslovakia to escape persecution by the communist regime. The communist authorities confiscated the claimants' property in Czechoslovakia and transferred it to others. After the fall of the communist regime, the Czech and Slovak Federal Government enacted legislation providing for restitution of property seized but only if the claimants "are citizens of the Czech and Slovak Federal Republic and are permanent residents in its territory."<sup>37</sup> None of the claimants could meet these requirements because none were residents and some were not citizens. The Committee ruled that the residential restriction violated the claimants' rights under Article 26 of the ICCPR, which prohibited "discrimination on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>38</sup> In reasoning that paralleled that of the European Court of Human Rights in *Darby*, however, the Committee's ruling was based not on the finding that residence is a "status," but on the determination that in this context discrimination on the ground of residence was irrational:

Bearing in mind that the authors' [of the complaint] original entitlement to their respective properties was

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34. Paust, *supra* note 1, at 408.

35. *Id.* at 408 n.15.

36. *Report of the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40, vol. II, at 89, U.N. Doc. A/50/40 (1999) [hereinafter *Human Rights Committee*].

37. *Id.* at 90.

38. ICCPR, *supra* note 6, art. 26.

not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. . . . Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.<sup>39</sup>

As further authority for his contention that the ICCPR does not permit discrimination on the basis of residence, he cites a General Comment of the Human Rights Committee.<sup>40</sup> The Committee was commenting on the meaning of “exist” in ICCPR Article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>41</sup>

The Committee commented:

Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents.<sup>42</sup>

Again, it is not discrimination on the basis of residence that violates the ICCPR, but discrimination that has no basis except

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39. *Human Rights Committee, supra* note 36, at 96.

40. Paust, *supra* note 1, at 409 n.15 (citing *General Comment No. 23*, U.N. GAOR, Hum. Rts. Comm., 50th Sess., at 38, U.N. Doc. HRI/gen/1/Rev.1 (1994) [hereinafter *General Comment No. 23*]).

41. ICCPR, *supra* note 6, art. 27.

42. *General Comment No. 23, supra* note 40, at ¶ 5.2.

irrational prejudice. Moreover, even if the ICCPR were not generally interpreted, as it has been, to permit discrimination on the grounds enumerated in articles 2(1) and 26 when the discrimination has a rational basis, that interpretation was adopted by the United States Senate as a condition to ratification. One of the “understandings” stated by the U.S. Senate is that discrimination on the basis of any status set out in articles 2(1) and 26 is “permitted when such distinctions are, at a minimum, rationally related to a legitimate governmental objective.”<sup>43</sup>

As further support for his contention that the Covenant’s reference to “other status” precludes a court from taking residence into account in making a *forum non conveniens* ruling, Professor Paust cites a computer search that revealed hundreds of U.S. cases referring to residence as a status.<sup>44</sup> This repeats one of the most pervasive fallacies in legal reasoning. As the great legal realist, Walter Wheeler Cook, cautioned over seventy years ago:

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.<sup>45</sup>

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43. See 138 CONG. REC. 8071 (1992), stating:

The Senate’s advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status as those terms are used in Article 2, paragraph 1 and Article 26 to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.

44. Paust, *supra* note 1, at 408 n.12.

45. Walter Wheeler Cook, “*Substance*” and “*Procedure*” in the Conflict of Laws, 42 YALE L.J. 333, 337 (1933).

IV. THE ICCPR DOES NOT BAR A COURT FROM CONSIDERING  
THE PLAINTIFF'S RESIDENCE WHEN MAKING A *FORUM  
NON CONVENIENS* RULING

The ICCPR does not preclude a U.S. court from considering the plaintiff's residence as a factor when ruling on a defendant's motion for a *forum non conveniens* stay or dismissal. Granting the motion is only proper when there is another available and more appropriate forum.<sup>46</sup> When a nonresident who has been injured abroad chooses to sue in the United States when he or she could have sued at home, the court is rational in suspecting improper forum shopping and in preserving the scarce resource of forum courts for matters more closely related to local events and local interests.

I am not in favor section 71.051's interdiction of a stay or dismissal "if the plaintiff is a legal resident of this state."<sup>47</sup> I would prefer that the plaintiff's residence be a factor for the court to consider, but not a controlling factor.<sup>48</sup> When I was negotiating with representatives of industry and the plaintiffs' bar much-needed legislation restoring *forum non conveniens* in Texas,<sup>49</sup> barring dismissal of suits brought by Texas residents was a necessary compromise. Legislation is the art of the possible. The perfect is the enemy of the good.

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46. See *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1230 (3d Cir. 1995) (affirming denial of *forum non conveniens* motion because massive delay in Indian courts rendered India an inadequate alternative forum).

47. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(e) (Vernon 1997).

48. Cf. N.Y. C.P.L.R. § 327(a) (McKinney 2001) ("The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.").

49. See *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990) (holding that a statute passed for a completely different purpose in 1913 had *sub silentio* abolished *forum non conveniens* in personal injury and wrongful death cases). Persons domiciled in Texas and companies incorporated or headquartered in Texas became target defendants. The Fifth Circuit had ruled that in diversity and alienage cases removed from a state court to federal court, the federal court would apply the robust federal *forum non conveniens* doctrine and was not concerned with limitations on that doctrine imposed under state law. *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1159 (5th Cir. 1987), *vacated for reconsideration on another issue*, 490 U.S. 1032 (1989). One way to lock a case into a Texas state court and prevent removal to federal court is to join a defendant domiciled in Texas or incorporated or with a principal place of business in Texas. 28 U.S.C. §§ 1332 (c)(1), 1441(b) (2000).

Moreover, that I may disagree with section 71.051's interdicting dismissal of a suit brought by a Texas resident or that the provision may be wrong or silly, does not mean that it is unconstitutional. A rule has to be monumentally silly before it is unconstitutional. It may be that a rule preventing a court that is ruling on a *forum non conveniens* motion from considering so relevant a factor as the plaintiff's residence would attain that exalted status.<sup>50</sup>

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50. See Bernard H. Oxman, *Comments on Forum Non Conveniens Issues in International Cases*, 35 U. MIAMI INTER-AM. L. REV. 123, 125-26 (2003-04):

It should also be recognized that the Supreme Court of the United States has recently evidenced considerable concern about Congressional encroachments on the rights of the states of the United States. It would be ironic, and sad, if those who seek to strengthen respect for international law in domestic litigation were, by virtue of aggressive assertions of the effect of treaties on ordinary rules regarding access to courts, to invite the Supreme Court, for the first time in its history, to declare a treaty unconstitutional on grounds of invasion of the powers of the states.