

## **The Roles of International Human Rights Norms in Comparative Constitutional Jurisprudence: CEDAW-Based Examples**

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In recent years constitutional law professors from around the world have been pondering how best to incorporate both comparative and international materials into their domestic constitutional law classes. Similarly, many of us have been seeking ways to make our courses more gender-sensitive. One way to accomplish all these goals is use the example of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to introduce students to the roles that international human rights norms play in different constitutional systems.

The most obvious uses of CEDAW are in the area of gender equality. CEDAW has played an important role in the drafting, reform, and judicial interpretation of the gender equality provisions in domestic constitutions in many countries.<sup>1</sup> Brazil, Colombia and South Africa provide good examples of how contemporary founding mothers and their supporters have used CEDAW at the drafting stage. Costa Rica, France and Argentina offer useful illustrations of how CEDAW has contributed to constitutional reform efforts. And the growing body of CEDAW-influenced constitutional jurisprudence from around the globe provides rich opportunities to expand coverage on judicial understandings of principles of equality and non-discrimination.

But CEDAW can also be used to provide a context for examining topics other than gender discrimination. For example, it can be used to concretize discussion of issues related to the hierarchical status of constitutional and international law in domestic legal systems and exploration of questions about whether international treaty provisions are self-executing or require implementing legislation to become domestically applicable and enforceable. Jurisprudence invoking CEDAW also offers interesting practical illustrations of differing views on the roles that international human rights norms should play in constitutional interpretation.

CEDAW's impact in particular countries has been affected both by the rank that international human rights treaties occupy in the internal hierarchy of law and by whether such treaties are deemed self-executing once ratified. Many constitutions refer to international human rights treaties and conventions as having preeminence over internal law, without any further specification (see Art. 93 of the 1991 Constitution of Colombia, Art. 7 of the Costa Rican Constitution and Art. 46 of the Guatemalan Constitution). This type of language lends itself to the interpretation of international human rights law as having supra-constitutional status. In addition, in many countries, particularly those with civil law systems, once ratified international

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<sup>1</sup> See, e.g., Ruth Rubio-Marín and Martha I. Morgan, Constitutional Domestication of International Gender Norms, in *Gender and Human Rights* (Karen Knop, ed. Oxford University Press, 2004). This paper draws on this and other earlier writings and talks on CEDAW.

human rights treaties are deemed self-executing or immediately applicable without the necessity of implementing legislation or regulations.

In Costa Rica, for example, the Constitutional Chamber of the Supreme Court has expressly sanctioned both the supremacy and immediate applicability of human rights treaties.<sup>2</sup> Section I, Article 7 of the Costa Rican Constitution expressly incorporates international human rights treaties and conventions ratified by Costa Rica and declares them to have authority “superior to the laws.”<sup>3</sup> The Constitutional Chamber of the Supreme Court has interpreted Article 7 as incorporating and according supra-constitutional status to international human rights conventions ratified by Costa Rica and as making them self-executing.<sup>4</sup> A 1993 opinion explained the hierarchy in these terms: “human rights instruments applicable in Costa Rica have not only a value similar to the Constitution, but to the extent that they grant greater rights or guarantees to the people, they prevail over the Constitution.”<sup>5</sup>

Article 7 has opened the door to the constitutional recognition of broad concepts of gender equality under several important international documents that Costa Rica has ratified, including the Inter-American Convention on Civil Rights for Women and the Inter-American Convention on the Political Rights of Women (both ratified by Law No. 1273 of March 13, 1951), the Convention on the Political Rights of Women (ratified by Law No. 3877 of June 3, 1967), the Convention on the Elimination of All Forms of Discrimination Against Women (ratified by Law No. 6969 of October 2, 1984), and the Belen Lo Para Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women (ratified by Law No. 7499 of May 2, 1995).

The Constitution of Argentina takes a somewhat different approach. Article 31 follows Article VI of the United States Constitution and provides that the constitution, national laws, and treaties are the supreme law of the nation. Article VI of the U.S. Constitution is interpreted as according treaties the same status as federal laws. However, following the 1994 amendments to the Argentine Constitution, its Article 75 (22) generally accords treaties and conventions supra-statutory status and lists ten specific human rights documents (including CEDAW) that are accorded constitutional status. Other human rights treaties and conventions approved by the Argentine Congress require a separate vote of two-thirds of the members of each legislative chamber to enjoy this constitutional status.

CEDAW can also provide a contextual setting for looking at different approaches to the interpretive uses of international human rights treaties. Some constitutions contain express provisions referring to human rights treaties as valid sources for the interpretation of relevant constitutional rights. Other constitutions contain no such express rules but have been interpreted as requiring or permitting such interpretive use. These interpretive rules, whether

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<sup>2</sup> In Colombia, the Constitutional Court first reached a similar conclusion but later changed course and interpreted article 93 as according constitutional status to international human rights law.

<sup>3</sup> Importantly, Article 48 of the Costa Rican Constitution provides that all persons have right to file an *amparo* action in the Constitutional Chamber of the Supreme Court to maintain or reestablish the enjoyment of rights granted in the constitution, as well as those fundamental rights established in international human rights instruments applicable in the country.

<sup>4</sup> The Constitutional Chamber has also recognized that interpretations of the Inter-American Court of Human Rights, whether in contentious cases or consultative opinions, have the same value as the norm interpreted. Voto No. 2313-95.

<sup>5</sup> Voto No. 5759-93.

express or implied, have provided another route for the use of CEDAW in domestic constitutional interpretation.

For instance, the Spanish Constitution contains an express interpretive rule in its Article 10. 2 which provides: "the norms related to the fundamental rights and liberties which the Constitution recognizes shall be interpreted in conformity with the Universal Declaration of Human Rights and the treaties and international agreements on these matters ratified by Spain."<sup>6</sup> It is not surprising that some of the countries with such express interpretive provisions are among those whose courts have been more prone to rely on international instruments when interpreting their national constitutions.<sup>7</sup>

Sometimes the reference to international law contained in the constitution is a more generic one, which the courts then use to develop an interpretive rule. For instance, this has been the case in India where Article 51c of the Constitution (situated among the Directive Principles of State Policy) provides that "the State shall endeavor to...foster respect for international law and treaty obligations in the dealings of organized people with one another." Article 51c's mandate has been relied upon by the Indian Constitutional Court to impose a duty on courts "to give due regard to International Conventions and Norms for construing domestic laws, especially when there is no inconsistency between them and there is a void in domestic law".<sup>8</sup>

Finally, there are countries where the interpretive value of international instruments is not explicitly sanctioned in the constitution and relies, instead on jurisprudential construction of what we could call interpretive presumptions or through judicial use of international norms or jurisprudence as of persuasive or contextual value. Importantly, this is the case in Australia. Although the Australian Constitution does not include a declaration of fundamental rights or bill of rights, Australian Courts have used several methods to facilitate the incorporation of international norms into Australian law. Of interpretive value is the doctrine of legitimate expectations, according to which there is a presumption that the public authorities will act in accordance with international conventions even when the treaty has not been incorporated into domestic law. This doctrine has been used to found legitimate expectations regarding the conduct of the Executive<sup>9</sup> and to determine the relevant interpretation of a certain statute.<sup>10</sup>

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<sup>6</sup> See also art. 93 of the Colombian Constitution and art. 39.1 of the South African Constitution.

<sup>7</sup> Heyns & Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', 23 *Human Rights Law Quarterly* (2001) 483 (findings and recommendations of study initiated in 1999 of six UN human rights treaties, including CEDAW in 20 different countries). Heynes and Viljoen found that the Colombian Constitutional Court has an exceptional record of reference to the treaties (in 129 cases between 1992 and 1998 it has based their decisions on the ICCPR) Heynes & Viljoen, *supra* note 6, at p. 502. Spain is also listed among other countries where domestic courts make frequent interpretive references to international human rights treaties (28), as is South Africa (28). Canada's Charter of Rights and Freedoms contains no express interpretive provision and yet Canada is also one of the countries with courts making frequent use of international law as an interpretive tool (169 references where identified in the study).

<sup>8</sup> See *Apparel Export Promotion Council v. AK Chopra*, [1999] All India Reporter (S.C.) 625; [2000] 1 Law Reports of the Commonwealth 563, para. 28, *Githa Hariharan v. Reserve Bank of India*, [1999] 1 Law Reports of India 151; *Vishaka v. State of Rajasthan* 1997 SOL Case No. 177, para. 13.

<sup>9</sup> See *Minister for Immigration v. Teoh* (1995) 183 CLR 273, at 287.

Canadian jurisprudence contains numerous interpretive references to international human rights norms that are somewhat more difficult to classify. Sometimes there seems to be implicit the thesis that the *Charter of Rights and Freedoms* should be interpreted to provide at least as much protection as provided in the international human rights documents Canada has ratified.<sup>11</sup> In the more recent decisions, the Canadian Supreme Court has referred more generically to “values reflected in international human rights law” as “able to inform the contextual approach to statutory interpretation and judicial review” even if such instruments could not be applied directly domestically because they had not been implemented by parliament.<sup>12</sup> The idea is that in determining the meaning of the Charter provisions, the Court has to look to the external context at the time the Charter was drafted. Because the legislature is presumed to have knowledge of the relevant law, international sources are presumed to have been an inspiration and therefore are used to inform the interpretation of the provisions.<sup>13</sup> The fact that a human rights tribunal has considered a clause similar to the constitutional provision in need of interpretation is sometimes considered an additional reason for relying on international sources.<sup>14</sup>

The Canadian case *Reference Re Firearms Act*, Decision of the Court of Appeal of Alberta, 1998 ABCA, upheld by the Supreme Court of Canada in 2000, provides an interesting example. In this case the Alberta Court decided that new gun control legislation did not violate the Canadian Constitution noting that Parliament’s efforts were motivated in part by the desire to reduce the incidence of firearms-related domestic violence consistent with the philosophy of CEDAW. The Court explicitly declared that “where legislation is open to two interpretations, one of which is more consistent with international human rights norms, then that interpretation is to be preferred” even if it has not been expressly incorporated into domestic law.

Tanzania provides another example of the interpretive use of CEDAW. In *Ephrahim v. Pastory and Another*, Decision of the High Court of Tanzania, [1990] Law Repost of the Commonwealth (Const) 757, the Court treated principles expressed in the Universal Declaration of Human Rights, CEDAW, and the African Charter on Human and People’s Rights as expressing “a standard below which any civilised nation will be ashamed to fall.” The Court relied upon the constitutional interpretive value of these principles to strike down customary law that discriminated against female members of a clan by denying them the right to sell land.

In other national settings the interpretive use of international human rights law is strengthened in those cases in which there is explicit recognition of the fact that constitutional rights were modeled on existing international instruments, as it is then assumed that such

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<sup>10</sup> See *MacBain v. State of Victoria* (2000) FCA 1009, where the ‘legitimate expectation’ principle was invoked in a dispute concerning the interpretation of The Sex Discrimination Act 1984 (Cth).

<sup>11</sup> See, e.g., *Davidson v. Slight Communications*, [1989] 1 S.C.R. 1038, 1056-57, where the Court looked to Canada’s international human rights obligations in interpreting both the content of *Charter* rights and the sufficiency of any justifications for restrictions upon such rights.

<sup>12</sup> See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 Supreme Court Reports 817.

<sup>13</sup> See *Québec Inc. v. Québec*, [1996] 3 Supreme Court Reports 919.

<sup>14</sup> See *Demers v. R.*, Decision of the Supreme Court of British Columbia, August 3, 1999.

constitutional rights “give expression” to the relevant international instruments. For instance, in *Chairman, Railway Board vs. Mrs. Chladrima Das* AIR 2000 S. Ct. 988, the Indian Supreme Court held that rape is a violation of the Fundamental Right to life with dignity guaranteed under Art. 21 of the Indian Constitution. The Court placed reliance on the broad construction that the term “life” had to be given in reference to the Universal Declaration of Human Rights upon which that this section of the Indian Constitution was modeled. Also, sometimes the fact that there was international involvement in the drafting the Constitution is taken to reinforce the need to interpret it in the light of then existing international human rights agreements whether or not they have become part of domestic law.<sup>15</sup>

These brief examples are offered with the hope that constitutional law professors from all parts of the world might find in them useful starting points for class discussions that explore differing views on the roles that international and comparative law should play in domestic constitutional interpretation while also expanding students’ understanding of gender discrimination within a global context.

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<sup>15</sup> See, for instance, *Kauesa v. Minister of Home Affairs and Others*, Decision of the High Court of Namibia, [1995] 1 South Africa Law Reports 51.