

# THE ROLE, RELEVANCE AND APPLICATION OF INTERNATIONAL LAW IN SOUTH AFRICA

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**Abstract:** The constitution of the Republic of South Africa directs the courts to consider international law when interpreting the provision in the bill of rights. The need for the judiciary to consider international law when interpreting rights came into being after a long period of South Africa's isolation from international arena due to its apartheid laws that were contrary to the human rights provisions. It has been over a decade since the coming into being of the constitution of the Republic of South Africa. This paper highlights, through analysis of the decisions of the constitutional court of South Africa, the role and relevance of international law in South Africa. The article also analyzes, the extent, if any, to which the courts in South Africa may be said to have utilized international law when interpreting the bill of rights. It is also seeks to ascertain if there is a uniformity and consistency in so far as application of international law is concerned in South Africa. Other than case law, the paper also aims at ascertaining the influence of international law in juvenile justice system in South Africa. Case law and relevant legislation is discussed with the view of considering the impact, if any, of international law in advancement of children's rights in South Africa. Recommendations are made and conclusion is drawn.

**Keywords:** Judiciary, bill of rights, legislation, international law

## Introduction

Prior to 1994, South Africa was a country notorious for disregard of a number of internationally recognized human rights like the right to equality, right to dignity etc. The country was also not a signatory to a number of international instruments advocating recognition and promotion of universal human rights. The country was isolated from the international world. The post 1994 era was characterized, by, amongst other things, recognition by South Africa itself, that it is a nation amongst other nations. This was through the adoption of a constitution enshrining a number of universally recognized rights. It also signed a number of international instruments guaranteeing human rights. The courts were directed to apply international law in South Africa.

It has been over two decades since the adoption of the new era in South Africa and .A number of landmark constitutional court decisions indicate in no uncertain terms that South Africa has shifted drastically from its pre 1994 disposition in the sphere of human rights.

The aim of this article is to ascertain the role, if any, that the international law has played in shaping South Africa since the constitution, from the outset, signaled the significance of incorporating international norms and standards into South African society through court's interpretation of the rights contained in the bill of rights.<sup>1</sup>

The article aims at evaluating if there is uniformity in the application of the international instruments courts in South Africa. It will also be explored if there is an optimum utilization of the international law in South Africa. This will be done through an analysis of the application of international law in various landmark decisions of the South African constitutional courts.

From the a foregoing, the first issue to be dealt with is an analysis of the place of international law in South Africa

## The constitution of the Republic of South Africa and the international law

The place of the international law within the South Africa's legal system is expressly manifested in section 39(1) (b) of the constitution providing that the court must consider international law when interpreting the provision in the Bill of Rights. It is noted that even though the courts in South Africa are constitutionally bound to consider

international law when interpreting the provision contained in the Bill of Rights, there is no indication in the constitution itself as to the extent, if any, to which international law can be utilized as an interpretation tool. It also does not give an indication on whether or not there is any preferential treatment to be given to certain international instruments when interpreting rights. However, there is no doubt that the constitution envisages a position wherein international law, plays a more persuasive role in South Africa than any foreign case law.

### **Case law on application of international law by courts in South Africa**

As there is no guidance on how, when and the extent to which international law must be considered in South Africa, the constitutional court had to develop the manner of application and the extent, if any, to which the foreign case law can be applied. The following case law shows the approach of South African Courts in considering the international law when interpreting bill of rights.

#### ***State versus Prince*<sup>ii</sup>**

In this case, the Appellant, a Rastafarian wanted to be admitted as an attorney for the High Court of South Africa but the Law Society objected on his application for admission on the basis that he had two previous convictions for possession of dagga unlawfully and in contravention of the applicable act. The Law society further stated that it was the Appellant's stance that he was going to continue smoking dagga even though this was going to be in contravention of the Act. The appellant's argument was that smoking dagga was accordance with his beliefs and it was a violation of his constitutional rights if he were to be ordered not to smoke it.

In dealing with the issue the court considered and analyzed international instruments and found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedoms.

In this case, therefore, the court considered international law and norms but international law was outweighed by the domestic laws and values.

#### ***S versus Williams*<sup>iii</sup>**

The issue before the court was the constitutionality of the provisions of section 294 of the Criminal Procedure Act providing for whipping of the juveniles as a competent sentence in South Africa. The argument by the accused was that such punishment violated his right to dignity and it was an inhuman treatment. He approached the court for declaration that the said provisions were unconstitutional. The court referred to various provisions of UN Human Rights committee and ECHR and remarked that there must be a regard to the emerging consensus of values in the civilized international community and that the manner in which the concepts are dealt with in the international law is a source of insight. The provisions of the Act were declared unconstitutional.

Thus, the international norms and law in this case was considered and found to provide for and insight in interpreting the right contained in the Bill of Rights

#### ***Bernstein v Bester*<sup>iv</sup>**

The applicants had challenged the constitutionality of the provisions of section 417 and 418 of companies Act permitting the summoning and examination of any person as to the affairs of the company to be wound up. The contention by the applicant was that the examination was unconstitutional in that it infringed examinees rights to freedom and security of the person as well as the right to privacy in interpreting the right to privacy, the court considered a number of ECHR decisions and dismissed the case.

#### ***In re Gauteng School Education Bill*<sup>v</sup>**

There was a challenge on the validity of the bill aimed at doing away with language competency test in schools. The minority rights group argued that they have a right to protect their language through the competency tests aimed at selecting those that passed language test, admission to those schools. It was argued that such test protected the right to language and culture. The contention was that the bill was going to violate such rights. The court examined the practice at the United Nations relating to minority rights and concluded that the international law on the subject reinforced the conclusion reached by the court- which was dismissing the challenge on the constitutionality of the bill. In this case the international law played a persuasive role in the courts decision.

***Christian Education South Africa v Minister of Education***<sup>vi</sup>

The issue in this case related to the Act that had been enacted by the Parliament of the Republic of South Africa, prohibiting corporal punishment in schools. Christian Education of South Africa approached the court, arguing that parents have the right to consent to the use of corporal punishment to their children in private schools. It was further stated that it was in accordance with the Christian values and religion for those parents and thus, prohibiting corporal punishment to their children was a violation of their right to religion, belief and culture. Further, it was argued that the right to privacy also violated by interference with what the parents wants for their children attending private schools. In a court a quo, the appellants' case was dismissed. The appeal was noted with the constitutional court of South Africa. In reaching its decision the constitutional court relied on international law and dismissed the appeal. The court invoked South Africa's obligations under the Convention against Torture and the Convention on the Rights of the Child. In this case the international law played a tremendous role and was heavily relied upon

***Mohamed v President of the Republic of South Africa***<sup>vii</sup>

The issue in this case was whether the South African Government can extradite a suspect to a country where, upon conviction for an offence, death penalty may be imposed. This case came before the court after the constitutional court had already declared unconstitutionality of death sentence in South Africa. The constitutional court considered a number of international instruments and decided that the government must, prior to extraditing the suspect; receive assurance from the country in question that death sentence e will not be imposed.

The court considered the ECHR in deciding on the accused right not to be deported to a country where death penalty was applicable.

***Minister of Health vs TAC***<sup>viii</sup>

The issue in this case was the restriction of anti retroviral drug to certain sites only and not to make it available to everyone, in particular outside the identified sites. It was argued by the Treatment Action Campaign that the restriction was a violation of a right to health enshrined in the constitution of the Republic of South Africa. The court had to interpret the meaning of the right to health as it appeared in the constitution of the Republic of South Africa to see if there was any constitutionally permissible infringement of the right. The court relied heavily on the international instruments and held that the restriction of the drug was a violation of the right the health.

***S V Makwanyane***<sup>ix</sup>

This case concerned the section of the Criminal Procedure Act 51 of 1977 which provided for death penalty as a sentence that can be imposed in South Africa. In fact death sentence was a competent sentence prior to the adoption of the new constitution guaranteeing the right to life. After the coming into being of the constitution advocating the right to life, there was a challenge on constitutionality of imposing death as a sentence. It was contended that sentencing someone to death infringed the right to life and the right to dignity. The constitutional court considered a wide range of international law sources that might be used in interpreting bill of rights and it was declared that death sentence was unconstitutional.

***Azapo v President of the Republic of South Africa***<sup>x</sup>

Whereas the constitutional court referred to a number of international instruments in Makwanyane, the court rejected the international law from the outset without analyzing principles in Azapo vs The President of the Republic of South Africa. The issue in this case concerned the constitutionality of the provisions of section 20 (7) of the Promotion of National Unity and Reconciliation Act 34 of 1995. The section under scrutiny gave a committee established under the authority to grant amnesty to perpetrators of unlawful acts associated with political objective committed prior to December 1993, absolving the perpetrator from civil and criminal liability if they comply with certain requirements like full disclosure of the information relating to the commission of certain unlawful acts. It was argued by the applicants that the section at hand limited the right to have disputes settled by a court of law. If the committee grants amnesty the victim of crime, it was argued, would have no right of recourse to criminal or civil remedies. It was argued that this, therefore interfered with the right to have disputes settled by the court of law. The application was dismissed. As stated, unlike in Makwanyane case, the international law was not considered like in other cases.

***Japhta v Schoeman and others***<sup>xi</sup>

The issue in this case was the constitutionality of the practice of evicting debtors who fail to pay their debts. The concern was that the sale in execution was authorized by the clerk of court and not the court itself. The court relied

on ICESCR, an instrument that is not binding on South Africa as well as General Comments of the Committee on Economic, Social and Cultural Rights. The status of these instruments were not clearly defined. It held that eviction must not be done without the oversight of the court ; otherwise the eviction is in violation of section 26 of the constitution guaranteeing the right to housing.

### **Conclusion**

The constitution of the Republic of South Africa directs that international law be considered in interpreting the bill of rights. From the case law, it appears that international law has played a vital role in shaping the laws in South Africa and in protecting the rights enshrined in the constitution of South Africa. However, case law also indicates that there is an uncertainty as to the role that international law plays in South Africa because in some instances it plays an advisory role. In others it is persuasive, in some instances it provides a useful insight. In other cases it is rejected from the outset. This can be problematic to the litigants because they may not know the role that a judicial officer may place to certain international instruments because of uncertainty and lack of uniformity as to the utilization of international law in domestic courts in South Africa.

However case law does indicate beyond doubt that in the sphere of children's rights, international law has been extensively used. It has been used in reaching landmark judgments pertaining to children's rights and has been consistently applied by the courts. It has also shaped and influenced the juvenile justice system in South Africa extensively.

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<sup>i</sup> Section 39(1) of the constitution- Act108 of 1996

<sup>ii</sup> Prince v President of the Law Society CCT 36 OF 2000

<sup>iii</sup> S v Williams and Others 1995(2) SACR 251

<sup>iv</sup> Bernstein v Bester CCT 23/95

<sup>v</sup> Case 39/1995 judgment delivered on 4 April 1996

<sup>vi</sup> 2000(10)BCLR 1051(CC) judgment delivered on 18 August 2000

<sup>vii</sup> 2001(7)BCLR685(CC)

<sup>viii</sup> (2002)5 SA721(CC)

<sup>ix</sup> (1995)(3)SA 391

<sup>x</sup> Azapo v President of the Republic of South Africa CCT 17/96 delivered on 25 July 1996

<sup>xi</sup> Japhtha v Schoeman and Others v Stoltz and Others (2005)2 SA 140