Constitutional Court Conference on Equality

31st January - 2nd February, 1998

Mr Chairman, fellow delegates,

It is with some trepidation that I take the floor to introduce the second subject for this afternoon's session on the subject of Affirmative Action. This is because not only have I been, through unforeseen circumstances, asked to do so at the very last moment, but also because I speak instead of Mr. Justice Jacques Robert, a fellow member of the Venice Commission, and an eminent member of the Constitutional Council of France who is unavoidably absent. Mr Robert intended to develop his thoughts on *"discrimination positives",* that he had referred to at a conference for French speaking Constitutional Courts which took place last April in Paris. This goes to show that the matter under discussion is today a subject of universal appeal and that possible practical solutions to avoid discrimination and to seek remedies against it are attracting the attention of legislators and jurists in all countries that recognize the intrinsic value of every individual as a person irrespective of race, sex, colour or religion, and that recognize that every human being has the right to partake and enjoy the same fundamental rights and freedoms.

Discrimination, inequality and prejudice are problems that occur throughout the world. They are apt to cause flagrant human right abuses as for example humanity witnessed with slavery in the United States, the Holocaust, and apartheid in your country. Human nature being what it is there is no guarantee that similar excesses will not in time be repeated, and it is the duty of each and every one of us to guard against the possibility of such an occurrence in our own country or elsewhere.

All men and women are not created equal in physical or intellectual attributes, and their entitlement to equality is really a right to have the same respect accorded to them as is shown to others who share their characteristics as human beings. Although law does not and in actual fact cannot change the way people think about each other, it can check the translation of prejudice into actions which disadvantage and harm fellow citizens.

The enunciation of the principle of equality, and the prohibition of discrimination were considered so fundamental as to be placed at the beginning of the Universal Declaration of Human Rights which promotes and encourages respect for human rights *"without distinction as to race, sex, language or religion",* and the United Nations Covenants on Economic, Social, and Cultural rights and on Civil and Political Rights (Article 2 and 3). Guarantees of

non-discrimination are also to be found in the International Covenant of Civil and Political Rights, the European Convention of Human Rights, the American Convention on Human Rights 1969 and the African Charter of Human and Peoples` Rights. Other international instruments prohibiting particular forms of discrimination, or discrimination in particular fields, have been drawn up, in the United Nations, in the International Labour Organization, and in UNESCO.

Without any doubt the increased regulation of the subject at international level is proof of its importance and a recognition by national legal systems that the complexity of non-discrimination and equality as legal ideas require special attention if the values they embody are to be protected effectively.

These principles also have a prominent place in many national constitutions, for example in the German Basic Law (Article 3), in the 'equal protection' clauses of the United States Constitution, and in the Constitutions of many Commonwealth countries.

President Lyndon B. Johnson stated in his 1965 commencement address at Howard University:

"You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you're free to compete with all the others', and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates... We seek not.... just equality as a right and theory but equality as a fact and equality as a result".

An attempt to remedy discrimination has been through affirmative action, which has been construed as consisting of a set of public policies and initiatives designed to help eliminate past and present discrimination based on race, colour, religion, sex, and national origin. Providing special measures of protection for socially, economically or culturally deprived groups is not discrimination, as long as those measures are not continued after there is no longer need for them. The granting of special rights for minority groups to maintain their own languages, culture and religious practices and establishing of their own schools, libraries, churches and similar insitutions is another form of offering protective measures. Such action is considered as a means of offering such groups real opportunities in life to overcome the disadvantages of inequality.

In certain cases it is the Constitution itself which provides for the taking of affirmative action. A case in point is Article 9(2) of the South African Constitution which stipulates:

"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

In Canada, Section 15(2) of the Constitution Act of 1982 explicitly provides that affirmative action is not a violation of the provision stipulating that every individual is equal before and under the law and has the right to be protected without discrimination. This section provides:

"Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

However, in the majority of cases Constitutions are silent as to the adoption of such measures. Thus, it is the duty of the judiciary to establish the validity or otherwise of such affirmative action. Judicial sanctions, are by far the most important means of ensuring the observance of human rights. Their importance is due partly as a result of the judiciary's traditional role as the guardian of individual liberty and partly to the existence of a general right of recourse to the courts where human rights have been violated. Without doubt, in countries which adopt the concept of separation of

powers, the judiciary is considered to be the natural protector of liberties.

In this respect Supreme Court of the United States has throughout the years realized that to wipe out nearly two centuries of discrimination, it had to support programs that create special opportunities for minorities, particularly blacks, in areas such as schooling and jobs. Otherwise the condition of such groups cannot be bettered or the effects of the years of discrimination cannot be remedied. Without doubt the consequences of centuries of unequal treatment are stark. Justice Harry A. Blackmun in 1978 observed that, *"In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat persons equally, we must treat them differently. We cannot - we dare not - let the Equal Protection Clause perpetuate racial supremacy".* The Supreme Cout first made clear that affirmative action programs could play a role in redressing discrimination when, in 1978, it said that race could be a factor, though not a determining one, in granting a student admission to a college or university. In 1980, the Supreme Court upheld a federal law that required ten percent of the money spent on federal public-works projects to be spent on bids from businesses owned by members of minority groups.

Within the European context, it is agreed that a State may engage in reverse discrimination and not breach

Article 14 of the European Convention on Human Rights which provides protection against discrimination and the promotion of equality. This was acknowledged by the European Court in the *Belgian Linguistic case (1968),* where the Court noted that not all instances of differential treatment are unacceptable and that "certain legal inequalities tend only to correct factual inequalities". The Court considered that the principle of equality of treatment would be violated if the distinction had no objective and reasonable justification. Similarly, in the *Lithgow case* (1986) the Court stated: *"for the purposes of Article 14, a difference of treatment is discriminatory if it 'has no objective or reasonable justification', that is, if it does not pursue a 'legitimate aim'".* Obvious groups where comparisons will be made are men and women where the European Court has recently taken a more robust view of discrimination on grounds of sex: *"The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe; this means that very weighty reasons would have to be put forward before a difference of treatment on the sole ground of sex could be regarded as compatible with the Convention"* (*Burghartz Case* [1994]). It follows that the nature of the justification presented will vary with the nature of the differential treatment in issue. Furthermore, the European Court of Human Rights has held that States parties enjoy a "margin of appreciation" in determining whether differential treatment is justifiable. Furthermore, the prelavent view is that the above-mentioned Article does not

impose any legal obligation upon states to engage in similar policies.

The Human Rights Committee, as a quasi - judicial body monitoring human rights on a world - wide scale and set up under the International Covenant of Civil and Political Rights, decided that tax laws which treated married and unmarried couples differently were found to be legitimate in *Sprenger vs the Netherlands* (Communication No. 395/1990) and *Danning vs the Netherlands* (Communication No. 180/1984), as were differences in state funding for public as opposed to private schools in *Blom vs Sweden* (Communication No. 191/1985).

These considereation lead me to this afternoon's topic so ably introduced and illustrated by the previous speaker. Discussing affirmative action in the context of a Constitutional Court Conference necessarily requires the debate to be encompassed within the juridical parameters rather than within legislative, economic and political considerations.

To what extent affirmative action should be pursued, is mainly a question which has economic and political ramifications depending on the ideology one believes in. Thus for example, to most socialist thinkers and

politicians, affirmative action is a legitimate strategy for the purpose of reaching the avowed goal of equality of outcome. There are in this philosophy few recognized limitations to affirmative action, that is seen as a means to achieve a declared political conviction. On the other hand, unrestrained affirmative action, aimed at the elimination of inequality - a utopian panacea - comes only at great economic and political cost. It has been said that beyond a certain point, affirmative action ceases to be concerned with the genuinely underprivileged and becomes the instrument of compulsory wealth redistribution.

I believe therefore that affirmative action aimed at providing equal opportunity should only be viewed as a means towards this end and not as an end in itself. It should aim to provide solutions to eradicate or alleviate discrimination in a given situation, by applying legislative and/or judicial remedies, rather than to impose blanket and rigid regulations that apply indiscriminately and at all times to a group or class of people without having regard to the overall effects on society as a whole.

In other words one should be wary that affirmative action aimed at removing discrimination, does not in time be in itself an unwitting instrument of discrimination by excluding from opportunity those who are just as qualified or competent. I therefore invite your comments on whether any

limitations should be imposed on affirmative action. This is of particular relevance for the Courts of those countries whose Constitutions allow them a margin of discretion in the application of suitable remedies against discrimination, that could not only be exercised through the application of specific provisions of an ad hoc law, but also through an interpretation of a constitutional provision providing for the protection of a fundamental right or freedom.

It is at this stage useful to list some of the arguments in favour and against of affirmative action. I shall limit to the main points.

Arguments which have been proposed in favour of affirmative action include:

1. *Reparations for past wrongs, injustice*: affirmative action as a step towards 'compensating' groups who have throughout the years been oppressed and discriminated;

2. *Counteract ongoing discrimination*: resulting from the idea that discrimination is pervasive and deep and is not always consciours, malicious, or intentional;

3. *Increase diversity*: emanating from the belief that different people with different backgrounds, bring different perspectives and add value.

4. *Empower minority groups, alter social insititutions*: Placing more members of minority groups in power, making them a part of the establishment and thereby redistributing wealth, power and status. It is also means of enhancing the socioeconomic status of minorities in the future, in that members of minority groups can at a very young age can realise that they can strive towards establishing themselves.

5. *Advancement to a better way of life, a long overdue chance to start enjoying the good thing a country has to offer*: nonetheless, affirmative action is to be well handled thereby binding the nation together and producing benefits to all. If not properly managed, it will merely produce resentment, and have damaging effects on the economy and destroy social peace.

On the contrary, arguments against affirmative action include:

1. *Just as discrimination against people because of race or gender is wrong, so is discrimination in favour of people*

because of race and gender: **Discrimination in either direction is wrong.**

2*. Affirmative Action benefits those members of minority groups who least need benefitting;*

3. *Affirmative Action may instill a sense of inferiority in the groups it aims at protecting.*

4. *The idea that Affirmative Action causes injustice to the person excluded*: affirmative action becomes reverse discrimination when persons who are alleged to have suffered a disadvantage are given special treatment at the expense of those who have done no wrong. Merit and qualifications are bypassed in the process.

5. *Affirmative Action may become unrestrained causing great economic and political cost:* beyond a certain point, affirmative action ceases to be concerned with the genuinely underprivileged and involves high taxation and regulation of economic activity thus eroding economic freedom.

In the light of this criticism, during the last few years a number of events have suggested that the era of affirmative action has in the United States not been applied

with the same rigour as in previous years. Thus, for example in:

*** 1994 - *Podboresky vs Kirwan,* a Fourth Circuit Court of Appeals decision striking down as unconstitutional the Banneker scholarships at the University of Maryland, which had been reserved solely for black students;**

*** 1996 - *Hopwood vs University of Texas Law School,* a Fifth Circuit Court of Appeals decision that public educational institutions cannot take race into account in any form in their admissions process.**

*** 1996 - Enactment of the California Civil Rights Initiative (Proposition 209), prohibiting all forms of racial and gender preferences in public employment and public education.**

It is a fact that any requirement, however meritorious in other respects, which grants preference to members of one group must by definition discriminate adversely against all other who may be competing for the same benefit.

Without any doubt laws and policies which aim at prohibiting discrimination have helped a lot in reducing some of the more blatant and displeasing forms of discrimination. However, experience has shown that they are by no means a complete solution to problems that are being faced by disadvantaged groups. Although strong and enforceable laws against discrimination are of great importance for the self respect and defence of groups, such laws should not be seen as self implemented. To be truly successful in combating discrimination and sustaining the effort, the problem must be tackled at its source, that is in the minds of those whose behaviour we must attempt and hope to modify - for their own protection, for the protection of others and for the protection of society. This is the reason why human rights education has today assumed an important role in the strategies being adopted by countries to control unfair discrimination.

Chief Justice Joseph Said Pullicino B.A. LL.D.

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