

Comments by Judge Gordillo

Thank you Mr. Chairman for allowing me to address this very important Colloquium. I would like to thank and congratulate Judge Stern for her very significant paper and the substantive issues she raises. I fully agree with Judge Stern that rules should be interpreted according to the status of social evolution, or the prevailing social values at the time of interpretation.

But which is the society, or which are the societies, from which one would derive the current social values: just those of the developed world, or most of it at least, or at the same time those of the developing countries?

And what happens when there is a distinct simultaneous clash of social values between the Legislative and the Judiciary?

When such clash occurs, tensions arise and constitutional checks and balances enter into place, generally ending in some kind of rebuke of the Tribunal by the legislative branch, a rebuke which in some cases has taken the form of statutory change of the Tribunal's operations. It happened at the Organization of American States a few years ago, it is happening next September at the General Assembly of the United Nations, where a new and different tribunal will be created: the United Nations Appeals Court, which is to start operations as of January 2008.

In other cases, similar conflicts created different tensions and resolutions, for instance at the Asian Development Bank Administrative Tribunal and the World Bank Administrative Tribunal, as is related by Judge Gorman in his extremely interesting published paper, which received wide attention both here and elsewhere.¹

Much the same happened at the Inter American Development Bank Administrative Tribunal, as I commented on its 20th Anniversary, a few years ago, here in Washington D.C.²

The evolutionary step on same sex couples has already been taken by the UN and the ILO Administrative Tribunals and *res judicata* or simple stability will probably mean that the legislative branch will be unable to take the new rule back.

But it would be inappropriate to conclude that the legislative is less equipped than the judiciary to detect unreasonable discrimination standards, not only as far as sexual and gender values go, but also in more remote areas of unreasonable discrimination, for instance as regards age limits of any and every kind.

¹ GORMAN, R.A., "The Development of International Employment Law", in: *European Review of Public Law*, Esperia, London, Autumn 2004, vol. 16, No 3, p. 631

² "Statutory Limitations of International Administrative Tribunals," in: *XXth Anniversary*, Inter American Development Bank, Administrative Tribunal, Washington D.C., 2003. Also in Spanish as "Restricciones normativas de los tribunales administrativos internacionales," *LL*, 2002-F, 1540-8, to be found at www.gordillo.com/cv/cv_2_7_1, 16.

No tribunal will go as far as deciding that judges, for example, should have different age limits than they do in different tribunals, and have its decision respected by the governing body. When the OASAT introduced into its rules a specific age limit for its judges, the General Assembly simply disregarded it and appointed a Judge with a different age than the tribunal had established in its own rules. Of course, the Tribunal had to respect the General Assembly's decision and accept the new Judge even if she did not comply with the tribunal normative standards of age.

A recent 2005 decision by the same OAS Tribunal which granted an *equity* payment contrary to the results of an appeal before the Permanent Council, led to the Secretary General asking President Morton Sklar of the Tribunal for a verbal explanation. As a result, only an equivalent *ex gratia* payment was made, instead of full and formal compliance with the decision. I was at the Tribunal as part of the unanimous decision in 2005, and as its 2006 rotating President I reported last year to the Permanent Council on these problems. Some Permanent Council's members expressed dissatisfaction with a perceived "throwing away" of money. My first term ends this year of 2007 and I have communicated to my government that I do not wish to have a renewed mandate.

These examples can be multiplied, as I do in my paper.³

I do agree that a change has occurred in the confrontation of different perceptions of social evolution, in the case of same sex couples, but that is a change I myself would not have proposed or espoused, being —as I am— a part of the so called developing world. International Tribunals must focus not only on developed societies, or in fact just some or perhaps most, but not all of them, to tell the developing world and indeed the universe what social evolution will mean from now on all over the world, in a particular case. An anthropologist, and my eldest son is one of them now teaching in Vancouver, would surely object, for it would mean *an ethnocentric view which would turn the table around on what tolerance means*.⁴

I have been present at the internal debates of the ILO Tribunal on a previous case of same sex couples and was prepared to write a dissenting opinion; it did not come to that because in the end we decided we had no jurisdiction to hear the case. But when the time came for a next plenary meeting on a later similar case, it seemed to me that if I dissented I would only diminish the force of the decision.

³ "The administrative Law of International Organizations: Checks and Balances in Law Making — The Case of Discrimination," in: European Public Law Series / Bibliothèque de Droit Public Européen, vol. LXXXIII, *Internationalisation of Public Law / L'Internationalisation du Droit Public*, London, Esperia, 2006, pp. 289-312; also in: *Revue Européenne de Droit Public / European Review of Public Law*, vol. 18, No. 1, Spring of 2006, London, Esperia, 2006, pp. 289-312. In Spanish "Frenos y contrapesos en la creación del derecho en organismos internacionales. El caso de la discriminación" , La Ley, "Suplemento Especial 70 Aniversario," november 2005, pp. 165-175, available at www.gordillo.com/cv/cv_2_7_1, 41.

⁴ I refer to my own paper "Civilizations and Public Law: a View from Latin America," in the collective book *Civilisations and Public Law / Civilisations et Droit Public*, "European Public Law Series / Bibliothèque de droit public européen," vol. LXXIX, Esperia Publications Ltd., London, 2005, pp. 215-232.

Since our statute requires that plenary meetings be composed either of 5 or 7 members, and at the time we were only 6, myself being one of the most recently appointed judges, I asked not to be included in the plenary meeting and decided to publish my opinion only as a private academic point of view.⁵

In the end, since I was unable to convince my colleagues, I did not actively oppose the decision, although I firmly disagreed with it. I not merely disagreed with the specific decision but, perhaps more, also with the possibility that it might engender a new trend where the so called clash of civilizations would only widen. It is open to debate, of course, whether that is a good or a bad thing, for it also has enormous ramifications on world peace and stability.

Two girls in love do not create fear, but rather protectiveness, both in men and women. Two men in love, on the contrary, do create fear in some unsecure men, and there is a word for that, while there is no equivalent “phobia” for women in love. The current consensus seems to be that such a distinction is an unreasonable discrimination; but is it so in a majority of countries and societies in the whole world?

Let me give you a further example: Will Muslim women be allowed to wear a veil in international organizations? Tolerance would say yes; fear and caution would say no. Whose current social evolving values should prevail, if they clash simultaneously? Those of the Legislative or those of the Judiciary?

Rather than ending with the word *tolerance*, I would suggest a blend of tolerance with *caution*. Thank you very much indeed, Mr. Chairman, Judge Stern, ladies and gentlemen.

⁵ “The administrative Law of International Organizations: Checks and Balances in Law Making — The Case of Discrimination,” note 3 above.