

Hypothetical Case Juana Olin vs. Iberoland

A. Background on the American State: Iberoland

1. Iberoland, a state member to the Organization of American States (OAS), gained its independence in 1811. Since its colonization in 1507, Iberoland's economy has been principally based on the production of sugar, coffee, cotton and cocoa. During the colonial period until 1887, Iberoland's agricultural system relied heavily on the manual labor generated from slavery. Throughout the 380 years that Iberoland supported slavery, more than fifteen million persons were shipped from Africa to work as slaves.

2. The climatic differences and the unequal distribution of natural resources among Iberoland's southern and northern regions created profound differences between the two. The southern regions became principally urban based in commerce and industry. The northern regions developed into predominantly rural areas based on agriculture. As to the composition of the population, the southern regions' population is mostly composed of European descendents who immigrated to Iberoland during colonization and during an important migratory influx at the end of the nineteenth and the beginning of the twentieth centuries. The northern regions' population is mainly composed of African descendants and by an economically and politically dominating white minority.

3. Given these economic and racial disparities, and following a series of civil conflicts and successive Constitutions since its independence, Iberoland chose to adopt the federal system of governance. Iberoland sought to provide autonomy to its regional governments while designating to its central government certain basic functions that would grant the country a level of cohesion. Currently, Iberoland consists of 16 provinces and the capital, a metropolitan district.

4. Iberoland has a population of approximately 75 million inhabitants distributed more or less equally among the 16 provinces and the capital. North Shore is the poorest province and has the greatest proportion of African-descendents at 53.8 percent.

5. The current 1988 Constitution distributes power among the provincial governments and the central government (the existing Constitution uses the terms national, central and federal government indistinguishably). Article 5 states:

Each province shall dictate its own Constitution and shall guarantee said Constitution respects the democratic principles consecrated in the Federal Constitution. The provinces will have exclusive power regarding the security of its citizens, the administration of justice and education.

6. Article 39 of the same Constitution states:

The Federal Congress shall have the power to legislate and promote affirmative action measures to guarantee equal treatment, equal access of opportunity and equal and full enjoyment and exercise of the Federal Constitution's recognized

rights, as well as of the human rights guaranteed in the international agreements ratified by Iberoland.

B. Education in Iberoland and the Province of North Shore

7. Iberoland's population of African-descendants has been victimized by inequality in education ever since their status as slaves or children of slaves prohibited them from attending academic institutions, whether public or private. Such a disproportionate and adverse environment has not been completely overcome despite the sustained efforts of the Federal and some provincial governments.

8. Inequality in education has been particularly grave in North Shore. Until 1922, the province retained a segregated education system at all academic levels, resulting in exclusively white or African-descendant primary schools, secondary schools and universities. The Federal Government's political and constitutional pressures ultimately convinced North Shore to eliminate the segregated system.

9. Even after North Shore's *de jure* integration of its education system, the province assigned education resources unequally among the predominantly white and predominantly African-descendant school districts. According to valid studies, the province annually distributed 79.3 percent of the academic budget to the predominantly white school districts although 50.4 percent of North Shore's students attended school in those districts. Thus, the predominantly African-descendant districts received 20.7 percent of the academic budget for 49.6 percent of their population in the school-age range.

10. The distribution of the academic budget resulted from the manner in which North Shore's education system was financed. The school districts' allocated percentage of the budget is proportional to the collection of taxes within each district. The province's government collects the taxes and then distributes them to each school district. Since the taxes are fixed according to the level of income of each contributor, the more economically disadvantaged school districts, which generally coincide with those that have the greatest population of African-descendants, collect fewer taxes in comparison to the more economically affluent and predominantly white districts.

11. Therefore, the great majority of the children of African descent have been forced to attend school districts that possess fewer resources in comparison with the other districts that possess greater financial resources. They lack a sufficient number of teachers, the ratio of students per class is three times greater than in the predominantly white districts, and there is one computer for every 23 students, compared to one for every 7 students in the most economically-advantaged districts.

12. As a consequence, in North Shore's sole public university, representation of professors and students of African descent is lower than of whites. The first professor of African descent was hired in 1984 and the first woman of African descent to graduate did so in 1978. Currently, there are only 48 professors of African descent over a total of 1,324 university educators. As to

the number of graduates, in the years 2002, 2003 and 2004, the students of African descent represented 3.5, 4.6 and 2.8 percent, respectively, of the total number of graduates.

13. In order to regulate the yearly admission of students, the University of North Shore makes available 250 spaces, which the Federal Supreme Court declared to be constitutional. The decision-making process of the University consists of the evaluation of the applicant's grade point average (GPA), a personal interview and a general admissions exam. The applicants must surpass the University's minimum standards as to these three aspects in order to be considered for admission. Typically, the number of applicants that meet the required minimum standards is greater than the number of students that can be admitted. In the last 10 years, the percentage of admitted students of African descent has oscillated every year between 1.2 and 7.3 percent.

C. Transformations as of 1996

14. In 1996, Iberoland experienced an impacting political transformation. That year, the Party for Equality (PI), whose political platform is based on the elimination of all the racial inequalities that exist in the country, won the Presidency of the Republic and the gubernatorial races of 10 of the 16 provinces. Juan Achebe, the PI candidate, became the first Iberolandian of African descent to attain the Presidency of the Republic. In the 2001 elections, he was reelected for a second term with 57.37 percent of the votes.

15. Since their election into power, the Acheben administration has been developing a series of policies, incentives and programs to achieve greater equality among the different racial sectors, particularly to improve the situation of the citizens of African descent.

16. Iberoland immediately felt the positive results from these efforts. In the last five years, there has been a decrease in the rate of infant mortality, malnutrition, unemployment and illiteracy among those of African descent. Additionally, income levels have increased, as well as the indexes of access to basic services such as potable water. The Federal Congress has used its legislative power to support a great part of the presidential incentives in this area. The Federal Supreme Court has also backed this process by declaring the constitutionality of the great majority of programs.

17. Among these programs, Congress adopted in 1999 a general law to promote racial equality, Law No. 678. One of the objectives of the Law is to foster diversity among the student body, particularly in public universities. Article 45 of said law states:

In all of the higher public academic institutions, whether federal, provincial or municipal, a minimum of twenty (20) percent of the spaces available for admission shall be reserved for students of African descent. In order to be eligible for consideration, the applicants must surpass the minimum standards set by the institution as to academic grades, the written exam and the oral interview.

18. In conformity with Article 103 of Law No. 678, the statute would become effective in the 2000 academic year. In the 15 provinces where the law was adopted, the student population of African descent grew approximately between 150 to 300 percent in the first three years the law

was active. The only province that did not adopt the law was North Shore, which is governed by the Traditional Party, President Achebe's opponents.

19. The University of North Shore refused to apply said law in the admission of its students for the 2000 academic year, arguing:

1. The regulation of all that is related to university education corresponds to the provinces of the federation and not to the Federal Government.
2. The quota system is unconstitutional because it is discriminatory.
3. The province was not obligated to adopt a system of affirmative action.

20. Therefore, North Shore continued to apply its traditional admissions system. In 2000, there were 250 spaces available at the University of North Shore. There were a total of 1,025 applicants; 387 students surpassed the minimum standards; therefore, 137 applicants were not admitted despite the fact they met the minimum qualifications. In 2000, only 10 students of African descent were admitted although 97 were eligible.

D. Juana Olin's scenario

21. Juana Olin is an 18-year-old student of African descent who lives in Murano, the capital of North Shore. She was the first in her family to graduate high school, where she achieved the best grades of her class. Juana attended one of the schools in the Murano school district, which predominantly contained students of African descent.

22. Juana and her family benefited from various federal programs implemented by President Achebe. The entire family was incorporated into the federal health plan free of cost and her father had obtained credit at a low interest rate designated for small business projects. Because of the precarious financial situation of her family and her high academic achievements, Juana received successive scholarships from the Federal Government that were exclusively set aside for students of African descent.

23. When she finished her high school studies, Juana applied to the University of North Shore for the year 2000. Juana's academic grades were superior to the minimum required by the University. Juana also surpassed the admissions exam and the personal interview. However, Juana was one of the 137 applicants who were not admitted although they surpassed the minimum standards. Juana considered applying to other universities in the country, but given the delicate state of her mother's health, she decided to remain in North Shore.

24. Upon being rejected by the University of North Shore, Juana initiated legal action against North Shore, claiming a violation of Law 678. After Juana won in district court, the Attorney General for North Shore appealed the decision, which the Federal Court of Appeals reversed in favor of the province. Consequently, Juana appealed before the Federal Supreme Court on October 5, 2001. In her appellate brief, Juana solicited that the Court declare the following:

1. That the Federal State was empowered to legislate issues promoting equality, including the admission of students to provincial universities, due to the constitutional norms and the State's international obligations.

2. That the quota system established by Law No. 678 was constitutional.

25. Alternatively, and in case the Supreme Court rejected any of her positions, Juana solicited the Court to establish that the Province of North Shore was obligated to adopt a system of affirmative action similar to the one adopted at the national level. The Attorney General of Iberoland, on behalf of the Executive Branch, along with the President of the Federal Congress, both submitted briefs supporting Juana's positions and called the Court to determine the constitutionality of Law No. 678, or alternatively, to order North Shore to adopt a policy of affirmative action in their university.

26. On February 25, 2002, the Federal Supreme Court resolved the case, *Olin v. The University of North Shore*. The Supreme Court rejected Juana's positions in their totality. Their extensive decision begins with an analysis of the situation of racial disparity in the country. From this perspective, the tribunal determined that in compliance with the Constitution, public authorities may adopt measures of affirmative action, including the establishment of quotas, such as is recognized by Article 39, so long as the distribution of power among the federation and the provinces is not altered. As a result, since Law No. 678 legislated issues pertaining to education, the Federal Government had invaded the private sphere of the provinces, making the law unconstitutional. Article 5 of the Constitution clearly establishes that the provinces are responsible for guaranteeing the right to education.

27. The Supreme Court then analyzed whether the Province of North Shore was obligated to adopt a policy of affirmative action. The tribunal summarized its extensive jurisprudence on equality and concluded that although the adoption of affirmative action policies is desirable, Juana does not have the right to demand the adoption of these policies since there is no constitutional foundation for such an obligation.

E. The process before the Inter-American system

28. Juana Olin was notified of the Supreme Court's adverse ruling on March 15, 2002. She presented her petition to the Inter-American Commission on Human Rights on September 10, 2002. During the celebration of a hearing before the Commission on March 1, 2003, and during the friendly settlement process, the Federal Government, as is its general practice in cases before the Commission, tried to arrive at an agreement with Juana. The Government offered her the possibility of applying to other provincial universities that had complied with Law No. 678, as well as a scholarship for her studies. However, in a note to the Commission dated April 15, 2003, Juana explained that her inability to attend a university far from North Shore given the health of her mother, and North Shore's failure to offer another alternative, impeded a positive conclusion to the process.

29. Consequently, on January 1, 2004, the Commission presented the case before the Inter-American Court of Human Rights, arguing the violation of the following articles: 1, 2, 24 and 28

of the American Convention on Human Rights; 13 of the Additional Protocol to the American Convention on Human Rights, also called the “Protocol of San Salvador”; and 7, in connection with articles 6(a) and 9, of the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women, also called the “Convention of Belém do Pará.” In her brief of solicitations, arguments and evidence before the Court, Juana concurred with the Commission as to the articles allegedly violated.

30. Iberoland, following its policies on the matter, decided not to interpose preliminary exceptions in the case. Nonetheless, in its answer to the complaints of the Commission, the State sustained that the violation of any article of the American Convention, the Protocol of San Salvador, or the Convention of Belém do Pará had not taken place.

31. The case has drawn international attention and various organizations have presented *amicus briefs* regarding different aspects of the issues. The Center for Equal Opportunities presented an *amicus brief* on the jurisprudential criteria of the European Court on Human Rights and the European Court of Justice. The Association for the Defense of Federalism presented an *amicus* relating to the decisions, final observations and general comments issued by the supervisory bodies created by the various United Nation treaties. Finally, the Continental Judicial Coalition in its *amicus* analyzed the affirmative action jurisprudence of various tribunals in the American continent.

32. Iberoland ratified the American Convention on Human Rights and accepted the jurisdiction of the Inter-American Court of Human Rights on October 5, 1971. The State ratified the Protocol of San Salvador on May 23, 1989 and signed onto the Convention of Belém do Pará on February 25, 1998.