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DISCRIMINATION AND THE ILO’S VIEW

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Definition

For the ILO, the definition of discrimination is provided by Convention No. 111 on Discrimination (Employment and Occupation), 1958. It includes “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”. The member States can add other causes of discrimination; if they want to do so, they need to consult with most representative employers’ and workers’ organisations.

The causes of discrimination

Convention No. 111 (C. 111) mentions several causes of discrimination. Race or skin colour is a well known source for discrimination and has led to segregation and apartheid. Likewise, differences in treatment based on sex are the focus of most debates on unacceptable discrimination versus legitimate distinctions. For example, the criteria for differentiation are not just marital status: a specific requirement (not to marry) is imposed on the members of one sex alone. Other causes of discrimination are political and religious convictions and these relate to freedom of opinion and expression and their limits in the employment relationship. Furthermore, whoever is called to make the interpretation has to exercise judgement on what is admissible and what is not: to what extent can the freedom of opinion and expression of those occupying certain posts be limited? Can a specific belief be required to perform a specific function (in a religious institution, for example)? Is religion enough to exempt the worker from the standard rules on paid leave or dress (for example the obligation to wear a helmet)? In this regard, the international texts which are drafted in general terms do not offer specific answers to such complex issues.

The reports of the Committee of Experts on the Application of Conventions and Recommendations (CEARC) state that the legal provisions of some countries create illegitimate preferences for people, on the basis of their social origin or the (political) merits of their parents to obtain access to a job or a training course; the same provisions also allow exclusions from employment or training on the basis of the same criteria. Additionally, the application of C. 111 is hampered when the national society is divided into classes or castes.

Specific Areas

C. 111 specifies that by referring to employment and occupation, it covers access to vocational training, access to employment, to different occupations and to conditions of employment. The instrument applies to self-employed workers. For example, the EU domestic legislation contains

specific rules on non-discrimination as it relates to numerous aspects of the employment relationship.

Situations and Actions

Discrimination can stem from the law itself. More often, it results from situations or actions. C.111 refers to any distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment. This wording does not limit discrimination to deliberate actions, negative conduct or even simple preference; it also covers the objective consequences of certain apparently neutral distinctions.

The Convention deals with both direct and indirect discrimination. Examples of indirect discrimination are legislation making admission to certain occupations contingent on possession of degrees/diplomas from specific institutions or special conditions, or work stoppages relating to pregnancy and maternity that are not calculated for the purposes of seniority when seniority is a decisive factor for promotion or in the period of notice for dismissal. Indirect discrimination also occurs when collective dismissals for economy reasons enable the employer selectively to get rid of workers for the reasons given in the Convention. In actual practice, discrimination can be difficult to prove in these circumstances.

C.111 does not define discrimination to include distinctions, exclusions or preferences based on the inherent requirements of a particular job, measures to safeguard security and special measures of protection and assistance for specific groups of persons. However, such exceptions are hard respect and there is a high risk of abuse.

The Scope and Implementation of the International Labour Standards on Equality

C. 111 is a programmatic instrument that obliges member States to implement a specific policy, to set goals and meet them by taking various legal, economic and administrative measures. The States must also abrogate any law or regulation and cease any activity that is counter to the stated policy. From this viewpoint, any country ratifying the Convention is obliged to justify any action it takes before the ILO bodies.

An active policy of equality of opportunity and treatment presupposes a coordinated series of actions: information campaigns, education (in particular for workers and employers) and other promotional activities. It would be a mistake to believe that damages or a sum of money can compensate for the wrong that has been done. They have little impact on the continuing consequences of a past discriminatory act. In fact, an unscrupulous employer will see them as a kind of tax he occasionally has to pay in order to act as he pleases. Annulment of the discriminatory measure is in many cases, the most effective step to take. In addition, a worker who has filed an appeal or a staff member who refuses to follow discriminatory instructions must also be protected from reprisals.

In general, victims seeking compensation face a huge legal hurdle when proving that discrimination has occurred. In some cases, notably those involving anti-trade union practices, the proof must be based on a deliberate element, a motive, hostility to membership or union activity. In other cases such as sexual discrimination, the aim is go beyond punishing a vicious intention, the deeper aim is

to change social habits and obtain true equality. No matter what the case is, it is always difficult to prove discrimination in real practice.

National laws and regulations contain various measures aimed at preventing acts or situations of this kind, or at making it easier for the victim to furnish proof. Thus, the law or the courts can ensure that the worker does not need to reveal facts or opinions (political, religious, etc.) that could give rise to discrimination. For example, legislation in some countries prohibits a reference to age in employment offers. Generally, the judge must be able to examine any tests, inquiries or questionnaires that are part of the recruitment process and make sure, if they are used, that they contain no element liable to result in discrimination.