

LABOUR AND FUNDAMENTAL HUMAN RIGHTS: IS “DISCRIMINATION LAW”
DOING THE JOB IT IS SUPPOSED TO DO?
(The Latin American Countries)

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All Latin American constitutions contain the principle of equality and many of them (e.g. Costa Rica, Panamá, Cuba, Brazil, Honduras, Perú, Ecuador, Argentina, México, Colombia, Nicaragua) also incorporate the resulting standard of *non-discrimination*, in some cases specifying which are the basis of discrimination expressly prohibited. There are also some constitutions that contain express provisions banning *employment discrimination* (Venezuela, Paraguay, Perú, Honduras, Chile, Colombia); however, some of them establish preference criteria in favor of national employees (Guatemala, Panamá, Honduras, México).

The institutions and legal provisions that comprise the Inter-American Human Rights System (the American Declaration of the Rights and Duties of Man of 1948, the Inter-American Convention on Human Rights of 1978, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities of 1999, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 1994 and the Proposed American Declaration on the Rights of Indigenous People of 1997) provide extensive treatment to the different types of discrimination; specific references to employment discrimination are contained in the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities. Furthermore, employment discrimination is spelled out in more detail still in the Proposed American Declaration on the Rights of Indigenous People (stating that indigenous people shall be entitled to protection as regards employment, rights to fair and equality employment conditions both in formal and informal labor systems and equal opportunity and treatment as regards all conditions of employment, job promotion and advancement).

Finally, as to sub-regional legal provisions, the Social and Employment Declaration of MERCOSUR is worth mentioning, which Article 1 contains the principle of employment and job non-discrimination (on any basis whatsoever whether race, national origin, colour, sex, sexual orientation, age, religion, political or union opinion, ideology, economic status or any other social or family condition) and Article 3 promotes equality of people with special needs as well as equal treatment and opportunities between men and women.

Under constitutional frameworks such as the aforementioned, most Latin American countries have passed multiple laws addressed at preventing and combating all kinds of discrimination, particularly job and employment discrimination, with special emphasis on the treatment of discriminatory dismissal. In some cases- either by express statutory provisions or by way of court interpretation- remedies for discriminatory dismissal include

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legal actions seeking the nullity thereof and the subsequent reinstatement in the job, as in the case of Argentina, Dominican Republic, Panama, Nicaragua and Peru. The required brevity of this paper prevents us from providing a detailed description of such legal framework.

However, discrimination cannot be treated exclusively by resorting to the principle of equality or by the enactment of legislation prohibiting and punishing discrimination, particularly, in the case of Latin American countries that share as a common feature much singled out by literature: the so-called *authenticity crisis*, i.e. the existence of a *gap between law and reality* and the ensuing non-effectiveness of the legal provisions.

It is evident that *legal provisions are not lacking*, the problem lies in the uncertainty of the enforcement thereof. Thus, employment discrimination –both traditional and new types- continues to exist, presenting- for the purposes of this paper- a scenario that is far from satisfactory.

Below we will provide a summary list of Latin American most frequent employment discrimination cases.

Among them, we highlight, the discrimination of **indigenous or aboriginal people**, who are among the poorest people in the world. They only can find jobs in the informal sector (off the books) and in the farming business, frequently without remuneration and sometimes in conditions that are not far from slavery. This can be noticed in countries such as Chile –e.g. particularly in the *mapuche* communities- and Argentina, where the indigenous *toba* and *wichi* populations survive in subhuman conditions. Discrimination is dramatic and abusive in relation to indigenous people living in the most remote territories, such as in Argentina, Brazil and Peru. In Bolivia, discrimination against indigenous women is long standing -in spite of the fact that they currently hold positions in different levels within the public administration. The current Ministry of Justice of Bolivia has declared that such discriminative treatment results from the fact that women preserve the traditional dressing and culture, whereas men “...tend to mimitize”. In Guatemala indigenous people are also subject to racism and discrimination, which according to a recent report (issued by the Presidential Commission against Discrimination and Racism) results in US\$ 780 million losses in terms of production. In Guatemala, indigenous workers are paid up to 50% less than non-indigenous workers, and in the case of professionals, up to 36% less. Discrimination against indigenous people also exists in Colombia and Ecuador.

Afro-American workers are still being discriminated against, such as in the case of Brazil. In Brazil, Afro-American people find it hard to get jobs involving contact with the public, such as bank cashiers, public relations, etc. and they are also subject to pay inequalities. Colombian Afro-descendants are also subject to this kind of racial discrimination (it should be noted that Afro-descendants amount to ten million people, i.e 11 % of the aggregate Colombian population).

The traditional separation of roles and the resulting discrimination between **men and women** still exists in Latin American societies, thus women continue to be relegated to

second rate positions, receive lower pay and have less chances to access management positions (Brazil, Uruguay, Perú, Argentina, Chile). In Brazil, in many cases, women are barred from being promoted to higher positions on the grounds of their colleagues' resistance to subordinate to their orders. On a worldwide scale, Brazil has the higher gender pay gap, currently women earn 34% less than their male counterparts. According to a recent survey conducted by the International Union Confederation, based on polls on 300,000 women in 24 countries, the worldwide average of the gender pay gap is of 22% in the detriment of women. According to the referred survey such gap amounts to 29.8% in Mexico and 26.1 in Argentina (on a worldwide scale Brazil is followed by South Africa where the gender pay gap is of 33%).

A generalized discrimination against the **disabled** also exists in several countries (among them, Chile and Argentina), the issue being more complex since in this case combating discrimination is not enough given that the problem also calls for the implementation of integration policies in the work place. In Mexico, only 25% of the disabled are employed. Disability is one of the most significant chapters of discrimination in Argentina; according to official figures there are 3,000,000 of disabled in Argentina and in such segment unemployment is of 90%. Argentina passed a law mandating that 4% of the public administration positions be reserved for disabled people qualified for the job; however, there are no similar provisions for the private market workforce.

Among the most recent discrimination cases –or which treatment is relatively recent- we find those involving **HIV/AIDS patients, those who are prone to develop diseases** that may be detected by the handling of genetic data, discrimination against **smokers** and those related to **sexual orientation**, cases that are closely related to the exercise of fundamental human rights and liberties outside the workplace.

As to **HIV/AIDS** discrimination, which according to the journal “Science” is also in the rise in Latin America and the Caribbean, the number of infected people could increase from its current 2 million figure to approx. 3.5 million in the incoming years (in 2007 the infected included approx. 400.000 young people aged 15 to 24, ages that are precisely those of insertion into the market workforce). To neutralize this type of discrimination, many Latin American countries have adopted special measures. For example, in Peru laws have been passed prescribing that HIV carriers may neither be fired nor mandatorily subjected to medical exams required as a condition to be hired. In the Dominican Republic Law No. 55 of December 31, 1993 bans dismissal based on the ground of HIV/AIDS (no other contagious disease has created reactions of this kind in such country). Interesting judicial precedents have developed in Argentina as regards discrimination based on HIV/AIDS, holding, for example, that medical exams conducted at the request of the employer to detect the presence of the virus can only be deemed admissible if the employee has expressed its “duly informed consent”, and that the employee is entitled to refuse to submit to such medical exams, this has been held on the grounds that not only health values are at stake but also the right to privacy. It has been held that the right of privacy –and its risk of discrimination- is also violated when the medical doctor who detects the virus informs the employer's medical doctor or the public health authorities and as results thereof the employee is dismissed.

There are many cases of discrimination against **migrant foreign employees** in Latin America. In the Dominican Republic, for instance, Haitians are constantly being discriminated against on the grounds of race, nationality or national origin and their union activities. Racists attacks are usual against these workers and Amnesty International reported such occurrences in its May 2009 claim, demanding that such related violent actions be stopped (for example, lynching as reprisal for the homicide of Dominican citizens that are attributed to Haitian migrants). In Argentina and Chile there are also discrimination practices against migrant workers coming from neighboring countries, e.g. in Argentina workers coming from Bolivia, Paraguay and Perú, and in Chile, from Perú and Bolivia.

Age discrimination practices against **older individuals** still exist in several countries in Latin America. In the Dominican Republic there are claims reporting that individuals over 35 years of age suffer age discrimination and that many employees over the age of 35 have been dismissed, in many cases on the grounds that younger workers are more efficient in the use of new technologies. In Argentina, it is usual to establish an age cap for employment recruitment purposes or to disqualify older candidates on the grounds that they are “overqualified” to hold a given position.

Employment discrimination based on **sexual orientation** affects homosexuals (gays and lesbians) and bisexuals, transsexuals, transgender and intersexuals both at the time they are looking for a job (time during which evidencing such discrimination is very hard) and during the employment relationship. Surveys conducted in Venezuela report that at least 90% of such individuals are unemployed -and that when employed, their pay is generally low- and that they work in sectors that tolerate such gender stereotypes (hairdressing and fashion for transsexuals from man to woman, and the building industry for women to men). There are several constitutions that “expressly” ban this kind of discrimination, as in the case of the Constitution of Ecuador of 2008 and the Constitution of Bolivia of 2009. During the late 20th century the Constitutional Court of Colombia has issued more than 110 decisions related to the protection of such individuals; we may highlight the decision of September 9, 1998 declaring the unconstitutionality of a discipline investigation against a teacher on the grounds of his homosexuality.

A poll conducted in Argentina in 2007 by the Discrimination, Xenophobia and Racism Institute reports that 3 out of 10 Argentines declare to have been discriminated against at some time and that 50% of the population has witnessed discriminatory actions. The poll declares that **the poor** are the ones who suffer the most cases of discrimination, followed by **people with overweight, those who suffer any contagious disease** and even **single mothers**. Among the poor, those living in the poorest and more ruinous areas called shanty-towns (“*villa miseria*”) are stigmatized at the time they look for a job. The mere fact of living in the southern district of Greater Buenos Aires hinders access to employment, it is believed that this arises from the fact that it is thought that those who live in such area are prone to arrive late or to be absent to work due to the pickets that usually cut the roads of access to the City of Buenos Aires.

In our presentation at the Conference we will deal with the most significant discrimination case law in the countries of the region and will refer to some of the latest

policies and actions launched in recent years to tackle the referred discrimination practices, which are certainly worrisome.