

DISCRIMINATION AND FUNDAMENTAL HUMAN RIGHTS IN AFRICA: IS 'DISCRIMINATION LAW' DOING THE JOB IT IS SUPPOSED TO DO?

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“Discrimination is any distinction, exclusion or preference based on 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”ⁱⁱ

Article 1 paragraph 1 (a) Discrimination (Employment and Occupation) Convention 1958 No 111.

Discrimination violates the fundamental human right to freedom from discrimination.ⁱⁱ Freedom from discrimination is indispensable for workers to choose their employment freely, to develop their potential to the full and to reap economic rewards on the basis of merit.ⁱⁱⁱ This is in agreement with the Declaration of Philadelphia, adopted by the International Labour Conference in 1944 and now part of the International Labour Organisation (ILO) Constitution, which states that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”^{iv} Accordingly, this is parallel with the recent the concept of a human-rights-based approach to development which has gained in importance and offers a normative framework which is very relevant to standards and standard setting.^v The rights-based approach naturally includes eliminating all forms of discrimination.^{vi} Therefore, elimination of discrimination at work is essential to other fundamental human rights such as freedom from discrimination, human dignity and social justice.

Discrimination is not a new phenomenon in Africa. It has a long history on the African Continent. Discrimination, particularly racial discrimination was in Africa in the form of slavery during the slave trade period when Africans were exploited based on skin colour. Although slavery and the slave trade had been outlawed by the late 1800s, the extraction of forced labour from the native African populations by colonial administrations was still widespread in the 1920s and discrimination was at the heart of this social tragedy.^{vii} However, as the colonial era approached its end in most countries.^{viii} The colonial legacy did continue as the scourge of racially segregated societies was still alive in other countries, such as South Africa and Namibia, with Zimbabwe (formerly Rhodesia) becoming, in 1980, the first to accept democracy and majority rule.^{ix}

a) Gender based discrimination

Gender inequality remains widespread and the data on this form of discrimination is extensive. Women generally earn less than men, and are more likely to be trapped in low-paid, low-skilled jobs with little or no hope of advancement.^x Owing to gender discrimination women are also more likely to work in the informal economy.^{xi} In most African countries, women are put at a disadvantage by laws that restrict their rights to own land and therefore to earn an income.^{xii} This form of discrimination is rooted in tradition and culture. The refusal to allow a peasant woman to own or inherit the land she farms is an illustration of discrimination in access to particular occupations.^{xiii} In Lesotho, as with many other African countries, women are minors in law and do not have the right of landownership.^{xiv} The refusal to allow women to own land not only impinges upon women’s ability to work as farmers, it also limits access to credit and cooperative memberships, as both often require

landownership.^{xv} Women's restricted access to agricultural extension services is another impediment to productivity enhancement, and hence to higher incomes.^{xvi}

One of the more serious examples of gender-based discrimination involves violence, especially physical and sexual abuse. A study in Zimbabwe showed that over 87 of girls with disabilities had been sexually abused.^{xvii}

b) Racial Discrimination

It is not the characteristics of a person, but other people's perceptions of his or her cultural, social or physical difference, such as colour, that lead to racial discrimination.^{xviii} Racial discrimination has had a long history in Africa, particularly Southern Africa. Racial discrimination in Southern Africa dates back to the period of colonialism when through racial segregation, the colonial governments denied blacks access to jobs and training, justified their low wages or restricted to them certain occupations simply on the basis of their race. The ILO notes a slow decline in racial discrimination in countries like South Africa which that have started addressing it more recently.^{xix}

Though Southern African countries are no longer under colonial, racial discrimination continues to be an obstinate problem.^{xx} In South Africa's case, there has been an improvement in the relative earnings of the black Africans relative to all other racial groups, but these gains seem to be minute since racial discrimination persists.^{xxi} The earnings gap between different racial groups remains significant today.^{xxii} It is reported that unemployment rates are highest among black Africans, especially those with low skills.^{xxiii} Despite the important efforts by the government and the social partners to tackle racial discrimination, a recent survey by the National Labour and Economic Development Institute (NALEDI) shows that black people, and especially black women, still face discrimination in the workplace.^{xxiv}

c) Caste-based Discrimination

Caste-based discrimination entails discriminating a certain group of people, because of their alleged "impurity" and inferiority.^{xxv} Discrimination rooted in caste or similar systems of rigid social stratification has been observed in Africa.^{xxvi} Caste systems still exist, sometimes in a work-related context.^{xxvii} In the case of Kenya, a subsection of the Samburu, known as the Ilkunono or blacksmiths are despised and discriminated against.^{xxviii} In the Somali region of Ethiopia, the Midgo community is regarded as impure, unlucky, sinful and polluting, and survives economically thanks to remittances from abroad. In Nigeria, the Osu are seen as untouchable and socially rejected.^{xxix}

d) Religious based discrimination

Religious discrimination in employment and occupation often arise as a result of a lack of religious freedom or intolerance towards persons of a particular faith or a different faith, or towards those who profess no religion.^{xxx} The unfair treatment in employment on religious grounds include offensive behaviour at work by co-workers or managers towards members of religious minorities, lack of respect and ignorance of religious customs, the obligation to work on religious days/holidays, biases in recruitment practices and in promotion, and lack of respect for dress restrictions.^{xxxi} One of the most resilient forms of discrimination is the targeting of Copts in Egypt, who are denied equal access to education and equal opportunities in recruitment and promotion.^{xxxii} Very few are appointed to key positions in the Government or are candidates for parliament.^{xxxiii} Enrolment of Copts in police academies and military schools is restricted, and very few are teachers and professors.^{xxxiv} In Senegal and Sudan,

Christian job applicants are required to deny their faith or to convert to Islam if they want to be employed.^{xxxv}

e) Age based discrimination

Discrimination based on age affects both ends of the age spectrum, although its manifestations and the reasons leading to it differ depending on whether younger or older workers are concerned.^{xxxvi} Moreover, there is a deep-seated belief that a high rate of employment of older workers can only be achieved at the expense of new, younger labour market entrants or vice versa.^{xxxvii} Negative attitudes towards hiring and retaining older workers are rooted in perceptions that portray them as slow learners, less adaptable and in poor health.^{xxxviii} In addition the younger labour entrants are often seen as inexperienced and are over-represented in casual jobs with lower benefits, training opportunities and career prospects.^{xxxix} The importance of tackling discrimination based on age is evident considering the shift in the age structure of the world population.^{xl} Developing countries still have relatively young populations while industrialized countries have relatively old populations.^{xli} Although there is not much data on age based discrimination, most of the African countries are ageing faster than those in industrialized countries

f) Discrimination based on Disability or HIV/AIDS status

(i) Discrimination based on disability

Discrimination based on disability is widespread and entails the denial of opportunities to the disabled, either to work altogether or to build on their abilities and potential. People with disabilities are often given low-paid, unskilled and menial tasks or belong to the “last hired – first fired” group of workers who are more vulnerable to the effects of recession.^{xlii} Disabled people also encounter discrimination in the labour market as a result of employers’ and co-workers’ misconceptions about their abilities and a lack of adapted working environments.^{xliii} Women with disability suffer multiple discriminations – firstly, gender discrimination and then discrimination based on their disability. In Zimbabwe, a study in 2004 showed that 87.4% of girls with disabilities had been sexually abused; among them, 52.4% tested HIV positive.^{xliv} Studies in Namibia and Botswana delivered similar results.^{xlv}

(ii) Discrimination based on HIV/AIDS

In the world of work, discrimination against workers with known or suspected HIV/AIDS may originate from co-workers, customers, service suppliers and employers.^{xlvi} Discrimination at work against people with known or suspected HIV/ AIDS can take many forms. One form of such discrimination is pre-employment testing, which results in a refusal to hire, is widespread, even where national and workplace policies against discrimination based on HIV/AIDS are in place, including in Southern Africa.^{xlvii} The breach of medical confidentiality is also prevalent and this, in turn, leads to either dismissal or resignation.^{xlviii} The pressures and hostility towards HIV positive workers are sometimes such that they feel compelled to resign even though they have not been formally dismissed.^{xlix} An ILO study found breach of confidentiality and dismissal to be widespread in Côte d’Ivoire, South Africa^l and Uganda.^{li}

Consequences of Discrimination

The different forms of discrimination impact severely on vulnerable individuals of society. At its worst, the discrimination against certain groups, such as women, ethnic or racial minorities and migrants, face in the labour market makes them vulnerable to such abuses as forced or compulsory labour.^{lii} Discrimination is also associated with child labour. The existence of

barriers to decent jobs often compels parents belonging to an ethnic minority or a denigrated caste to resort to the labour of their children to make ends meet.^{liii} Child labour is often associated with the poverty of parents who face discrimination in the labour market by virtue of their social or ethnic origin.^{liv} Poor single-parent families, usually headed by women, and migrant families are also often forced to resort to having their children work.^{lv} The recent rise in labour trafficking, which disproportionately affects women and children, is related in part to sex-based discrimination in the labour market that causes unequal access for women to remunerative employment as well as to traditional beliefs that devalue girls.^{lvi}

Evaluation of Discrimination law

Today, new legislative and policy frameworks are being constructed that aim to eliminate discrimination in the work place and bring about equality in the workplace. And although important steps have been taken to reduce the dramatic disparities that existed, significant inequalities remain.

Some progress in eliminating discrimination in Africa has been made. African countries have adopted different legislative provisions to prevent different types of discrimination. Firstly African countries have adopted provisions to increase the number of women in high status positions, in particular legislative senior or managerial (LSOM) jobs. In the case of the United Republic of Tanzania and Burkina Faso, the countries have developed provisions to prevent women's exclusion from government.^{lvii} In other countries like South Africa and Rwanda, provisions have been made to increase percentage of women in leadership to more than 30%. These provisions have yielded success in increasing the number of women into government. However, some countries have lagged behind in this respect. In countries like Swaziland and Lesotho gender discrimination is reinforced by custom and customary law which view women as minors.

Secondly, African countries have adopted laws and regulations addressing discrimination based on HIV/AIDS with ILO support in a number of countries including Benin, Lesotho, Madagascar and Uganda, while in other countries legislative measures are under preparation. Countries have adopted codes of practise in regards to HIV/Aids which although non-binding provide guidance of elimination of stigma and discrimination on the basis of actual or perceived discrimination.^{lviii}

Thirdly, most African countries have Constitutions that have provisions that prohibit all the forms of discrimination. Countries like South Africa^{lix} and Zimbabwe^{lx} have constitutions that contain comprehensive bills of rights with provisions prohibiting discrimination. These Constitutional provisions have in some cases been translated into legislation like the Labour Relations Act or various legislations in Malawi^{lxi}, Namibia^{lxii}, Botswana^{lxiii}, South Africa^{lxiv} and Lesotho,^{lxv} to mention a few. In spite of such progress some of the legislation is subject to customary influence and does not adequately eliminate discrimination, as is the case in Lesotho.^{lxvi} In addition, some the legislations have gaps in their application which leaves room for discrimination^{lxvii} and implementation of policies brought about by statute is slow.^{lxviii}

All this legislation in the different countries goes a long way in eliminating discrimination. However, legislation need to be supplemented because legislation its own is in adequate. Legislative framework needs to be supplemented by policies such as microfinance projects that target low income women^{lxix}, preferential procurement policies^{lxx} and creation of enforcement bodies.^{lxxi}

End notes

ⁱILO: *Time for equality at work*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 91st Session, Geneva, 2003 accessed at http://www.ilo.org/global/What_we_do/Publications/ILOBookstore/Orderonline/Books/lang--en/docName--WCMS_PUBL_9221128717_EN/index.htm on 03/02/2010. Discrimination in employment occurs when people are denied jobs, confined to certain occupations or offered lower pay simply because of their sex, their religion or the colour of their skin, irrespective of their capabilities or the requirements of the job. It entails treating people differently because of certain characteristics, such as race, colour or sex, which results in the impairment of equality of opportunity and treatment.

ⁱⁱ ILO website Fundamental Rights at Work available at E:\Fundamental Rights at Work.mht on 02/02/2010

ⁱⁱⁱ Ibid.

^{iv} ILO: *Time for equality at work* p1.

^v ILO: *ABC of women worker's rights and gender equality* 2ed (Geneva, 2007) p6 accessed at <http://www.ilo.org/dyn/gender/.../ABC%20of%20women%20workers.doc> on 02/02/2010.

^{vi} Ibid.

^{vii} ILO: *Time for equality at work* para22.

^{viii} ILO: *Time for equality at work* para22.

^{ix} Ibid.

^x ILO Fact Sheet: *Discrimination in Africa* accessed at www.ilo.org/wcmsp5/groups/.../wcms_decl_fs_88_en.pdf on 02/02/2010 p1

^{xi} Ibid.

^{xii} ILO: *Time for equality at work* para53.

^{xiii} ILO: *Time for equality at work* para53.

^{xiv} Tajgman D and Kalula E “Analysis of the legal framework for gender equality in employment: Lesotho, a case study”, in E. Date-Bah (ed.): *Promoting gender equality at work: Turning vision into reality for the twenty-first century* (London and New York, Zed Books Ltd., 1997), pp. 173-188.

^{xv} ILO: *Time for equality at work* para53.

^{xvi} Ibid.

^{xvii} ILO Fact Sheet: *Discrimination in Africa* p1.

^{xviii} Partsch K J “Fundamental principles of human rights: Self-determination, equality and non-discrimination”, in Vasak K (ed.): *The international dimensions of human rights* (Paris, UNESCO, 1982), pp. 76-77

^{xix} ILO: *Equality at work: Tackling the Challenges*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I (B), International Labour Conference, 96th Session, Geneva, 2007 para83 accessed at www.ilo.org/wcmsp5/groups/.../wcms_082607.pdf on 03/02/2010.

^{xx} Ibid.

^{xxi} ILO: *Equality at work: Tackling the Challenges* para90.

^{xxii} Ibid.

^{xxiii} Ibid.

^{xxiv} Ibid.

^{xxv} ILO: *Equality at work: Tackling the Challenges* par 130.

^{xxvi} The study by the UN Sub-Commission on the Promotion and Protection of Human Rights presented in 2004 examines the situation in Bangladesh, Burkina Faso, India, Japan, Kenya, Mali, Federated States of Micronesia, Nepal, Pakistan, Senegal, Sri Lanka and Yemen (Commission on Human Rights: *Prevention of discrimination*, expanded working paper by Mr Asbjørn Eide and Mr Yozo Yokota on the topic of discrimination based on work and descent, doc. E/CN.4/Sub.2/2004/31, 5 July 2004).

^{xxvii} ILO: *Equality at work: Tackling the Challenges* para130.

^{xxviii} ILO: *Equality at work: Tackling the Challenges* para134.

^{xxix} ILO: *Equality at work: Tackling the Challenges* para134.

^{xxx} ILO: *Equality in employment and occupation*, Report III (4B), International Labour Conference, 75th Session, Geneva, 1988, paras. 139-156 and 166-169.

^{xxxi} ILO: *Time for equality at work*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 91st Session, Geneva, 2003.

^{xxxii} ILO: *Equality at work: Tackling the Challenges* par 119-120.

^{xxxiii} Ibid.

^{xxxiv} ILO: *Equality at work: Tackling the Challenges* par 119-120.

^{xxxv} Ibid.

^{xxxvi} Ibid.

^{xxxvii} ILO: *Equality at work: Tackling the Challenges* para138.

^{xxxviii} ILO: *Equality at work: Tackling the Challenges* para147

^{xxxix} ILO: *Equality at work: Tackling the Challenges* para141.

^{xl} ILO: *Time for equality at work* para118.

^{xli} Ibid.

^{xlii} ILO: *Time for equality at work* para116.

^{xliii} ILO: *Equality at work: Tackling the Challenges* para161.

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- ^{xliv} ILO Fact Sheet: *Discrimination in Africa* p1.
- ^{xlvi} ILO: *Equality at work: Tackling the Challenges* para161.
- ^{xlvii} ILO: *Time for equality at work* para107.
- ^{xlviii} ILO: *Time for equality at work* para108.
- ^{xliviii} Ibid.
- ^{xlix} ILO: *Time for equality at work* para108.
- ^l In South Africa, the Horizons programme, in cooperation with the South African power company Eskom and Development Research Africa, launched a study on stigma and discrimination at the workplace. The greatest fear among respondents focused on relations with colleagues: three-quarters feared social isolation, 50 per cent mentioned rumours and gossip, 18 per cent verbal abuse. Around 90 per cent of workers surveyed agreed with the statement “if I have AIDS, people will avoid me”. One-quarter of workers and 55 per cent of the workers’ female partners or relatives said they were afraid of dismissal on account of AIDS.
- ^{li} ILO: *Time for equality at work* para109.
- ^{lii} Ibid.
- ^{liii} Ibid.
- ^{liv} ILO: *Time for equality at work* para22.
- ^{lv} ILO: Combating the most intolerable forms of child labour: A global challenge, Background paper prepared for the Amsterdam Child Labour Conference (Geneva, 1997), pp. 10-11.
- ^{lvi} ILO: Stopping forced labour, Report of the Director-General, International Labour Conference, 89th Session, Geneva, 2001, para. 168.
- ^{lvii} ILO: *Time for equality at work* para280-293.
- ^{lviii} ILO: *Time for equality at work* para293.
- ^{lix} The Constitution of The Republic of South Africa s
- ^{lx} The Constitution of Zimbabwe s23.
- ^{lxi} Kalula E, Odor A and Fenwick *Labour Law Reforms that support Decent Work: The Case of Southern Africa* ILO Issues Paper No 28 p13.
- ^{lxii} Namibian Labour Relations Act 15 of 2004.
- ^{lxiii} Kalula E, Odor A and Fenwick (note61) p13.
- ^{lxiv} South Africa Labour Relations Act 66 of 1995.
- ^{lxv} Labour Code Order of Lesotho.
- ^{lxvi} Kalula E, Odor A and Fenwick (note61) p16.
- ^{lxvii} Kalula E, Odor A and Fenwick (note61) p16. In the case of the Labour Code Order in Lesotho, the legislation does provide 12 weeks of maternity leave, six weeks of which take effect after birth but there is no guarantee that this provision will actually be observed particularly in the private sector. In addition required by statute to be paid leave, this period of maternity leave is not only a contract may provide for paid leave.
- ^{lxviii} The South African Employment Equity Act of 1998 provides for affirmative action policies put in place by statutory framework. This helped contribute to a rise in the number of black households earning as much or more than the average white household, from an original figure of less than 1000, to 1.2 million but because of enforcement racial differentials remain high. See ILO Fact Sheet – *Discrimination at Work: Africa* p1. The position of black women, especially African women, appears to be worsening, while the number of people with disabilities has remained low, and variations in their representation in top management positions insignificant. This is similar to the case in Namibia where even though the representation of previously racially disadvantaged men increased, white men, dominated both top and senior management positions, while women, both white and black, were still under-represented. See South African Commission for Employment Equity: *Annual Report 2008–09* and V. Usiku: “Affirmative action in employment: The Namibian experience”, paper presented at the International Dialogue on Advancing Equity and Racial Inclusion, Brasilia, 11–14 April 2005.
- ^{lxix} ILO Fact Sheet - *Discrimination At Work: Africa* p2.
- ^{lxx} ILO: *Time for equality at work* para 185-186.
- ^{lxxi} ILO: *Time for equality at work* para188.