

Against Discrimination

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Octavio Nave/AE

Discrimination against the physically challenged is not explicitly prohibited in the Constitution.

Discrimination is an asymmetrical relationship of dominance, that is, a political relationship. Any strategy for reducing discriminatory practices in Mexico must start off from that simple, often underestimated, fact. Therefore, any means of fighting against the different forms of discrimination in Mexico must first comply with the obvious but essential prerequisite of recognizing that it exists, that it is widespread and that it is part of

the most deeply rooted representations among the population.

The fact that discrimination is practiced in those areas that scholars consider “private” or “non-public,” like the work place or the family, creates the illusion that its reduction should be sought mainly through education or the transformation of value systems, without involving legal and political action by the state. That illusion has solid reasons for existing. In contrast with forms of behavior that damage people’s physical integrity, property or legitimate economic expectations, discriminatory acts seem to remain in the terrain of sym-

bolic relationships, subjective attitudes or even in the area of freedom of expression and opinion. The central issue, then, is not whether discrimination is a fantasy, but whether in public life it frequently becomes “invisible” given the legal order defined by liberal abstract universalism.

This is particularly true in the Mexican case, in which the Constitution expressly prohibits all differentiated treatment for citizens by public bodies in the definition of their individual and citizens’ rights.¹ Nevertheless, with the exception of what Article 4 stipulates—that is, the multicultural nature of

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the Mexican nation and the equality of men and women— other forms of discrimination, like those based on ethnic origin, being physically challenged or sexual preference, are not explicitly prohibited. For that reason, acts of discrimination seem to be above all practices of civil society whose nature makes them very difficult not only to prosecute, but even to formulate as crimes. In Mexico, if the differences in treatment that implies disparaging vulnerable social groups are not prohibited in legislation, discriminatory practices will only be seen as forms of cultural backwardness or community inertia, but not as serious deficiencies in the legal-political order.

Even though including discrimination in the law is a demand for justice, the problems arising out of the broad gamut of discriminatory practices cannot be overcome if legal action against them is limited to the formulation of “negative” rights, that is, the right to protection vis-à-vis the action of other individuals or the state. Together with these “negative” protections, a strategy of affirmative action must be established by the state for the development of the basic capacities of social groups vulnerable to discrimination.

For that reason, the fight against discrimination must be taken on as a variation of what Amartya Sen has conceptualized as the struggle for freedom. According to Sen, “Attention is thus paid particularly to the expansion of the ‘capabilities’ of persons to lead the kind of lives they value—and have reason to value. These capabilities can be enhanced by public policy, but also, on the other side, the direction of public policy can be influenced by the effective use of participatory capabilities by the public.”² Government pro-

motion of the abilities of vulnerable groups makes it possible to protect them against society’s undervaluing them and also—and this is probably more important—to equip them as citizens with a sense of self-respect, able in time to demand the respect of

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others for their rights. In this sense, affirmative action must lead to the empowerment of these groups. In this way, discrimination must be made visible in our legislation not only to punish it, but also to compensate for the damage suffered by groups subjected to it and to prevent further discriminatory practices through both education and the fear of legal penalty.

An example that contrasts with the Mexican case but is revealing in terms of the political nature of discrimination is the civil rights struggle in the United States in the 1960s and part of the 1970s. There, explicitly citing discrimination in the law in some states opened the way for the Supreme Court to come to very concrete deci-

sions that led to a political process of social, educational and employment integration that had consequences that are still felt and that opposed the practices, traditions and values of some specific communities.

For that reason, even though it is true that the different forms of discrimination are intertwined with historically established cultural practices that are difficult to change, they should be seen above all as a series of political practices that can be fought through legislation, education and the socialization of the values of reciprocity and mutual recognition. No single strategy will be effective for attacking discriminatory practices. But, since it is fundamentally a political problem, it is necessary to change the legal framework, not only so it can show up discrimination, but also to allow for the state to protect vulnerable groups.

Acts of discrimination are direct violations of basic human rights. Article 1 of the United Nations’ Universal Declaration of Human Rights, signed in 1948, clearly stipulates the universality of freedom, equality and human dignity.³ If we define discrimination as differentiated treatment that tramples human dignity even if hidden behind formal respect for freedoms and legal or political equality, we would have to say that a society does not offer real protection for an individual’s inalienable rights as long as it permits discriminatory practices to occur.

In practice, differentiated treatment based on discrimination sooner or later leads to limitations on fundamental freedoms and unequal political and legal treatment, just as the absence of civil rights and legal and political equality foments discrimination against the most vulnerable groups in society. Dis-

crimination is part of the spiral of authoritarian domination since it tends to stigmatize social groups, specific practices and world views and to lead to the cancellation of their rights and civic, legal and political guarantees. The converse is equally true: the existence of politically authoritarian societies is the ideal breeding ground for discriminatory practices.

The Universal Declaration of Human Rights has become an insufficient basis upon which to defend the demand for the respect for human dignity. As a model, it was based, of course, on the triumvirate of rights (civil, political and social) that characterized the model of social and democratic rule of law that reached its normative zenith in the 1980s. Nevertheless, the demands by ethnic groups, women, the differently enabled and those with non-conventional sexual orientations that they be recognized has made the fight against discrimination a kind of contemporary version of the civil rights movement. That is how Nicola Matteucci sees it, for example, when she says, "It is significant that, while the trend in our century and the last [speaking of the nineteenth and twentieth centuries] seems dominated by the struggle for social rights, we are now seeing conversely an upsurge in the battle for civil rights."⁴

This judgement is acceptable as long as we remember that a great part of this new battle is for a new generation of civil rights, such as the recognition of non-conventional sexual orientations or ecological rights.

In that sense, any debate in Mexico on a constitutional amendment expressly prohibiting discriminatory acts should take into account the fact that the United Nations is on the brink of for-



Retirees demonstrating outside the Chamber of Deputies, September 12, 2000.

mulating its own declaration on discrimination. This is a good political opportunity to make our legal steps forward in this matter coincide with the explicit, militant support of an international charter of the right to equal treatment and redress for harm caused by discrimination. In September 2001, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance will be held in South Africa. The conference will probably produce a universal declaration conceiving the protection against discrimination as a human right that requires protection and promotion by United Nations member states.

The ideal scenario would be that public debate in Mexico about constitutional protection against the different forms of discrimination establish its priorities, local tasks and arguments based on our national experience and that, therefore, its conclusions be defended in the UN conference. In this way the oft-repeated experience of the Mexican government accepting inter-

national conventions without the nation's political forces really making their topics a priority could be avoided.

A political discussion and even a constitutional amendment prior to the international debate on discrimination would reverse the usual order of events with regard to the treaties Mexico has signed in the past. In the first place, that kind of prior discussion would establish the political and legal conditions needed to ensure that the international agreement would not just be a general declaration with no specific consequences, preparing its application in the different laws it would have to be included in. In the second place, it would make Mexico's signing the convention a demand based on domestic policy and not, as is often the case, a kind of external imposition whose only actors seem to be the diplomats familiar with it. And finally, making domestic and international law jibe would give greater normative strength to the fight to end the different forms of discrimination in Mexico.



In a symbolic ceremony outside Mexico City's Fine Arts Palace, gay and lesbian couples were "married," February 14, 2001.

Attempting to create a constitutional amendment and different regulatory laws dealing with discrimination is a way of defending the idea that a just political system must preserve the rights of minorities from abuse by the majority. This idea was formulated almost simultaneously by Alexis de Tocqueville and John Stuart Mill in the mid-nineteenth century. Mill offered up an argument that could be applied with almost no modification to the current Mexican situation:

The notion that people have no need to limit their power over themselves might seem axiomatic, when popular government was a thing only dreamed about....In time, however, a democratic republic came to occupy a large portion of the earth's surface....The will of the people, moreover, practically means the will of the most numerous or the most active part of the people, the majority....The people, consequently, may desire to oppress a part of their number, and precautions are as much need-

ed against this as against any other abuse of power.⁵

The achievement of a democratic regimen necessarily poses the problem that the majority may try to use its now recognized strength to dominate the minorities. The establishment of constitutional limits on the action of the majority and the corresponding special protections for minorities are the only way of avoiding the risk of a "tyranny of the majority." Even in a democracy, the problem does not lie so much in the majorities' trodding on the minorities' rights because of inertia or to further vested interests, but in the depth of passionate feelings like racial hatred, homophobia or sexism.⁶

Discrimination is fed by social passions long nurtured in a nation's political culture, passions like racism, sexism, the rejection of non-conventional sexual identities and a disproportionate sense of the majority groups' self-worth. That is why educational and cultural efforts and all attempts to convince

will be insufficient in reducing discrimination if they are not regulated and guided by a profound legal and political reform capable of dealing with it for what it is: a violation of fundamental human rights. ■■■

NOTES

¹ For example, Article 1 of the Constitution guarantees protection for everyone without exception; Articles 6 and 7 guarantee freedom of expression and of the press; Article 24, religious freedom and freedom of conscience; Articles 13 and those that follow, the rights guaranteed under the rule of law; and Article 35, citizens' political rights, such as the right to vote and be voted into office. Article 4 is a special case in that it explicitly states the special protection for the languages, customs, and forms of organization of indigenous peoples. Nevertheless, until now, this article has not been regulated in law to ensure its implementation in specific circumstances and, of course, to punish its not being respected.

² Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999), p. 18.

³ The article reads, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article 7 explicitly prohibits discrimination, saying, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

⁴ Nicola Matteucci, "Derechos del hombre," N. Matteucci and N. Bobbio, eds., *Diccionario de política*, vol. 1 (Mexico City: Siglo XXI Editores, 1987), p. 516.

⁵ John Stuart Mill, "On Liberty," *On Liberty and Other Essays* (Oxford: World's Classics, Oxford University Press, 1991), pp. 7-8.

⁶ This idea that the attacks by majorities on minorities are guided in many cases by passions and not only by interests appears in Jon Elster, "Majority Rule and Individual Rights," Stephen Shute and Susan Hurley, eds., *On Human Rights, The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993).