

Guiding questions for defining the normative content of the issues examined at the eleventh session of the General Assembly open-ended working group for the purpose of strengthening the protection of the human rights of older persons

Right to work and access to the labor market

Definition

1. How is the right to work and access to the labor market for older persons defined in the national legislation in your country? If such a definition is not available, how should it be defined considering relevant existing national, regional and international legal frameworks?

The Older Persons' Rights Law (Ley de los Derechos de las Personas Adultas Mayores-LDPAM) on its 5th article defines the right to work as the right to enjoy equal opportunities of access to employment or other options that allow older persons to earn an income on their own and to work productively for as long as they wish, as well as to be protected by the Federal Labor Law and other legislations on this matter.

Scope of the right

2. What are the key normative elements of the right to work and access to the labor market for older persons? Please provide references to existing standards on elements such as:

The three main legislations regarding labor in Mexico are the Mexican Constitution, the Federal Labor Law and the Older Persons' Rights Law which generally establish that the access to work is a right and a social duty, which should not be restricted, nor establish any discriminative conditions based on ethnic origin, gender, age, disability, social or health conditions, religion, or any other condition that attempts against human dignity.

As stated above, older persons and workers in general, have the right to be protected by the Federal Labor Law and any other institutions, such as the Ministry of Labor and Social Security (Secretaría de Trabajo y Previsión Social) and the National Employment Service (Servicio Nacional de Empleo) which are in charge of designing, conducting and evaluating specific programs to generate employment opportunities for vulnerable groups including older persons.

The National Employment Service assist older persons looking for a job, offering intermediation between employers and employees, training employers to know the rights of the older persons with the objective of avoiding ageism, and providing reasonable accommodation in the workplace.

At the same time, the National Institute for the Older Persons (Instituto Nacional de las Personas Adultas Mayores, INAPAM, for its acronym in Spanish) provides different services to older persons. One of them is the productive linkage service, consisting in two options for older persons who wish to access the labor market, according to their skills:

1. Formal employment: Designed for those older persons who wish to participate in the labor market in a formal employment according to their skills, and profession. This option allows them to generate a base salary, a regular work schedule, as well as social benefits.
2. Voluntary packers system: This option allows older persons to develop a voluntary activity, related to the packaging of merchandise in supermarkets, generating an income through tipping.

In terms of retirement schemes, the Social Security Law (Ley del Seguro Social) and the State Workers Social Security and Social Services Institute Law (Ley del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado) promote the two most important retirement schemes.

In order to promote older persons' self-employment and entrepreneurship, INAPAM has celebrated agreements with the General Direction of the Training Center for Work (DGCFT, for its acronym in Spanish) to train older persons at the campuses of the Training Center for industrial Work (CECATI, for its acronym in Spanish) with the objective of promoting the access to employment through courses, training activities and updates for work.

As for the measures to prompt remedies and redress when the right to work of older persons is denied, the Procurator's Office for the Defense of Work (Procuraduría de la Defensa del Trabajo) is the agency in charge of solving these problems, not only for older persons working, but in general.

Besides, in Amparo Directo en Revisión 992/2014, the Supreme Court of Justice of the Nation (SCJN for its acronym in Spanish) analyzed age as a factor of discrimination in the labor market. It was explained that this discrimination consists of a differential treatment against a person for reasons of age without previously considering their capacities and aptitudes. Thus, an arbitrary act is produced that updates the constitutional and legal prohibition of non-discrimination. The SCJN clarified that, in this case, the principle of equality does not seek parity but rather the reasonableness of the difference in treatment. In simple terms, it does not oblige employers to hire or keep in a job someone who is not competent, trained or available to perform the required functions. However, the decision on access or permanence in work cannot be related to the suspicious categories of the first constitutional article.

State obligations

- 3. What are the measures that should be undertaken by the State to respect, protect and fulfil the right to work and access to the labor market for older persons, regarding the normative elements as provided above?**

According to the normative elements above mentioned, the State must create targeted public policies and legislation applicable to all the Federal States and which clearly indicates roles and obligations for each Ministry or Institution involved, as well as sanctions in case of breaching the terms stated on it.

Moreover, in the aforementioned direct amparo in review 992/2014, it was established that the jurisdictional authorities have the obligation to distinguish the updating of a discriminatory act and the effects that it produces. Therefore, the analysis of discriminatory behavior must be carried out from the phase prior to hiring—even if a formal employment relationship has not been established—. Otherwise, job applicants would be deprived of their labor rights and would regain them until they obtain a job, thus eliminating the assumption that a discriminatory act can take place from the job offer.

Special considerations

- 4. What special measures and specific considerations should be considered in developing the normative content of the right of older persons to work and access to labour market, such as protection and regularization of older workers in informal sector, equal remuneration for work of equal value particularly for older women as well as recognition of unpaid work often carried out by older women?**

Currently, the country does not have a solid structure in labor matters, so it is necessary to approach the public, private and social sectors, so that older persons can be reintegrated to the labor market, through awareness in human rights and non-discrimination and reframing current laws, based on a human rights' perspective. The INAPAM works closely with the National Institute of Women (Instituto Nacional de las Mujeres, INMUJERES) with the intention of protecting women and guaranteeing all their rights, including the right to an equal remuneration, whether formal or informal, as well as non-discrimination of any kind.

- 5. How should the responsibilities of non-State parties such as private sector be defined in the context of the right to work and access the labour market for older persons?**

In the aforementioned direct amparo in review 992/2014, the SCJN determined that employers can establish differential treatment in the hiring of people in relation to age. This, as long as they justify that age, due to the nature of the activity in question or due to the conditions in which it is carried out, constitutes an essential professional requirement and determines work, as long as the objective is legitimate and the provided requirement.

Likewise, in said sentence the legal consequences that discriminatory acts can have in job offers are deepened. Which consist of: (i) the declaration of nullity of the discriminatory act; (ii) compensation for damages caused; (iii) the imposition of remedial measures of a dissuasive nature; and (iv) if the applicable legislation provides for it, the establishment of criminal sanctions. With this type of pronouncement, the scope of the obligations of the Mexican State in the reparation of violations of the right to work of older persons is clarified.

Implementation

- 6. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to work and access to the labor market for older persons?**

The main challenges faced by the country is that there is no a specific regulation of employment for older persons, the law contemplates citizens in a general way and do not consider the specific needs of older persons. Hence, it is necessary to integrate them into the normative framework, as well as in the creation of specific support programs designed by the State with the collaboration of all sectors of society, including private sectors.

Access to justice

Definition

1. What is the definition of the right of older persons to access justice in the national legislation in your country? Or how should such a right be defined, considering existing national, regional and international legal framework?

Through its constitutional doctrine, the SCJN has understood the concept of access to justice, as the subjective public right that every person has, within the terms and conditions established by law, to promptly access an impartial and independent tribunal. to raise a claim or defend against it, so that through a process, in which certain formalities are respected, a decision is made on the claim or defence and, where appropriate, that decision is executed. Such definition does not have a specific approach regarding older adults, but it presents the general scope of the law.

According to the LDPAM, older persons have the right to legal certainty. This means that they must receive a dignified and appropriate treatment in any judicial proceeding, whether it involves them as aggrieved or convicted persons, as well as receiving support from the federal, state and municipal institutions to respect their rights, to receive free legal advice in administrative or judicial proceedings, and to have a legal representative, besides of receiving preferential attention to the protection of their personal and family patrimony, and when necessary, to make a will with no violence or pressure.

Scope of the right

2. What are the key normative elements of the right of older persons to access justice on an equal basis with others? Please provide references to existing standards on such elements as below, as well as any additional elements:

The Mexican Constitution, on its 1st article states that all the authorities have the obligation to promote, respect, protect and guarantee human rights, based on universal, independence, indivisibility and progressivity principles and prohibits all kinds of discrimination based on ethnic origin, gender, age, disability, sexual preferences or any other condition that attempts against human dignity and that aims to cancel or undermine rights and liberties of people. Furthermore, the 17th article establishes that every person has the right of access to justice, managed by the courts, according to deadlines and terms established in the laws in a free and rapid way.

This recognition of the right guarantees the legal capacity of the State, on an equal basis, which means that it is not denied or undermined by the age. As stated in the Law, older persons should

be treated in equal basis with the others, including, the award of damages or compensations, where the age is not important to access a fair compensation of damages.

The INAPAM works closely with the Superior Court of Justice (Tribunal Superior de Justicia) in the protection of the right to access justice for older persons, carrying out actions for older persons to access to timely legal proceedings, and immediacy, rights that are equal with the others, such as the Mexican Constitution mentions in its 17th article.

In terms of the access to legal services, the Institute provides free legal advice and any other services of legal guidance to older persons in diverse aspects such as civil, family, labor, criminal and administrative matters, and supports them to carry out their procedures with the corresponding authorities in those cases where it is not competent. Besides this, many institutions provide legal services to older persons free of charge or with a discount.

Besides, the normative elements are based on what is established in the Law on the Rights of Older Adults in accordance with the following:

- a) Prohibition of all kinds of discrimination against older persons based solely on age or combined with others, in all matters related to employment.
- b) Elimination of all forms of age discrimination in workplaces and organizational cultures.
- c) Provision of reasonable accommodations for the elderly in the workplace.
- d) Affirmative action programs to promote the hiring of older persons.
- e) Access to professional, technical and vocational development programs, placement and vocational services and skills development.
- f) Promotion among the elderly of self-employment and entrepreneurship.
- g) Favorable, fair and safe working conditions when undertaking formal, informal or unpaid work:
- h) Quick access to damage repair when older people are denied access to the labor market

In the case of alternative, non-judicial pathways to justice, community justice centers, paralegal support or specialists commissioners, the Superior Court of Justice opens its doors to people in general who wish to carry out their procedure through conciliation, this means that there are no requirements to access this kind of justice. In accordance to this, the National Commission for Human Rights (CNDH for its acronym in Spanish) is able to attend complaints and denunciations of older persons through specific areas.

The SCJN has issued the following criteria on judicial guarantees and other types of measures that guarantee equality and non-discrimination of older adults in the context of access to justice.

The amparo in review 1082/2019 analyzed an interdiction case against an elderly person due to the deterioration of her health due to aging. In this case, a precautionary measure was taken consisting of placing the administration of the assets of the allegedly incapable person in the hands of a guardian.

In this regard, the SCJN concluded that the precautionary measure translates into the restriction of the legal capacity of the elderly person with disabilities, which is contrary to the Convention on the Rights of Persons with Disabilities (CRPD), since it replaces the will of the person by that of the guardian. In such a way that the unconstitutionality and unconventionality of the norm challenged in the amparo process was declared, since its right to legal capacity must be guaranteed at all times.

In amparo under review 4774/2015, the issue of adjustments to the procedure that can be made in cases involving older people was addressed. Therefore, the figure of the substitution of the complaint in the framework of the amparo trial was analyzed. In this precedent, the SCJN determined that it is a procedural institution created with the purpose of balancing the process, especially when one of the parties belongs to a disadvantaged group or in a vulnerable situation. Therefore, it was determined that substitution could be appropriate even when the rule does not expressly provide for it.

In relation to the above, in the Direct Amparo in Revision 1399/2015, the substitution of the complaint is limited to the occasions in which the older person is in a situation of vulnerability. It was reasoned that the mere fact that people age over time does not mean that they are in a state or situation of vulnerability. In any case, the application of this institution will be subject to the reasons given to consider that someone is in a situation of vulnerability. Otherwise, the right to procedural equality and the principle of impartiality of the judges that prevails in access to justice could be violated.

In the Direct Amparo in Revision 1672/2014, the SCJN analyzed the participation of the Social Attorney of the State of Jalisco in those cases in which older people are involved. In this regard, the SCJN specified that the intervention of this institution should be understood as a legislative action adopted within the framework of the state obligation to provide special protection to the elderly. The foregoing has the purpose of reversing the effects of a structural marginality to which this population has been subjected in the field of access to justice. Thus, the jurisdictional authority must notify said dependency about the existence of a trial in which an elderly person, their assets or rights are affected. It was clear that his intervention is not subject to modulation or exceptions in accordance with the corresponding legislation. In addition, it was determined that access to this protection measure did not depend on the accreditation of a certain situation of vulnerability, since this would unduly impose the burden of proof on the beneficiaries of the same.

State obligations

3. What mechanisms or measures are necessary to ensure the enjoyment and to monitor implementation of the right of older persons to access justice, including State obligations to respect, promote, protect, and fulfill the right?

To continue ensuring the right of older persons to access justice, the State has the obligation to elaborate the necessary mechanisms and measures to protect this right, through the creation, verification and implementation of programs and activities in collaboration with agencies and institutions, coordinating with the INAPAM to avoid ageist stereotypes, as well as guiding the development of public policies in favor of this group of population, looking for alternatives on their benefit.

In addition, it must create the necessary conditions from the establishment of actions that contribute to promoting their comprehensive development and full inclusion as subjects of law, taking into account their circumstances and needs, with the aim of directly influencing the improvement of their living conditions.

Besides, the SCJN established that judges must adopt an aging approach in those cases in which older people are involved. The parameters that must be followed for this purpose were even detailed.

Special considerations

4. What special considerations or specific issues should be included in the right of older persons to access justice, including procedural and age-appropriate accommodations as well as responsibilities of non-State actors?

In accordance to the above-mentioned measures, the access to justice for older persons is similar to the others, because there is no ageism in terms of proceeding measures. However, the State could improve by developing shorter procedures for older persons, to guarantee their rights contained in the Older Persons' Rights Law, including older prisoners whose rights are the most affected.

Similarly, it must provide legal certainty about working conditions in the informal sector, in which older women are found. With the purpose of guaranteeing the exercise of their rights in equal conditions.

Implementation

5. What are the best practices and main challenges faced by your country in the adoption and implementation of the normative framework on the right to access justice for older persons?

The main challenge is that in the country, the access to justice is limited in terms of long and extended processes and older persons are treated in equal basis with respect to others. This means that ageism is not the main problem in the access to justice, but the laws that do not contemplate shorter procedures, based on the preferential attention principle and sometimes the resolutions are not adequate for the committed offenses.

One of the best practices is the legal advice service carried out by the Institute, which avoids leaving the older persons defenseless and providing them with the legal information they need, according to their conditions and needs.

Also, As has already been mentioned, for what corresponds to the SCJN, a constitutional doctrine is implemented with an aging approach and a human rights perspective in relation to the elderly.