
LEGAL RESPONSES TO DISCRIMINATORY ACTIONS: A COMPARATIVE ANALYSIS

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I. Introduction

Comparison is, at its core, an odious device. However, comparative analyses provide us with the opportunity to learn from others' experiences. The purpose of this essay is to evaluate and analyze the different variables that exist in the treatment of discrimination across divergent legal cultures. Within each of the defined variables, it is possible to detect levels of normative intensity, with some countries focusing more on the victim's ability to glean monetary compensation and others focusing on the punishment and/or sanctioning of the discriminator and still others focusing on variables in between. Ultimately, it is not my intention to assert that any one model is more suitable or effective in its treatment of discrimination than another. Instead, the intricacies of a variety of legal cultures are laid out like a map, providing an overview of the diverse geography that exists in the legal treatment of discrimination and simplifying the task of navigating this ever-changing terrain.

First, this essay emphasizes that the law can and should assume an active role in the prevention, sanctioning and reparation of discrimination. Furthermore, the law can and should be used to affect social change. Second, it analyzes the regulation of discriminatory conduct at the constitutional level (variable 1) through the incorporation of international law into the domestic legal system (variable 2) and through the specific recognition of discrimination within the domestic legislative setting (variable 3).

Next, this essay discusses the legal consequences of committing a discriminatory act. In most instances, anti-discrimination enforcement measures (variable 4) exist. For example, in some countries, the discriminating actor is forced to modify his behavior. Other countries have gone a little further and prescribed criminal sanctions against such violators (variable 5) of anti-discrimination laws. In addition, damages are often awarded to the victims of discrimination (variable 6).

The fourth section provides a description of the ways in which states have organized themselves to facilitate appropriate legal responses to discriminatory acts. In addition, this section examines reliance on the court system (variable 7) and the creation of specialized agencies designed to prevent, combat and develop appropriate and sensible public policies to address discrimination (variable 8).

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Finally, the essay concludes with my commentary regarding the eight aforementioned variables. However, before delving into such a complex web of comparative analysis, it seems imperative to point out the sheer importance of the subject. To illustrate its significance, I ask the reader to imagine him or herself as a victim of arbitrary discrimination. First, the reader will wonder why he or she has been discriminated against and soon thereafter, the desire to protest such discrimination will emanate from the very core of his or her being. For the most wealthy and privileged of society, understanding and identifying such discrimination may prove to be an insurmountable task. However, for those who are permanent victims of discrimination, due to their physical appearance, age, socio-economic status, religious beliefs, sex, gender, sexual orientation, political opinions, cultural identity, or a variety of characteristics, imagining and understanding such a situation is easy. For these individuals, the permanent victims of discrimination, the law can prove to change the course of their lives, by recognizing their personal dignity, securing them equal opportunity, and by helping them to fully achieve the complex goals of individual and collective development.

II. Law As an Instrument in the Prevention of Discrimination

In general, law has many different functions as it has developed in society. Some of these functions are: 1) to maintain social control by establishing guidelines of appropriate conduct and legal norms to be respected under threat of criminal sanctions if breached (e.g., Penal Code); 2) to facilitate social harmony and agreement between individuals by ensuring cooperation in the processes of attaining one's particular interests (e.g., through contracts); 3) to establish methods of conflict resolution by determining the standards, procedures, and methods to be followed in resolving conflicts, (e.g., resorting to the courts); 4) to promote certain behaviors by obtaining socially desirable objectives and recognizing rewards, benefits, and compensation for demonstrating correct behavior, (e.g., tributary incentives); 5) to organize political power by using the law to guarantee the separation of powers (e.g. defining the jurisdiction of the courts, etc.); 6) to reflect social reality by stimulating or preventing social change, in harmony with the necessities, requirements, and values of a society at any given time.¹

In order to achieve these functions, the law must find a way to treat all people as equals and how to deal with those who violate the law. Discrimination is a subject that has been addressed by the overwhelming majority of the world's legal systems. One of the most contentious points in the ongoing dialogue concerning discrimination has been the act of defining what "discrimination" actually is at any given moment in any specific place.² Even more delicate is the act of defining what "discrimination" is understood to mean within the context of the

¹ AGUSTÍN SQUELLA, *INTRODUCCIÓN AL DERECHO*, 9 (Editorial Jurídica de Chile 2000).

² I would like to thank Domingo Lovera and Martín Saavedra for a meaningful conversation on the essence of the word "discrimination", as well as the participants of the "Anti-Discrimination Policy Workshop", organized by Fundación Chile 21, in Santiago, Chile, 2005.

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legal system.³ This latter question is a loaded one because any answer serves as a declaration of the role that law will play in the prevention and sanctioning of discriminatory conduct.⁴ When human rights issues first entered the public discourse in the second half of the 20th century, nations were principally concerned with the vertical relationship between the state as actor and the individual as victim. Later, however, as human rights issues gained more widespread awareness and recognition, this thinking expanded to include the horizontal relationship between one individual and another. Currently, both vertical and horizontal relationships are recognized in the promotion of human rights, with countries such as Germany and Spain paying more attention to the former by limiting and controlling the state, while other countries concentrate more on the latter. Yet, it is far more advantageous to those who are being discriminated against for a nation's laws to address both relationships, so that the victim of discrimination, at the hands of either the state or a private citizen, may seek appropriate legal recourse.

Therefore, the first point to consider concerns the will of those who control and define what is "right" within a legal system; that is to say, whether the political-legal system provides recourse against discriminatory actions carried out by the State or an individual. Moreover, it is necessary to question the type of discriminatory action, because a judicial response cannot necessarily promote the fundamental rights of the discriminated person.⁵

The law can be used as an effective tool to promote the recognition of people's fundamental rights. When the conduct that affects equality and that deserves legal reaction can be established with clarity, this permits the State or the person affected to utilize legal mechanisms to put an end to the discriminatory action,

³ For example, the Supreme Court of Canada has defined discrimination as a "distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens. . . not imposed upon others or which withholds or limits access to opportunities. . . available to other members of society." *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. Concerning discrimination in the workplace, Canada has acknowledged discrimination occurring during the hiring process and termination. Discrimination is also understood to occur when any individual is humiliated or frightened because of a particular perceivable or known characteristic, whether it be race, religion, economic status, or any other such characteristics. Discrimination can also encompass those acts that are purely physical or verbal and designed to humiliate or degrade a person or group. Such physical acts can take the form of a punch or a push. Even jokes or poster and television commercials may qualify as discriminatory verbal acts. If such acts are directed against a specific person or group protected under Canadian Human Rights Act, then they are deemed to be discriminatory.

⁴ In the United States, discrimination occurs when the civil rights of a group or individual are affected or denied on the basis of race, gender, religion, color, national origin, legitimacy, disability, and in some states, sexual orientation. Both federal and state statutory legislation has been enacted to prevent discrimination based on the above-mentioned factors. The transgression of civil rights, recognized in the Constitution and its amendments, generate causes of action. Discrimination is prohibited in the areas of employment, education, housing, voting rights, public places, federally funded programs, and in urban transport. In some, those who have not yet obtained American citizenship are also permitted to put forth civil rights claims, as is the case when a non-American citizen is the victim of a hate crime. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

⁵ It should be remembered that, historically, the law has also been used to exclude, marginalize, and eliminate nations, towns, groups, and individuals. For that reason the first variable to consider in an analysis must be the attitude of the normative creator.

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and to request that competent public agencies apply a sanction.⁶ We must also keep in mind that legislation is not the determinative factor. The remedy that legislation offers will enjoy greater effectiveness and legitimacy if society is aware of the reproach that the discriminatory conduct deserves.

III. The Regulation of Discriminatory Conduct

From the viewpoint of public perception, the degree to which a state regulates discriminatory conduct necessarily reflects how it views that conduct. For example, when a law unambiguously prohibits employers from instituting maximum age requirements in hiring, the act of imposing a maximum age requirement is thus deemed to be discriminatory. However, the law can also implicitly indicate that certain conduct is politically incorrect and socially inappropriate, without plainly articulating which conduct is prohibited.

However, it is important to note that the definition of what constitutes a discriminatory act varies from country to country. Some countries demand that the victim meet a high burden of proof to demonstrate that discrimination did in fact occur, while other countries require much less substantiation on the part of the victim. It is also crucial to note that variations will most certainly occur depending on the political power of the judiciary and its discretion in rendering judgment.⁷

In addition, while some legal systems focus on the discriminatory action and its consequences, others emphasize discovering of the true intention of the discriminatory actor. Finally, it is also possible that a legal system may not distinguish between the fact, the intention, and the result of discrimination.

A. Constitutional Recognition of the Principle of Nondiscrimination

The general inclination of many countries has been to hold the principle of nondiscrimination at the highest level within the normative hierarchy of their respective legal orderings. Thus, the principle of nondiscrimination has been included in the constitutions of Germany⁸, Canada⁹, Brazil¹⁰, Colombia¹¹, Spain¹²,

⁶ See generally Hugo Rojas, *Cambios Sociales y Cambios Jurídicos en Chile: Construyendo Nuevos Puentes entre Sociología y Derecho en la Promoción del Realismo Jurídico Latinoamericano*, 13 BERKELEY LA RAZA L.J. 453 (2002). An intense correlation between social change and legal change exists. A legal change can cause a social change and vice versa. In this case, it is important that we reiterate the following:

. . . in many instances, the people who retain the political power use it to create social change: (1) improving the quality of life of the citizens, (2) creating greater equality of distribution of accounts/fees and of property or (3) pursuing geopolitical goals. However, during the 20th century, real experience has demonstrated that one cannot be too generous or too willing to offer great power or responsibility to judicial and legislative actors, as they may use it to pursue their own measured and calculated ends . . . *Id.* at 475.

⁷ See generally HERBERT JACOB, ET AL., *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* (1996).

⁸ Article 3(1) states that, “[a]ll persons shall be equal before the law.” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 3(1). Article 3(2) details that, “[m]en and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.” *Id.* art. 3(2). Article 3(3) provides that, “[n]o person shall be favored or disfavored because of sex, parentage, race, language,

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France¹³, Italy¹⁴, Mexico¹⁵, Portugal¹⁶, Puerto Rico¹⁷, South Africa¹⁸, and Vene-

homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability." *Id.* art. 3(3).

⁹ Section 15 recognizes that, "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability . . . does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability." PART I OF THE CONSTITUTION ACT, 1982, being Schedule B to the Canada Act 1982, ch. 11, §15 (U.K.).

¹⁰ Article 3 states that the fundamental objectives of the Federative Republic of Brazil are: to build a free, just, and unified society; to guarantee national development; to eradicate poverty and marginal living conditions and to reduce social and regional inequalities; to promote the well being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination. CONSTITUIÇÃO FEDERAL [C.F.] art. 3. In addition, Article 5 declares that, "all persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life, liberty, equality, security and property, on the following terms: I. Men and women have equal rights and duties under the terms of this Constitution; . . . VI. Freedom of conscience and of belief is inviolable, ensuring the free exercise of religious cults and guaranteeing, as set forth in the law, the protection of places of worship and their rites; VII. Under the terms of the law, the rendering of religious assistance in civil and military establishments of collective confinement is guaranteed; VIII. No one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he invokes it to exempt himself from a legal obligation required of all and refuses to perform an alternative obligation established by law; . . . XLI. The law shall punish any discrimination which may attempt against fundamental rights and liberties; XLII. The practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law. *Id.* art. 5.

¹¹ Article 13 of the Colombian Constitution holds that rights, liberties, and opportunities are guaranteed, without discrimination by reason of sex, race, national or familial origin, language, religion, political or philosophical opinion. CONSTITUCIÓN DE 1991 art. 33 (Colum.).

¹² Section 14 of the Spanish Constitution declares that, "Spaniards are equal before the law, and cannot be discriminated against on account of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance." CONSTITUCIÓN [C.E.] §14 (Spain).

¹³ Article 1 of the French Constitution states that, "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs." 1958 CONST. art. 1 (Fr.).

¹⁴ Article 3.1 of the Italian Constitution affirms that, "[a]ll citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions", while Article 3.2 states that, "[i]t is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country." COST. art 3 (Italy). The Constitution also ensures that the Republic must protect linguistic minorities by adequate norms. *Id.* art. 6.

¹⁵ Article 1.3 of the Mexican Constitution declares that, "[a]ll discrimination motivated by ethnic or national origin, gender, age, differing abilities, social conditions, health conditions, religion, opinions, preferences, marital status, or anything else that may be against human dignity and have as its object to restrict or reduce the rights and liberties of persons, remains prohibited." CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, Art. 1.3 (Mex.).

¹⁶ Article 13 of the Portuguese Constitution holds that, "1. Every citizen shall possess the same social dignity and shall be equal before the law. 2. No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation." CONSTITUIÇÃO [Constitution] art. 13 (Port.).

¹⁷ Article 2, Section 1 of the Puerto Rican Constitution states that, "[t]he dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality." CONST. OF THE COMMONWEALTH OF PUERTO RICO art. II § 1 (P.R.).

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zuela¹⁹, among others. Other countries, however, have been less willing to recognize the principle of nondiscrimination, as happens to be the situation in Chile.²⁰ Although the Chilean Constitution recognizes equality under the law in articles 1 and 19,²¹ further doctrinal development would heed a greater level of protection to those victimized by discrimination.

The principle of discrimination, when recognized in a Constitution, cannot be understood as separate and distinct from the rest of the Constitutional text, as if it were independent of the ideological groundwork of the Constitution itself. Thus, the Constitutional text concerning discrimination can only truly be understood within the context of a nation's belief system. For example, to fully appreciate the Canadian anti-discrimination law, one must understand it as it exists in concert with the expressly recognized principle of multiculturalism, central to Canadian society.²²

Secondly, one cannot forget that the constitutional provisions pertaining to nondiscrimination may or may not require an approach that heeds the historical and political context within which the provisions were created. For example, while the 13th Amendment of the Constitution of the United States was adopted to formally end slavery, judicial interpretation throughout the years has undeniably expanded it to include the guarantees of equal rights and personal liberty, which in principle, was what the 14th Amendment was designed to do.²³

In Mexico, an interesting debate has taken place in the last few years concerning the Constitutional Reform of 2001. As a result of this debate, a clause that

¹⁸ While Article 9.1 of the South African Constitution guarantees that, "[e]veryone is equal before the law and has the right to equal protection and benefit of the law", Article 9.3 adds that, "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." S. AFR. CONST. 1996 art. 9.1, 9.3.

¹⁹ Article 21 of the Venezuelan Constitution states that, "[n]o discrimination based on race, sex, creed or social standing shall be permitted." CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA art. 21.

²⁰ Article 1.1 of the Chilean Constitution details that, "[p]ersons are born free and equal, in dignity and rights". CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONSTITUTION], Art.1. Article 19, section 2 states, "[t]he Constitution guarantees all persons equality before the law. Neither the law nor any authority may establish arbitrary differences", also stating in Section 16.3 that, "[a]ny discrimination which is not based on personal skills or capability is prohibited, although the law may require Chilean citizenship or age limits in certain cases." *Id.* art. 19(2), art. 19(16).

²¹ *Id.* art. 1, art. 19.

²² Multiculturalism is a fundamental characteristic of Canadian identity and heritage. Canada works hard to support and to encourage not only respect for each and all of its diverse cultures, but also to actively promote cultural expression. It furthermore recognizes the freedom of its citizens to maintain, enjoy, and share in its celebrated diversity while total, equal, and collective participation by all individuals is encouraged regardless of origin or cultural background. Canada's policy of multiculturalism maintains, for example, that all Canadians have an equal opportunity to obtain employment and to introduce policies, programs, or measures that support both individual and collective contributions from all cultural backgrounds. These are designed to stimulate the understanding and respect of Canada's diverse society and integrate the linguistic and cultural knowledge of all individuals and ultimately guide Canada toward appropriate responses to its multicultural reality. *See* HUGO ROJAS, *EL PRINCIPIO DE LA MULTICULTURALIDAD: UNA PROPUESTA JURIDICA PARA PROMOVER Y PROTEGER NUESTRA DIVERSIDAD CULTURAL*, 83-84 (Arzobispado de Santiago 2002).

²³ U.S. CONST. amend. XIII, XIV.

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provides protection to victims of discrimination was included in the Mexican Constitution on August 14, 2001.²⁴

The 1853 Constitution of Argentina, which has survived vast changes and numerous policy modifications²⁵, is also an interesting case. Presently, the Constitution recognizes the relevance of inverse discrimination, underscoring the necessity of adopting measures to allow the ongoing evaluation of the opportunities provided to those who, because of their race, sex, religion, social condition, etc., are subject to unequal treatment. Section 75(23) of the Constitution authorizes the legislature to pass laws and to promote affirmative action measures that guarantee genuine equality of opportunity and treatment and total enjoyment and exercise of rights recognized by the Constitution and by international treaties on human rights, particularly with respect to children, women, the elderly and those with disabilities.²⁶ This Constitution would not exist if not for the favorable political happenstance sparked by the discussion to improve the condition of minority groups.

In South Africa, the system of apartheid ended in 1994 and was replaced by the African National Congress (ANC). Within this political process of change, a new Constitution was enacted that recognized the equality of all citizens and placed value in the diversity of South Africa. Article 1 of the Constitution of 1996 declares that South Africa fundamentally holds true to the idea of human dignity, the striving for equality and the advancement of the human rights and liberties, and anti-racism and anti-sexism, among other values.²⁷ While keeping in mind the historical oppression suffered by South Africa's cultural minorities, it is important to note that the spirit of its new Constitution has raised public awareness of discrimination and helped the nation aspire to achieve genuine equality under the law among all its citizens.²⁸

²⁴ CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended, Art. 1.3 (Mex.).

²⁵ The Constitution was amended in 1860, 1866, 1898, 1949, 1956, 1957, 1972, and 1994.

²⁶ CONST. ARG. 1996 § 75(23) (Arg.).

²⁷ S. AFR. CONST. 1996 art. 1

²⁸ Article 16 of the South African Constitution addresses freedom of expression, stating that every individual has the right to freedom of expression, which includes: freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research. S. AFR. CONST. 1996 art. 16. However, such freedom of expression does not extend to propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender, or religion and that constitutes incitement to cause harm. While recognizing the relevance of egalitarian access to mass media, the South African legal system restricts journalistic work used to cause hatred or to discriminate. *Id.* art. 16.2. Article 9, of the Bill of Rights, declares that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth, and further prohibits any person from unfairly discriminating directly or indirectly against anyone on one or more of the like grounds. *Id.* art. 9.3. It is emphasized here that this is one of the first instances of constitutional protection against discrimination for gays and lesbians in the world. Such an unambiguous articulation of these protections creates a new standard as concerns substantiating discrimination and obtaining appropriate remedies. This extensive list legitimizes South Africa's commitment to defeat social and political inequalities. Article 9 is reinforced by other related guarantees, such as Articles 10, 11, and 15, which guarantee the right to human dignity, life and freedom of religion, and belief and opinion, respectively. *Id.* arts. 10, 11, & 15. In the end, the constitutional acknowledgment, with great emphasis on the deliberate ordering and

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This objective has been reinforced by the jurisprudence of the Constitutional Court.²⁹

There are two additional aspects of the above debate, namely 1) the possibility of using international law in local courts to extend the protection against discrimination; and 2) if a non-discriminatory principle is recognized in the Constitution, which legal mechanisms in each system are most appropriate to be used by the victims.

B. Discrimination in International Law

Some legal systems have not yet incorporated any or all “fundamental rights”, as defined under international law, into their own domestic law. This section offers a brief review of the relevant international law which contributes to the prevention and sanctioning of discrimination. For various reasons, international norms and standards are becoming increasingly more influential on domestic law.

The multitude of international multilateral agreements regarding the protection of individuals against discrimination is one of the most important legal developments resulting from the period of reconstruction following the end of World War II. The international standards concerning these agreements were established in the International Covenant on Civil and Political Rights³⁰ and the International Covenant on Economic, Social, and Cultural Rights³¹, as well as complemented by many more documents.^{32 33}

specificity, inculcates the absolute and genuine constitutional and societal importance of anti-discriminatory values. In fact, it is very difficult to find an instance of discrimination which would not be protected under the South African Constitution. Yet this anti-discriminatory sentiment extends far beyond the above-mentioned protections. South Africa created penal legislation sanctioning discriminatory and racist conduct and adopted affirmative actions to secure much delayed benefits for those social groups historically discriminated against and those who continue to suffer inequalities as a result of apartheid.

²⁹ For example, in *Harksen v. Lane*, the Constitutional Court held that to completely understand a discrimination case, it is necessary to fully appreciate the social standing of a victim in South African society, which includes understanding that they most likely suffered discrimination under apartheid as well. *Harksen v Lane & Others* 1998 (1) SA 300 (CC) (S. Afr.).

³⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2.1, U.N. Doc. A/6316 (Dec. 16, 1966).

³¹ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) art. 2.2, U.N. Doc. A/6316 (Dec. 16, 1966).

³² American Convention on Human Rights, “Pact of San Jose, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36; International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX) U.N. Doc. A/6014 (Dec. 21, 1965); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES 44/736 (Nov. 20, 1989); Inter-American Convention for the Elimination of All Forms of Discrimination Against Persons with Disabilities, Organization of American States, June 7, 1999, AG/Res. 1608 (XXIX-0/99); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, “Convention of Belem Do Para”, Organization of American States, June 9, 1994, AG/Res. 1740 (XXX-O/00), reprinted in 33 I.L.M. 1049 (1994); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, Organization of American States, Nov. 17, 1988, O.A.S.T.S. No. 69, reprinted in 28 I.L.M. 161 (1989); Convention Against Discrimination in Education, 429 U.N.T.S. 93, (May 22, 1960); Equal Remuneration Convention, June 29, 1951, 165 U.N.T.S. 303; Discrimination (Employment and

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Whether these documents are able to effectuate any real change remains to be seen, as their level of efficacy depends wholly on the will of the signatory states to fulfill the declarations found within them.

C) The Incorporation of International Law into Domestic Law

The relationship between international law and domestic law is one plagued with controversy in many legal systems. For example, when faced with a conflict between an international treaty and a statute, the determination of which law will prevail is dependant on the legal system in question, as each system has its own answer. Yet, a tendency to promote domestic law as an instrument in the application of international norms exists.

The incorporation of international law into the 1994 Constitutional Reform of Argentina's Constitution, for instance, presents an interesting case. This reform granted constitutional rank to several instruments of international law.³⁴ Thus, by incorporating international standards of equality and nondiscrimination, the Argentine Constitution is able to protect its citizens from unfavorable distinction

Occupation) Convention, June 25, 1958, 362 U.N.T.S.31; Employment Policy Convention, July 9, 1964, 569 U.N.T.S. 65; Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons), June 20, 1983, 236 U.N.T.S. 1985; Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169, 72 Official Bull. 59, Sept. 5, 1991; ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour Convention, June 17, 1999, 38 I.L.M. 1207; United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/36/51 (Nov. 25, 1981); Declaration on Race and Racial Prejudice, UN Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V (Nov. 27, 1978); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/Res/45/158 (Dec. 18, 1990); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/47/49 (Dec. 18, 1992); Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, UNESCO Gen. Conf. Res. 4/9.3/2, 20th Sess., Doc. 20c/20 Rev. (1978); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948); and the Compilation of International Norms and Standards Relating to Disability, Oct. 2003, *available at* <http://www.un.org/esa/socdev/enable/comp00.htm>.

³³ For example, Argentina, Brazil, Canada, Chile, Columbia, Ecuador, Mexico, Peru and Uruguay, amongst others, have ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination Against Women, Convention No. 100 of OIT on Equality and Convention No. 111 of OIT on employment discrimination. However, Argentina, Brazil and Peru have yet to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

³⁴ These documents include: the American Declaration of the Rights and Duties of the Man, O.A.S. Res. XXX, (1948); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) art. 2.2, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2.1, U.N. Doc. A/6316 (Dec. 16, 1966); International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX) U.N. Doc. A/6014 (Dec. 21, 1965); the American Convention on Human Rights, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36.; Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (1984); and the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES 44/736 (Nov. 20, 1989).

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due to his or her race, religion, nationality, sex, social orientation, physical features, language, or other defining characteristics.³⁵

On the other hand, the situation in Chile is quite different. The 1980 Pinochet Constitution does not fully embrace the principle of nondiscrimination. Yet Article 5 of the Chilean Constitution has extended the constitutional guarantee to specific fundamental rights found in the international treaties that Chile has ratified.³⁶ Chileans are guaranteed both the human rights established in international treaties ratified by the Congress and the guarantees provided in Article 19 of the Constitution.³⁷ Consequently, Chilean judges and lawyers engage in a vigorous debate concerning where exactly international treaties fall in the hierarchical list of sources of the law. The prevailing opinion holds that, once a treaty has been ratified by the Congress, any treaty specifically referencing human rights has constitutional rank, and all laws must be in conformity with the treaty.³⁸ However, if the treaty discusses other matters outside of human rights, it is not given constitutional rank and instead is given the same weight as a statute.

D) Anti-Discrimination Statutes

Having briefly discussed constitutional inclusion of the principle of nondiscrimination and outlined the domestic inclusion of international law concerning this principle, the third variable I will discuss is the anti-discrimination legislation that exists in each country.

Legal actors are faced with the challenge of deciding which legal instruments are most pertinent to ensure that victims of discrimination can exercise their rights unerringly and without delay, obtain the appropriate reparations, and apply the appropriate legal sanctions to the discriminatory actor. Some countries have been able to move beyond the simple declarations of broad principles of good intentions and have approved specialized laws, which outline prohibited behaviors and actions.³⁹ An example of such a law is Brazil's Anti-Racism Law which

³⁵ If a person is discriminated against, they may file a summary proceeding regarding constitutional guarantees. CONST. ARG. ch. II § 43. Here, both the Public Defender and the Ombudsman retain the ability to file such a summary proceedings. *Id.* ch. VII § 86. Where the action is initiated by the Ombudsman, such action is deemed to be a class action.

³⁶ "Sovereignty rests essentially with the Nation. It is exercised by the people through the plebiscites and periodic elections, as well as by the authorities established by this Constitution. No group of people nor any individual may assume its exercise. The exercise of sovereignty recognizes as a limitation the respect for the essential rights originating from human nature." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 5.2. This text was incorporated in the Pinochet-era Constitution after approval by voting plebiscite, in the months preceding the presidential election of December of 1989. Law No. 18,825, Aug. 17, 1989. The text, along with 54 other modifications to the 1980 Constitution, came as a result of intense negotiation that occurred after Pinochet *lost the popular vote*. This Constitution continues to be effective in Chile, even though it has been subject to continuing modification. Chile's right-wing political parties have been opposed to the recognition of the principle of non-discrimination in the Constitution.

³⁷ *Id.* art. 19.

³⁸ See MARIO VERDUGO, EMILIO PFEFFER, HUMBERTO NOGUEIRA, DERECHO CONSTITUCIONAL, I, 123 (Editorial Jurídica de Chile 1994).

³⁹ For example, Canada's Employment Equity Act of 1995. Employment Equity Act 1995 S.C., ch. 44. Article 5 states that, "[e]very employer shall implement employment equity by (a) identifying and

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sets forth a detailed list of prohibitions and their corresponding criminal sanctions.⁴⁰

A victim of discrimination in Chile, however, does not have access to such protective mechanisms as those set forth by other countries. While this certainly does not bar Chilean citizens from seeking recourse for discrimination,⁴¹ they are unable to pursue a case of discrimination *per se* because discrimination is not specifically included in any general list of prohibited conduct.⁴²

eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and (b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representations in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees." *Id.* In Article 9 of Mexico's Federal Law on the Prevention and Elimination of Discrimination, however, discriminatory conduct is found to include the following: 1) prevention or deprivation of public access to education, scholarships and incentives to stay in centers of learning; 2) prohibiting the free election of employment or restriction of opportunities to access, duration or upward movement within employment, establishing differences in payment, prestige and labor conditions for similar jobs; 3) limiting access to professional development programs; 4) denial or restriction of access to available information on reproductive rights and the prevention of individual determination regarding the number or spacing of children; 5) denial or restrictions to medical services and attention, and the prevention of participation in decisions regarding medical or therapeutic treatment; 6) prevention of equal participation in civil and political organizations, or of any other nature; 7) preventing the free exercise of property rights and the administration and disposition of goods of any other type; 8) limitation on or prevention of the freedoms of expression, thought, conscience, religion or religious practices or customs, whenever these are not adverse to public order; 9) restriction of access to social security and its benefits or the establishment of limitations, creating restricted access to medical insurances; 10) limitations on the right to food, housing, recreation and medical services and attention; 11) prevention of access to institutions, public or private, which serve the public, so as to limit access to and free enjoyment of public places; 12) exploitation or abuse of any person or social group; 13) restrictions on participation in any sports, recreation or cultural activities; 14) the encouragement or incitement of hatred, violence, rejection, deceit, defamation, injury, persecution or exclusion; 15) the act or promotion of psychological or physical mistreatment based on physical appearance, manner of dress, manner of speech, or sexual preference; etc. Ley Federal para Prevenir y Eliminar la Discriminación, Última Reforma DOF 27-11-2007.

⁴⁰ Law no. 7,716 (Anti-Racism Law, 1989, modified by laws no. 8,081, of 1990, and no. 9,459, of 1997).

⁴¹ In instances where the integral principle of equality before the law is attacked, a victim of discrimination may resort to the respective Court of Appeals, which shall immediately take the necessary steps to re-establish the rule of law and ensure due process protection to the victim. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONSTITUTION], art. 20 (Chile). With regard to employment law, a victim of discrimination is able to invoke Article 19, number 16 of the Constitution and Article 2 inc. 2 of the Labor Code. Article 2 inc. 2 of the Labor Code specifically prohibits discrimination in all labor relations by asserting that discrimination, exclusion or preferences based on race, color, sex, union affiliation or membership, religion, political opinion, nationality or social origin are contrary to the most basic principles of labor law and consequently declares that no employer shall condition the hiring or firing of workers on any of the above-mentioned factors. See CÓDIGO DEL TRABAJO, Art. 2.

⁴² My position with respect to Chilean legislation is critical, because victims of discrimination are not able to find adequate means to solve their problems, and this happens partly because, any like list of prohibitions, it is lacking. However, the situation is not completely dire. Rather, norms created in the past ten years to benefit women, the indigenous population, and the disabled, as well as other norms which secure even greater levels of equality among the people, have established a stable foundation on which such a catalogue may take its roots. Further, advancements in public policy relating to tolerance and antidiscrimination (e.g., Programa Tolerancia y No Discriminación, Plan por la Igualdad y la No Discriminación, etc.) work to steady the same foundation. However, any legislative change is yet to come. And, while diverse parliamentary motions have failed in the last ten years, Congress is now discussing a law on the prevention and sanctioning of discrimination.

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In contrast, something very different occurs in the United States. Using the Equal Protection Clause of the 14th Amendment, the United States Congress has expanded the reach of the Constitution to include many previously unprotected classes.⁴³ Furthermore, the Civil Rights Act of 1964 had the greatest impact in the promotion of civil rights, prohibiting discrimination on the basis of race, sex, religion, and national origin in the public forum (e.g., restaurants, hotels, places of leisure and diversion, etc.).⁴⁴ For example, Title IV of the Civil Rights Act prohibits discrimination in all federally funded programs and activities including the public education system,⁴⁵ while Title VII prohibits discrimination in the workplace.⁴⁶ In addition, the Congress has subsequently expanded the umbrella of civil rights through the enactment of additional statutes.⁴⁷

Furthermore, another point that bears mentioning is the tendency of agencies or courts to broadly interpret such regulations, thereby expanding the types of conduct that fall under the regulation. For example, imagine a sign that prohibits dogs posted on the entrance of a restaurant. While the average person would probably not interpret the sign to mean that dogs are the only animals prohibited and then subsequently attempt to enter the establishment with a pet monkey, others may understand this sign to mean that their pet alligator is welcome. The average person's reading of this situation follows the Roman interpretation of law, whereby one basic rule served as an example of a whole category of conduct it was meant to encompass.⁴⁸ With regard to discrimination, it is interesting to observe how administrative authorities and courts of justice react to the same phenomena, and either choose to expand or limit their understanding of what constitutes discrimination when unanticipated situations arise. Argentine legislation is a good example of a working system which does not provide a detailed list of prohibited acts, instead granting ample authority to the courts to define discrimination in each instance. In effect, Law 23592 was created to establish mea-

⁴³ U.S. CONST. amend. XIV.

⁴⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).

⁴⁵ *Id.* § 2000d.

⁴⁶ 42 U.S.C. § 2000e-2.

⁴⁷ See The Voting Rights Act, 42 U.S.C. § 1973-1973aa-6 (1965); the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1974); the Americans with Disabilities Act, 42 U.S.C. § 12101 (1990); the National Voter Registration Act, 42 U.S.C. § 1973gg (1993); the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-6 (1986); the Voting for Accessibility the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (1984); the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1980); the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994); the Police Misconduct Provision of the Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141 (1994); and section 102 of the Immigration Reform and Act Control (IRCA), 8 U.S.C. § 1101 (1986). Of course there are some areas that remain unregulated i.e., discrimination in private clubs is permissible in some states.

⁴⁸ For example, the Canadian courts have interpreted the Canadian Human Rights Act extensively, incorporating even those discriminatory "acts" not explicitly cited in the text, like sexual orientation. The Canadian Human Rights Act is reinforced by Part I of the Canadian Bill of Rights which protects Canadians against discriminatory acts based on ethnicity or national origin. Canadian Bill of Rights, 1960. S.C., ch. 44 (Can.).

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asures to be taken against those who arbitrarily prevent the implementation of any individual's fundamental rights, as guaranteed by the National Constitution.⁴⁹

In addition, the procedural development of the law must be efficient and expedient. The administrative system facilitating the initiation of such laws should function without the need for a lawyer or the tedious and time-consuming task of sending emails, faxes, and posts. These are problems which beleaguer many administrative agencies like the Canadian Human Rights Commission, the South African Human Rights Commission, the National Council for the Prevention of Discrimination, as well as the United States Department of Justice, Civil Rights Division.⁵⁰

IV. Legal Responses to Discriminatory Actions

It is one thing to examine the variety of ways in which the law defines discriminatory actions and quite another to explore the divergent legal mechanisms and remedies made available to the victims of discrimination. This section will explain the significance and function of these legal mechanisms.

A) Correction of the Discriminatory Practice

If my children are not accepted to a school because of the color of their skin, if I am not hired by an employer due to my religious beliefs or my DNA,⁵¹ if I am not allowed to live in the apartment of my choice because of my sexual orientation or the clothes that I wear, or any range of other discriminatory actions, the first thing I would do is employ the law to address my specific problem and attempt to get the result I originally intended to achieve. While such a reaction seems overly simplified, such a reaction is optimal even though worldwide strug-

⁴⁹ Law No. 23592, July 23, 1988, [26458] B.O. 1. *See also* Law No. 24782, 25608, and 28618 which provides a more complete understanding of Argentine legislation as concerns this topic. With respect to the definition and dynamic amalgamation of normative adjustments, one of the most notable Canadian remedies is The Legal Commission of Canada. Created by the Ministry of Justice and made up of experts in various disciplines, its purpose is to promote those normative changes necessary to ensure the reinforcement of rights and guarantees.

⁵⁰ When discussing applicable procedures and remedies in the case of the United States, it becomes necessary to distinguish the various types of discrimination. If a civil rights violation is deemed to be criminal, perhaps because it encompassed a threat or use of force, police abuse, unlawful arrest, property damage or religious discrimination, etc., the victim or a state agency, such as the FBI, the Immigration and Nationalization Service (INS), or the Department of Housing, can file a complaint with the Criminal Section of the Civil Rights Division of the Department of Justice. The facts of the case will then be investigated by the office of the public prosecutor, whereupon a grand jury will be given the task of determining if the evidence is sufficient enough to warrant a trial. The burden of proof rests on the prosecutor, who must prove that the defendant is guilty beyond a reasonable doubt. If the defendant is found guilty, the applicable sanctions vary, depending on the severity of the crime, ranging from community service to financial compensation for damages to imprisonment. If a civil rights violation is not classified as criminal, a victim may file a complaint with the appropriate federal agency. Where no federal agency is equipped to handle the specific complaint, the complaint can be submitted to the Civil Rights Division of the Department of Justice which retains the ability to act as an auxiliary in such cases. Generally, possible remedies include the indemnification of damages, injunctive relief and other civil sanctions.

⁵¹ *See generally* Hugo Rojas, *Labor Law and Genetic Discrimination in Chile*, 16 FLA. J. INT'L L. 561 (2004).

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gles to combat discrimination demonstrate the difficulty of obtaining a legal remedy, especially one that is affordable to the masses. In Argentina, people subjected to discrimination or deprivations of their guaranteed rights under the Constitution have the right to demand that the discrimination or deprivation cease.⁵² If the discrimination or the deprivation of rights continues, the citizen can bring the matter to the police or the appropriate civil court. These institutions are then obligated to acknowledge the accusation and to initiate legal actions that allow the citizen to receive compensation for both direct and indirect damages.

The capacity of the law to respond to discrimination depends both on the will and the interest of lawmakers as they identify norms that determine prohibited discriminatory behaviors. The law's ability to respond also depends on the way in which the judiciary and the government, in considering human rights violations, understand what constitutes discrimination.

B) The Right to Compensation

When a person is discriminated against, he/she will seek to put an end to the discrimination by employing the applicable laws. However, in many cases, the victim of discrimination will not be satisfied by the simple cessation of such discrimination and will want to be compensated for all the damages he has suffered.

In general, most legal systems recognize the right to compensatory damages. Familiarity with the divergent legal mechanisms available to ensure that the victim is compensated is absolutely imperative in the study of comparative anti-discrimination law. In terms of legal proceedings, it is interesting to observe how legal systems choose to format and organize the legal mechanisms available to the victim to obtain compensation. In some cases, a victim must first obtain a criminal judgment in his/her favor in order to receive compensation. In other cases, both the criminal and civil proceeding can advance simultaneously and independently of one another.⁵³ Moreover, it is equally fascinating to delve into the varying costs of initiating a lawsuit for damages, the amount of time it takes

⁵² Law No. 23592, July 23, 1988, [26458] B.O. 1.

⁵³ For example, Brazilian civil legislation recognizes the right of a victim of discrimination to file a civil action for moral damages. From a procedural point of view, it is necessary to make a distinction between the different amounts of requested indemnification. If the plaintiff seeks damages of less of US \$4,800, the procedural rules of "expedited civil judgment" apply. However, if a larger amount is sought, general procedural rules are followed. A victim who has obtained a favorable penal sentence will consequently remain in favor in the civil forum, because the extent of the damage suffered has already been demonstrated. When the judiciary holds that a crime has indeed been committed, and the defendant is declared guilty, it is not necessary to demonstrate the same facts again in civil court. Instead, a copy of the criminal sentence may be given to the court along with a request for indemnification. Where a condemnatory penal sentence is absent, the burden of proof rests on the plaintiff, who must then plead his case and identify all damages. Victims of employment discrimination may also rely on civil legislation to secure their rights, in using the Constitution of 1988 which declares that civil legislation is applicable to "employment/labor law," which strengthens the force of antidiscrimination mechanisms in the private sector. In the event that the victim of discrimination is a public servant and the discriminatory actor is the victim's superior, the victim can use the 1988 Constitution as well as the administrative laws. (I owe these explanations to Humberto Dalla (Rio de Janeiro, 2005)).

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to resolve the matter, the variances in the judgments of such cases, and the standard compensation awarded to the victim.⁵⁴ It is also interesting to examine whether legal systems tend to encourage settlement negotiation before proceeding to trial.

C) The Application of Criminal Sanctions

Many different legal systems have employed criminal sanctions to control discrimination. For example, Brazil's Anti-Racism Law,⁵⁵ paragraph 130 of the German Penal Code⁵⁶, (sanctions the instigation of racial hatred and other forms of discrimination), Articles 90 and 137 of the Dutch Penal Code⁵⁷ (after defining discrimination, it reflects on the diversity of discriminatory conduct and the incitation of hatred and discrimination), Article 225 of the French Penal Code⁵⁸, sections 318 to 320 of the Canadian Penal Code⁵⁹, Article 154 of the Puerto Rican Penal Code⁶⁰, and Articles 22, 510 to 512 of the Spanish Penal Code.⁶¹

⁵⁴ A highlight of the American model is the possibility of alleging the "extra-contractual responsibility" of the discriminating agent in a tort suit. Here, the victim of discrimination has the option to demand compensation for damages in the civil courts of the respective state. Depending on the circumstances, a plaintiff might reference the strict liability, negligence, or intentional conduct of the other party. In these cases the victim is responsible for providing her own legal representation, as the Department of Justice is not authorized to initiate such a suit. The legal standard of proof here differs from a criminal case in that the standard is lowered from "beyond a reasonable doubt" to a "preponderance of evidence".

⁵⁵ Código Penal [CP], Lei no. 7716, 1989. Brazilian legislation both prevents and sanctions discrimination in its 1988 Constitution. A victim of discrimination may cite discrimination on the basis of sex, sexual orientation, gender, race, ethnicity, age, religion, political opinion, etc. Brazilian law further distinguishes discrimination as having criminal and/or civil consequences.

⁵⁶ Strafgesetzbuch [StGB] [Penal Code] ¶130, Nov. 13, 1998.

⁵⁷ Wetboek van Koophandel [Sr] [Penal Code] Art. 90, 137, 1881, amended 1994.

⁵⁸ Code pénal [C.PÉN] Art. 225, 1994.

⁵⁹ Canada Criminal Code, R.S.C. 1985 ch. C-46, § 318 (2008). Section 318 establishes the crime of genocide, understood as the support or promotion of the commission of homicide of persons who belong to a clearly identifiable group based on their color, race, religion or ethnic origin. The intention or motivation of the aggressor is the destruction of members of the target group. If the accused is found guilty, (s)he is sentenced to less than five years of incarceration. Section 319 prohibits the promotion of hatred through the media and in public places against a particular group or the incitement of social unrest. *Id.* § 319. The penalty for such acts is less than two years of incarceration. The Anti-Terrorism Act of 2001 added the diffusion of aggressive messages or discriminatory propaganda on the internet to the list of hate crimes. Section 320.1 provides that a tribunal can order the archives on the server or original computer erased. The penal legislation will also consider hate or prejudice to be an aggravating factor in the commission of other crimes. Canada Criminal Code, R.S.C. 1985 ch. C-46 § 718.2(a)(i) (2008).

⁶⁰ Código Penal, 33 L.P.R.A. §§. 4171-4195 (1974). The Penal Code of 1974 includes a range of crimes against civil rights and explicitly sanctions illegal threats and discrimination on the basis of political beliefs, religion, race, color, sex, social status or national origin. Discriminatory acts are prohibited in the public sphere and means of transportation, in all advertisements, on the premises of private clubs, and in any sale of or transaction involving property *Id.* § 4194. One of the most controversial topics in recent times concerns the contents of Article 103 of the Puerto Rican Penal Code (1902), which penalizes sexual relations between persons of the same sex or acts against human nature. 33 L.P.R.A. § 4065. The penalty for such crimes is ten years of incarceration. In 1974, revisions to the Penal Code distinguished between homosexual conduct and bestiality. In 1999, the constitutionality of the law was called into question, the resolution of which is still pending.

⁶¹ Código Penal [C.P.] Art. 510-512. The Spanish Penal Code contains a variety of sanctions for the provocation of discrimination as well as discriminatory insults. In addition, racist motives, anti-Semitism or discrimination on the basis of ideology, religion, ethnicity, race, national origin, sex, sexual orienta-

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In general, criminal anti-discrimination legislation can be classified as follows:

1. Legislation that defines specific discriminatory acts or omissions that greatly offend human dignity and fundamental rights and thus merit criminal sanctions.⁶²

2. Legislation that, standing alone, does not address discrimination through any provision or series of provisions, but nonetheless is applied by courts to acts of discrimination and which often results in stiffer penalties for the wrongdoer than if discriminatory intent was not present. For example, if a crime (e.g. robbery) is committed with the intent to discriminate, the court may choose a higher penalty than if such discriminatory intent was absent. Some legislatures forgo establishing special crimes and instead increase the applicable punishment to the case at hand. They consider discrimination only an aggravating factor in the overall crime.

3. Legislation that combines the two previous alternatives and defines special discriminatory crimes while also providing a higher sentencing penalty when an individual commits a crime with the intent to discriminate.⁶³

V. Institutions in Charge of the Prevention and Punishment of Discriminatory Conduct

In order to authentically engage in a comparative study of discrimination law, one must be able not only to identify the divergent definitions of discrimination and the legal reactions to it, but also to understand who or what puts these legal reactions into play. This section will address the role of the courts in the sanctioning of discriminatory actions and the role of governmental agencies in the promotion of diversity.

tion, health, or disability will be considered an aggravating factor in the commission of other crimes. C.P. Art. 22(4).

⁶² On September 2, 1999, the Legislative Assembly of the Federal District of Mexico reformed Article 281 of the Penal Code, incorporating discrimination on the basis of sexual orientation as a crime. Código Penal Federal [C.P.F.], *as amended*, Art. 281, 14 de Agosto de 1931. However, on July 16, 2002 a new version of the Penal Code of the Federal District was published, with Article 260 establishing a prison sentence one to three years of prison and of 52 to 200 days in fines for discrimination on the basis of “age, sex, pregnancy, civil status, race, ethnic origin, language, religion, ideology, sexual orientation, skin color, nationality, origin or social status, work or profession, economic position, physical characteristics, disability or state of health”. C.P.F. Art. 260.

⁶³ Argentina is an example of a country that combines both aspects. Article II of Law No. 23.592 states: “The minimum punishment is raised by one third and the maximum by one half for any crime prohibited by the Penal Code or complementary laws when the crime is committed because of hatred for a race, religion or nationality, or the object of the crime is to destroy all or part of a national, ethnic, racial or religious group. Under no circumstances can the penalty exceed the maximum penalty for that type of crime.” Article 3 states that: “Those who participate in an organization or distribute propaganda based on ideas or theories of superiority of one race or religious group, origin or color, with the goal of justifying or promoting racial or religious discrimination in any form shall be sentenced to one month to three years in prison.” In addition, “those who support or incite, in whatever form, persecution or hatred of a person or group of persons because of race, religion, nationality or political ideas are subject to the same penalties.”

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A. Courts

The courts of justice are imperative in levying sanctions for discriminatory actions. Each country must not only determine the treatment that will be accorded to discriminatory actors, but also establish the institutions that are given jurisdiction over human rights violations.

One of the most interesting points to discuss in comparative law is citizens' access to justice in various countries. If the victims of discrimination cannot, or choose not to resort to the courts when they are discriminated against, in spite of the fact that discriminatory conduct is prohibited by law, then something is awry in the judicial system. An effective and inclusive legal system must pay attention to the people who believe they have access to justice through the court system, and even more importantly, to the people who believe they do not. In addition, an effective and inclusive legal system not only concerns itself with ensuring access to justice, but also endeavors to provide access that is consistently of high quality.⁶⁴

A second point worth investigating is the nature of the procedures to which the courts adhere. If the probative rules are too demanding, the judgments too long and drawn out, the proceedings too bureaucratic, the language used too technical, or the trials written instead of oral, it is quite possible that the victims of the discrimination will choose to keep silent rather than resort to such unwelcoming and intimidating tribunals.⁶⁵

It is also essential to understand the particulars of the processes. If one is accused of a crime, it is necessary to understand whether the accusation is formulated by the public prosecutor, directly by the victim, or if the system allows for both options. However, if financial compensation is sought, the victim often has an economic stake in the action and is in a better position to formulate a demand. In addition, one should also inquire into whether the legal system allows class actions, since discrimination unquestionably affects groups of people as well as individuals.

I maintain, however, that an efficient model of conflict resolution, when discrimination is at the nucleus of the conflict, cannot rest solely on the capacity of the courts to apply the respective law and institute criminal sanctions. The parties must also have the opportunity to negotiate and to find a proper solution to the conflict, when possible, as the cessation of discriminatory action is the ultimate goal.

⁶⁴ A good example of access to justice is The Court Challenges Program in Canada. Public funds are used to support NGOs that represent minority groups, academic centers, lawyers' associations, etc., so that these groups can provide legal assistance to individuals or groups whose rights have been violated. This program is interesting because, in this case, the state has given civil society the complex task of protecting the rights of its citizens against acts of discrimination whether on the part of individuals or the state itself. *See also* Court Challenges Program of Canada, <http://www.ccpcj.ca> (last visited June 17, 2008).

⁶⁵ The National Commission for the Prevention of Discrimination in Mexico: 1) contributes to cultural, social and democratic development in the country; 2) brings about actions that prevent and eliminate discrimination; 3) creates public policies that favor equality of opportunity; and 4) coordinates the effort on the part of entities within the executive branch of the government to prevent and eliminate discrimination. *See also* Ley Federal para Prevenir y Eliminar la Discriminación (2003).

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B. Governmental Agencies

If one reviews the role of the executive branches in the prevention and sanctioning of discrimination across the globe, he will observe very diverse models of governmental organization. In some cases, a governmental body is charged with the task of overseeing the prevention and prohibition of discrimination, while at other times the task is assigned to specialized organizations. In some cases, it is impossible to identify which organization is in charge of enforcement, as the job has been diffused amongst a number of them.

A typical example of moderate dispersion is the United States. The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Acts of 1964 and 1991⁶⁶, Titles I and V of the Americans with Disabilities Act⁶⁷, the Age Discrimination in Employment Act of 1967⁶⁸, the Equal Pay Act of 1963⁶⁹, and Sections 501 and 505 of the Rehabilitation Act of 1973.⁷⁰ The Education Opportunities Section of the Civil Rights Division enforces federal statutes which prohibit public school officials from engaging in discriminatory practices involving both elementary and secondary schools and institutions of higher education.⁷¹ The Housing and Civil Enforcement Section of the Civil Rights Division has the multifaceted function of enforcing the Fair Housing Act⁷², the Equal Credit Opportunity Act⁷³, Title II of the Civil Rights Act of 1964⁷⁴, and the Religious Land Use and Institutionalized Persons Act.⁷⁵ The Special Litigation Section of the Civil Rights Division is entrusted with enforcing the Civil Rights of Institutionalized Persons Act⁷⁶, the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994⁷⁷, Title III of the Civil Rights Act of 1964⁷⁸, the Omnibus Crime Control and Safe Streets Act of 1968⁷⁹, the Freedom of Access to Clinic Entrances Act of 1994⁸⁰, and the Religious Land Use and Institutionalized Persons Act⁸¹. The Voting Section of the Civil Rights Division of the Department of Justice oversees and supports effective enforcement of the Voting

⁶⁶ 42 U.S.C. § 2000(e) (2000), *amended by* 42 U.S.C. § 1981 (1991).

⁶⁷ 42 U.S.C. §§ 12111 & 12201 (2000).

⁶⁸ 29 U.S.C. §§ 621-634 (2000).

⁶⁹ 29 U.S.C. § 206(d) (2000).

⁷⁰ 29 U.S.C. §§ 791 & 794(a) (2000).

⁷¹ These statutes include: Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2000); the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703 (2000); the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12231 (2000); and various other federal laws.

⁷² 42 U.S.C. §§ 3601-3631 (2000).

⁷³ 15 U.S.C. § 1691 (2000).

⁷⁴ 42 U.S.C. § 2000(a) (2000).

⁷⁵ 42 U.S.C. § 2000(cc) (2000).

⁷⁶ 42 U.S.C. § 1997 (2000).

⁷⁷ 18 U.S.C. §§ 1033-1034 (2000).

⁷⁸ 42 U.S.C. § 2000(b) (2000).

⁷⁹ 42 U.S.C. § 3701 (2000).

⁸⁰ 18 U.S.C. § 248 (2000).

⁸¹ 42 U.S.C. § 2000(cc) (2000).

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Rights Act of 1965⁸², the National Voter Registration Act of 1993⁸³, the Uniformed and Overseas Citizens Absentee Voting Act of 1986⁸⁴, the Voting for Accessibility the Elderly and Handicapped Act⁸⁵, and the Help America Vote Act of 2002⁸⁶.

The American system is characterized by: a) detailed legislation on behaviors that are considered discriminatory, distinguished according to the nature of the discrimination; b) specialized agencies designed to defend the rights of those who have been victims of discrimination; c) determination of whether a mandatory agency proceeding is required and evaluation as to whether the petition has merit; d) access to the criminal courts, depending of the severity of the discriminatory act, in order to sanction the violator and afford the victim of the discrimination the appropriate remedies; and e) opportunity for the victim to also demand civil reparations. It should also be noted that, due to the application of *stare decisis* and the subsequent binding force of precedent, jurisprudential development in the United States has greater political-legal weight than in other legal systems.

Argentina represents a more concentrated model. In 1995, the government created the National Institute to Combat Discrimination, Xenophobia, and Racism (Instituto Nacional contra la Discriminacion, Xenophobia y Racismo, INADI).⁸⁷ A decentralized organization, falling under the umbrella of the Ministry of Justice and Human Rights, INADI is responsible for preparing and approving national policies, developing distinct methods to combat discrimination, xenophobia, and racism, putting those methods into action, and engaging in campaigns and investigations to reach these objectives. These responsibilities correspond to the principles established under law number 23,592 which defines the valuable nature of social and cultural pluralism and the elimination of discriminatory attitudes in general.⁸⁸ Concerning complaints of discrimination, xenophobia, and racism, the victim is able to receive free legal advice and assistance in filing a claim against any person or institution, which can then be presented at INADI or in court. In cases where the Public Ministry or the courts require specialized knowledge on matters related to the phenomenon of discrimination, INADI can serve as an expert.

The Mexican model is one of moderate concentration. The National Council for the Prevention of Discrimination (CONAPRED) is primarily responsible for combating discrimination.⁸⁹ However, the National Commission of Human

⁸² 42 U.S.C. § 1973 (2000).

⁸³ 42 U.S.C. § 1973(gg) (2000).

⁸⁴ 42 U.S.C. § 1973(ff) (2000).

⁸⁵ 42 U.S.C. § 1973(ee) (2000).

⁸⁶ 42 U.S.C. §§ 15301-15545 (2000).

⁸⁷ Instituto Nacional contra la Discriminacion, Xenophobia y Racismo, <http://www.inadi.gov.ar/> (last visited June 17, 2008).

⁸⁸ Anti-discrimination Act, Act No. 23592 of 23 August 1988.

⁸⁹ CONARE, <http://www.conapred.org.mx> (last visited June 17, 2008).

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Rights also plays a significant role.⁹⁰ If a person's fundamental rights, as recognized by Mexican law, have been violated, he is then able to go to any of the Commission's offices, either personally or via a representative, to file a complaint.

Canada offers quite an encouraging view. The state not only affords citizens the possibility of going to an agency specializing in the promotion of human rights, but also gives the agency the role of mediator when possible, allowing the agency to represent general interests in court.⁹¹ The main advantage of the Canadian model is that it is based on legitimacy, or societal support of government action. Other distinguishing features of this model include the steadfast commitment of the government to fulfill the basic principles of the Canadian state, the dedication of resources to the discussion and implementation of anti-discriminatory programs, and the monitoring of the results of such programs. This model has positively influenced countries like Australia and New Zealand.⁹²

⁹⁰ Victims of discrimination can also bring their claims to the National Commission on Human Rights which was created in 1990. In 1992, pursuant to the Law of the Commission on Human Rights, the Commission was given constitutional rank. As a result of the constitutional reform of September 13, 1999, the Commission gained even greater autonomy. For additional information, see Comisión Nacional Derechos Humanos Mexico, <http://www.cndh.org.mx/> (last visited June 17, 2008).

⁹¹ With respect to concrete mechanisms that can be used by Canadian citizens in the event of discrimination or a violation of rights guaranteed by the Human Rights Act, the victim of discrimination can go to the Canadian Human Rights Commission, the organization in charge of the administration and supervision of the Human Rights Act and the Employment Equity Act. Human Rights Act R.S.C., ch. 33 (1977). The Human Rights Act protects workers and consumers tied to organizations that are federally regulated including, but not limited to, the departments and agencies of the federal government, telephone companies, banks, airlines, buses, trains, television and radio stations, and the postal service. On the other hand, the Employment Equity Act protects women, indigenous groups, people with disabilities and other minority groups, assuring their proportional representation in the workforce. Employment Equity Act R.S.C. c. 44 (1995). The Human Rights Commission uses knowledge gained from allegations and/or complaints to set up mediation between the affected groups with the goal of vindicating the victim's rights. The Canadian Human Rights Act also confers upon the Commission the power to combat discrimination through other means such as studies, public opinion surveys, approval of special programs, revision of federal legislation and special reports to Parliament, to name a few. In addition, the Commission receives and investigates accusations and complaints. Formal complaints can then proceed to mediation or be heard by the Human Rights Court. The Human Rights Court will hear the complaint and the evidence and will render a decision providing a remedy to the victim of discrimination. Decisions of the Human Rights Court can be appealed to the Federal Court of Canada and the Supreme Court. The guarantees recognized by the Bill of Rights are as follows: dignity, equality and the prohibition of discrimination, the right to life, the right to security of person, the right to privacy, freedom of culture, belief and opinion, freedom of expression, the right of assembly, freedom of association, political rights, citizenship, the right to freedom of movement, economic, occupational and professional freedom, the right to freely associate with labor unions, the right to strike, right to health, property rights, social security, health, food and water, special rights and protections for minors, the right to a basic education in your native language, cultural, religious and linguistic rights, freedom of information, a just government, access to justice, and freedom from slavery or indentured servitude. Canadian Bill of Rights, S.C., ch. 44 (1960).

⁹² A similar situation is found in the New Zealand model. A citizen can go before the Human Rights Commission. The Commission can hear cases involving violations of fundamental rights and provide remedies for those whose rights have been violated. If agreement cannot be reached, the case can be appealed to the Human Rights Review Tribunal. A citizen also has the option of taking his case to the Office of Human Rights Proceedings (created in 2001 as part of a reform of the Human Rights Act), who will represent him and defend his fundamental rights. See generally, New Zealand Ministry of Justice, <http://www.justice.govt.nz/> (last visited on April 17, 2008) and Human Rights Commission, <http://www.hrc.co.nz/home/default.php> (last visited June 17, 2008).

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South Africa also embraces a similar approach. In addition to the important role that the Constitutional Court of South Africa has played in the transitional process towards democracy, its diffusion and expansion into specialized courts and other independent organizations (as indicated in Chapter 9 of the Constitution),⁹³ also contributes to the promotion and protection of human rights. Created in 1995, the South African Human Rights Commission contributes to the promotion, respect, observance, and protection of citizens' rights, as well as the strengthening of the constitutional democracy and the rule of law.⁹⁴ The Commission is authorized by the Constitution and the Human Rights Commission Act to: 1) monitor the observance of human rights; 2) express its concerns as per the reality of the observance of its citizens' fundamental rights; and 3) promote a respect for human rights as well as a culture of human rights.⁹⁵ It is also authorized to work with the government, the public and individuals, conduct investigations and reports on the observance of the human rights, take concrete actions to respond to violations of human rights and educate and inform the citizens. The Secretariat of the Commission is placed in charge of carrying out the policies of the Commission. Under the Secretariat are a series of directors: Chairperson, Chief, and Executive Officer, and specialized departments and committees, who all work together to accomplish the goals of the Commission. Any person who feels that his or her human rights, as recognized by South African law, have been violated, is able to go before the Commission and fill out a form explaining the incident.

VI. Conclusions

In comparing the anti-discrimination laws of Argentina, Brazil, Canada, Chile, Mexico, South Africa, and United States, I have put forth eight variables that provide normative guidelines, useful in the prevention and sanction of discriminatory actions to those individuals involved in the creation of law. The variables contemplated in this comparative work have been: (1) the recognition of the principle of nondiscrimination in the Constitution; (2) the incorporation of international law into domestic law which allows victims of discrimination to invoke relevant international treaties to redress their discrimination claims at the national level; (3) the identification of discriminatory conduct in domestic law; (4) the determination of suitable mechanisms to address such discriminatory conduct; (5) a description of the criminal consequences of such discriminatory acts; (6) the possibility of obtaining compensation for damages caused by such discrimination under civil law; (7) the roll of the judiciary in the resolution of such conflicts;

⁹³ S. AFR. CONST. 1996 § 181. "These institutions are independent, and subject only to the Constitution and the law. They must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of these institutions. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year." *Id.*

⁹⁴ South African Human Rights Commission, <http://www.sahrc.org.za> (last visited June 17, 2008).

⁹⁵ S. AFR. CONST. 1996 § 184(1); Human Rights Commission Act 54 of 1994 s. 9.

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and (8) the processes by which governments have created specialized agencies designed to both prevent and combat discrimination. The main conclusions that can here be drawn are summarized in the following.

A. Law As an Instrument in the Prevention of Discrimination

As history has shown us, the law can both contribute to the prevention of discriminatory conduct and exacerbate discrimination. However, when effective, it can play a leading role in ending the propensity of individuals and societies to discriminate, sanction discriminatory conduct, and finally, serve to secure the liberties and fundamental rights of all citizens. For these reasons, it is crucial that we comprehend the substance of diverse legal systems in order to better understand how to assist the victims of discrimination in using the law as a tool to facilitate justice. Although it is important to recognize that the law can be used as an instrument to promote social changes and prevent and sanction discriminatory actions, it is equally important to acknowledge the significance of the will of lawmakers.

B. The Regulation of Discriminatory Conduct

In comparative law, it is possible to find examples of specificity in the legal mechanisms that individuals may invoke to protect themselves against discriminatory actions or omissions. The general inclination of the observed countries and of the international community in general, is to hold the principle of non-discrimination at the highest level within the normative hierarchy of their respective legal orderings, thus placing it on par with the Constitution (e.g., South Africa, Canada, Brazil, Mexico, Colombia, Spain, and Italy, among others). When a country chooses to recognize the principle of non-discrimination in the constitution, it sends a clear sign to society that discrimination of any sort will not be tolerated. Furthermore, this recognition can have a great influence on the rest of the legal system because of the fact that all statutes must respect the constitution, leading to imminent changes to any statute incongruent with the principle of non-discrimination.

In addition, one must consider how receptive a legal system is to the incorporation of international law into its domestic law. For example, Argentina has readily embraced international law and incorporated it into its domestic law, an eagerness exhibited in the various debates that have taken place in its courts.⁹⁶ Although certainly with more caution, Chile seems to be moving in the same direction.

Another important aspect to consider is the level of detail and coordination a country displays in establishing a list of prohibited conduct. In some countries, it is possible to observe a diffusion of norms related to discrimination into different statutes or legal bodies (e.g., United States and Puerto Rico). Such diffusion

⁹⁶ My position is that if one truly wants to condemn acts committed against human dignity and public order, then it is necessary to have corresponding penalties that sanction serious acts or omissions. It is also necessary to consider discrimination an aggravating factor when the motivation of any crime is discrimination or hatred.

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should not be interpreted as a weakness of the legal system. It should instead be understood as a possible specialization in previously-regulated subjects (e.g. anti discrimination laws in labor relations in Chile, USA, and Brazil, among others). In other countries, there has been a push to concentrate regulation in a smaller number of statutes (e.g., Argentina and Mexico), the advantage of such an approach being easier dissemination of information to the people.

Furthermore, it is essential to analyze the flexibility of those laws which regulate discrimination, as well as the level of discretion the judiciary has when interpreting those laws. Some countries are more formalistic, disallowing the court to sanction conduct not explicitly prohibited by the law. Other countries are more open to using the Roman method of interpretation, using analogy to expand the list of prohibitions to other related actions (e.g., Canada). The advantage of this model is that it allows a legal system to easily update itself to manage a changing society, which will undeniably provide an ever-changing variety of unanticipated conduct and actions which should be understood as discriminatory.

It is important to take note of the differences between the legal mechanisms made available to victims of discrimination that allow them to obtain appropriate remedies. Of course, it is best to have simple, efficient legal mechanisms in place which allow the victim to activate the legal system, present a complaint, and have their claim addressed quickly. If the legal system does not provide this to its citizens, then the most genuine intentions of the legislature are in vain.⁹⁷

C. Legal Responses to Discriminatory Actions

In this comparative study, I have analyzed different mechanisms meant to put an end to discriminatory action. In evaluating the quality of such legal reactions, it is necessary to know whether the law provides a mechanism to stop the discriminatory action. Additionally, it is important to understand the intensity with which the legal system acts in terms of giving the victim the right to be compensated. While some legal systems consider certain discriminatory actions crimes themselves (e.g., Brazil and Canada), other countries consider the intent to discriminate an aggravating factor of a pre-existing crime. Other countries combine both models.

D. Institutions in Charge of the Prevention and Punishment of Discriminatory Conduct

I have analyzed the role of two important governmental organizations: the courts of justice and the agencies of government. In addition to emphasizing the competence and the awareness of the courts of accusations of discriminatory con-

⁹⁷ Constitutional norms not only must have obligatory force and general applicability but also must be effective. The effectiveness of these norms is understood through observation of the judicial system and how it reacts and responds to discriminatory acts. In order for these norms to be effective, proceedings that are just, impartial, objective, transparent and of little cost are a necessary. However, at the same time, comparative experience has demonstrated that the judicial system is not the only means of resolving a problem involving discrimination, in fact, empirical studies have shown that it is possible, often with better results, to resolve such problems through extrajudicial channels (e.g. mediation and restorative justice in Canada, etc.).

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duct, it is also important to evaluate the access to formal justice, the procedures to follow, the system of activation of judicial actions, the possibility of expanding the case to a greater number of people, and the settings of negotiation between the parties.

Within each government, it is interesting to see the degrees of concentration of attribution and responsibility inside the Executive apparatus. In some countries a greater concentration is appreciated (e.g., Argentina), while in others, there is greater dispersion (e.g., United States), normally associated with a high degree of specialization.⁹⁸

Finally, one must consider the intervention of the government in the design and evaluation of anti-discrimination public policy (in this area, Canada and South Africa are noteworthy).⁹⁹

In this essay I have provided an overview of the many ways that diverse legal cultures use a variety of norms and standards to shape and develop laws that prevent and sanction discrimination. Although the intricacies and complexities of each country create a tangled web of standards and guidelines, as this essay demonstrates, the variables set forth above can be used in a number of different ways to secure the liberties and fundamental rights of all citizens.¹⁰⁰

⁹⁸ Here, I would like to thank Martín Saavedra for his insightful explanation of Argentina's recent Constitutional shift toward a more expansive acceptance of international law.

⁹⁹ A large majority of the aforementioned legal systems contemplate the various mechanisms a victim of discrimination might use to remedy the effects of his maltreatment, thereby identifying competent organizations to denounce, support, or solve the respective legal controversies (e.g., the United States, Argentina, Canada, Puerto Rico, Mexico). Additionally, some countries have chosen to leave space within laws of general applicability, particularly when discussing indemnification (e.g., the United States and Brazil). South Africa has put into effect the South African Human Rights Commission, comprised in part of representatives of civil society who are responsible for investigating complaints and creating legal projects, among other activities. In Argentina, the modification of the 1994 Constitution and the creation of the National Institute to Combat Discrimination, Xenophobia and Racism, put discrimination more properly into focus.

¹⁰⁰ The role assumed by the government is another important factor regarding the ultimate efficacy of norms. It is evident that the state does not have to have an implicit or explicit policy to address those acts or omissions which contribute to inequality. As simple as this seems, it is quite complex, because while western democracies provide formal declarations of equality and fundamental fairness, these declarations may not in turn lead to effective public policies that create equality in any real sense. Here, I would like to reiterate two central queries in my argument: a) what are the recognized remedies? and b) what are the methods adopted or permitted by the state to assure the effective attainment of guaranteed rights?