

INSTITUTE FOR INTERNATIONAL LAW & HUMAN RIGHTS

**COMPARATIVE LOOK
AT
INTERNATIONAL STANDARDS AND BEST STATE
PRACTICES
ON
ANTI-DISCRIMINATION LEGISLATION**

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**PREPARED BY
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I. STATEMENT OF PURPOSE

The purpose of this memorandum is to identify through comparative state practice the necessary and common components of anti-discrimination legislation and implementation in contemporary states based on international standards.

II. INTRODUCTION

Equality and non-discrimination principles are enshrined in essentially every constitution around the world. Moreover, equality and non-discrimination is a foundational principle in international law, codified in numerous international treaties. Based upon a comparative and international law survey of efforts to eradicate discrimination several basic norms emerge. To the extent that a State has a constitution, the right to non-discrimination and equality should be enshrined as a right of constitutional magnitude, as is already established in the Iraqi Constitution. This, however, is only a minimal requirement. Precise legislation must be enacted that specifies the scope and content of the right to non-discrimination. As will be discussed below, different models may be utilized to effectuate the specific goals a society seeks to achieve through implementation of its anti-discrimination provisions.

Every society seeks a form of equality which reflects particular values, values that have a particular place in the history and fabric of that society. For example, in South Africa, the significant emphasis on equality serves as a clear rejection of the past in which South African society was based on a system of inequality – on apartheid. Sensitive to its legacy, the drafters of South Africa's Constitution made the achievement of the equality of opportunity a central goal. Accordingly, measure designed to protect or advance historically disadvantaged persons is permitted, if not encouraged. For its part, Europe's focus on equality incorporates specific minority rights protections due to the relatively recent increase in rapidly growing ethnic, racial and religious diversity. The final steps in the process of effective anti-discrimination strategies involve implementation, which is comprised of a dynamic process between judicial, quasi-judicial and civil society interaction. Each part of the strategic policy agenda required for effective promotion of equality will be discussed below.

III. INTERNATIONAL STANDARDS OF ANTI-DISCRIMINATION LAW

The general principles of equality and non-discrimination are a cornerstone of international human rights law and are codified in most international human rights treaties. In fact, the prohibition of racial discrimination has gained broad acceptance worldwide, as to amount to a provision of customary international law - indeed *jus cogens* (a norm from which no derogation is permitted).¹ It is universally accepted that the right to non-discrimination is a fundamental human right, essential to lasting peace and justice. As emphasized in the Preamble to the Universal Declaration of Human Rights, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”²

One of the most important non-discrimination provisions is found in Article 26 of The International Covenant on Civil and Political Rights (ICCPR), which provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similar equality provisions are found in the International Covenant on Economic, Social and Cultural Rights (1969) (CESCR)³ Art. 2(2); the Convention

¹See e.g. International Court of Justice Namibia Case 1971, § 17; Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), ICJ Reports (1966), § 298; Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo/Rwanda) I.C.J. Reports 2006 § 64; Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10), commentary to article 40 of the draft articles on State Responsibility, paras. (4)-(6), Advisory Opinion 18/2003 of the Inter-American Court of Human Rights, declaring non-discrimination a principle of *jus cogens*, because the entire legal structure of public order rests on it.

² Universal Declaration of Human Rights, U.N. G.A. Res. 217A (III), 10 Dec. 1948, Preamble. Article 1 of the Universal Declaration of Human Rights proclaims: “All human beings are born free and equal in dignity and rights,” and article 2 provides that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind.

³ Covenant on Economic Social and Cultural Rights, U.N. G.A. Res. 2200A (XXI) Article 2(2): “[T]he rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

on the Rights of the Child (1989)(CRC) Art. 3⁴; and the UNESCO Convention against Discrimination in Education,⁵ to name a few.

While each treaty regime differs somewhat, standards of what constitutes discrimination have emerged. In general, international law provides that a difference in treatment is discriminatory if it has no *objective* and *reasonable* basis and does not serve a legitimate aim.⁶ In other words distinctions among individuals and groups must be rational and proportional. For example, while it may be rational and therefore acceptable to keep young children from driving cars on the road, it may not be rational to deny adult women the right to drive.

Direct discrimination consists of acts and measures that discriminate against a particular class or classes of people on its face.⁷ For example, a law that specifically excludes all women from the right to vote for public officials would be an act of direct discrimination. Indirect discrimination occurs where an act or measure appears neutral but has a discriminatory purpose or effect.⁸ For example, the requirement that applicants pass an aptitude test to obtain employment was found to be indirect discrimination because while minorities were not specifically excluded from employment, the aptitude test disproportionately affected

⁴ Convention of the Rights of the Child, U.N. G.A. Res. 44/25, 20 November 1989, Art. 3: (1) “...without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status; (2) “...on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

⁵ UNESCO Convention on the Right to Education, 429 U.N.T.S. 93 May 22, 1962: “[T]he term “discrimination” includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment...”

⁶ General Comment No. 18 (Non-discrimination, adopted at the thirty-seventh session (1989), para.13 (“not every differentiation of treatment will constitute discrimination, if the criteria for the such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”).

⁷ Oran Doyle, *Direct discrimination, indirect discrimination and autonomy*, 27 Oxford J. of Legal Studies 537, 537-38 (2007).

⁸ *Id.* The Convention on the Elimination of All Forms of Racial Discrimination (CERD expresses the concept of *direct* and *indirect* discrimination in its definition: “In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose* or *effect* of nullifying or impairing recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” Art 1(1) Convention on the Elimination of All Forms of Racial Discrimination. G.A. Res. 2106 (XX) (Dec. 21, 1965). Available at http://www.unhchr.ch/html/menu3/b/d_icerd.htm,

minority's abilities to obtain jobs, and the tests were found unnecessary since they were unrelated to job performance.⁹

The concept of positive discrimination or affirmative actions provides that different treatment among individuals may be justified if the goal is to further equality, specifically equality of opportunity, by correcting past inequalities. This is done by providing advantages to groups that were historically discriminated against, so long as the "special measures" or "affirmative action" programs are limited in time and scope. For example, the Court of Justice of the European Communities found that giving priority to female candidates for public jobs does not amount to discrimination when both male and female candidates are equally qualified for the same position.¹⁰ Such preference is justified by the need to restore the balance of opportunity between male and female applicants, where such balance has been lacking. In the United States, affirmative action has existed since 1961, chiefly as a tool for correcting the results of racial discrimination¹¹.

Iraq is a contracting Party to CERD, ICCPR, CESC, CEDAW and the CRC.¹² These treaties impose positive obligations on states parties to respect,

⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs* the Duke Power Company had a policy of segregating employees according to race, specifically at one plant African-Americans were only allowed to hold the lowest paying jobs. After the Civil Rights Act was passed the company changed its policy to require a high-school diploma or a minimum score on an IQ test for higher paid positions, which had the effect of preventing a large number of African-American employees from applying for higher paid positions. The Supreme Court ruled that the requirement of a high-school diploma or certain aptitude tests was a violation of the Civil Rights Act because such tests were not a reasonable measure of job performance.

¹⁰ *Hellmut Marschall v. Land Nordrhein-westfalen*, No. C-409/95, E.C. Court of Justice, (1997). According to the Court, in the working world a male candidate will tend to be promoted even if a female candidate is equally qualified for the post in question. Certain deep-rooted prejudices and stereotypes as to the role and capacities of women in working life still persist. The Court concludes from this that priority given to equally qualified women - which is designed to restore the balance - is not contrary to Community law provided that an objective assessment of each individual candidate, irrespective of the sex of the candidate in question, is assured and that, accordingly, promotion of a male candidate is not excluded from the outset,

¹¹ President John F. Kennedy signed an executive order that first called for "affirmative action" to ensure non-discrimination. Executive Order 10925 (1961) available at <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html>. Affirmative Action has, however, become controversial in the U.S. over the decades.

¹² Iraq has not entered reservations for the ICCPR or the ICESCR. However, it has entered reservations to article 22 of CERD, Article 14 of the CRC, and Articles 2(f), 2(f), 9, 16 and article 29 paragraph 1 of CEDAW. The Committee on the Elimination of Discrimination against Women considers Article 2 to be a core provision of the Convention, and under Article 28 of CEDAW, as well as Article 28, paragraph 2, of the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and

protect and fulfill the rights provided therein.¹³ In essence, this means that state must act to remove existing discriminatory laws, enact positive legislation, promote equality, and protect individuals from violations through providing effective remedies. In particular, states have the duty to refrain from discriminating.¹⁴ This means they must eliminate all laws, regulations and practices that are either directly or indirectly discriminatory. States must also pass legislation that prohibits discrimination.¹⁵ For example, Article 4 of CERD requires State Parties to criminalize propaganda and hate groups. Also, Article 11(2) of CEDAW requires legislation that prohibits job termination based on pregnancy. States must further pass legislation that promotes equality.¹⁶ For example, Article 2(2) of CERD requires State Parties to create programs or legislation that gives advantages to groups that were historically discriminated against. Further examples can be found in Article 5(b) of CEDAW, which calls for education concerning the social function of maternity, and provide for a legally protected maternity leave. Finally, State Parties must provide remedies for violations of the right to non-discrimination, in competent national tribunals and other State institutions.¹⁷

purpose of a treaty is not be permitted. Therefore, despite its reservations Iraq is still obligated to comply with Article 2. Convention on the Elimination of all forms of Discrimination Against Woman, Reservations to CEDAW available at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

¹³ The duty to respect means that states will not act or tolerate acts that interfere with an individual's enjoyment of human rights; the duty to protect requires states to establish measures to prevent discrimination, and provide access to remedies; while the duty to fulfill requires states to implement positive measures to make sure that people have full access to their rights.

¹⁴ Office of the United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, Professional Training Series No. 12, 2005, p. 13.

¹⁵ Office of the United Nations High Commissioner for Human Rights, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, Professional Training Series No. 12, 2005, p. 13.

¹⁶ CEDAW Articles 15 and 16, as well as CERD Articles 4-5, place positive obligations on contracting Parties. While Iraq has entered reservations for Article 16 of CEDAW, Article 15 requires states to make women equal to men before the law, give women equal rights to contract and administer property, make contracts that restrict women's legal capacity null and void, and give women equal rights related to movement and residence. Articles 4 and 5 of CERD require contracting Parties to enact legislation that condemns propaganda, and prohibits racial discrimination.

¹⁷ CERD Art. 6 supra note 8; ICCPR Art. 2(3)(b).

III. LEGAL FRAMEWORK IN IRAQ

The foundation for anti-discrimination legislation is found in the Iraqi Constitution. These provisions, while not exhaustive, provide the framework for further legislation to give effect to these constitutional demands. There are several provisions that provide for equal rights and protection for all people from discrimination. Article 14 provides that all Iraqis are equal before the law without discrimination.¹⁸ Like the South African Constitution, Under Article 16 the state shall guarantee equal opportunities to all Iraqis and shall take proactive measures to ensure this.¹⁹ The Constitution also recognizes the rights of minorities under Article 125, which guarantees the administrative, political, cultural and educational rights of various “nationalities” such as Turcoman and Chaldeans.²⁰ Article 125 is not an exclusive list of protected groups as it states “all other constituents” will be protected. Additionally, Article 49 of the Constitution requires that at least one fourth of the Council of Representatives be women, a measure of positive discrimination aimed at preventing under representation of women.²¹

These articles are strengthened by language in Article 2(C) that states that no law will be enacted that contradicts the rights provided for in the Constitution.²² Therefore, according to both the Iraqi constitution and its international obligations, the legislature must now enact legislation to ensure that such provisions are implemented and upheld.²³

¹⁸ Iraq Const. Article 14,

¹⁹ Iraq Const. Article 16,

²⁰ Iraq Const. Article 125,

²¹ Iraq Const. Article 49,

²² Iraq Const. Article 2,

²³ The Iraqi constitution mandates legislation for various articles dealing with rights. For example, the right to form and join unions (Art. 22); freedom of movement (Art. 24); protection of the handicapped (Note that the reason we kept the term “handicapped” is that that is the term that we have in our translated version of the constitution and we wanted to be consistent with the language we were quoting.) (Art. 32); freedom of assembly (Art. 38); freedom of personal status (Art. 41); functions of the High Commission for Human Rights (Art. 102); and rights of minorities (Art. 125), all contain the phrase “and this shall be regulated by law.”

Iraq has established a Human Rights Ministry and, in accordance with Article 102 of the Constitution, has enacted legislation for the creation of the Independent High Commission for Human Rights (IHCHR). The IHCHR has yet to be established. Both institutions are intended to advance the promotion of human rights, including the right to be free from discrimination, report back to the government on human rights situations in Iraq, and make suggestions on improvements.²⁴ The IHCHR is discussed in Part VI below.

IV ANTI-DISCRIMINATION LAW

Most societies want a concept of equality that comports with their specific history and culture. This is reflected by the fact that almost all countries in the world guarantee some form of equality and non-discrimination in their constitutions and through their legislation and practice. Given each society's unique heritage, several concepts of equality present themselves to be the basis of anti-discrimination law. These concepts are rooted in a society's particular history and indicate the sort of heritage a society is struggling against. Different countries, therefore, employ different strategies in order to effectuate their understanding of what constitutes discrimination, who should be protected from discrimination, and how to implement laws against discrimination. This section will discuss the basic elements to be considered when drafting anti-discrimination law.

a. Legislative Strategy

There are two basic models of anti-discrimination legislation. First, there is the overarching approach, which generally entails one piece of legislation, encompassing all protected groups and prohibited behaviors. Second, there is the piecemeal approach, which consists of separate pieces of legislation enacted at different times, which provides staggered protections and prohibitions. The first approach, that of a single piece of legislation covering most protected areas, has become the dominant approach for its simplicity and ease of interpretation and

²⁴ Coalition Provisional Authority order number 60, Ministry of Human Rights, available at www.nahrain.com/d/cpa/regulations/20040220_CPAORD60.pdf. See also *United Nations Assistance Mission for Iraq The SRSG welcomes the adoption of the Independent High Commission for Human Rights' Law* (November, 2008) available at <http://www.uniraq.org/newsroom/getarticle.asp?ArticleID=867>.

application. Piecemeal legislation, such as that found in the United States is often seen as aiming to correct individual historical instances of discrimination. Overarching legislation, as found in South Africa, Serbia or Canada, is seen as a comprehensive attempt to both remedy historical discrimination and prevent unforeseen future discrimination.

Within the past 25 years, countries have generally chosen overarching legislation when writing anti-discrimination laws, including South Africa, Serbia and Canada, among others. This shows an evolving trend in favor of this overarching approach. For example Serbia, which enacted their legislation in March of this year, looked to EU standards, under the European Convention on Human Rights, the new directive and other relevant EU laws, and enacted a broad, single piece of legislation that is intended to provide robust protection for equality of opportunity. Another example is the United Kingdom, which is revising its anti-discrimination laws in favor of an overarching approach in order to simplify its law. Furthermore, at the request of the United Nations General Assembly, the Secretary-General has drafted model anti-discrimination legislation that is overarching.²⁵ This development reflects the expansion of regional and international anti-discrimination principles over the past fifty years, which has affected the legislative strategies in favor of this approach. The explosive development of anti-discrimination law makes it simpler to recognize both the scope and content of discrimination and thereby incorporate those principles in one overarching piece of legislation.

Moreover, there exist ‘open’ and ‘closed’ models of legislation. In an open model, such as Canada’s, discrimination is very generally defined leaving it up to the court to determine what constitutes discrimination. In a closed model, “the prohibited discrimination is carefully and precisely defined, leaving less discretion to the courts.”²⁶ This is reflected in South Africa’s approach. The definition of discrimination in the legislation is central to operation of the provision. “The

²⁵ United Nations Office of the High Commissioner for Human Rights, *Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination*, 1996. HR/Pub/96/2. See Annex.

²⁶ Dr. Belinda Smith, *Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia’s laws?* Paper presented at Law and Society Association of Australia and New Zealand Conference 2008, 1-12 December.

definition is the legislative characterization of the problem and determines the nature of the right to be free from discrimination.”²⁷

Canada, Serbia, South Africa and the European Union have enacted overarching anti-discrimination legislation. The Canadian Human Rights Act, enacted in 1985, protects a large number of groups within a number of protected arenas.²⁸ Serbia’s Law on the Prohibition of Discrimination, enacted in 2009, states that everyone in the territory is protected from all kinds of discrimination, with an emphasis on public discrimination.²⁹

South Africa’s Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act), enacted in 2000, prevents and prohibits unfair discrimination,³⁰ promotes equality and prevents and prohibits hate speech.³¹ Who is protected, what constitutes discrimination, how the South African Equality Act will be enforced and implemented are all spelled out. In 2000 the European Council enacted the Directive Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin.³² The

²⁷ *Id.* at page.1.

²⁸ *Canadian Human Rights Act*, R.S., 1985, c. H-6 (1985). Available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html>; Other legislation passed since the enactment of the Human Rights Act are more specific, for example the Canadian Employment Equity Act, Canadian Official Languages Act, Canadian Multiculturalism Act and the Canadian Race Relations Foundation Act. See European Commission, *Tackling Multiple Discrimination: Practices, Policies and Laws* (2007) at 24. Available at: ec.europa.eu/social/BlobServlet?docId=96&langId=en.

²⁹ *Zakon O Zabrani Diskriminacije (Law on the Prohibition of Discrimination)*, Serbia (April 26, 2009), available at: <http://www.parlament.sr.gov.yu/content/lat/akta/zakoni.asp>. (available in English at http://translate.google.com/translate?hl=en&sl=sr&u=http://www.gayecho.com/Aktivizam.aspx%3Fid%3D8398%26grid%3D2001&ei=19LxSdKgKZqstgfXyNi3Dw&sa=X&oi=translate&resnum=6&ct=result&rev=/search%3Fq%3Dzakon%2Bo%2Bzabrani%2Bdiskriminacije%2Brepublika%2Bsrbiya%26hl%3Den%26rls%3Dcom.microsoft:en-us:IE-SearchBox%26rlz%3D117HPND_en),

³⁰ Unfair discrimination is defined as any discrimination which is not “fair”. It is not “unfair” discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons. Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 of 2000, Chapter 1 (S. Afr.) [Hereinafter S.A. Equality Act]. Available at www.iwraw-ap.org/resources/pdf/South%20Africa_GE1.pdf.

³¹ *Id.* at Introduction,

³² 2000-43-EC Council Directive Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial and Ethnic Origin. [Herein after EC Directive on Race 2000/43/EC]. Available

Directives were written to strengthen and clarify States' obligations under Article 14 and Protocol 12 of the European Convention on Human Rights. The European Court of Human Rights is the highest court in Europe, and it has jurisdiction over cases arising over the European Convention on Human Rights. The Directives also expressly rely on the Universal Declaration of Human Rights, CEDAW, CERD and the ICCPR. The Directives are the most recent and relevant explanations of anti-discrimination obligations in Europe.³³ The purpose of the overarching directive is to give specific guidance to member states on the measures they must take to uphold the fundamental rights of equality and protection against discrimination that are guaranteed by the European Convention on Human Rights under Article 14 and Protocol 12.³⁴ For example under both EU Directives states must implement effective, proportionate and dissuasive sanctions for violations of anti-discrimination laws.³⁵

The United States and Morocco are examples of countries that have enacted piecemeal legislation. The United States has enacted 17 federal statutes, and the scope of protection and protected groups differ from statute to statute.³⁶ Morocco also has different statutes relating to discrimination. The Penal, Prison, Labour, Family, Press and Public Freedoms codes were all recently amended to prohibit discrimination.³⁷

at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>. They also implemented the Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation.

³³ A directive is a legislative act of the European Union. All countries that are members or requesting membership, of the EU are required to comply with a directive. Claims of violations of the Directives can be brought to the European Court of Justice. Additionally claims of violations of Article 14 and/or Protocol 12 of the ECHR can be brought before the European Court of Human Rights.

³⁴ Council Directive 2000/43/EC, *supra* note 30 at (2)-(4),

³⁵ *Id.* at Article 7. *Infra* note 40 at 15.

³⁶ Jody Feder, CRS Report for Congress: Federal Civil Rights Statutes: A Primer, Congressional Research Service, 24 October 2008.

³⁷ Moroccan Penal code article 431 was supplemented by Dahir No. 1-03-207 of 16 Ramadan A.H. 1424 (11 November 2003), adding section II entitled "Discrimination", defined in article 431-1, as follows: "Any distinction among individuals based on national or social origin, colour, sex, family status, state of health, disability, trade union membership, or affiliation or non-affiliation, whether actual or assumed,

b. Grounds of Protection (Who?)

Most countries delimit specific groups that are protected from discrimination. Race, national origin, ethnicity, religion, disability, age and sex are almost always protected under anti-discrimination law.³⁸ These demarcations are not, however, static. Through judicial interpretation or further legislation other groups come under the protection of the law at a later time. For example, the United States did not have legislation that protected people with disabilities until the 1990s, when the Americans with Disabilities Act was passed.³⁹ In addition to the groups enumerated above, Canada mandates protection based on sexual orientation, marital status, family status, disability and conviction for which a pardon was granted.⁴⁰ The European Union drafted the separate Directives encompassing specific groups: the first protects on the basis of racial or ethnic

with a specific ethnic group, nation, race or religion shall constitute discrimination.” Available at: www.adhgeneva.ch/RULAC/pdf_state/401.pdf; Act No. 23/98 on the Organization of Prison Establishments, Dahir No. 200-99-1 25/08/99, *see* 2003 CERD State Party Report by Morocco available at: <http://www.unhcr.org/refworld/pdfid/3d5a73c86.pdf>; Labor Code article 9, *see* Concluding observations of the Committee on the Elimination of Racial Discrimination: Morocco. 21/03/2003, CERD/C/62/CO/5, Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.62.CO.5.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.62.CO.5.En?Opendocument); Moroccan Family Code (Moudawana) of Feb. 25, 2004, amending the former Personal Status Code, substantially removes gender based discrimination in family law. available at: http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf?docID=3106.

³⁸ The United States protects these groups in Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990, among other legislation. *See* Jody Feder, *CRS Report for Congress: Federal Civil Rights Statutes: A Primer*, Congressional Research Service, 24 October 2008 at 1, 3, 6-7. The Canadian Human Rights Act specifies these groups, as well as others, in Article 3. *Canadian Human Rights Act*, Art. 3 Available at: <http://laws.justice.gc.ca/en/showdoc/cs/H-6/bo-ga:l I-gb:s 3/en#anchorbo-ga:l I-gb:s 3>. Serbia protects these groups in the Law on the Prohibition of Discrimination, *supra* note 27.

³⁹ Jody Feder, *CRS Report for Congress: Federal Civil Rights Statutes: A Primer*, Congressional Research Service, 24 October 2008, at 6-7.

⁴⁰ Canadian Human Rights Act, Art. 3, R.S., 1985, *supra* note 30 c. H-6, available at: <http://laws.justice.gc.ca/en/showdoc/cs/H-6/bo-ga:l I-gb:s 3/en#anchorbo-ga:l I-gb:s 3>.

origin,⁴¹ and the second protects on the basis of religion or belief, disability, age and sexual orientation in employment.⁴²

Argentina and Turkey also categorize the groups that are protected under the anti-discrimination legislation, including race, ethnicity, national origin, religion, disability, age and sex. However, these countries also offer protection based on ideology or political opinion. Argentina includes ideology, political opinion or union membership, economic position, social condition or physical characteristics as protected groups.⁴³ In Turkey discrimination in employment is prohibited on grounds of language, political opinion, philosophical belief, union membership and/or involvement in trade union activities, and fixed-term or part-time nature of work from discrimination in employment.⁴⁴ Argentina and Turkey both have histories of discrimination based on political belief or opinion, and the legislation reflects an attempt to prevent further discrimination on these bases.

In addition to the generally protected groups, Serbia also prohibits discrimination based on citizenship, language, religious or political beliefs, financial standing, sexual orientation, genetic features, health condition, previous convictions, membership in political, union or other organizations, as well as real or presumed personal property.⁴⁵

The South African Equality Act does not demarcate the groups protected from discrimination.⁴⁶ The South African Constitution does not demarcate the

⁴¹ EC Directive on Race 2000/43/EC *supra* note 32.

⁴² 2000-78-EC Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation [hereinafter EC Directive on Employment 2000/78/EC]. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

⁴³ Alto Comisionado de las Naciones Unidas para los Derechos Humanos, Programa de las Naciones Unidas para el Desarrollo, Proyecto ARG/02/024, *Hacia un Plan Nacional contra la Discriminación: La discriminación en Argentina: Diagnóstico y propuestas* (2005), 37.

⁴⁴ Nurhan Sural, *Anti-discrimination rules and policies in Turkey*, 30 Comp. Labor Law & Pol'y J. 245, 245 (13 January 2009).

⁴⁵ Article 2(1), *Law on the Prohibition of Discrimination*, Serbia, 2009, *supra* note 27.

⁴⁶ Rather, the Equality Act states that: "neither the state nor any person may unfairly discriminate against any person. S.A. Equality Act *supra* note 30 at Art. 6.

protected groups but the South African Constitutional Court has determined that Section 9(3) of the Constitution prohibits unfair discrimination based on race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. However, this list is not exclusive and discrimination may be found in other circumstances.⁴⁷ The Equality Act does give specific examples of discriminatory acts, but the list is meant to be illustrative, not exclusive.

c. Scope of Protection/Protected Activities

Anti-discrimination legislation enumerates areas and activities in which discrimination is prohibited. However, these areas are constantly evolving and adapting to changing circumstances. Most countries specify areas where the government will prohibit and penalize discrimination. Most countries prohibit discrimination by public authorities and private actors, though the reach to private actors is limited. At a minimum, commonly protected areas include access to justice, employment, public accommodation, and participatory rights.⁴⁸ Canada's Human Rights Act, Part I, prohibits discrimination in public and private accommodation, employment, wages, speech, harassment and retaliation.⁴⁹ The United States prohibits discrimination in federally funded programs, public accommodations, federally funded education programs, employment and public services.⁵⁰ Moreover, in the United States, there is a relationship between the

⁴⁷ The court established a "test" to determine if discrimination against a person was based on a prohibited ground, first laid out in *Harksen v Lane NO and Others*. CCT9/97 (S. Afr.), available at: <http://www.saflii.org/za/cases/ZACC/1997/12.html>. First, the court inquires if the differentiation is based on one of the grounds specified in Article 9 of the Constitution. If it is not based on one of these specified grounds, the court will determine whether there is discrimination, "[o]bjectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."

⁴⁸ Public accommodation, as defined in the Americans with Disabilities Act, includes private entities whose operations affect commerce, such as hotels, restaurants, theaters, retail establishments, museums, libraries and private schools. *Americans with Disabilities Act of 1990, as amended in 2008*, 42 USC § 12181, available at: <http://www.ada.gov/pubs/adastatute08.pdf>. Participatory rights include the right to vote and the right to run for government office.

⁴⁹ Canadian Human Rights Act, Arts. 5-14, R.S., 1985, *supra* note 26 c. H-6, available at: <http://laws.justice.gc.ca/en/showdoc/cs/H-6/bo-ga:l I-gb:s 5/en#anchorbo-ga:l I-gb:s 5>.

⁵⁰ Feder, *Supra* note 34.

groups protected and the scope of protection.⁵¹ For example, the Americans with Disabilities Act prohibit discrimination against people with disabilities, but only with respect to employment or public accommodations.⁵²

The European Union Directives prohibit discrimination in specific areas. One European Union directive prohibits discrimination in employment, and it applies to both public and private sectors.⁵³ Additionally, the European Union Directive on Racial Discrimination prohibits direct discrimination, indirect discrimination, harassment and instruction to discriminate in the areas of employment, training, union membership, social services, education and access to public goods and services (including housing) in the public and private sectors.⁵⁴

South Africa takes a unique approach whereby it prohibits discrimination in every sector of society and government.⁵⁵ This includes “any act or omission including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”⁵⁶ The Equality Act does provide examples of sectors, like employment, where discrimination is prohibited.⁵⁷ However, the examples are very specific and are meant only to be illustrative.⁵⁸

Fundamental cornerstone rights of democracy, such as participatory rights, must be within the scope of anti-discrimination legislation. For example, both the United States and Canada prohibit discriminatory behavior in elections.⁵⁹ In the

⁵¹ *Id.*

⁵² *Id.* at 6-7.

⁵³ EC Directive on Employment 2000/78/EC *supra* note 41 at Article 3.

⁵⁴ EC Directive on Race 2000/43/EC *supra* note 30 at Article 3.

⁵⁵ S.A. Equality Act *supra* note 30.

⁵⁶ S.A. Equality Act *id.* at Chapter 1.

⁵⁷ *Id.*, Ch. 2.

⁵⁸ *Id.*, Schedule.

⁵⁹ Human Rights in Canada: A Historical Perspective, *Voting Rights*. Available at: <http://www.chrc-ccdp.ca/en/browseSubjects/votingRights.asp>; Elections Canada, *The Evolution of the Federal*

United States, the Voting Rights Act of 1965 prohibits a state government from implementing programs that would prevent minorities from voting, or prevents minorities from being elected to state or local bodies.⁶⁰ The Voting Rights Act was written to prohibit discrimination based on race, but has since been expanded to include language.⁶¹ Canada protects the vote from discrimination in the Charter of Rights and Freedoms, as well as national and provincial legislation.⁶² The right to vote is guaranteed in the Dominions Election Act, which has been amended over time to ensure universal suffrage.⁶³ And the European Court of Human Rights has held that the will of the people can only be heard through inclusive, non-discriminatory universal suffrage.⁶⁴

VI. ENFORCEMENT AND IMPLEMENTATION STRATEGIES

Enacting legislation that precisely defines discrimination, including indirect discrimination, the groups it protects and the scope of protection is an important first step in providing protection to individuals from discrimination. Equally as important are the policies chosen to ensure that these laws are fairly and adequately enforced. Enforcement requires a multi-pronged strategy that makes the laws accessible, foreseeable and enforceable. Moreover, the remedies must be practical and effective, not theoretical and illusory.

Franchise, February 2005. Available

at: <http://www.elections.ca/content.asp?section=gen&document=ec90785&dir=bkg&lang=e&textonly=false>; United States Department of Justice, Civil Rights Division. *Introduction to Federal Voting Rights Laws: The Voting Rights Act of 1965*, 25 July 2008. Available at: http://www.usdoj.gov/crt/voting/intro/intro_b.php.

⁶⁰ United States Department of Justice, Civil Rights Division. “*Voting Section: Frequently Asked Questions*,” 25 July 2008. Available at: <http://www.usdoj.gov/crt/voting/misc/faq.php>.

⁶¹ *Id.*

⁶² Human Rights in Canada: *A Historical Perspective, Voting Rights*. Available at: <http://www.chrc-ccdp.ca/en/browseSubjects/votingRights.asp>; Elections Canada, *The Evolution of the Federal*

Franchise, February 2005. Available at:

<http://www.elections.ca/content.asp?section=gen&document=ec90785&dir=bkg&lang=e&textonly=false>.

⁶³ *Id.*

⁶⁴ *Aziz v. Cyprus*, no. 69949/01, Judgment of 22 June 2004.

i. National Institutions

Some regional bodies, like the African Commission on Human and Peoples' Rights and the Organization for Security and Co-operation in Europe, require member states to create national institutions to address human rights issues.⁶⁵ The Organization for Security and Co-operation in Europe focuses on national institutions against discrimination, which includes human rights commissions as well as administrative agencies such as la HALDE (Haute Autorité de Lutte Contre les Discriminations et pour l'Égalité, The High Authority Against Discrimination and for Equality) in France.⁶⁶ There also exist regional bodies such as the European High Commissioner on National Minorities. National human rights institutions are bodies created by the government with the goal of working towards the promotion and protection of rights.⁶⁷ The Paris Principles, developed by the UN Commission on Human Rights, reflect the minimum standards necessary to create and maintain an effective National Human Rights Institution (NHRI).⁶⁸ These Principles do not demand any one type of national institution.

⁶⁵ Organization for Security and Co-operation in Europe, *Supplementary Human Dimension Meeting: The role of national institutions against discrimination in combating racism and xenophobia with a special focus on persons belonging to national minorities and migrants: Final Report*, Vienna, (29-30 May 2008) at 2.; African Commission on Human and Peoples' Rights, *Resolution on granting observer status to national human rights institutions in Africa* (31 October 1998) at 1. Available at: <http://www.nhri.net/pdf/ResAfrNhri.pdf>.

⁶⁶ Organization for Security and Co-operation in Europe, *Supplementary Human Dimension Meeting: The role of national institutions against discrimination in combating racism and xenophobia with a special focus on persons belonging to national minorities and migrants: Final Report*, Vienna, (29-30 May 2008) at 14.

⁶⁷ UNHR Handbook, *supra* note 14; citing *A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, 1995, para. 39.

⁶⁸ UNHR Handbook, *supra* note 14; See also *UN Commission for Human Rights Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights*. Available at <http://www.unhchr.ch/html/menu6/2/fs19.htm#intro>. Generally the Principles require that national human rights institutes be given a broad mandate, prepare and submit reports on human rights issues in the country, submit recommendations to the government, work to harmonize national legislation with international obligations, and promote education on human rights issues. They further require that the institute itself represent the various groups that have an interest in human rights (NGO's, academics, religious leaders, civil society, etc.), and that the institution be adequately funded. See *Principles relating to the status and functioning of national institutions for protection and promotion of human rights*, Commission on Human Rights resolution 1992/54 (March 1992), General Assembly resolution

National institutions can be structured in a number of different ways with differing powers and functions, provided they exist independently from other branches of government.

On November 16, 2008, the Iraqi Parliament enacted legislation for the Iraqi Independent High Commission for Human Rights (IHCHR).⁶⁹ According to this legislation the IHCHR will be an independent body responsible for the oversight of human rights in the country.⁷⁰ National institutions like the IHCHR must be independent, and should specifically address discrimination through assisting in the implementation of anti-discrimination legislation. The IHCHR may be given the appropriate resources and latitude to investigate and prosecute cases of discrimination.⁷¹ While some countries give adjudicative powers to such institutions, others do not give their national institutions judicial functions.

Canada's Human Rights Act contains a section outlining the creation and role of the Human Rights Commission.⁷² The Human Rights Commission functions solely to implement the Human Rights Act. The Commission engages in education and outreach; research; publication of reports and studies; and investigation of complaints of discrimination.⁷³ The Commission will mediate between the parties in an attempt to resolve the matter, and if a resolution is

A/RES/48/134 of 20 December 1993. Available at <http://www.unhchr.ch/html/menu6/2/fs19.htm#annex>.

⁶⁹ *The SRSG welcomes the adoption of the Independent High Commission for Human Rights' Law* (November 17, 2008). Available at <http://www.uniraq.org/newsroom/getarticle.asp?ArticleID=867>.

⁷⁰ The commission has the power to receive complaints, investigate claims, initiate legal proceedings and refer violations to the courts or appropriate agency. **Law of the High Commission for Human Rights, Passed on 16 Nov 2008.**

⁷¹ Organization for Security and Co-operation in Europe, *“Supplementary Human Dimension Meeting: The role of national institutions against discrimination in combating racism and xenophobia with a special focus on persons belonging to national minorities and migrants: Final Report,”* *supra* note 62 at 11.

⁷² Canadian Human Rights Act, *supra* note 26 Arts. 26-29. Available at: <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-h-6/latest/rsc-1985-c-h-6.html>; The Human Rights Commission contains a Chief Commissioner, a Deputy Commissioner and between 3 and 6 members. Canadian Human Rights Act, Art. 26. The Human Rights Act and Human Rights Commission exist at the federal level. Each province has enacted similar Human Rights Acts and created provincial Human Rights Commissions as well.

⁷³ *Id.* Art. 27.

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impossible will refer the matter to the Human Rights Tribunal.⁷⁴ However, individuals are given a choice of venue and many people choose to file their claims in court or other national bodies because of delays of 3 to 7 years in the Commission.⁷⁵

India's Human Rights Commission has the power to investigate complaints of violations, intervene in court proceedings involving human rights violations, visit jails, and partake in research and outreach.⁷⁶ Also, the Commission has the powers of a civil court, including issuing subpoenas and receiving evidence.⁷⁷ The Commission hears cases on discrimination as well as other human rights issues.⁷⁸

Many states have national institutions that do not have judicial or quasi-judicial functions. The South African Human Rights Commission's, for instance, oversees implementation of the Equality Act within state agencies, aid victims with filing complaints, conduct investigations, reports on progress made in regards to implementation,⁷⁹ and provides education and training.⁸⁰ In South Africa, the Equality Act is implemented in a unique fashion. There, each state agency must develop an equality plan, implement it within their agency and report to the Human Rights Commission on the effectiveness of the plan.⁸¹

⁷⁴ Jay Makarenko, *The Canadian Human Rights Act: Introduction to Canada's Federal Human Rights Legislation*, (2008). Available at: <http://www.mapleleafweb.com/features/canadian-human-rights-act-introduction-canada-s-federal-human-rights-legislation#administration>.

⁷⁵ Brian Ehtherington, *Promises, Promises: Notes in Diversity and Access to Justice*, 26 Queen's L.J. 43, 53-5 (2000).

⁷⁶ The Protection of Human Rights Act, 1993 (As amended by the Protection of Human Rights (Amendment) Act, No. 43 of 2006,) Art. 12, available at: <http://nhrc.nic.in/Publications/HRAAct.htm>. The Commission is primarily made up of current or former chief judges of various level courts, as well as experts in the field of human rights. *See* Art. 3.

⁷⁷ *Id.* at Art. 13.

⁷⁸ "Selected Case Summaries," National Human Rights Commission, India. Available at: <http://nhrc.nic.in/>.

⁷⁹ S.A. Equality Act *supra* note 30 at Chapter 5.

⁸⁰ South Africa Human Rights Commission, (website) Education and Training, available at: http://www.sahrc.org.za/sahrc_cms/publish/cat_index_31.shtml.

Additionally the Equality Act itself requires the establishment of an Equality Review Committee⁸² that reports to the minister of justice about the operation of the Equality Act and makes recommendations on how to improve its operation.⁸³

A more recent example is the National Human Rights Committee in Qatar, established in 2002. The Committee investigates complaints and suggests ways to deal with violations; advises bodies on human rights; monitors the human rights situation in the country; prepares reports; and takes part in outreach.⁸⁴ As with Argentina and South Africa, there is no judicial or quasi-judicial function.

Some countries, including Iraq, have a Ministry of Human Rights in addition to an independent national institution that implements and enforces anti-discrimination law. In Morocco, the independent national institution is the Advisory Council on Human Rights (CCDH) which oversees the implementation and enforcement of anti-discrimination and other human rights laws. The CCDH issues advisory opinions; studies the harmonization of international obligations and national laws; encourages the ratification of treaties; and makes recommendations to appropriate bodies.⁸⁵ Prior to its dissolution in 2004, the Ministry of Human Rights also played an active role in enforcing human rights law, specifically it developed educational programs to help promote minority cultures throughout the national school system.⁸⁶

⁸¹ The same requirement applies to all government contractors. S.A. Equality Act *supra* note 30 at Chapter 5.

⁸² The members will represent various stakeholders who have an interest in eliminating discrimination. S.A. Equality Act *supra* note 30 at Article 32.

⁸³ S.A. Equality Act *id* at Article 33.

⁸⁴ Decree law 38 of 2002 – Qatar NHRC Art. 2. The Committee is an independent legal entity, made up of members of civil society as well as representatives of various Ministries, *see* Decree law 38 of 2002 – Qatar NHRC, Art. 1, 3. Available at <http://www.nhrc-qa.org/en/files/downloads/Constitution%20of%20NHRC.pdf>.

⁸⁵ Kingdom of Morocco Advisory Council on Human Rights (website), CCDH Mission available at <http://www.ccdh.org.ma/spip.php?article391>.

⁸⁶ *See* U.N.D.P. Arab Human Rights Index, Human Rights Profiles: Morocco. Available at: <http://www.arabhumanrights.org/en/countries/humanrights.asp?cid=12>; CERD/C/430/Add.1. (State Party Report) Sixteenth periodic reports of States parties due in 2002 : Morocco. 17/02/2003. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.430.Add.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.430.Add.1.En?Opendocument)

Argentina's National Institute Against Discrimination, Xenophobia and Racism (INADI) was created to create national policies and measures to combat discrimination.⁸⁷ The actual responsibilities of INADI include: investigation of complaints; directing the complaint and completed reports to the proper authorities, including conflict resolution; outreach; and formation of national policies regarding discrimination.⁸⁸ Recently, the INADI has come under the direction of the Ministry of Justice and Human Rights.⁸⁹

ii. Judicial Implementation

The role of judicial implementation differs from country to country. In Canada, the Human Rights Commission is considered the main enforcer of the Human Rights Act. When a claim cannot be resolved through mediation, the Commission refers the matter to the Human Rights Tribunal. The Tribunal has judicial functions and renders decisions on the claimed discrimination.⁹⁰ Participants can appeal to the courts, including the Supreme Court of Canada, if the decision is not satisfactory.⁹¹ The role of the courts is limited beyond the appeals process. Courts have entertained violations of common law rights, as long as those rights are not covered by the Human Rights Act.⁹² Also, the courts

⁸⁷ INADI was instituted in 1995, as part of the Ministry of the Interior. By 2002, INADI had decentralized and come under the auspices of the Ministry of Justice and Human Rights. Alto Comisionado de las Naciones Unidas para los Derechos Humanos, Programa de las Naciones Unidas para el Desarrollo, Proyecto ARG/02/024, *Hacia un Plan Nacional contra la Discriminación: La discriminación en Argentina: Diagnóstico y propuestas* (2005) at 34-35.

⁸⁸ Ministerio de Justicia, Seguridad y Derechos Humanos, Instituto Nacional Contra la Discriminación, la Xenofobia y el Racismo. Available at: http://www.inadi.gov.ar/inadiweb/index.php?option=com_content&view=frontpage&Itemid=1

⁸⁹ Alto Comisionado de las Naciones Unidas para los Derechos Humanos, Programa de las Naciones Unidas para el Desarrollo, Proyecto ARG/02/024, *Hacia un Plan Nacional contra la Discriminación: La discriminación en Argentina: Diagnóstico y propuestas* (2005) at 35.

⁹⁰ "The Canadian Human Rights Act: Introduction to Canada's Federal Human Rights Legislation," Mapleleafweb., Available at: <http://www.mapleleafweb.com/features/canadian-human-rights-act-introduction-canada-s-federal-human-rights-legislation#administration>

⁹¹ *Id.*

⁹² Brian Ehterington, *Promises, Promises: Notes in Diversity and Access to Justice*, 26 Queen's L.J. 43, 55 (2000).

cannot extend the grounds on which people are protected under the Human Rights Act because that power belongs to the legislature.⁹³

In South Africa Chapter 4 of the Equality Act establishes the Equality courts. These courts will be created in the current magistrate and high courts that already exist throughout the country. The courts will have the power to review claims and investigate those that are considered legitimate. They can also refer the claim to a more appropriate venue if appropriate. The equality courts will determine if there has been discrimination and if so whether it was unfair.⁹⁴ If they determine there has been unfair discrimination they can order the appropriate remedy, and though the Equality Act lists examples it is not an exclusive list.⁹⁵ According to article 20 any person acting in their interest, or acting in the public interest, or in the interest of others, can bring a claim.⁹⁶ The minister of Justice governs the courts.

The South African Equality Act, the Serbian Anti Discrimination Law, and the European Directives specify the burden of proof for claims that come before a court. The complainant must present facts where it can be presumed that there has been discrimination.⁹⁷ Once the complainant has presented such evidence the burden is on the respondent to prove that there was no discrimination or that the discrimination was justified in some way.⁹⁸

V. CONCLUSION

There is an emerging consensus that overarching legislation is the preferred strategy for promoting non-discrimination and equality. This is

⁹³ European Commission, Tackling Multiple Discrimination: Practices, policies and laws (2007) at 24, available at ec.europa.eu/social/BlobServlet?docId=96&langId=en; “The Canadian Human Rights Act: Introduction to Canada’s Federal Human Rights Legislation,” Mapleleafweb, available at: <http://www.mapleleafweb.com/features/canadian-human-rights-act-introduction-canada-s-federal-human-rights-legislation#administration>. Iraq’s civil law system should produce a similar result, as legislation is generally not expanded through case law.

⁹⁴ S.A. Equality Act *supra* note 30 at Chapter 4.

⁹⁵ S.A. Equality Act *id* at Article 21.

⁹⁶ S.A. Equality Act *id* at Article 20.

⁹⁷ S.A. Equality Act *id* at Chapter 3, Article 13. EC Directive on Employment 2000/78/EC *supra* note 42 at Article 10, Law on the Prohibition of Discrimination, Serbia, 2009, Art. 45.

⁹⁸ S.A. Equality Act *id* at Chapter 3, Article 13; EC Directive on Employment 2000/78/EC *id* at Article 10, Law on the Prohibition of Discrimination, Serbia, 2009, Art. 45.

preferred because it provides simplicity and clarity for those who want to pursue a claim and for those who have to adjudicate such claims. Of course subsequent legislation, covering specific areas such as employment or election rights may supplement the main piece of legislation.

In that piece of legislation, a closed model is preferred and the legislature should clearly define discrimination, including indirect discrimination, and set forth a non-exhaustive list of the protected groups and the scope/areas of protection. Generally, this scope will include, at a minimum, equal protection under the law, access to the judiciary, employment, public accommodation, and public participation. Though, it should be born in mind that there is a growing trend to broaden both the grounds and scope of protection.⁹⁹ It should be noted that, in a civil law system, such as Iraq, courts generally do not have power to expand on legislated grounds. This makes specific and comprehensive legislation crucial. An example of a comprehensive, yet non-exhaustive list of groups would be: gender, race, national origin, ethnicity, language, religion or belief, political beliefs, disability, age, socio-economic background, citizenship, and sexual orientation.

As described above, national institutions, like human rights commissions, or other specific institutions like the Antidiscrimination Council of Romania, and the courts play a key role in ensuring that anti-discrimination laws are implemented and enforced. In order for the IHCHR to fulfill this role, the IHCHR must be physically established, and its work must remain independent from the government. Moreover, it should not be made redundant by the Ministry. While the Ministry may be involved in monitoring, the IHCHR is tasked with receiving complaints. It should also function as an extra-governmental monitoring body. Moreover, the IHCHR is specifically tasked with coordinating with civil society, a very important part of institutional development. Nonetheless, the IHCHR and the Human Rights Ministry should work together on areas that overlap. For example, the two can work together on obtaining information for reports submitted to the UN and promoting awareness of human rights through education and outreach. However, the IHCHR should be independent of

⁹⁹ Protocol 12 of the European Convention of Human Rights intentionally broadens the scope of protection from discrimination for all member states of the Council of Europe that have ratified Protocol 12. Protocol 12 came into force in 2005.

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government interference to comply with their legislated duties, such as visiting detention centers and prisons and investigating complaints. The Ministry has a significant role in developing the State's policies on promoting human rights. It should, therefore, be the primary drafter of anti-discrimination legislation, and the IHCHR should be the primary evaluator of the legality and effectiveness of such legislation.

Only through a comprehensive set of policy priorities coupled with an effective strategy for defining, outlawing, and providing effective access to redress for discrimination can the hopes and aspiration of equality be realized.