

FROM BEGGARS TO CITIZENS: THE RIGHT TO NONDISCRIMINATION IN ADMISSION INTO COMMERCIAL ESTABLISHMENTS IN GUATEMALA

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[P]erhaps more dangerous is the fact that the knowledge that [the poor, the elderly, people with disabilities and other individuals in need] think they have is often wrong. Under such circumstances, these individuals cannot protect themselves and will be less likely to seek legal assistance because their basic presumption is that the law protects others, not them.¹

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1. “[T]he poor, the elderly, the disabled and other individuals in need are usually functionally without any knowledge about the law; perhaps more dangerous is the fact that the knowledge that they think they have is often wrong. Under such circumstances, these individuals cannot protect themselves and indeed are unlikely to even seek legal assistance because of their basic

[The decision of the Supreme Court against segregation in public schools] transformed African-Americans from beggars pleading for decent treatment to citizens demanding equal treatment before the law as their constitutionally recognized right.²

SYNOPSIS: In Guatemala, cases have arisen where commercial establishments, which are open to the public, have refused access based on discriminatory criteria, primarily against indigenous people. Some argue that owners have an absolute right to select their clients. However, national and international law guarantee a discrimination-free right in these circumstances. Likewise, property rights, freedom of industry and commerce rights, and freedom of contract rights do not entitle owners to discriminate. When reserving a right of admission, one objective is to change the legal position of the owner from an offer to an invitation to bid. This seeks to transfer to the contractual field a legal discussion that pertains to the sphere of human rights. These cases are not amenable to correction by the market alone. Court participation is necessary, and should take into consideration the deficiencies that such cases have experienced until now.

I. INTRODUCTION

The denial of access to individuals into commercial establishments for arbitrary reasons is a common occurrence.³ Many of these denials are a result of historic processes of exclusion, racism, or slavery.⁴ But such situations are not problems of the past, but rather events that occur daily.⁵ In Guatemala, as in other countries, access has been denied to people into

assumption that the law protects others, not them." Derrick Bell, *Does Discrimination Make Economic Sense? For Some — It Did and Still Does*, 15 *HUM. RTS.* 39, 40 (1988).

2. Robert L. Carter on the effects of the decision by the Supreme Court of the United States in *Brown v. Board of Education*. See Derrick A. Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 *HARV. L. REV.* 518, 518 (1980).

3. See, e.g., Corte de Constitucionalidad [C.C.] [Constitutional Court], Oct. 27, 2003, Sentencia 855-2003, Expediente 855-2003 (Guat.) (The facts of the case note that on March 6, 2003 a man was denied access to the club "El Zaguán" in Quetzaltenango based on his appearance and traditional dress.) [hereinafter Expediente 855-2003].

4. See, e.g., Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Oct. 6, 2006, Sentencia 7608-06, Expediente 04-008030-0007-CO (Costa Rica) (A man was blocked from entering a hardware store, and was told, "We don't want Orientals coming in here." Then an armed man forced him to leave. The Court held that this conduct was discrimination.) [hereinafter Sentencia 7608-06].

5. See, e.g., Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], June 17, 2005, Sentencia 7768-05 (Costa Rica).

restaurants and bars on account of their indigenous identity.⁶ In Colombia, some cases demonstrate that people have been prevented from entering night clubs because of the color of their skin.⁷ In Costa Rica, people have been prevented from purchasing goods in commercial establishments because of their foreign heritage.⁸ Some taxi⁹ and bus drivers¹⁰ have

6. Citing only some cases: Human Rights Comm'n of Econ. and Soc. Council of the United States, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, Doc. No. E/CN.4/2003/NGO/123 (Mar. 12, 2003) (written statement submitted by the International Indian Treaty Council, a non-governmental organization in special consultative status); Leslie Perez, *Casos de Racismo No Llegan a Debate Oral [Cases of Racism Do Not Reach Oral Debate]*, PRENSA LIBRE (Dec. 18, 2007), available at http://www.prensalibre.com/noticias/Casos-racismo-llegan-debate-oral_0_151786052.html (last visited Feb. 22, 2011); Luisa Rodríguez, *Aún Prevalece Discriminación y Racismo [Discrimination and Racism Still Prevail]*, PRENSA LIBRE (Mar. 2, 2003), available at http://www.prensalibre.com/noticias/prevalece-discriminacion-racismo_0_72593713.html (last visited Feb. 22, 2010) (in June 2002, a woman was impeded from entering "The Golden Pot" because of her indigenous identity). See Expediente 855-2003, *supra* note 3; HUMAN RIGHTS OMBUDSMAN, EVENT ANNUAL REPORT TO THE CONGRESS OF THE REPUBLIC ON THE ACTIVITIES AND THE SITUATION OF HUMAN RIGHTS IN GUATEMALA FOR 2004, at 690 (2005) [hereinafter PDH REPORT 2004]; Conié Reynoso, *Segunda Condena Por Discriminación [Second Conviction for Discrimination]*, PRENSA LIBRE (May 28, 2005), available at http://www.prensalibre.com/noticias/Segunda-condena-discriminacion_0_110989341.html (last visited Feb. 22, 2011) (On July 9, 2004, the doorman for the bar "The Library" stopped a woman from entering based on her ethnic origin, stating to her that "servants stay at the door."); United Nations Entity for Gender Equality and the Empowerment of Women, INDIGENOUS WOMEN AND RIGHTS 79, Vol. I (Myrna Cunningham et al. eds., 1st ed., UNIFEM 2009); Comm. on the Elimination of Racial Discrimination, Information Provided by the Government of Guatemala in Relation to the Implementation of the Final Observations of the Committee on Racial Discrimination, Aug. 23, 2007, CERD/C/GTM/CO/11/Add.2 (2007); Erlie Castillo & Carlos Ventura, *Públicamente Presenta Disculpas Por Racismo [Public Apologies for Racism]*, PRENSA LIBRE (Apr. 25, 2006), available at http://www.prensalibre.com.gt/noticias/Publicamente-presenta-disculpas-racismo_0_128388233.html (last visited Feb. 22, 2011) (In December 2004, a woman was denied entry to "La Fratta" in Quetzaltenango because of her indigenous identity.); HUMAN RIGHTS OMBUDSMAN, EVENT ANNUAL REPORT TO THE CONGRESS OF THE REPUBLIC ON THE ACTIVITIES AND THE SITUATION OF HUMAN RIGHTS IN GUATEMALA FOR 2004, at 692 (2005) [hereinafter PDH REPORT OF 2004] (In June 2004, two people were told that they could not enter the restaurant "El Señor Tortuga" if they were wearing their traditional attire.); JOSÉ AYLWIN, OMBUDSMAN Y DERECHOS INDÍGENAS EN AMÉRICA LATINA: ESTUDIO COMPARATIVO SOBRE EL MARCO NORMATIVO E INSTITUCIONAL [OMBUDSMAN AND INDIGENOUS RIGHTS IN LATIN AMERICA: COMPARATIVE STUDY ON THE NORMATIVE AND INSTITUTIONAL FRAMEWORK] 377 (INTERAMERICAN INST. OF HUMAN RIGHTS 2007) (In July 2004, an indigenous woman was prohibited from entering the "Disco Bar mi Guajira.") [hereinafter OMBUDSMAN AND INDIGENOUS RIGHTS].

7. Corte Constitucional [C.C.] [Constitutional Court], Oct. 26, 2005, Sentencia T-1090, Expediente T-1132315 (Colom.) (A woman, because of her skin color, was refused entrance into two nightclubs when she was preparing to celebrate Christmas with some friends. Those who were white and blonde could enter. The Court held that this was discrimination.) [hereinafter Sentencia T-1090].

8. Sentencia 7608-06, *supra* note 4.

9. Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], June 17, 2005, Sentencia 7768-05, Expediente 04-008030-0007-CO (Costa Rica);

declined to transport blind passengers with guide dogs. Many establishments do not have facilities with access for people with disabilities.¹¹ Some motels¹² and restaurants¹³ will not serve certain couples by virtue of their sexual orientation. In the end, the examples would be too numerous to cite in this limited space.

“We Reserve the Right of Admission”¹⁴ is a phrase commonly read on signs outside commercial establishments in Guatemala. It is not uncommon for it to be included within general contract terms, or to be placed on visible signs outside, that the owners reserve the right to select who they allow into the establishment.¹⁵ This statement is commonly called the “Right of Admission” and it is important to analyze its legal implications. In many cases, such a statement hopes to establish that the owners can refuse to render a service for whatever motive, at their discretion.¹⁶

Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Apr. 13, 2005, Sentencia 3829-01, Expediente 04-008030-0007-CO (Costa Rica); Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Aug. 28, 2001, Sentencia 8559-01, Expediente 04-008030-0007-CO (Costa Rica) (Blind people were refused taxi service because they had guide dogs. The Court held that this is discrimination.).

10. Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Nov. 30, 2007, Sentencia 17528-07, Expediente 04-008030-0007-CO (Costa Rica) (A person was not allowed to sit in the designated seats for people with disabilities due to the presence of his guide dog. The Court held that this is discrimination.) [hereinafter Sentencia 17528-07].

11. Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], July 20, 2007, Sentencia 10327-07, Expediente 04-008030-0007-CO (Costa Rica) (A bathroom at a restaurant did not have facilities for people with disabilities. The Court held that this is discrimination.) [hereinafter Sentencia 10327-07].

12. Enrique Naveda, *La Moral de Los Moteles [The Morality of Motels]*, EL PERIÓDICO (June 26, 2008), available at <http://www.elperiodico.com.gt/es/20080626/opinion/59036> (last visited Feb. 22, 2011).

13. Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Dec. 21, 2007, Sentencia 18660-07, Expediente 04-008030-0007-CO (Costa Rica) (A same-sex couple was not given service in a restaurant. The Court determined that they were not rendered services by the restaurant because the restaurant feared that negative reactions by its customers would cause damage and a loss of business.).

14. For the purposes of this study we will use the term “Right of Admission.” This term does not imply that it is a legal term. In other jurisdictions it is known as the right of exclusion, the second focuses on the right to withdraw, while the first focuses on the right to permit. But both refer to the same thing: see, e.g., Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Nov. 30, 2007, Sentencia 3299-97, Expediente 04-008030-0007-CO (Costa Rica) (In this case, a theatre critic was prevented from purchasing a ticket because he had given a negative review in the past. The Court concluded that this is impermissible.) [hereinafter Sentencia 3299-97].

15. See, e.g., Sentencia 17528-07, *supra* note 10.

16. See, e.g., Sentencia 3299-97, *supra* note 14.

Initially, there appears to be a conflict between the purpose and nature of a commercial establishment in refusing access to someone that is ready and willing to pay. An establishment that renders services to the public is usually open to whoever pays the respective consideration, it is precisely for this reason that it is open to the public. Therefore, it should be unusual that the owner¹⁷ imposes restrictions on access to the establishment, and loses a payment that could mean an economic gain. While denial can take many forms and include actions and omissions, the present study will address discrimination in access to commercial establishments open to the public.¹⁸ That is to say, any business that continuously offers for-profit services or goods to the general population, in exchange for a previously established price.

The term discrimination is quite general, and its applications diverse.¹⁹ There is no single definition of discrimination; it has commonly been stated as giving inferior treatment to a person or community based on racial, religious, or political motives, among others.²⁰ One of the definitions most widely accepted in the international arena is that contained in the International Convention on the Elimination of All Forms of Racial Discrimination (Convention Against Discrimination) that defines racial discrimination as:

[A]ny 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 the recognition, enjoyment or exercise, on an equal footing, of human rights and

17. The term "owner" in this article refers to the owner of the commercial establishment, which may differ from the owner of the property where it is located. It also refers to operators, licensees, possessors, beneficial owners, lessors, franchisees, employees, agents, and any other legal relationship derived from operating a business and having control over the physical space.

18. To clarify, "discrimination" does not mean the criminal offense unless it is expressly stated or it is expressly understood from the context of its use in this work.

19. See generally Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). Professor Ayers obtained statistical evidence in his study that car salesmen consistently offer to sell vehicles at higher prices to African-American men and women, more so than those offered to whites. See also Carlos Sulugui de Leon, *Los Pronombres Personales, Tú, Usted y Vos y La Discriminación en el Contexto Escolar Capitalino, Zona 1* [*The Personal Pronouns, You, You, and You all and the Discrimination in the Capital School Context, Zone 1*] (1999) (thesis for the degree of Licensure in Sociolinguistics, University of Mariano Gálvez) (The author explores the use of more common pronouns in Guatemala as an instrument of discrimination.) (on file with author).

20. DICTIONARY OF THE SPANISH LANGUAGE, ROYAL ACADEMY OF THE SPANISH LANGUAGE (2001) [hereinafter DICTIONARY OF THE ROYAL ACADEMY]. In this work the term "race" is utilized as in the applicable legal standard and as generally recognized by international law, but to clarify, all human beings are understood to belong to the same race.

fundamental freedoms in the political, economic, social, cultural or any other field of public life.²¹

Discrimination manifests through both actions and omissions. For example, there can be discrimination against persons with disabilities if there are no facilities for them to enter, or against a blind man that is assisted by a guide dog if the animal is not allowed to accompany the person into the building.²²

This article will have important implications in the legal relations between individuals. As will be explained, the effectiveness of the protection of the right to equality necessarily involves the incorporation of fundamental human rights principles in the relationships between individuals.²³ This may present some difficulties, since this private sphere traditionally has been perceived as an exclusive product of the freedom of contract.

Included in this work is a substantial quotation from Guatemalan sources of law and jurisprudence.²⁴ This is not because the study has a formal positivist tendency, but rather to gather in a single work all the applicable rules and relevant background.

This work is divided into four parts. The first part (The Right to Nondiscrimination in the Access to Public Commercial Establishments), presents the legal foundations in domestic and international law of the right to nondiscrimination in accessing private commercial establishments as a human right. In the second part ("We Reserve the Right of Admission:" Private Property, Freedom of Industry and Commerce, and Freedom of Contract), the foundations and legal limitations regarding the power of an owner to refuse such access under private property rights, freedom of industry and commerce rights, and the freedom of contract rights are analyzed. In this section, the argument that one can sustain a power to discriminate on the exercise of those rights is refuted. Also, how the right

21. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2061 (XX), art. 1 (Dec. 21, 1965) (although it is named after racial discrimination the prohibition is not limited to racial discrimination cases) [hereinafter Convention Against Discrimination].

22. For an interesting case, see Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Dec. 12, 2004, Sentencia 12802-04, Expediente 04-008030-0007-CO (Costa Rica) (The owners of the restaurant "La Princesa Maya" argued that they did not discriminate against a blind person since they allowed him to enter. However, they did not permit his guide dog to enter. The Court concluded that this was discrimination.).

23. American Convention on Human Rights, arts. 1, 24, July 13, 1978, Decree No. 6, available at http://www.hrcr.org/docs/American_Convention/oashr.html (last visited Feb. 22, 2011) [hereinafter American Convention on Human Rights].

24. See, e.g., *supra* notes 7–10. See, e.g., *infra* notes 28, 30–31.

of admission seeks to transfer a discussion that pertains to the human rights' field to the contractual sphere is explained. The third part (Votes and Bills: Protecting the Right to Equality in Democracy and Commerce), indicates the teleological basis for justifying the intervention of the courts in cases where discrimination is not susceptible to correction by the commercial process. Finally, the fourth part (Conclusion: Discrimination in Guatemala), explains how discrimination takes place in commercial establishments in Guatemala.

II. THE HUMAN RIGHT TO NONDISCRIMINATION IN THE ACCESS TO PUBLIC COMMERCIAL ESTABLISHMENTS

This section discusses the foundations of the right to equality under Guatemalan law, including international human rights law. First, the legal foundations of the right of equality are discussed in general. The second part will address, more specifically, the right of nondiscrimination to access commercial establishments as a human right.

A. *The Right to Equality*

The right to nondiscrimination finds very ample support in international law.²⁵ There are many international human rights instruments that recognize the right to nondiscrimination which have been ratified by Guatemala.²⁶ It even finds support in the field of Central American

25. See, e.g., Convention Against Discrimination, *supra* note 21.

26. See, e.g., Convention Against Discrimination, *supra* note 21, at pmb1., arts. 1, 5; American Convention on Human Rights, *supra* note 23, arts. 1, 24; International Pact of Civil and Political Rights, G.A. Res. 2200A (XXI), CCPR/C81/Add.7, arts. 2, 26 (Feb. 19, 1992); Charter of the Organization of American States, arts. 3.1, 17, May 9, 1951, 119 U.N.T.S. 3; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), art. 1, Nov. 17, 1988, Decree No. 127-96; U.N. Charter art. 55(c); International Pact of Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 19, 1966); International Convention on the Protection of the Rights of All Migrant Workers and Their Families, G.A. Res. 45/158 (Dec. 18, 1990); Convention for the Elimination of All Forms of Discrimination Against Women, art. 1, June 29, 1982, Decree No. 49; Inter-American Convention for the Prevention Sanctioning and Eradication of Violence Against Women "Convention of Belem do Para," arts. 4(f), 5, Dec. 15, 1994, Decree No. 69-94; Convention on the Rights of Children, G.A. Res. 44/25, at 2 (May 10, 1990); Convention on the Rights of People with Disabilities, G.A. Res. 59-2008, at 2-3, 5-7, 9, 12 (Dec. 13, 2006); Erlic Castillo, *Publicamente Presenta Disculpas por Racismo [Publicly Apologizes for Racism]*, PRENSA LIBRE (Apr. 25, 2006), available at http://www.prensalibre.com/noticias/Publicamente-presenta-disculpas-racismo_0_128388233.html (last visited Feb. 24, 2011) (In December 2004, a woman was stopped from entering "La Fratta" in Quetzaltenango because of her ethnic identity.); PDH REPORT OF 2004, *supra* note 6, at 692 (In June, 2004, two people were told that they could not enter the "El Señor Tortuga" restaurant if they were dressed in their traditional attire.); Inter-American Convention on the Elimination of All Forms of

Integration community law.²⁷ It is important to note that in Guatemala, human rights conventions occupy a favored hierarchical position because of their preeminence over domestic law.²⁸

The numerous international instruments that prohibit discrimination, and their almost universal acceptance, has led to the recognition of this principle by the International Court of Justice, as an obligation *erga omnes* owed to the entire international community and in which all states have an interest.²⁹

The right to equality has also been the subject of several pronouncements within the Inter-American System for the Protection of Human Rights.³⁰ The Inter-American Court of Human Rights has stated, on

Discrimination Against People with Disabilities, G.A. Res. 1369 (XXVI-O/96), arts. 2–3 (June 7, 1999); Convention 100 of the International Labor Organization on Equal Pay Between Male and Female Workers for Work of Equal Value, Guat.-Switz., art. 2, July 6, 1951; International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 2202A, U.N. GAOR, 28th Sess., 2004th Plen. Mtg., at 1–2, U.N. Doc. A/C.3/SR.2004 (Nov. 30, 1973); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III) (Dec. 9, 1948); Convention 169 on Indigenous Tribal People in Independent Countries of the International Labor Organization, June 26, 1989, available at <http://www.ilo.org/public/spanish/region/ampro/lima/publ/conv-169/convenio.shtml> (last visited Feb. 24, 2011) (This agreement was subjected to a preventative analysis of constitutionality by the Constitutional Court, Sala Constitucional [C.C.] [Constitutional Court], May 18, 1995, Expediente 199-95 (Guat.)).

27. Treaty of Central-American Social Integration, arts. 6(e), 7(e), Mar. 30, 1995, United Nations, *Treaty Series*, vol. 1927, No. I-32889.

28. CONSTITUCIÓN DE LA REPUBLICA DE GUATEMALA [CONSTITUTION OF GUATEMALA], art. 46, Nov. 17, 1993 [hereinafter CONSTITUTION OF GUATEMALA]; Ley de Amparo, Exhibición Personal y Constitucionalidad [Law of Protection, Personal Exhibition and Constitutionality], Decree No. 1-86 (Guat.); Ley de Organismo Judicial [Law of the Judicial Branch], Decree No. 2-89, art. 9 (Guat.) [hereinafter Law of Judicial Branch].

29. Case Concerning the Barcelona Traction, Light and Power Co., Judgment, 1970 I.C.J. 34 (Feb. 5) (in terms of racial discrimination) [hereinafter Barcelona Traction, Light and Power Co.]; see also Legal Consequences for the States of the Continued Presence of South Africa in Namibia (Southwest Africa), Notwithstanding Resolution 276 (1970) of the Security Council, Request for Advisory Opinion, 1971 I.C.J. ¶ 131 (June 21, 1971) (The Court declared discrimination as a violation of human rights and a flagrant violation of the United Nations Charter.).

30. See Legal Condition and Rights of Undocumented Migrants, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 82–127 (Sept. 17, 2003) (contains an ample discussion of the right of equality in accordance to the inter-American system) [hereinafter Legal Condition and Rights of Undocumented Migrants]; The Right to Information on Consular Assistance in the Framework of Guarantees of Legal Due Process, Advisory Opinion, OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 119 (Oct. 1, 1999); Legal Condition and Human Rights of Children, Advisory Opinion, OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶¶ 43–55 (Aug. 28, 2002); Propuesta de Modificación a la Constitución Política de Costa Rica Relacionada con la Naturalización [Proposal to Modify the Political Constitution of Costa Rica Relating to Naturalization], Advisory Opinion, OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 52 (Jan. 19, 1984) [hereinafter Proposal to Modify Costa Rican Constitution]. See also, *inter alia*, cases: Caso de las Niñas Yean y Bosico v. República Dominicana [Case of the girls Yean

several occasions, that the right to nondiscrimination is based on equality and respect, and has concluded that “based on the recognition of equality before the law all discriminatory treatment is prohibited.”³¹ Moreover, it has indicated that “in the present stage of evolution of international law, the fundamental principle of equality and nondiscrimination has entered the domain of *jus cogens*. . . .”³² The Court has stated that the importance of this principle lies in that:

[T]he whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.

Few rights have been so widely accepted in the international community as the right to nondiscrimination.³³ In addition to its extensive protection in international conventions and national laws, the right to nondiscrimination has also been the subject of substantial international declarations on human rights.³⁴

and Bosico v. Dominican Republic], (ser. C) No. 130 (Sept. 8, 2005); Caso Yatama v. Nicaragua [Yatama v. Nicaragua], (ser. C) No. 127 (June 23, 2005); Caso de la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua [Community of Mayagna (Greater) Awas Tingni v. Nicaragua], (ser. C) No. 79 (Aug. 31, 2001); Caso González y otras (“Campo Algodonero”) v. México [Gonzalez et al. v. Mexico], (ser. C) No. 205 (Nov. 16, 2009).

31. Proposal to Modify Costa Rican Constitution, *supra* note 30, ¶ 54; Legal Condition and Rights of Undocumented Migrants, *supra* note 30, ¶ 83.

32. Legal Condition and Rights of Undocumented Migrants, *supra* note 30, ¶ 101.

33. Barcelona Traction, Light and Power Co., *supra* note 29, at 34 (mentioning acts of international aggression, genocide, slavery and racial discrimination). See LOUIS HENKIN ET AL., HUMAN RIGHTS 301, 309 (Foundation Press 1999) (The principles of the United Nations Charter prohibit the use of force, genocide, slavery, murder or forced disappearance, torture, and other cruel treatment or inhumane treatment, prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights.) [hereinafter HUMAN RIGHTS].

34. See, e.g., United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904 (XVIII), U.N. Doc. A/RES/36/55 (Nov. 20, 1963) (which served as an important antecedent for the convention of the same name) [hereinafter Declaration Against Discrimination]; Declaration On Race and Racial Prejudices, United Nations Educational, Scientific and Cultural Organization, 20th sess., UNESCO Res. (Nov. 27, 1978); United Nations Declaration on the Rights of Indigenous People, G.A. Res. 61/68, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). It is important to note that the right to nondiscrimination in accessing a commercial establishment intended for public use could be recognized as an inherent human right to the human person, and is protected by

The right to nondiscrimination has taken on fundamental importance in the field of international law, but has also been prominent in the national laws of all states.³⁵ This is because the principles of equality and nondiscrimination are fundamental for safeguarding human rights in domestic law.³⁶ Sir Hersch Lauterpacht said that equality is in a “substantial sense the most fundamental of all human rights. It holds first place in the majority of written Constitutions. It is the starting point of all other freedoms.”³⁷ In Guatemala, nondiscrimination as a human right is grounded in the rights to equality and dignity recognized in Article 4 of the Constitution:

In Guatemala all human beings are free and equal in dignity and rights. Man and woman, whatever their marital status, have equal opportunities and responsibilities. No person shall be subjected to servitude or any other condition which impairs their dignity. Human beings should conduct themselves in fraternally with one another.³⁸

It is also recognized in specific situations with respect to particular protected groups in Articles 50, 51, 66, 69, 71, 93, and 102(k) of the Constitution of the Republic of Guatemala (Constitution).³⁹

the Constitution, because it is derived from the right to equality enshrined in Article Four, even though not expressly stated in the supreme text as set out in Article Forty-Four of the Constitution.

35. See, e.g., Declaration Against Discrimination, *supra* note 34.

36. Legal Condition and Rights of Undocumented Migrants, *supra* note 30, ¶ 88.

37. HUMAN RIGHTS, *supra* note 33, at 1032 (quoting Sir Hersch Lauterpacht).

38. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 4.

39. Equality of Children: “All children are equal before the law and have the same rights. All discrimination is punishable.” CONSTITUTION OF GUATEMALA, *supra* note 28, art. 50; Protection of Minors and the Elderly: “The State will protect the physical, mental and moral health of minors and the elderly. They are guaranteed the right to food, health, education, social security and welfare.” CONSTITUTION OF GUATEMALA, *supra* note 28, art. 51; Protection for Ethnic Groups: “Guatemala is composed of diverse ethnic groups including those of Mayan descent. The State recognizes, respects and promotes their way of life, customs, traditions, social organization, indigenous dress for men and women, customs and dialects.” CONSTITUTION OF GUATEMALA, *supra* note 28, art. 66; Relocation of Workers and Their Protection: “Labor activities that involve relocation of workers from their communities will be protected by legislation to ensure adequate conditions of health, safety, and welfare and ensure the payment of their unadjusted salaries, the disintegration of these communities, and in general all discriminatory treatment.” CONSTITUTION OF GUATEMALA, *supra* note 28, art. 69; Right to Education: “Guarantee of the freedom of education and teaching. It is the obligation of the State to provide and facilitate education to its inhabitants without any discrimination. It is declared a public utility and need for the establishment and maintenance of cultural education centers and museums.” CONSTITUTION OF GUATEMALA, *supra* note 28, art. 71; Right to Health: “The enjoyment of health is a fundamental human right, without discrimination.” CONSTITUTION OF GUATEMALA, *supra* note 28, art.

In the area of Guatemalan constitutional jurisprudence, the Constitutional Court has noted that:

It is absolutely undeniable that the issues concerning the protection of personal dignity, have a fundamental character and priority, therefore all acts of racial discrimination that violate human rights and fundamental freedoms should be condemned; all this with the aim of promoting understanding and tolerance within the population of the Republic, under the inescapable principle that all of us are equal in dignity and rights and promoting the realization that human rights are protected by our Constitution and by the conventions adopted by the State of Guatemala.⁴⁰

Many Guatemalan laws also guarantee the right to equality and protect against discrimination.⁴¹ This protection is even found in criminal law.⁴² Discrimination has been defined as a crime since 2002.⁴³ To this end, relevant law states:

93; Minimum Social Rights of Labor Legislation: “These are the minimum social rights that underlie labor legislation and the activity of the courts and authorities: . . . k) Protection of the female worker and regulation the conditions under which they must serve. They should not establish differences between married and unmarried women in the workplace. . . .” CONSTITUTION OF GUATEMALA, *supra* note 28, art. 102.

40. Expediente 855-2003, *supra* note 3, at II.

41. See, e.g., CONSTITUTION OF GUATEMALA, *supra* note 28, art. 18(a) ¶¶ 50–51, 66, 69, 71, 73, 93, 102; Ley contra el Femicidio y otras Formas de Violencia contra la Mujer [Law Against Femicide and Other Forms of Violence Against Women], Decree No. 22-2008, May 7, 2008 (Guat.); Ley de la Carrera Judicial [Judicial Career Law], Decree No. 41-99, Dec. 2, 1999 (Guat.); Ley de Radiocomunicaciones [Radio Communication Act], Decree No. 433, Mar. 16, 1966 (Guat.); Ley de Dignificación y Promoción Integral de la Mujer [Dignity and Integral Promotion of Women Act], Decree No. 7-99, Sept. 3, 1999 (Guat.); Ley de Protección Integral de la Niñez y Adolescencia [Protection of Children and Adolescents Act], Decree No. 27-2003, June 4, 2003 (Guat.); Código de Trabajo [Labor Code], Decree No. 1441, arts. 14, 89, 137, Mar. 10, 2004 (Guat.) [hereinafter Labor Code]; Ley del Servicio Civil [Civil Service Law], Decree No. 1748, May 2, 1968 (Guat.); Ley de Protección para las Personas de la Tercera Edad [Protection for People of the Third Age Act], Decree No. 80-96, Oct. 21, 1996 (Guat.); Ley de Desarrollo Social [Social Development Law], Decree No. 42-2001, Sept. 26, 2001 (Guat.); Ley de Promoción Educativa contra la Discriminación [Educative Promotion Law Against Discrimination], Decree No. 81-2002, Nov. 28, 2002 (Guat.); Ley de Probidad y Responsabilidad de Funcionarios Públicos [Law of Probity and Responsibility of Public Officials], Decree No. 89-2002, Dec. 6, 2002 (Guat.); Ley de Atención a Personas con Discapacidad [Services for Persons with Disabilities Act], Decree No. 135-96, Nov. 28, 1996 (Guat.); CÓDIGO PENAL [C.P.] [Penal Code], *as amended*, Oct. 9, 2002, art. 202 (Guat.) [hereinafter PENAL CODE].

42. PENAL CODE, *supra* note 41, art. 202.

43. *Id.*

Article 202 bis. Discrimination. Discrimination is understood as any distinction, exclusion, restriction or preference based on gender, race, ethnicity, language, age, religion, economic status, sickness, disability, marital status, or in any other cause, race or circumstance, that prevents or obstructs a person, group of people or associations, from the exercise of a legally established right including common law or custom, in accordance with the Constitution of the Republic and international human rights treaties.

Whoever by act or omission incurs in the conduct described in the previous paragraph, will be punished by imprisonment of one to three years, and fined five hundred to three thousand Quetzales.

The penalty shall be increased by one third:

- a) When the discrimination is based on grounds of language, culture or ethnicity;
- b) For those that in any form or by any means disseminate, support or incite discriminatory ideas;
- c) When the act has been committed by a public officer or employee in the exercise of his office;
- d) When the act is committed by an individual providing a public service.⁴⁴

Thus far, some convictions have already been issued.⁴⁵ Because of the substantial legal protection that the right to nondiscrimination receives in a great number of laws, treaties, and declarations, we can conclude that

44. *Id.* (as amended by Decree No. 57-2002, Sept. 11, 2002).

45. The first was issued by el Tribunal Décimo de Sentencia Penal, Narcoactividad y Delitos contra el Medio Ambiente [Tenth Criminal Court, Drugtrafficking and Environmental Crimes], Case No. 12930-2003, Apr. 11, 2005 (Guat.). See Rigoberta Menchú Tum Foundation, *Informe del Proyecto sobre la Búsqueda de Justicia por Delito de Discriminación en Guatemala* [Report on the Search of Justice for the Crime of Discrimination in Guatemala], at 1 (2003) (In this case, Nobel Prize winner Rigoberta Menchú was discriminated against by Juan Carlos Ríos Ramírez, Ana Cristina López Kestler, Elvia Domitila Morales de López, Vilma Orellana Ruano, and Enma Concepción Samayoa de Rosales when she attended a public session of the Constitutional Court because the defendants offended her and did not permit her to leave the courtroom.) [hereinafter *Rigoberta Menchú Tum Discrimination Report*]; for the second, see *Condenan a Tres Empleados del Ministerio de Trabajo por Discriminación* [Three Ministry of Labor Employees Condemned for Discrimination], PRENSA LIBRE, Sept. 2, 2009, available at http://www.prensalibre.com/noticias/Condenan-empleados-Ministerio-Trabajo-discriminacion_0_109190950.html (last visited Mar. 1, 2011) (María de los Ángeles Narváez, José Dionisio Ochoa, and Aracely Valenzuela Orozco were sentenced for mocking, disrespectful conduct, and discriminating against the Vice Minister of Labor when in August of 2006, she visited the Tecún Umán delegation. To prove a criminal case, the existence of the right to enter a facility without discrimination is essential because the obstruction of a right is a requirement of the crime.) [hereinafter *Three Ministry of Labor Employees Condemned for Discrimination*].

within the Guatemalan legal system, this right occupies a privileged position.

B. The Right to Nondiscrimination in Accessing Commercial Establishments Open to the Public

“It is of great importance in a republic not only to guard the society against oppression of its rulers, but to guard one part of the society against the injustice of the other part.”⁴⁶

Equality and nondiscrimination are, in essence, two parts of the same principle: the right to be treated as equal and the right not to be treated unequally.⁴⁷ It contains a positive obligation to treat equally and a negative obligation to not treat differently.⁴⁸ The right to nondiscrimination in accessing commercial establishments open to the public comes as an inevitable consequence of the general right to nondiscrimination, and is therefore based on the same rules. Nondiscrimination prohibits all treatment based on irrational, irrelevant, or arbitrary distinctions.⁴⁹ If the objective of the provisions in the Constitution and the conventions is to eliminate discrimination, then they should be interpreted as equally applicable to cases of discrimination committed by individuals in commercial establishments.⁵⁰ Especially when one considers that international treaties should be interpreted in good-faith and in light of their objective and purpose,⁵¹ and that human rights should be interpreted in an evolutionary manner in accordance with the *pro homine* principle.⁵²

However, besides going to the purpose and spirit of the prohibition of discrimination, in these cases there is a specific rule that establishes it as such—in particular, the Convention Against Discrimination.⁵³ This

46. THE FEDERALIST No. 51 (James Madison).

47. See Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L. L. 283 (1985); Proposal to Modify Costa Rican Constitution, *supra* note 30 (citing to the opinion of Judge Rodolfo E. Piza Escalante).

48. See generally Alexander Morawa, *The Content of Non-Discrimination: An Introductory Comment*, 2002 J. ETHNOPOLITICS & MINORITY ISSUES EUR. 1 (2002).

49. Humberto Nogueira Alcalá, *El Derecho a la Igualdad en la Jurisprudencia Constitucional [The Right to Equality in Constitutional Jurisprudence]*, in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO [ANNUAL PUBLICATION OF LATIN AMERICAN CONSTITUTIONAL LAW] 234 (1997).

50. See, e.g., Luisa Rodriguez, *supra* note 6.

51. HUMAN RIGHTS, *supra* note 33, at 311.

52. Legal Condition and Rights of Undocumented Migrants, *supra* note 30, ¶ 105.

53. See NATÁN LÉRNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION 6 (The Netherlands, Sijthoff & Noordhooij Int'l Publ's BV 1980). See generally

international instrument has gained almost universal acceptance.⁵⁴ This instrument seeks to eliminate all distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin, that has the objective or effect of nullifying or impairing the recognition, enjoyment, or exercise, in equal terms, of human rights and fundamental liberties in political, economic, social, cultural, or any other arena of public life.⁵⁵ It is not limited to racial discrimination, or to acts committed by the state.⁵⁶ The Convention Against Discrimination obliges state parties to outlaw, through appropriate means, discrimination practiced by both the state and individuals in the private sphere.⁵⁷

The Convention Against Discrimination in Article 5(f) provides that state parties compromise to prohibit and eliminate racial discrimination in all forms. At the same time, it obligates them to guarantee the right of equality before the law to all people, without distinction, “[in] access[ing] any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres, and parks.”⁵⁸ In addition, the Declaration by the United Nations on the Elimination of All Forms of Racial Discrimination, which served as an important background to the Convention Against Discrimination, in Article 3, Paragraph 2 states: “[e]veryone shall have equal access to any place or facility intended for use of the general public, without distinction as to race, colour or ethnic origin.”⁵⁹

At the national level, it is necessary to mention the Consumer and User Protection Act which establishes the obligation of providers to “respect the dignity of the human person and not discriminate against the consumer or user, by unjustly or arbitrarily refusing to provide a good or render a service.”⁶⁰ The Regulation of the Consumer and User Protection Act further states that “no provider should refuse to provide a good or render a

Convention Against Discrimination, *supra* note 21 (The Convention was adopted with a unanimous vote from 106 countries, with one abstention (Mexico), which indicated that it would vote affirmatively.).

54. *See generally* Convention Against Discrimination, *supra* note 21.

55. *Id.* art. 1.

56. *Id.*

57. *Id.*

58. *Id.*

59. Declaration Against Discrimination, *supra* note 34, at 2.

60. Ley de Protección al Consumidor y Usuario [Consumer and User Protection Act], Decree No. 6-2003, Mar. 11, 2003 (Guat.) [hereinafter Consumer and User Protection Act].

service to any consumer or user arguing reasons that implicate discrimination against a human person. . . .”⁶¹

In the workplace, the Guatemalan Labor Code states:

Discrimination is prohibited based on race, religion, political views and economic situation, in social assistance establishments, education, culture, entertainment or commerce that function for the use or benefit of workers, in businesses or workplaces of private ownership, or in those which the State creates for workers in general. . . .⁶²

Considering all the foregoing, the prohibition of discrimination is not an obligation that generates consequences only for the state, but also for individuals.⁶³ On that point, the Inter-American Court of Human Rights has established that the principle of equality and nondiscrimination “may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.”⁶⁴ International rights permit states to impose obligations on individuals to respect human rights.⁶⁵ This means that some human rights can be enforced both against acts of the state and those of individuals in private relationships.⁶⁶ The Constitutional Court of Guatemala (Constitutional Court) has already done this in accordance with what is stated by Article 5(f) of the Convention Against Discrimination, in relation to access of an individual to a commercial establishment even though there was no direct state intervention.⁶⁷ It must also be pointed that that in these cases there is clearly some relevant state activity as well.⁶⁸ The Constitution and operation of a commercial establishment in Guatemala requires various

61. Reglamento de la Ley de Protección al Consumidor y Usuario [Regulation of the Consumer and User Protection Act], Gub. No. 777-2003, Nov. 28, 2003 (Guat.).

62. Labor Code, *supra* note 41, art. 14.

63. Legal Condition and Rights of Undocumented Migrants, *supra* note 30, ¶ 100.

64. *Id.*

65. HUMAN RIGHTS, *supra* note 33, at 316.

66. On the horizontal effect of human rights treaties between private individuals, see Carmen Cerdá Martínez-Pujalte, *Principio de Igualdad y Prohibición de Discriminación en las Relaciones Jurídico Privadas: La Doctrina de la Drittwirkung* [Principle of Equality and the Prohibition of Discrimination in Private Legal Relationships: The Doctrine of the Drittwirkung], 61 REVISTA DE LAS CORTES GENERALES [GENERAL COURTS MAGAZINE] 156 (2004); Corte Constitucional [C.C.] [Constitutional Court], Sept. 28, 2001, Sentencia T-1042/01 (Colom.).

67. Expediente 855-2003, *supra* note 3, at II.

68. *Id.*

acts in which the state is also involved, through authorization, patents, and licenses, among others.⁶⁹ Thus, the state cannot allow businesses that operate under its consent and acquiesce, and by virtue of registrations, licenses, and public permits, to commit acts prohibited by the basic rules that govern state activity.

Equality in the access to public commercial establishments is a human right under Guatemalan law. This becomes clear from an authentic interpretation of the human right to equality which is constitutionally protected and from the application of international human rights treaties. Therefore, a refusal to admit a person to a public commercial establishment based on discriminatory motives constitutes a violation of a fundamental human right and not simply a refusal to enter into a legal relationship between individuals. Recognition of access, in these cases, as a right and not a mere faculty is of vital importance because this means it can be enforced. This also has implications in the determination of the elements of the crime of discrimination.⁷⁰ This crime under Guatemalan law is committed when the act of distinction prevents or hinders the exercise of a right.⁷¹

III. "WE RESERVE THE RIGHT OF ADMISSION:" PRIVATE PROPERTY, FREEDOM OF INDUSTRY AND BUSINESS, AND FREEDOM OF CONTRACT

The so-called right of admission is a term that is commonly utilized, but is not legally defined as such. In essence, the argument behind the term is that the owner of a commercial property has the right to decide to whom he permits admission. It is not a right that is expressly regulated in Guatemala, and therefore, those who support it must do so with a foundation on other regulated rights. Among them, the most frequently cited are the rights to private property, freedom of industry and commerce, and the freedom of contract.⁷² The right to freedom of association could be cited in relation to private clubs, as the associated link loses its relevance in relation to commercial establishments. As long as there is no concealment of the true public nature of a commercial establishment, by deceptively calling it a private club, if it does not meet the essential characteristics of

69. Public records (trade, fiscal, municipal, labor), patents (patents of commerce, companies), licenses (food, drink, sound, shows), supervision (health, labor inspection, fiscal), among others.

70. PENAL CODE, *supra* note 41, art. 202.

71. *Id.*

72. CONSTITUTION OF GUATEMALA, *supra* note 28, arts. 39, 40; CÓDIGO DE COMERCIO [C. COM.] [CODE OF COMMERCE], Decree No. 2-70, Apr. 9, 1970, arts. 1, 2 (Guat.) [hereinafter CODE OF COMMERCE].

such.⁷³ Notwithstanding, these private clubs are also subject to limitations.⁷⁴ One could also base the right of admission on the right of freedom of expression, but it is less feasible to sustain that a conduct that is prohibited under criminal law can be protected by freedom of expression.⁷⁵ Being that the first three stated rights (private property, freedom of industry and commerce, and freedom of contract) are the most relevant to this study, they will be explored with more detail in this work. This situation, at first glance, presents the conflict as a problem of balance, hierarchy, or weighing of conflicting interests or rights. The alleged conflict would be between a right to nondiscrimination and the right to decide who can enter a commercial establishment. What follows is an analysis of the scope of such rights and their confrontation with the right to nondiscrimination in the Guatemalan legal system.

A. Private Property

The right to private property is guaranteed in Article 39 of the Constitution, which establishes:

Private property is guaranteed as an inherent right to the human person. Every person can freely dispose of their property according to law. The State guarantees the exercise of this right and shall create conditions that facilitate the owner's use and

73. See generally James P. Murphy Jr., *Public Accommodations: What is a Private Club?*, 30 MONT. L. REV. 58 (1968) (The author notes that a truly private club is distinguished by the following criterion: 1) formed by a single common interest among members; 2) carefully selects those that apply and selects new members with reference to the common intimacy of the association; 3) limits the use of the installations and services to members or guests of good-faith; 4) controlled by members at general meetings; 5) limits its membership to a sufficiently small number to permit complete participation of its members and ensures that all share the link by which they are associated; 6) not for-profit and exists solely for the benefit of its members; and 7) publicity, if any, is limited to members.).

74. Corte de Constitucionalidad [C.C.] [Constitutional Court], June 15, 2004, Expediente 1756-2003 (Guat.) (In this case, the "Mayan Golf Club" was accused of discriminating against people of Korean origin. The case was dismissed.); Corte de Constitucionalidad [C.C.] [Constitutional Court], Aug. 2, 2004, Appeal of Expediente 1756-2003, Expediente 1003-2004 (Guat.) (The "Mayan Golf Club" was accused of discriminating against people of Korean origin. Again the Court dismissed the case, but stated that private clubs are obligated to not discriminate.).

75. See generally *Wisconsin v. Mitchell*, 508 U.S. 476 (1992) (A group of African-American men argued that beating a white man constituted an expression, and increasing the penalty because of the discriminatory selection of their victim, constituted a restriction of their freedom of expression; punishing their thoughts and not their conduct. In this regard, the Court stated that physical attacks cannot be considered, in any way, expressive conduct which is protected by the right of freedom of expression.).

enjoyment of their property, so as to reach individual progress and national development for the benefit of all Guatemalans.⁷⁶

Furthermore, this right is recognized and protected in other and conventions.⁷⁷ The right to private property, in general terms, bestows to its holder a high degree of power over the property. This doctrine recognizes that the right to real property is that of exclusion. This includes being able to take measures “that prevent the possible intrusion or interference of others” and the maintenance of the right of the holder to possession.⁷⁸ An important part of the protection of property rights is the right to exclude a third party from enjoying those rights.⁷⁹ From this doctrine, it has been commonly argued that the right to private property includes the power to make a discretionary decision of who to permit into an establishment.

While the right to property is a constitutionally guaranteed right, it is not a right that should be interpreted without limitations, or should be exercised in violation of the rights of others. Property rights, like other rights, have limits. The Constitutional Court has stated that the right to property is not unlimited, because that “would not be proper for life in society,” and has already ruled on the constitutionality of many of its limitations.⁸⁰ Even the same rules that recognize the right of ownership establish limits by associating the right to what is established by law and the common good. The existence of various limits is evident in the fact that Guatemalan law permits expropriation.⁸¹ But apart from this, which is the

76. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 39.

77. Among others, CÓDIGO CIVIL [C.C.] [Civil Code], Decree No. 106, Oct. 7, 1963, arts. 460, 464 (Guat.) [hereinafter CIVIL CODE]; HUMAN RIGHTS, *supra* note 33 (In the history of the convention, this right has been interpreted in an evolutionary manner and included communal property of indigenous people.). See *Caso de la Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua* [Community of Mayagna (Greater) Awas Tingni v. Nicaragua], (ser. C) No. 79 (Aug. 31, 2001); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), ¶ 79 (Dec. 10, 1948) (which has not been ratified by Guatemala).

78. LUIS DíEZ-PICAZO & ANTONIO GULLÓN, *SISTEMA DE DERECHO CIVIL [CIVIL RIGHT SYSTEM]* 50 (Editorial Técno 2003) (1976).

79. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 39.

80. See *Corte de Constitucionalidad [C.C.] [Constitutional Court]*, Jan. 16, 2007, Expediente 1110-2005 (Guat.); *Corte de Constitucionalidad [C.C.] [Constitutional Court]*, Dec. 28, 2004, Expediente 124-2004 (Guat.); *Corte de Constitucionalidad [C.C.] [Constitutional Court]*, Jan. 5, 2000, Expediente 276-99 (Guat.).

81. Regulated, among others, by: CONSTITUTION OF GUATEMALA, *supra* note 28, art. 40; CIVIL CODE, *supra* note 77, art. 467; *Tratado de Libre Comercio Centroamericano* [Central American Free-Trade Agreement], *Diario Oficial de la Federación [D.O.]*, Aug. 5, 2001, art. 10.7; *Tratado de Libre Comercio entre los Estados Unidos Mexicanos y las Repúblicas de El Salvador, Guatemala, y Honduras* [Free-Trade Treaty Between Mexico, El Salvador, Guatemala, and Honduras], *Diario Oficial*

most extreme form of limiting the right to property, Guatemalan law has many other limitations, mainly concerning prejudice that can cause harm to others.⁸² It also contains various limitations for foreigners.⁸³

The Constitution describes the right to property and indicates that people can dispose of their property “in accordance with the law”⁸⁴ and that this right is guaranteed in conditions that reach “the national development for the benefit of all Guatemalans.”⁸⁵ On its part, the Civil Code provides that ownership should be exercised “within the limits and with compliance of the obligations that are established by the law.”⁸⁶ The right of ownership is legally defined and its exercise can only be conducted in accordance with that which the law has established. As demonstrated above, the law and international treaties on human rights establish a human right to nondiscrimination in access to public commercial establishments.⁸⁷ Hence, discrimination in access to commercial establishments is an established legal limitation on ownership rights. Therefore, the right of ownership cannot be exercised in violation of it. To do so would not only contravene the rule that establishes the right to nondiscrimination, but also the laws that serve as foundation for the right of ownership itself.

The right to property is subject to existing laws and these, including laws of the highest hierarchy, prohibit discrimination.⁸⁸ If the property was voluntarily submitted by the owner for a public commercial purpose, the owner cannot discriminatorily define who has access to it based on property rights. In this regard, the Constitutional Court, in a case where a man was prevented from entering a night club based on ethnic criteria, noted that

de la Federación [D.O.], June 29, 2002, arts. 11–14; Tratado de Libre Comercio entre la República de Guatemala y la República de China (Taiwán) [Free-Trade Treaty Between Guatemala and the Republic of China (Taiwan)], Sept. 22, 2005, art. 10.11.

82. See, e.g., CIVIL CODE, *supra* note 77, arts. 473–84; Ley de Creación de Ambientes Libres de Humo de Tabaco [Creation of Environments Free of Tobacco Smoke Act], Decree No. 74-2008, Dec. 18, 2008 (Guat.).

83. For example, the prohibition of foreigners in acquiring border territories, see CONSTITUTION OF GUATEMALA, *supra* note 28, art. 122; Reguladora de Áreas de Reservas Territoriales del Estado [Regulation of Territorial Reserve Areas of the State], Decree No. 126-97, Mar. 12, 1997. The prohibition of foreigners in exploiting natural forest resources, see CONSTITUTION OF GUATEMALA, *supra* note 28, art. 125 (prohibition of obtaining rights over national lands in the El Petén area); Ley de Bancos y Grupos Financieros [Foreign Investment Law], Decree No. 19-2002, Apr. 29, 2002, arts. 6–7, 18, 64–65, 70 (limitations to constitution and supervision of foreign banks).

84. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 39.

85. *Id.*

86. CIVIL CODE, *supra* note 77, art. 464.

87. *Id.*

88. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 39.

while “the owners of private places intended for public services are entitled to reserve the right to refuse admission, it should not be based on any type of discrimination.”⁸⁹ Unfortunately, the Court did not expound on what they referred to as “the right of admission.”⁹⁰ Moreover, it can be presumed that the Court wanted to refer to services intended for the public and not to “public services” as indicated, because the case in question referred to a nightclub.⁹¹ Nevertheless, it clearly stated that the right to exclude third parties from commercial establishments cannot be exercised in a discriminatory manner.⁹²

The use that is given to the property is also relevant to determine the extent of power that is permitted to restrict third party access to it. An individual who devotes his property to private and intimate use can freely determine who he admits into it. In this manner, everyone can decide who they admit into their home under any circumstance. But by dedicating property for use by the general public this right is lost in order to accommodate the rights of others. In fact, the more a property is allocated for use by others, the more it loses its intimate and private character, and therefore, the law should grant less protection for the power to exclude. In this regard, the law must protect the intimacy and privacy of people, leaving them free absolutely to reserve the right to decide who they admit in the privileged sphere of their home. But when they designate a property for general commercial purposes, they renounce the expectation of privacy that they would otherwise expect from the same. It is interesting to refer to a statement by the Supreme Court of the State of New Jersey, which held that “when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably.”⁹³ If the owners want to reap the economic benefits that can result from offering commercial services to the general public, they are subject to the obligations and limitations that such offering entails.⁹⁴ The more a private property is intended for the public, the less expectation of privacy or intimacy for the owner there is, and the more they must accommodate the rights of others.⁹⁵ The establishments intended for public use are buildings where there is a lower expectation of privacy on the part

89. Expediente 855-2003, *supra* note 3, at II.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Uston v. Resorts International Hotel Inc.*, 445 A.2d 370, 376 (N.J. 1982).

94. *Id.*

95. See generally Steven Sutherland, *Patron's Right of Access to Premises Generally Open to the Public*, 1983 U. ILL. L. REV. 545 (1983).

of the owners than in other property. Other provisions also recognize that there is less expectation of privacy in these cases.⁹⁶ For example, the penal provisions governing the crime of burglary make an exception in its application in regards to establishments open to the public.⁹⁷ The Criminal Procedure Code states that in some circumstances, the authorities can enter into these sites without a search warrant.⁹⁸

When referring to Central American jurisprudence, it is appropriate to cite the Constitutional Chamber of the Supreme Court of Costa Rica, which has raised the issue currently under study and stated that:

When despite being privately owned property, it is intended—in whole or in part—by its legitimate owner for public use, i.e. it offers one or more services or conducts public entertainment for profit or for free, that sets it apart from the concept of a private enclosure as contemplated by our Political Constitution, thereby limiting the legitimate possessor of the property of the ability to restrict public access to that part precisely destined for that purpose, because if it is authorized in certain cases to condition or restrict entrance of certain people, it is true that it will never be constitutionally valid if this exclusion infringes on or threatens the fundamental rights of those people, be it by causing discrimination, undignified or degrading treatment, or restricting some public freedom that is recognized constitutionally or in international conventions adopted by our country, because in this manner there would be an abusive exercise of such right.⁹⁹

However, in order to clarify, another distinct case occurs when the entry or stay of an individual alerts or endangers the safety of the property or the integrity of the establishment, because this person intends to cause damage. Then the owner can deny access or remove the person from the property. Exclusion in this case, and when seeking to protect the physical integrity of people inside it, is expressly recognized in Article 9 of the Regulation of the Consumer and User Protection Act.¹⁰⁰ This, however, cannot be used to exclude on the grounds that the presence of a person that is not tolerated by other clients, or by the owner, can lead to a situation where personal safety is at risk. In every case, the law protects the interests

96. PENAL CODE, *supra* note 41, art. 208.

97. *Id.*

98. CÓDIGO PROCESAL PENAL [C.P.P.] [Criminal Procedure Code], Decree No. 51-92, Sept. 28, 1992, art. 196 (published on Dec. 14, 1992).

99. Sentencia 10327-07, *supra* note 11.

100. *See generally* Consumer and User Protection Act, *supra* note 60, art. 9.

of everyone to access the establishment and not the right to discriminate or act violently against a client.¹⁰¹

Discrimination in access to commercial establishments is an act that is not protected by the regulation of property rights. In effect, the regulation of property rights prohibits the execution of acts that cause prejudices to others.¹⁰² To justify these acts based on property rights constitutes a bad faith abuse of those property rights.¹⁰³

B. Freedom of Industry and Commerce

Besides property rights as a foundation to the right of admission, freedom of industry and commerce is also frequently cited. Such freedom is recognized as an individual right by Article 43 of the Constitution.¹⁰⁴ This states that “[f]reedom of industry, commerce and work is recognized, except as limited by social or national interests as imposed by law.”¹⁰⁵ Within international human rights law there is no specific provision that recognizes the right to freedom of industry and commerce.¹⁰⁶ But interpreted broadly, it is possible to interpret it as part of the right to property. But in any case, the link between freedom of industry and commerce and property rights is problematic because to argue such a right is an absolute right for the purposes of discriminatory admission, as noted earlier, is incorrect because property rights do not grant that power.

As in the case of property rights, the Constitution also imposes limitations on the right to freedom of industry and commerce.¹⁰⁷ In effect, Article 43 of the Constitution states that the laws recognize this right “except as limited because of social or social interest imposed by the law,” which is to say that it cannot be exercised in an unlimited manner.¹⁰⁸ The laws actually impose some limitations on this right. The right to nondiscrimination in accessing establishments intended for the general

101. For a discussion of the topic, rendering a disagreeable result, see *Sentencia 17528-07*, *supra* note 10 (In that case, the Court was incorrect in holding that the denial of service was justified, since the owners should have removed the persons who threatened the couple, or called the police, rather than denying the couple their human rights.).

102. See generally CIVIL CODE, *supra* note 77, art. 465.

103. Law of Judicial Branch, *supra* note 28, art. 18; Consumer and User Protection Act, *supra* note 60, art. 68; CIVIL CODE, *supra* note 77, arts. 466, 1653 (Abuse of rights is an argument equally applicable to the freedom of industry and commerce and freedom of contract.).

104. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 43.

105. *Id.*

106. HUMAN RIGHTS, *supra* note 33, at 1143.

107. CONSTITUTION OF GUATEMALA, *supra* note 28, art. 43.

108. *Id.*

public, as we have already seen, is a substantial limitation imposed by many laws and treaties, and therefore, in accordance with Article 43, constitutes a restriction on the right to freedom of industry and commerce. As in the case of property rights, the exercise of freedom of industry and commerce with discriminatory purposes constitutes a violation of the right to equality, as a violation of the same constitutional text that recognized the right to freedom of industry and commerce.

Also, the Consumer and User Protection Act establishes the right of providers to “[r]eceive gains or profits from their economic activities in accordance to the law, ethics and corresponding morals.”¹⁰⁹ But that article is not useful for substantiating the possibility of discrimination in access to commercial establishments, since as we have already discussed, it would not be a conduct in accordance with the law.

It should further be noted that the right to freedom of industry and commerce breaks from the right to equality, since it necessarily involves allowing anyone, without discrimination, to establish a commercial enterprise. However, such a right to nondiscrimination in the exercise of an economic activity cannot be used as a basis for discriminating against others.

C. Freedom of Contract

This study focuses on commercial establishments, which are regulated, *inter alia*, by the rules of the Commercial Code.¹¹⁰ A commercial establishment offers services or sells goods to the public on a continuous basis and for profit. All this falls within the terms of a business relationship.¹¹¹ The purchase of goods or services, in these circumstances, implies the execution of a commercial contract, and therefore, naturally the right to freedom of contract applies. This freedom involves self-determination in deciding whether to contract, with whom to contract, and the content of the agreement. Defending the right of admission with a basis on freedom of contract is to emphasize that by allowing entrance to a private commercial establishment, and the subsequent acquisition of goods or services, the parties are entering into a contractual relationship.¹¹² This relationship is a product of autonomy. That is to say, that if nobody is forced to contract, then they should not be able to require the owner to contract with anyone specifically and against his will. This argument

109. Consumer and User Protection Act, *supra* note 60, art. 14(a).

110. *See generally* CODE OF COMMERCE, *supra* note 72.

111. *Id.* arts. 1–2.

112. For an analysis on this issue, *see generally* Sala Primera del Tribunal Constitucional de Perú [First Chamber of the Constitutional Court of Peru], Expediente 4788-2005-PA/TC, Dec. 20, 2005.

suggests that if nobody is obligated to contract, then everyone is free to contract with whomever they wish without limitation.¹¹³ This conclusion is incorrect because the protection afforded by fundamental rights is not absent in relationships between individuals. The rule that recognizes freedom of contract is not without limitation and in any case a rule of ordinary hierarchy, while the right to equality is recognized by the Constitution and numerous treaties on human rights, which are hierarchically superior. These rights are also fully applicable in the private sphere.¹¹⁴

Freedom of contract is not a right that is expressly recognized by the Constitution or by international law on human rights.¹¹⁵ Nevertheless, it is possible to infer such a freedom from a broad interpretation of the right to property and freedom of industry and commerce. But in all cases, the derivation of this right from those two prevents supporting freedom of contract to deny the right of admission based on discriminatory terms.¹¹⁶ If the genesis of freedom of contract comes from those two aforementioned rights, they cannot allow another derivative right that which is forbidden to them.

In the ordinary legal framework, freedom of contract finds express regulation, albeit rare.¹¹⁷ In this regard, the Commercial Code states “no one can be forced to contract except when the refusal to do so constitutes an unlawful act or abuse of a right.”¹¹⁸ Freedom of contract, as well as the two rights set forth in the preceding paragraph, is also qualified. In this case, the law expressly limits its exercise in terms of effects on third parties.¹¹⁹ As stated before, denying access to a commercial establishment on a discriminatory basis is a violation of a human right and constitutes a crime under the Penal Code.¹²⁰ Therefore, if an owner of a commercial establishment refuses to provide a service on a discriminatory basis, it constitutes a crime, that is to say, an unlawful action excluded from the

113. Often even those who use this argument assert that it is not extensive for public services.

114. Gonzalo Aguilar Cavallo & Cristian Contreras Rojas, *El Efecto Horizontal de los Derechos Humanos y su Reconocimiento Expreso en las Relaciones Laborales en Chile* [The Horizontal Effect of Human Rights and its Explicit Recognition in Labor Relations in Chile], 13 IUS ET PRAXIS 1 (2007).

115. See generally HUMAN RIGHTS, *supra* note 33; CONSTITUTION OF GUATEMALA, *supra* note 28.

116. See generally CODE OF COMMERCE, *supra* note 72.

117. *Id.*

118. CODE OF COMMERCE, *supra* note 72, art. 681.

119. See generally CODE OF COMMERCE, *supra* note 72.

120. PENAL CODE, *supra* note 41, art. 202.

protection of the right to freedom of contract under the Commercial Code.¹²¹ Additionally, in accordance with Article 18 of the Judicial Branch Act, an exercise of power that is excessive and in bad-faith, and causes harm to others, constitutes an abuse of rights.¹²² Discrimination in the exercise of freedom of contract is an action of bad-faith in the exercise of the right, which goes beyond the legal limitations imposed by the law, and violates the human rights of others. Additionally, it is important to state that the Consumer and User Protection Act expressly recognizes the freedom of contract, but only for the consumer, therefore it is not useful as a foundation for owners.¹²³ Furthermore, it is possible to interpret that because that right is recognized for consumers and not for owners, they do not have a right to decide with whom they contract and that by deciding to create a commercial establishment they lose it.

D. From Demanding to Begging: The Right of Admission Transferred to the Law of Obligations

From the point of view of the law of obligations, it should be understood that the opening of a commercial establishment is an offer to contract. Through the opening, an offer is directed at the general public without discriminatory distinction. Such a distinction, in this case, would contravene public order and express prohibitive rules. As an offer aimed at the general public, it is perfected upon acceptance,¹²⁴ which is why the owner is obliged to comply with his offer.¹²⁵ Therefore, the right to nondiscrimination in establishments aimed at the public does not infringe on the freedom of contract, but to the contrary, seeks to enforce the offer that the owner made by opening the commercial establishment to the public.

Within this area, the objective of owners in placing signs that express a right of admission becomes more evident, as an intention, conscious or not, to limit the offer aimed at the public. The sign is intended to inform potential customers that the establishment reserves the right to admit, or not, potential clients. This is ingenious, as it seeks to limit the potential liability of the owner for an eventual claim for breach of an offer. Furthermore, it has a strong effect on the mind of potential clients, who justify the denial of access in that they have already been informed of what

121. See generally PENAL CODE, *supra* note 41; CODE OF COMMERCE, *supra* note 72.

122. Law of Judicial Branch, *supra* note 28, art. 18.

123. Consumer and User Protection Act, *supra* note 60, art. 4(c).

124. CIVIL CODE, *supra* note 77, art. 1520; CODE OF COMMERCE, *supra* note 72, art. 694.

125. See CIVIL CODE, *supra* note 77, arts. 1520, 1629.

could happen, just in case, *a priori* rejecting any subsequent claim. In the clients' minds, if they have already been informed and still try to make a claim, their claim would be in bad-faith. This seems to imply that the discriminated individual voluntarily accepted such a condition by going to the establishment and seeing the sign before attempting to enter. This substantially changes the public's position, from a mandatory to an optional position. It shifts the power to demand recognition of their rights to pleading and asking that the owner decides to grant him or her, that which they grant to others; it turns him from citizen to beggar.

Also, the use of signs aims to substantially change the legal position of the owner. It shifts what is an offer to what is an invitation to offer. The difference between one and the other lies in that the contract in the offer situation is perfected with a simple acceptance, while the invitation to offer requires a manifestation of a will to contract by the owner. In the latter case, he who made the invitation to offer could accept or refuse the offer before the perfection of the contract. This difference is of paramount importance because in the case of an offer, the owner is obligated to comply with the terms of the contract, at least with whichever terms are accepted, while the invitation to offer puts the owner in the position of power to choose which offers he accepts.

However, in commercial establishments open to the public, there really is an offer and not an invitation to offer. This is evidenced by the fact that the terms of the contract are always the same, independent of the parties, and are sufficiently clear, general, and precise so as to perfect with the simple acceptance of a perspective customer. The terms and conditions do not vary with the parties nor depend on their personal aptitudes or capacities. Customers are asked for a single fee, a payment. A bar or restaurant does not ask each client to offer distinct terms and conditions before the rendering of a service; they are generally the same for everyone, and therefore, it is unconvincing to argue that it is an invitation to offer and not an offer aimed at the public. Prices are already established and announced on signs and menus, which constitute offers and not invitations to offer. In some cases, the prices are subject to State regulations. Under commercial contract law, obligations should be interpreted in such a way so as to respect the straight and honorable intentions of the parties;¹²⁶ since the violation of a human right¹²⁷ and the commission of a crime¹²⁸ cannot be understood as straight and honorable, it cannot be understood as the

126. CODE OF COMMERCE, *supra* note 72, art. 669.

127. See HUMAN RIGHTS, *supra* note 33, at 1143.

128. See generally PENAL CODE, *supra* note 41.

intention of the owner. In such cases, the true relationship should prevail, not the fraudulent one.

It is important to note that this analysis regarding the placement of signs, perhaps without intention, significantly varies the owners' legal position. In the field of human rights, it is absolutely prohibited, but in the field of contract law, it has the illusion of legality. The announcement of the reservation to contract can result in a fraudulent intent to legitimize prohibited conduct in accordance to the field of human rights, moving it into the contractual field. However, the right to nondiscrimination in accessing commercial establishments is a human right, with precedence over the statements of the owner. Discrimination must be analyzed under the field of human rights and not the contractual field. As such, discrimination is prohibited.

IV. VOTES AND BILLS: PROTECTION OF THE RIGHT TO EQUALITY IN DEMOCRACY AND COMMERCE

Having presented the legal basis of the legitimacy of the right to nondiscrimination in commercial establishments, it is also important to note some teleological basis for the need to involve the judiciary in safeguarding the right to equality in these cases.

In theory, democracy must take into account the interests of every sector of the population; in practice we know that this is not always the case. Through the democratic process, a group with less political capital can be prejudiced.¹²⁹ This is logical by virtue that by the political system, a politician must take into account the interests of the sectors that he needs to satisfy for his own political survival, and not necessarily those of everyone.¹³⁰ This means, then, that the democratic electoral system does not provide sufficient incentives to protect those who do not have political capital. If a matter affects only a minority, the situation will not be susceptible to political correction through majority vote. Therefore, to correct these flaws the courts should intervene, applying the right of equality. The right to equality, in the interest of justice, grants minorities by law what they cannot obtain politically. The laws, therefore, cannot be used to favor some at the expense of others. This equality in practice imposes a large incentive on the public power to restrict their actions so that

129. Political capital is not just about votes, but resources that can be used to obtain votes (media, campaign finances, resources for organizations, among others).

130. See generally John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 735 (1973); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 55-74 (Harvard Univ. Press 1980); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 934 (1973).

if the public power damages one sector, it should equally apply to all others, including the majority group, which the politician depends on for his own political survival. As Jackson, a previous justice on the Supreme Court of the United States, pointed out, there are no guarantees more effective against arbitrary and unreasonable government than requiring that the principles imposed on a minority be imposed on everyone.¹³¹

This analysis applies equally to the economic field in relation to commercial establishments. An owner of a commercial establishment, as well as a politician, must take into consideration the interests of those who maintain his position, his main clients. However, there is no incentive to take into consideration the rights of everyone. In particular, if there are minority groups that occasionally represent some profit, he has a prejudice against them, or when a substantial part of his customers have that prejudice. In these cases, he could contravene the rights of those who do not represent a substantial economic interest for him. In many cases, this situation will be susceptible to economic correction through the market, when the loss of customers affects his business by enriching the competition. But it cannot be corrected by the market in all cases. An owner can routinely and consistently oppress a group or person that does not represent a substantial income without affecting his business. Economic groups with little economic capital are especially vulnerable, which are also the ones that require the most protection against discrimination. Also, when a group controls an important part of an entire business sector and acts uniformly to discriminate against a group this cannot be corrected by the market alone. It is therefore, in the interest of justice, necessary that the courts and laws give the groups that which they cannot obtain through the economic process.

It is not necessary that the courts take part in every commercial process or situation; that is not their role and would be prejudicial to everyone. But when a commercial establishment has voluntarily assigned to itself the attention of the general public, it is necessary that it is not done in a discriminatory manner, because otherwise it damages the dignity of those affected by the unequal treatment. Discrimination leads to the isolation of oppressed groups and reduces their participation in the economic process, which affects not only the parties, but all of society. In this regard, the Supreme Court of the United States has stated that discrimination "denies society of the benefits of wide participation in political, economic, and cultural life."¹³² This exclusion does not allow

131. *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring). See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

132. *Roberts et al. v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

marginalized groups to participate in the political community as equals.¹³³ This places costs not only the excluded group, but on everyone. At least one statistical study indicated that discrimination against indigenous groups in Guatemala cost the country's economy more than six billion Quetzales a year, the equivalent of 722 million U.S. dollars.¹³⁴

V. CONCLUSION: DISCRIMINATION IN GUATEMALA

The cases of discrimination which the higher courts of Guatemala have ruled on are few, fewer still if you take into account only records related to commercial establishments.¹³⁵ This must not be interpreted as a lack of discriminatory acts, because there is evidence that they do exist and are abundant in number.¹³⁶ Rather, this can result from other factors, such as a lack of knowledge or confidence in the justice system to resolve these issues.¹³⁷ The cases that have been discussed in Guatemalan courts predominately refer to discriminatory acts against indigenous people, among these the majority are against indigenous women.¹³⁸

In other countries, the cases highlight other vulnerable groups, like those with disabilities and the blind in Costa Rica, or those of African descent and homosexuals in Colombia.¹³⁹ In Guatemala, members of these groups have not had judicial cases in sufficient number or relevance.¹⁴⁰ In some situations, this is due to the interest in avoiding publicity and social

133. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 349, 349–55 (1987).

134. U.N. Committee on the Elimination of Racial Discrimination, Periodic Report XII and XIII from Guatemala in Compliance with Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination, § 482 (Nov. 2008), available at <http://www.dfat.gov.au/hr/reports/cerd/fifteenth-sixteenth-seventeenth-cerd-report.pdf> (last visited Mar. 3, 2011).

135. See generally Corte de Constitucionalidad [C.C.] [Constitutional Court], Mar. 6, 2003, Expediente 1-2003 (Guat.) [hereinafter Expediente 1-2003].

136. U.N. Committee on the Elimination of Racial Discrimination, Information Provided by the Government of Guatemala in Relation to the Implementation of the Final Observations of the Committee on Racial Discrimination Committee on the Elimination of Racial Discrimination, at 5 (July 20, 2007), available at <http://www.unhcr.org/refworld/publisher,CERD,,GTM,,0.html> (last visited Mar. 3, 2011).

137. OMBUDSMAN AND INDIGENOUS RIGHTS, *supra* note 6, at 376.

138. See generally Expediente 855-2003, *supra* note 3 (a few of the exceptions found include a case involving an indigenous man); Sentencia 7608-06, *supra* note 4 (two cases of discrimination against people of Korean descent that were not upheld).

139. See, e.g., Sentencia T-1090, *supra* note 7.

140. It was not possible to locate any cases involving those vulnerable groups in the Guatemalan Courts.

stigma that a case can generate. It can also be attributed to the lack of resources or the belief that the law will not assist them. In the cases in which the discriminatory act took place against a woman, usually the victim has attained some degree of academic preparation.¹⁴¹ In almost every case, the affected people have held some previous connection with the issue of human rights; for example, through their participation in government institutions, non-governmental organizations (NGOs), or diplomatic links to groups charged with the promotion of the rights of indigenous peoples.¹⁴² In three cited cases, the acts of discrimination took place immediately after an activity related to human rights, and the victims went to a local business accompanied by other participants directly afterwards.¹⁴³ It can be inferred that the involvement of those affected with these institutions, and the knowledge that the law would assist them, conferred on the victims the confidence and determination to enforce their rights in court. There are very few occasions in which people with no relation to these institutions have filed a legal claim. From this, it can be concluded that the information and dissemination of these rights has had a marked result in relation to cases presented, especially considering the temporal proximity between the event and the discriminatory act. It is important to emphasize that in the majority of cases, the victims have been accompanied by non-indigenous people, who have been allowed to enter, which makes the discrimination more evident.¹⁴⁴

In cases of discrimination related to access to commercial establishments, usually, the acts took place at the front door of a bar or nightclub. Generally, the act is committed by a bouncer or security guard at the door, who is a male, and his ethnicity is not indicated.¹⁴⁵ Typically, the legal claim is only directed against the security guard, and only in some

141. Expediente 855-2003, *supra* note 3, at II.

142. For example with the Instituto de la Defensa Pública Penal [The Institute for Criminal Public Defense], <http://www.idpp.gob.gt/> (last visited Mar. 3, 2011).

143. The events described in Expediente 855-2003, *supra* note 3, took place after the affected parties attended the seminar entitled “Aplicación de Derecho Internacional de los Derechos Humanos en el Ámbito Interno, en Materia de Pueblos Indígenas” [“Implementation of International Law of Human Rights in the Domestic Sphere, on Indigenous Peoples”]. See Memorial de Interposición de Amparo de Vicente Victor Lem Masc [Action for the Protection of Human Rights Filed by Vicente Victor Lem Masc], Apr. 4, 2003 (on file with author); Expediente No. 1-2003, *supra* note 135; Expediente 855-2003, *supra* note 3, § 3 (discrimination occurred after the affected parties attended a meeting of the Coordinators of Justice Centers of a Justice Program run by US-AID); Luisa Rodríguez, *supra* note 6 (discrimination occurred after the affected parties attended a meeting of the Agrarian Platform).

144. See generally Sentencia 7608-06, *supra* note 4.

145. *Id.*

cases has it also been brought against the owner of the establishment.¹⁴⁶ In other contexts, that is to say outside the activity of a security guard, discriminatory acts have been committed by both men and women.¹⁴⁷ Most court cases are based on acts that occurred in the capital city of Guatemala or in the city Quetzaltenango, the largest urban centers in the country. Both have the most commercial establishments, resources, ease in access to courts, and legal assistance. These are also places that concentrate large groups of indigenous and non-indigenous people.

Most of the discriminatory acts demonstrate a belief that these marginalized groups are not entitled to enter a certain type of establishment. There is evidence of a rejection of their economic or academic capacity. Further, an association is made between them and jobs that require less preparation, such as domestic employment¹⁴⁸ or market vendors,¹⁴⁹ as activities that are proper to the excluded group. The indigenous traditional dress usually has relevance in terms of exclusion, which is criticized as informal or inappropriate for entrance to the establishment.¹⁵⁰

With few exceptions, the restriction is made orally, in front of the other people, with no attempt to hide it.¹⁵¹ In other countries, it is common that the acts pretend to be based on other criteria and not directly related to the excluded group, such as the capacity of the business or the need for a membership.¹⁵² In Guatemala, some cases demonstrate that discrimination is done directly, without attempting to conceal it, and with clearly expressed motives. In one case, for example, it was clearly stated in front of others to an indigenous woman that servants had to remain at the door.¹⁵³ A case of discrimination against the Nobel Peace Prize winner, Dr. Rigoberta Menchú, took place in front of the media, by people in attendance at the Constitutional Court, but did not refer to access to a commercial establishment.¹⁵⁴ This direct discriminatory attitude surely

146. See generally Expediente 1-2003, *supra* note 135.

147. See generally *Rigoberta Menchú Tum Discrimination Report*, *supra* note 45; *Three Ministry of Labor Employees Condemned for Discrimination*, *supra* note 45.

148. See generally Expediente 855-2003, *supra* note 3.

149. *Rigoberta Menchú Tum Discrimination Report*, *supra* note 45.

150. See generally Expediente 855-2003, *supra* note 3.

151. Expediente 855-2003, *supra* note 3, at II. At least in two cases, there were attempts to conceal the discrimination; it was argued that he was not properly dressed when he wore traditional attire. Conié Reynoso, *supra* note 6 (it was indicated that membership was required to enter).

152. See, e.g., Sentencia T-1090, *supra* note 7.

153. See Expediente 855-2003, *supra* note 3, at II.

154. *Id.*

results because some people believe it is legally permitted or a right of the owner.

It is estimated that such a direct expression of discrimination will change in time as there is more knowledge of the prohibition of discrimination and of court rulings. This will result in some establishments seeking to cover their actions based on apparently neutral parameters that are not directly related to a particular group. These could be the capacity of the locale, conducting a private event, the requirement of a membership, among others. In a case in which an indigenous man was denied entrance, the defense argued during judicial proceedings that the man supposedly came in an inebriated state.¹⁵⁵ This was not accepted by the court.¹⁵⁶ Some night clubs have already implemented admission policies which require membership with the goal of having more control over the entrance of their clients and to protect against lawsuits. But yet, these establishments must be subject to the right of nondiscrimination, and through the requirement of membership, do not cease to be commercial establishments intended for public use, until they meet the requirements of an authentic private club.¹⁵⁷ It is important that these mechanisms do not serve to cover the exercise of a prohibited activity. It is also possible to attempt to prove that there is no discrimination with evidence of isolated situations in which these establishments have permitted entrance to people with the same characteristics. It is typical in many cases for people who are notable figures within the community or influential people to be permitted access. For example, in one case the owner of an establishment attempted to show that he had permitted access to indigenous people by providing a photograph of an indigenous singer inside the establishment.¹⁵⁸ Isolated incidents in relation to notable figures do not demonstrate the absence of discriminatory policies.

In other cases exclusion manifests itself more subtly, simply because there are no conditions that allow for access.¹⁵⁹ For example, there may be a lack of ramps for the entrance for people with disabilities. In all cases of discrimination, the burden of proof, the presumption, and the information held by the establishment and its employees are essential. The affected cannot be expected to document the existence of all facts related to the discriminatory acts when the information is held by the owner. It is because of this that it should be the owner who has the burden of

155. *See generally* Expediente 855-2003, *supra* note 3.

156. Expediente No. 1-2003, *supra* note 135.

157. *See generally* James Murphy Jr., *supra* note 73.

158. Expediente No. 1-2003, *supra* note 135.

159. *See generally* Sentencia 10327-07, *supra* note 11.

demonstrating the justifications for restricting access. For example, the accounting records could be analyzed to see if the establishment was at full capacity. These cases will require a greater sensitivity on the part of the judges in order to clearly identify cases of discrimination.¹⁶⁰

The analysis of the cases under this study also showed a weak role of the public authorities in the investigation and prosecution of these acts, particularly in court proceedings. The cases are usually brought by victims through private attorneys with their own means. State entities, when they have some sort of participation in the process, usually do not assume a relevant role.¹⁶¹ Further, a perception also exists that the acts of discrimination pertaining to access to commercial establishments do not have the same weight of importance attributed to other instances of discrimination, like employment discrimination or access to public services. Moreover, there is ignorance of the prohibition of discrimination by owners of commercial establishments.

Judicial proceedings that have reached a final resolution, more than authentic reparations, consist of moral victories. Usually, no one is ordered to pay for injuries and damages. The judgments order permission for the affected to enter the establishment, the "elimination of all rules that tend to discriminate," or a prohibition to commit acts of discrimination in the future.¹⁶² These statements are too broad to be measurable in clear and concrete terms and do not repair the damage caused. Sometimes there is a conviction for court costs, but these are not enough to recuperate the legal fees the affected victim has incurred. Further, in cases where costs are not paid voluntarily, a separate enforcement action, which could take years, is required.¹⁶³ Some proceedings have ended with an agreement between the parties.¹⁶⁴ Sometimes these agreements include an obligation to attend a

160. In civil and constitutional cases, it should be required that the one who has made the exclusion demonstrate that the act is not discriminatory, rather than placing the burden of proof on the victim.

161. See, e.g., Expediente No. 1-2003, *supra* note 135 (In the proceeding before the Juzgado de Primera Instancia Penal y Delitos Contra el Ambiente del Departamento de Quetzaltenango, acting as a Tribunal de Amparo, it is limited to procedural requirements in the initial briefs. In the appellate decision, it is not even mentioned if the prosecutor took any position.). See Expediente 855-2003, *supra* note 3.

162. Expediente 855-2003, *supra* note 3, at II.

163. CÓDIGO PROCESAL CIVIL Y MERCANTIL [C. PROC. CIV. Y MERC.] [Civil and Mercantile Procedure Code], Decree No. 107, Sept. 14, 1963, arts. 294, 340.

164. Empirical studies suggest that reconciliation is more effective because in many cases the discriminatory conduct arises from "racism or unconscious sexism and not a conscious mind." In this sense, the settlement requires the offender to confront the immorality of their actions and therefore, it is more persuasive than a criminal or civil conviction. However, the settlement would not be effective without the possibility of a criminal or civil conviction of the defendant. See ANTI-DISCRIMINATION

workshop on discrimination.¹⁶⁵ As for the judicial proceedings filed through constitutional actions, it should be noted that one of the constitutional processes from its inception, all the way to its conclusion on final appeal, took nine months.¹⁶⁶ This was short compared to the usual timeframe.¹⁶⁷ First instance took about two months.¹⁶⁸ The cases filed through criminal proceedings have lasted substantially longer and usually result in short jail sentences, exchangeable for economic sanctions so that the condemned do not spend any time in jail.¹⁶⁹ No access to any process by means of a civil action was obtained.

It is important to disseminate, that under the applicable law, the decision of whether to admit someone into a commercial establishment is not at the discretion of the owner as the right of admission seems to suggest. It is an act that is contrary to the principle of equality. Nondiscrimination in these cases is a right pertaining to the field of human rights that can be demanded and does not belong to the contractual sphere where it has been tried to be transferred. It is a right that does not have to be begged for at the entrance to someone who can either grant it or deny it at his discretion, but can be demanded. Hopefully, this knowledge will be able to transform all of us from a person who pleads to one who demands and therefore from beggars to citizens.

LAW ENFORCEMENT: A COMPARATIVE PERSPECTIVE 246 (Martin MacEwen ed., Ashgate Publ'g Ltd. 1997).

165. Comisión de Derechos Humanos de Guatemala [The Guatemalan Commission on Human Rights], *Informe Semanal Sobre Derechos Humanos* [Weekly Reports on Human Rights], Decree No. 14/06, at 5 (Apr. 26, 2006).

166. Expediente 855-2003, *supra* note 3, at II.

167. The action was filed on April 4, 2003 and the ruling of the Constitutional Court of Guatemala was delivered on December 2, 2003. See Expediente 855-2003, *supra* note 3, at II. For information on the delay a process can take in Guatemala, see Case of the "Las Dos Erres" Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 1211, ¶¶ 106-24 (Nov. 2, 2003); Case of Myrna Mack-Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 211, ¶¶ 106-24, 153, 237 (Nov. 2, 2003).

168. See generally Expediente No. 1-2003, *supra* note 135.

169. The first conviction for the crime of discrimination, the case of Dr. Rigoberta Menchú Tum, the judgment was for three years and two months at 75 Quetzales a day (only two years and eight months for the crime of discrimination, the other six months were imposed for a disorderly conduct crime), plus a fine of 500 Quetzales each. See *Rigoberta Menchú Tum Discrimination Report*, *supra* note 45. And in the second case, the conviction was for one year and four months at five Quetzals per day, plus a fine of 644 Quetzales. See Conié Reynoso, *supra* note 6.