Horizontal Discrimination in the Private Sector in the Mexican and the Canadian Legal Systems: Divergence of Means but Convergence of Results

A Functionalist Approach

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws,

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Abstract

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The thesis lends support to the functionalist theory of Konrad Zweigert and Heinz Kötz that legal systems converge on results but diverge on means. We apply the Mexican and the Canadian legal systems to a hypothetical discrimination case. This work shows that, although the Mexican and the Canadian legal systems have different legal principles, different concepts of discrimination and different means of choosing the appropriate forum, law and remedy, both jurisdictions produce the same result: the protection of the equalization of opportunities human right of people of vulnerable social groups by compensating individuals for rights which have been infringed.
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I. INTRODUCTION

Comparatists and legal scholars Konrad Zweigert and Heinz Kötz claim that all the legal systems of all the societies face the same problems. They argue that these legal systems solve these problems through different means but produce the same results in most cases.¹ The purpose of this work is to support Zweigert and Kötz’s theory by providing a functional example of how two different legal systems using different means solve an identical factual problem in much the same way. In other words, they reach the same results.

In 2001 the Federal Congress of Mexico added a third paragraph to Article 1 of the Mexican Constitution, which contains the fundamental equality of opportunities right. As we will see, this constitutional amendment prohibited any kind of discrimination based on any ground when the purpose of the discrimination is to nullify or lessen the rights and freedoms of the persons.

Afterwards, in 2003, the Congress enacted the Federal Law to Prevent and Eradicate Discrimination (Ley Federal para Prevenir y Eliminar la Discriminación)² (Discrimination Law), which had as its main purpose the prevention and eradication of discrimination as set out in Article 1 of the Mexican Constitution, the promotion of equal opportunities for vulnerable people and their integration into society.³ The Discrimination Law set up the National Council for the Prevention and Eradication of Discrimination (Consejo Nacional para Prevenir y Eliminar la Discriminación) (hereafter CONAPRED). CONAPRED is an independent


² Ley Federal para Prevenir y Eliminar la Discriminación (Publicado en el Diario Oficial de la Federación el 11 de de 2003) (Federal Law to Prevent and Eradicate Discrimination, Published on the Federal Daily Gazette on June 11, 2003) [translated by author] [Discrimination Law]

³ Ibid. See Articles 1 to 3.
administrative organ of the executive branch which has the main purpose preventing and eradicating discrimination in Mexico.  

In 2005, the General Law for Persons with Disabilities (*Ley General de las Personas con Discapacidad*) (LGPD) was published, a law intended to integrate people with disabilities into the society. In addition, after the constitutional amendment of Article 1 of the Mexican Constitution, some States created the crime discrimination in their criminal codes, proscribing any discriminatory conduct intended to damage human dignity and suppress the rights and freedoms of vulnerable people.  

Before 2003, the SCJ construed the right to equal opportunities vertically – that is, they construed it to be mean that all individuals should be equal and should have the same opportunities before the law. The SCJ termed this concept legal equality (*Igualdad Jurídica*). For decades, academic commentators and the SCJ held that only the law or the government can violate fundamental rights. The idea that private individuals could violate the fundamental rights of others was considered a legal absurdity. The Discrimination Law was the first legislative

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4 *Ibid.* See Articles 16 and 17.  
5 *Ley General de las Personas con Discapacidad* (Publicado en el Diario Oficial de la Federación el 10 de junio de 2005) (General Law for Persons with Disabilities, Published on the Federal Daily Gazette on June 11, 2003) [translated by author] [LGPD]  
7 See *Jurisprudencia, Registro 921068: Garantía de Igualdad Jurídica contenida en el Artículo 1o. de la Constitución Federal* (October 2002)  
8 See especially Spar Ignacio Burgoa, *Las Garantías Individuales* (México, Ed. Porrúa, 2002) at 168 [Burgoa is considered the most respectable scholar regarding Amparo and Constitutional Law in Mexico]  
9 See generally Spar Miguel Carbonell, *El derecho a no ser discriminado entre particulares y la no discriminación en el texto de la Constitución Mexicana* (México, Colección Estudios CONAPRED, 2006) at 21-39. [Carbonell, “No Discriminación”]
instrument that created the concept of horizontal discrimination in the private sector in Mexico. It recognized that private individuals can infringe the fundamental right to equality of others through unlawful discrimination.

Despite all these changes, Carlos de la Torre has noted that the Mexican legal system lacks any jurisprudential development of its discrimination laws. None the less, the basic infrastructure to claim protection against discrimination is in place in the Mexican legal system.\(^\text{10}\) The Mexican legal system has only recently acquired the means to address horizontal discrimination in the private sector. In contrast, the Canadian legal system has been able to deal with this problem since the first Human Rights Commission in Ontario was created in 1961, and the Ontario Human Rights Code was enacted in 1962.\(^\text{11}\)

In this thesis, we will demonstrate that, despite these differences in time, legal evolution and culture between the Mexican and the Canadian legal systems, both legal systems achieved very similar results regarding horizontal discrimination in the private sector but using different means. We will compare these two legal systems from an internal perspective and we will try to discover how the Mexican and the Canadian legal systems deal with horizontal discrimination in the private sector.

To such end we will use a hypothetical case. The facts will be identical in both legal systems. We will scrutinize the appropriate forum, the applicable law and the possible legal remedies on each legal system as a competent lawyer would in each legal system. We will

\(^{10}\) Carlos de la Torre Martínez et al. *Derecho a la no Discriminación* (México: Universidad Nacional Autónoma de México, 2006) at XI. [de la Torre]

compare the outcomes and draw our final conclusions, which ideally will help us to account for the comparative law theory of Zweigert and Kötz.

This work will be of interest primarily to human rights policy researchers, litigant attorneys and adjudicators. It will also benefit anyone interested in the comparative analysis of the Canadian and Mexican legal systems. It also provides a practical guideline for any lawyer who wants to understand how the antidiscrimination laws currently work in both legal systems. Ideally, this work will help Mexican human rights policy researchers to improve the current antidiscrimination laws, policies and practices in order to make them more effective at preventing and eradicating discrimination.

II. PRELIMINARY OBSERVATIONS

Zweigert and Kötz argue that any comparative study “must be posed in purely functional terms” since only things that fulfill the same functions are comparable.\textsuperscript{12} We need to eradicate any legal preconceptions that may distort the comparison. Only in this way can we discover the real legal tools, concepts and results which will help us to understand the legal system on its own terms and from an internal perspective. Factual questions, rather than abstract enquiries, will help to maintain focus and objectivity. Ideally, comparing the same facts of our hypothetical case will help us to extract the real and internal similarities and differences in equalivalent circumstances. We want to avoid the danger of comparing concepts by comparing facts.\textsuperscript{13}

\textsuperscript{12} Zweigert & Kötz, \textit{supra} note 1 at 34-35.

We will then ask some factual questions which will be the framework and boundaries of our comparison work. We will compare how each legal system manages the facts and what are their results. Thus, based on the facts and considering the two legal systems’ jurisdictions we will ask what would be the most appropriate forum, the applicable law and the possible remedy in each jurisdiction. We think that by answering those same questions in both jurisdictions we will see what would be the internal means and results in each system.

We understand that not all the facts have the same value or quality in all legal systems, and therefore making the same questions on both legal systems may be a risky task, since by imposing the same questions we might be adding some preconceptions of one legal system on to the other. However it is fair to assume that, at least for purposes of the present enquiry, the Mexican and Canadian legal systems, in one way or in other, must always answer the following queries regarding any legal issue: Who would adjudicate the issue (the forum)? What would be the legal basis of the adjudicator’s decision (the law)? And what would be the legal remedy or legal consequence (remedy at law)? Those are at least the three fundamental questions that any good Mexican and Canadian lawyers would ask.

The facts of our hypothetical case are as follows:

Mr. X, an obese male individual with diabetes mellitus, was denied employment on the basis of his diabetes and obesity. Mr. X had all the required qualifications and skills for the job position offered by the company. However, the company’s human resources director (HR Director) said that Mr. X’s diabetes, jointly with his weight problem, would not fit in the fast-paced lifestyle of the company; a lifestyle which, he emphasised, includes high levels of stress. Mr. X has worked for other employers in similar office-worker positions for 15 years. He

\[Ibid.\]
therefore replied to the HR Director that his obesity and his diabetes had never been a problem for him, and that the company should not assume he could not perform his job adequately because of them. Nevertheless, the HR Director did not change his mind and replied to Mr. X that those were the company’s health and weight policies, and the company was really concerned that the fast-paced lifestyle of the company would affect his particular health-condition and safety. The company refused to employ Mr. X and instead hired somebody else who did not have diabetes or obesity but who was less qualified than Mr. X. Mr. X wonders if he has any legal action against the company in order to look for monetary compensation since he believes he was illegally discriminated because of his diabetes and obesity.

Based purely on the abovementioned facts and trying to take the objective position that we do not know anything about the legal concepts of discrimination in both legal systems, we will ask the following questions:

1) If there is any legal action available, and what would be the most appropriate and convenient forum to file Mr. X’s claim?

2) What would be the law on which Mr X may base his cause of action?

3) Is monetary compensation a possible remedy at law to redress his right?

Canada is a federation and a democratic constitutional monarchy which consists of 10 Provinces and 3 territories,\(^\text{15}\) and according to s. 92 (13) of the Constitution Act, 1867, the regulation and administration of property and civil rights laws are in the control of the provinces. Antidiscrimination laws are part and parcel of the civil rights. For reasons of time and space it is not possible in this work to perform a complete survey on the law of all ten provinces.

\(^{15}\) Provinces: Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland. Territories: the Yukon Territory, the Northwest Territories and the territory of Nunavut.
Nevertheless, as Howe and Johnson established, the study of the Ontario Human Rights Commissions and its Human Rights Code is mandatory if we want to understand the human rights system in Canada. For that reason we will use the *mother of commissions* – Ontario – as the Canadian parameter to perform our comparative work.

The Mexican comparative-legal-scholars traditionally compare the Mexican legal system with that of Spain, Argentina, Chile, France, Italy or Germany because of the historical civil-law tradition, and this might be seem as a more natural or logic choice. From their perspective, it would be more logical to study Quebec’s civil-law-jurisdiction as opposed to Ontario’s common-law-jurisdiction. However, there are good reasons to compare Mexican law to Canadian law and specifically to that of Ontario. First, since we want to support Zweigert and Kötz’s theory we want to use two very dissimilar systems from two different legal families – a civil-law tradition *versus* a common-law. Otherwise, if we compare the Mexican legal system with that of Spain, Argentina or any other civil-law system country, or Quebec, we may encounter very similar means and legal concepts with very similar results, and that kind of comparative analysis is not what we are looking for in this thesis. If we want to support Zweigert and Kötz’s claim that different means lead to same results, we need different legal

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16 *Supra* note 11 at 33 para. 1. (“Ontario was the birthplace of human rights commissions in Canada. ... [Therefore] To provide a basic overview of human rights procedure in Canada, we will begin by analyzing the organization and workings of the ‘mother of commissions’ – that of Ontario.”)

17 See e.g. Spar Jose Ovalle Favella, *Administración de Justicia en Iberoamérica y Sistemas Judiciales Comparados*, (Mexico: Universidad Nacional Autónoma de México, 2006) (Ovalle Favella performs a comparative study between the following Ibero-American legal systems: Argentina, Brazil, Chile, Colombia, Costa Rica, España, Mexico, Peru, Portugal, Uruguay and Venezuela); Jorge Fernández Ruiz and Javier Santiago Sánchez, *Régimen Jurídico de la Radio, Televisión y Telecomunicaciones en General. Culturas y Sistemas Jurídicos Comparados* (Mexico: Universidad Nacional Autónoma de México, 2007). (Fernández and Santiago made a comparative study between Mexico, Venezuela, Brazil, Ecuador and Italy regarding the legal regimes of broadcasting and telecommunications services)

18 Quebec is the only province in Canada that has a civil law system regarding private law inherited by France (Napoleonic Code). The criminal law in Quebex is structured on the common law.
systems with differences of a more profound nature in their legal processes, concepts and principles. Thus, comparing the Mexican legal system with the Ontario-Canadian will be more fruitful for this study.

There is a second reason to compare Mexico with Canada. We are assuming that the legal tools to deal with horizontal discrimination in Mexico are relatively new and less developed than in Canada. We therefore chose the Canadian legal system as a comparator, because it is internationally recognized that Canada has achieved an advanced jurisprudential evolution level in protecting human rights – for instance, nowadays Canada’s federal antidiscrimination laws are among the most advanced between the OECD members –\(^{19}\) and we are expecting that that gap between those two legal systems will give us a greater contrast between the means. For purposes of this work, the greater the differences between the two legal systems, the greater the evidence to support our claim. Mexico is a developing country with a civil-law tradition inherited from Continental Europe while Canada is a developed country with a common-law tradition inherited from the United Kingdom - two legal systems of very different societies with their singular history and culture which, while using different legal means, will achieve the same results.

And finally, we will compare a civil-law and a common-law system because we are also relying on the functionalist ideas of Ernst Rabel that it is possible to compare the incomparable provided that focus is on the same facts.\(^{20}\) We hope that our comparison between the Mexican and Canadian legal systems will illustrate this idea. However we will be cautious about the limitations and “traps” of the factual approach noted by Rudolf B. Schlesinger: not all the facts have the same quality due to the particular history, mores and ethos in all legal systems,


thus, despite the similar results between two legal systems we need to avoid the temptation to assume that their adjudicators applied the same rules or principles.\textsuperscript{21}

Mexico is a federal democratic republic consisting of 31 states and one federal district.\textsuperscript{22} According to Article 44 of the Mexican Constitution, Mexico City or \textit{México Distrito Federal} (Mexico D.F.) is the federal district where the three Powers of the Union are seated – the Federal Congress, the Supreme Court of Justice and the Executive. For all practical purposes, Mexico D.F. has been politically and legally administered as a state-like-legal-entity with autonomous legal personality since 1997. It is a hybrid institution with a degree of autonomy and has its own executive, legislative and judicial powers. Nonetheless, these powers are limited by the three Powers of the Union.\textsuperscript{23}

We will focus on the law of Mexico D.F. as this law can be considered representative of Mexican law more generally. Historically, Mexico D.F. exercises influence over the laws, legal policies and practices of the other Mexican jurisdictions. The whole political and social structure of Mexico is extremely centralized in Mexico D.F. The legal system is not the exception. Virtually everything is controlled from Mexico City: the Executive, the Congress and the Supreme Court are located in Mexico D.F. For historical reasons, Mexico has a political system that – for 72 years – diminished the \textit{de facto} political and jurisdictional powers of the


\textsuperscript{22} States: Aguascalientes, Baja California, Baja California Sur, Campeche, Coahuila, Colima, Chiapas, Chihuahua, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán, Zacatecas.

\textsuperscript{23} Every State has its own and independent jurisdiction accorded by their own political Constitution, which is limited by the Federal Constitution. Mexico D.F. does not have a Constitution; rather it has a Statute of Government (\textit{Estatuto de Gobierno del Distrito Federal}).
states (including the powers of the municipalities which were practically null and void). Consequently, all the political constitutions and legislations of the 31-sovereign-states are practically identical to the federal constitution and Mexico D.F.’s legislation. Thus, the two chief statutes of the states, the civil code and the criminal code, are virtually a copy of the civil and criminal codes of Mexico D.F. (with some negligible differences due to culture, history and geography).

Before 1999, there was only one federal civil code and one federal criminal code that were applicable to all federal issues, including those of Mexico, D.F. Those codes were named “Civil Code for the Federal District concerning Ordinary Subject-matter and for the whole Republic regarding Federal Subject-matter” and “Criminal Code for the Federal District concerning Ordinary Subject-matter and for the whole Republic regarding Federal Subject-matter”. These codes are the “mother of the codes” in the Mexican legal system, so to speak. However, due to political reasons – perhaps to give more legal and political autonomy to Mexico D.F.’s government – these two federal codes suffered a bifurcation after 1999. Nowadays, the Federal Civil Code and the Federal Criminal Code govern all federal issues, while the Civil and Criminal Codes of Mexico D.F. govern the issues of this jurisdiction exclusively. Nevertheless, this division of the federal codes did not change the legal tradition of centralizing the legal system in Mexico D.F.’s laws and jurisdiction.

It is the common practice of good competent commercial and civil Mexican lawyers to apply Mexico D.F.’s jurisdiction and laws to their contracts, no matter where the parties are

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24 See e.g. Spar Luis T. Díaz Müller et al. *El Mito del Desarrollo y las Transiciones a la Democracia. Terceras Jornadas sobre Globalización y Derechos Humanos.* (México: Universidad Nacional Autónoma de México, 2006) (In July 2, 2000 after 72 years the PRI party lost the presidential elections. Vicente Fox Quesada member of National Action Party (PAN) won the elections. Until these days the former opposition remains in the presidency with Felipe Calderon Hinojosa as President since 2006)
located. This practice is just one example of influence exerted by Mexico D.F.’s jurisdiction and laws. Any good Mexican lawyer would know that, in most of the cases and depending on the particular interests and legal strategies, it is more convenient to start a legal action based on Mexico D.F.’s laws and in its tribunals, than in those of the states of Guerrero, Chiapas, Durango or Oaxaca.\(^{25}\)

We could have used the Federal Civil and Criminal Codes and the federal tribunals’ jurisdiction as the comparative reference for the Mexican legal system instead of Mexico D.F., because they are, to a certain degree, as influential power on the whole legal system. However, the Criminal Code for Mexico D.F. sees discrimination as a crime, whereas the Federal Criminal Code does not and, as we will see, this discrimination crime concept is a key element of our comparison.\(^{26}\)

Since Mexico has a civil-law legal system, we will not analyze and study case-law. Instead, we will use *jurisprudencias* and *tesis aisladas*. To understand what *jurisprudencias* and *tesis aisladas* are, we need to briefly explain what the *juicio de amparo* is since this is the source of these two legal concepts.\(^{27}\) The *juicio de amparo* is a summary proceeding administered by the Supreme Court of Justice (SCJ) and by some federal tribunals that protects constitutional rights. In other words, the purpose of the *juicio de amparo* is to solve any controversy that arises

\(^{25}\) The states of Guerrero, Chiapas, Durango and Oaxaca are characterized of being the least developed states in Mexico, with a considerable social and economical lag that affects the efficiency, efficacy and integrity of their tribunals and laws. The exception to this rule may be the laws and tribunals of the States of Nuevo Leon, Jalisco and Mexico, which are the most developed states in terms of economy.

\(^{26}\) Mexico D.F.’s Legislative Assembly was the first legislative body in Mexico to create the discrimination crime. Other states followed Mexico D.F.’s legislative enactment. This confirms the centralized influential power of Mexico D.F. laws. Currently the Federal Congress is studying the amendment of the Federal Criminal Code in order to add the discrimination crime. It seems that Mexico D.F. is influencing the federal laws.

\(^{27}\) The Spanish word *Amparo* means protection or shelter.
from:  

a) laws or government acts that infringe the fundamental rights of the individuals;  
b) laws or acts of the federal government that lessen or suppress the powers of the States, and from  
c) laws or acts of the state’s governments that infringe the powers of the federation. If an  
individual in Mexico believes that his or her fundamental rights (enlisted in the first 29 articles of  
the Constitution) are violated or infringed by any law – municipal, state or federal – or by any  
administrative-government act, then he or she can ask for the protection or shelter of the SCJ or  
the federal tribunals through the juicio de amparo. The SCJ or the federal tribunal studies the  
case and decides if the law or government-act is indeed unconstitutional or a violation of  
fundamental rights. Thus, the SCJ and the federal tribunals must give the appropriate  
interpretation of the law or government-act. The final judgments of the SCJ or federal tribunals  
are binding only on the parties to the respective juicio de amparo; for instance, if “x” asked for  
the protection of the juicio de amparo against “n” law, such “n” law would be unconstitutional  
and inapplicable only to “x”, but such law will be constitutional and valid against “y”, “z”, etc.  
In the Mexican legal system, a law or government act could be unconstitutional and a  
fundamental-right violation for someone and, on the other hand, the same law or act could be  
constitutional and innocuous to the fundamental rights of others.

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28 See Article 1 of the Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, (Publicada en el Diario Oficial de la Federación el 10 de enero de 1936) (Amparo Law, Regulatory of Articles 103 and 107 of the Political Constitution of the Mexican United States, Published on the Federal Daily Gazette on January 10, 1936) [translated by author] [Amparo Law]

29 The first 29 articles of the Mexican Constitution are the fundamental rights of the individual, called Garantías Individuales (Individual Guarantees). The Garantías Individuales are equivalent to the Canadian Charter of Rights and Freedom (Constitution Act, 1982). These 29 fundamental rights are the incorporation of the human rights into the positivist Mexican legal system. See Carla Huerta Ochoa, La Estructura Jurídica del Derecho a la no Discriminación (México: Universidad Nacional Autónoma de México, 2006) at 195.

30 The Juicio de Amparo also protects from future and possible violations, i.e. sound and reasonable threats.
However, the SCJ and the federal tribunals, subject to some specific rules established in the *Amparo Law*,\(^{31}\) can create a *jurisprudencia*. The term *jurisprudencia* denotes something similar to judge-made law in the common-law system, but it is not law *sensu stricto*; it is instead the interpretation of law.\(^{32}\) A *jurisprudencia* is created when five consecutive SCJ’s final judgements, regarding five different *juicios de amparo*, are solved uninterruptedly – without any opposing judgement – on the same reasoning, provided that such five final judgements were voted in favour by at least 8 judges if they are acting in plenary meeting or by 4 if they acted in benches. The SCJ has 11 judges (named *Ministros*). The federal tribunals can also create *jurisprudencia* on much the same terms. The SCJ’s *jurisprudencia* is mandatory interpretation of the law for SCJ itself and for state and federal adjudicators. The federal tribunals’ *jurisprudencia* is binding only on the federal and state adjudicators.

The *juicio de amparo*’s final judgments of the SCJ and the federal tribunals which have not yet reached the status of *jurisprudencia* are called *tesis aisladas* (isolated theses). Sometimes a *tesis aislada* may be very influential in certain cases; depending on some factors such as the reputation of the SCJ’s minister(s) or federal tribunals’ magistrate(s) who issued it, and on the degree of novelty of the legal issue at hand.

In the Mexican Treatment section, we analyze the following hierarchical of norms: a) the Constitution, b) the applicable treaty-law, and c) the appropriate federal and state statutes, acts, rules and policies. This is the hierarchy of the laws in the Mexican legal system. Article 133 of the Mexican Constitution establishes that the Constitution, the laws enacted by the Congress and the International Treaties are the Supreme Law of the Union. In a literal

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\(^{31}\) See *Amparo Law*, Articles 192-194.

interpretation the three instruments are at the same level and they form the Supreme Law together. However, in order to avoid possible contradictions, the federal courts have interpreted Article 133 to grant primacy to the Constitution, followed by International Treaties (that had been signed by the President and ratified by the Senate), and then by the federal and state laws, both at the same level. For that reason, treaty law in the Mexican legal system is very decisive and crucial to interpret the federal and state laws, and in our particular case, as we will see, the discrimination law “is very sensitive to the international law”.

III. MEXICAN TREATMENT

1. Forum

In the Mexican legal system each State (including Mexico D.F.) has its own court and tribunal systems which are organized and financed solely by the state governments. Judges and magistrates are appointed by the state governments. There is no federal intervention on the state’s judicial system. All state’s judicial systems are structured roughly on the same following way:

1. Superior Court of Justice of the State (Tribunal Superior de Justicia del Estado) (SCJS). Appellate and some special trial functions. The decisions of the SCJS are final. There is no other legal recourse or appeal. Only an amparo trial before the federal tribunals or the SCJ could be available if there is a constitutional violation.

   1.1. Civil Law Bench (Sala Civil)

   1.2. Criminal Law Bench (Sala Penal)

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33 Tesis Aislada, Registro: No. 172650. Tratados Internacionales. Son parte integrante de la Ley Suprema de la Unión y se ubican jerárquicamente por encima de las leyes generales, federales y locales. Interpretación del Artículo 133 Constitucional. (April, 2007)

34 See specially de la Torre, supra note 10 at 210-211.
1.3. Family Law Bench (*Sala Familiar*)

1.4. In some jurisdictions, other special benches such as property or juvenile justice.

2. Civil Courts

3. Criminal Courts

4. Family Courts

5. Justice of Peace Courts (minor civil and criminal claims)

Additionally, they have administrative tribunals such as:

1. Labour Law Tribunals (*Juntas Locales de Conciliación y Arbitraje*)

2. Administrative Law Tribunals (*Tribunal de los Contencioso Administrativo*)

3. Local Elections Tribunal (*Tribunal Estatal Electoral*)

And finally, they have some administrative commissions or agencies that have some tribunal-like functions and powers, such as the State Human Rights Commissions (*Comisión Estatal de Derechos Humanos*).

On the federal jurisdiction the courts’ structure is as follow:

1. National Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*)

2. Electoral Tribunal of the Federal Judicial Power (*Tribunal Electoral del Poder Judicial de la Federación*)

3. One-judge Tribunals of Circuit (*Tribunales Unitarios de Circuito*) Appellate and *amparo* functions.

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35 Labour law claims are a separate subject-matter of civil law claims. All labour law claims in the Mexican legal system are mediated and adjudicated by an administrative and tripartite-panel tribunal formed by one representative of the state executive-government (or federal government depending on the tribunals jurisdiction), a representative of the state chamber of commerce (or national), and a representative of the state chamber of workers unions (or national).
4. Three-judge Tribunals of Circuit (Tribunales Colegiados de Circuito) Trial, *amparo* and appellate functions.

5. District Judges (Juzgados de Distrito) Trial and *Amparo* functions.

The state administrative tribunals and commissions are mirrored by corresponding offices at the federal level. Sometimes, the state and federal courts and tribunals have simultaneous jurisdiction on some issues, such as on mercantile or commercial subject-matter. In this case, the legal action can be started on a state civil court or the corresponding federal civil law tribunal (at the *Juzgados de Distrito*). The same happens with the state and federal human rights commissions; an individual can file a claim in the state or federal commission.

To discover what would be the most appropriate forum to file a claim or start a legal action against unlawful discrimination, first we need to understand what or who is causing the alleged discrimination. If the alleged discrimination is caused by a law or by any state or federal government authority, then the best forum would be the SCJ or the respective federal tribunal in order for the individual to ask for the protection of the *amparo*. As mentioned above, the *juicio de amparo* is only a protection against laws or government acts. This is not the case in Mr. X’s situation as the alleged discriminator is a private company. The labour law tribunals would also not be an appropriate forum because the Federal Labour Law regulates labour relationships between employers and employees and, according to Article 8 of the Federal Labour Law, a job applicant is not an employee. Thus Mr. X is not protected by the Federal Labour Law.\(^\text{36}\)

\(^{36}\) See also articles 2, 3, 4 and 56 of the *Ley Federal del Trabajo* (Publicada en el Diario Oficial de la Federación, el 1 de Abril 1970) (Federal Labour Law, Published on the Federal Daily Gazette on April 1, 1970) (The Federal Labour Law is the sole statute that regulates the labour relationships among the whole country; there are no state labour laws). [*Labour Law*]
Other possible forums would be the CONAPRED and the state and federal human rights commissions.\textsuperscript{37} The National Commission of Human Rights (\textit{Comision Nacional de Derechos Humanos}) (CNDH) and the Mexico D.F.’s Commission of Human Rights (\textit{Comision de Derechos Humanos del Distrito Federal}) (CDHDF) are not tribunals. They are public, decentralized administrative organizations that investigate all kind of human rights violations, including discrimination that originated in action by a government authority, public servant or government officer.\textsuperscript{38} Again this is not the case in our hypothetical facts. The CONAPRED is also not a tribunal; it is also a public, decentralized administrative organization that investigates human rights violations, but only if they related to discrimination.\textsuperscript{39} However, in contrast to the CNDH and the CDHDF, the CONAPRED has the power to investigate human rights violations (of the right to equality) which were committed not only by government authorities, public servants or government officers, but also by private individuals.\textsuperscript{40} Since CONAPRED is a federal agency, it has country-wide jurisdiction, i.e. it can investigate claims of alleged discriminatory behaviours in any state. There are no state antidiscrimination commissions.

Articles 66 to 85 of the Discrimination Law set out the conciliatory process which CONAPRED must follow when the respondent is a private individual. The proceeding starts

\textsuperscript{37} Currently there are no state antidiscrimination laws. Whoever, we analyzed Articles 115 to 122 of the Mexican Constitution that establish and enlist the powers of the state government, and Article 73 that dictates the exclusive powers of the federal Congress, and we concluded that the states could enact antidiscrimination laws and create state institutions similar to the Discrimination Law and the CONAPRED. Perhaps in the future we will see state antidiscrimination laws in the Mexican legal system.


\textsuperscript{39} \textit{Discrimination Law}, Article 20.

\textsuperscript{40} \textit{Ibid}. Article 80.
with the complainant’s claim. Once the complainant has filed a complaint, CONAPRED notifies the respondent and asks whether he or she wants to solve the claim through CONAPRED’s conciliatory proceeding. If the respondent does not agreed to use the conciliatory proceeding, CONAPRED cannot perform any other action other than giving the complainant the necessary advice on the relevant legal remedy available through the appropriate courts or tribunals.\(^{41}\) The Discrimination Law does not define exactly what would be such “necessary advice”, but it does not include legal representation or even legal advice, because that is not part of CONAPRED’s purpose or its legal duties as listed in articles 17 and 20 of the Discrimination Law. Therefore, the complainant would need to look for a lawyer.

If the respondent accepts the conciliatory proceeding then the parties will have a conciliatory hearing before a CONAPRED officer. At such a hearing, the parties will present all the appropriate evidence to demonstrate their claims and defences before the officer. The officer acts only as conciliator and mediator. If the parties can reach an agreement in that hearing, that agreement would be signed by both parties, and it will be certified by the CONAPRED officer. Article 71 of the Discrimination Law establishes that such agreement will be *Res Judicata* – the parties waive their right to start any other legal action regarding the same issue. The parties can ask for the execution and fulfilment of such agreement before a civil judge in a statutory summary proceeding. If the parties couldn’t reach an agreement at the hearing, then the CONAPRED officer will start an inquiry and may, if he or she decides that there was unlawful discrimination, impose any of the following administrative measures:\(^{42}\)

\(^{41}\) *Ibid.* Article 81 para. 2.

\(^{42}\) *Ibid.* Article 83.
1. The respondent will be compelled to take seminars and courses regarding the right to equal opportunity.

2. The respondent must fix posters or banners in his or her business establishment with messages or motifs promoting the elimination of discriminatory practices.

3. CONAPRED’s officials will temporarily be present at the respondent’s premises in order to verify the compliance with the Discrimination Law.

4. The results of the inquiry will be published in the CONAPRED’s public newsletter.

5. The synthesis of the inquiry’s results will be available in other public electronic and printed sources.

The CONAPRED seems to be the obvious forum to choose. However, in our hypothetical case, Mr. X is looking for monetary compensation. As set out above, financial compensation is not one of the Discrimination Law’s compulsory remedies. Therefore, if the complainant’s main objective is financial compensation, CONAPRED is not the most appropriate forum. The only possible way in which Mr. X would be able to obtain some financial compensation through CONAPRED forum would be to reach an agreement with the respondent at the conciliatory hearing. That might be difficult to achieve. In the first place, the respondent would need to agree to join the conciliatory proceeding and, in the second place, the respondent would have to recognize that he or she unlawfully discriminated Mr. X in some way – or at least to certain degree. Assuming that the discrimination was indeed illegal, the only two possible reasons that we can think of why the respondent would recognize his or her discriminatory behaviour and agree to pay financial compensation to the complainant would be, first, because of the respondent’s own good faith or decency, or second, to avoid a more harmful civil or criminal procedure since that agreement (and payment) will be res judicata. By virtue of
its status as *res judicata* such agreement will eliminate any future civil or criminal action. However, considering that in most of the cases similar to Mr. X’s situation, the respondents are corporations with more economical and legal resources than the complainants, a civil or criminal proceeding of unlawful discrimination would hardly be a threat for the corporation’s business.

On the other hand, if Mr. X does indeed obtain financial compensation through the said conciliatory agreement, then, technically speaking, that financial compensation wouldn’t be the result of a legal remedy established by the Discrimination Law, but the direct result of a private civil agreement. Such agreement would to some extent have the same legal nature of any other civil contract, with one difference: the agreement will be *res judicata* and enforceable through a statutory summary civil proceeding named *juicio ejecutivo* (executable proceeding),\(^{43}\) since such agreement will have automatic legal recognition and execution, i.e. the agreement will have *aparejada ejecución*.\(^{44}\)

For all practical purposes, CONAPRED is not the most appropriate forum to look for monetary compensation for unlawful discrimination. It is worth trying to reach a monetary-compensation agreement with the respondent at the CONAPRED’s conciliatory hearing, but the complainant must be aware that CONAPRED’s proceedings do not interrupt the prescription of other legal actions before the criminal or civil courts, or other administrative tribunals.\(^{45}\)


\(^{44}\) In the Mexican legal system “a legal instrument that have *aparejada ejecución*” means that such document have a legal efficacy recognized or proven by the law (such as a promissory note, cheque, other credit instrument or a judge’s final judgement) and such document by itself is the bases of the legal cause of action in the *Juicio Ejecutivo*. Basically the only exception or defence of the respondent on an *aparejada ejecución* legal instrument is the falseness of the legal instrument. See Article 443 of the *Código de Procedimientos Civiles para el Distrito Federal* (Publicado en el Diario Oficial de la Federación, el 26 de Mayo de 1928) (Civil Procedural Code for the Federal District, Published on the Federal Daily Gazette on May 26, 1928) [*Civil Procedural Code*]

\(^{45}\) *Discrimination Law*, Article 53.
If Mr. X chooses not to use CONAPRED, or if his efforts to reach a compensatory agreement with the respondent at the CONAPRED conciliatory hearing are fruitless, then – independently of the CONAPRED’s inquiry process that would follow – any good Mexican litigant lawyer would advise Mr. X to seek monetary compensation at the criminal and/or civil courts. The following sections explains in detail how, Mr. X will base his cause of action on Article 206 of the Criminal Code for the Federal District (the Criminal Code) where the criminal procedure is concerned, as this article creates the crime of discrimination. For the civil procedure, he will base his action on Articles 1910 to 1934 of the Civil Code for the Federal District (Civil Code) – obligations resulting from illicit acts – which refers to the subjective, aquilian and objective civil responsibilities.

In the Mexican legal system, then, a victim of horizontal labour discrimination who was denied employment in the private sector and seeks monetary compensation as a legal remedy for the infringement of his or her fundamental rights, would be best advised to approach the criminal and/or the civil courts. An amparo will be inadmissible since the respondent is not an authority. The labour law tribunals will have no jurisdiction since job applicants are not employees. And finally, monetary compensation is not a remedy on the Discrimination Law, with the result that CONAPRED, with its solely administrative remedies, is not the most appropriate forum.

46 Código Penal para el Distrito Federal (Publicado en la Gaceta Oficial del Distrito Federal, México D.F., Julio 16 de 2002) [Criminal Code]

47 Código Civil para el Distrito Federal (Publicado en el Diario Oficial de la Federación, México, Mayo 26 de 1928) [Civil Code]

48 Currently this criminal procedure would be available only in the States of Aguascalientes, Chiapas, Colima, Coahuila, Durango, Morelos, Veracruz and Mexico D.F. which are the only ones that theirs criminal codes typify discrimination as a crime.
Thus, on our hypothetical case Mr. X must file a criminal claim before the criminal-court judge of the peace of Mexico D.F. (juzgado de paz del orden penal)\textsuperscript{49} against the HR Director,\textsuperscript{50} while also suing the company in the civil court of first instance of Mexico D.F. (juzgado civil de primera instancia).\textsuperscript{51}

2. Law and Remedy

Mr. X can start both legal actions – civil and criminal – simultaneously, because it is possible to do so even when the two actions relate to the same facts and involve the same parties (that is, the same claimant and same defendant).\textsuperscript{52} It is a common practice to use both forums, since this provides the claimant with two opportunities to obtain a favourable resolution. Thus, if the adjudicator of the criminal procedure stays the procedure or acquits the defendant for any reason, then the claimant still has another chance with the civil procedure, and vice versa. Also, using the criminal procedure simultaneously serves as strategic legal leverage to put pressure on the defendant in the civil procedure. In our hypothetical case, it is possible that the complainant could accumulate the damages awarded in both proceedings because both civil and criminal codes are silent in this respect, and there are no relevant jurisprudencias on this regard. There is

\textsuperscript{49} See Article 10 of the Código de Procedimientos Penales para el Distrito Federal (Publicado en el Diario Oficial de la Federación, México, 29 de agosto de 1931) (Criminal Procedural Code for the Federal District, Published on the Federal Daily Gazette on August 29, 1931) [Criminal Procedural Code]

\textsuperscript{50} The company would not be criminally responsible since only individuals are prosecutable under the Mexican criminal law system. See Criminal Code, Article 27.

\textsuperscript{51} See Article 50 of the Ley Orgánica del Tribunal Superior de Justicia del Distrito Federal (Organizational Law of the Superior Court of Justice of the Federal District).

\textsuperscript{52} See Tesis Aislada, Registro No. 218961: Juicios Civil y Penal Coexistentes, Basados en los Mismos Hechos Citados por la Misma Persona. No Violan el Artículo 23 Constitucional (July 1992); Tesis Aislada, Registro No. 211508: Inprocedencia de la Acción Penal, No Implica la de la Acción Civil Intentada (July 1994); Tesis Aislada, Registro No. 169808: Responsabilidad Civil Proveniente de Hecho Ilícito, Para la Procedencia de Dicha Acción No es Necesaria la Existencia de una Sentencia Penal Condenatoria (Legislación del Estado de Puebla) (April 2008)
only one tesis aislada that dictates that a defendant will not be obliged to pay damages in an objective civil claim if he has already paid damages to the claimant in the criminal procedure regarding the same action. Here, the term “same action” means that the criminal procedure is the source of the civil claim. However, in our case, as we will see, in the civil procedure we are not dealing with a claim of objective civil responsibility, we will deal with an aquilian civil responsibility claim. Additionally, our criminal and civil procedures are not the same legal action because the criminal claim did not originate from the civil claim. Our aquilian civil responsibility legal action will be a completely independent legal action from the criminal claim. And finally, in our criminal claim, the defendant will be the HR Director, whereas, in the civil claim, it will be the company. Thus Mr. X will be suing two different persons regarding two different legal actions. The claims will only share the same facts.

**Criminal Law Analysis**

In the Mexican legal system, the Ministerio Público is an administrative body of the executive branch that acts as prosecutor in all criminal procedures. It has the power to investigate crimes and carry out all criminal legal actions before the criminal courts. The Ministerio Público is equivalent to the Attorney General in the Canadian legal system. Each state, including Mexico D.F., has its own Ministerio Público. There is also a federal Ministerio Público that has jurisdiction over federal crimes typified on the Federal Criminal Code.

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53 Tesis Aislada, Registro No. 209351: Responsabilidad civil objetiva, es improcedente la acción de, si ya se cubrió la reparación del daño determinada en proceso penal (February 1995).

54 See Criminal Procedural Code, Article 2.

55 See Articles 1 and 2 of the Código Penal Federal (Publicado en el Diario Oficial de la Federación el 14 de Agosto de 1931) (Federal Criminal Code).
Contrary to the Canadian legal system, where there is only one Criminal Code for the whole legal system, as each state has its own criminal code in Mexico.

The *denuncia* and the *querella* are the two triggers that make the *Ministerio Público* start its investigations and the criminal legal actions.\(^{56}\) *Denuncia* is the mandatory denunciation or accusation that anyone that is aware of criminal acts must make before the competent authorities. The *Ministerio Público* is obliged to investigate and prosecute all *denuncias*. *Querella* is the criminal complaint or accusation brought exclusively by the injured party, i.e. the victim. The Criminal Code specifies what crimes must be prosecuted by *querella* only. The *Ministerio Público* is technically the sole claimant in a criminal proceeding, while the victim or *querellante* is just a third party, who may assist the *Ministerio Público* in the legal process.\(^{57}\) However, for the sake of simplicity in this work hereinafter we will refer Mr. X as the claimant in the criminal procedure.

Mr. X can be awarded monetary compensation for damages caused by the defendant, but as Mr. X is a third party in the criminal process, the *Ministerio Público* is obliged to ask for the victim’s compensation for damages in the *querella*, otherwise the victim will lose the right in the criminal procedure.\(^{58}\) According to the *jurisprudencia*, the indemnification or compensation for damages in the criminal law is a public sanction, whereas such indemnification is a private obligation between the parties in the Civil Code.\(^{59}\)

\(^{56}\) *Criminal Procedural Code*, Articles 3 to 9 BIS.

\(^{57}\) *Ibid.*


Mr. X can obtain monetary compensation for *moral damage*. The defendant must compensate the victim for damage to his or her integrity. This includes harm to the feelings, affections, beliefs, dignity, reputation, privacy, body shape and physical appearance, or the self-esteem of the victim. Thus, the *Ministerio Público* should demonstrate that Mr. X suffered damage in any of those factors. The monetary amount of the damage to Mr. X’s integrity will be determined by the judge considering the degree of damage and the particular factors and personal conditions of the defendant enlisted on Article 72 of the Criminal Code. The judge must also consider the particular condition of Mr. X and the economical capacity of the defendant. Mr. X can ask for the payment of losses caused by the defendant. For instance, if the *Ministerio Público* is able to demonstrate that Mr. X would have obtained the job if the defendants hadn’t discriminated against him, then the judge may award monetary compensation for lost wages from the time that the crime was committed until the date of the final judgement in the criminal proceeding.

Article 206 of the Criminal Code, the basis of Mr. X’s criminal action, establishes that the legal action must be initiated by *querella*. We will therefore assume that Mr. X filed a *querella* against the HR Director of the company and that the *Ministerio Público* found the

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60 *Criminal Code*, Article 42 para. III.

61 See Spar *Civil Code*, Article 1916 (the *Criminal Code* does not define *daño moral*, thus the adjudicator must apply the *Civil Code*’s definition, following the Mexican legal principle of *supletoriedad de la ley* (law supplementarity)).


63 *Criminal Code*, Article 43.

64 *Jurisprudencia, Registro No. 904911: Reparación del Daño, Fundamentación de la*. (2000)

65 *Criminal Code*, Article 42 para. IV.

66 *Jurisprudencia, Registro No. 921445: Reparación del Daño, Comprende los perjuicios ocasionados de manera directa por la comisión del delito* (2002)
necessary elements to start the criminal action before the criminal court. Article 206 of the Criminal Code reads as follow:

Article 206. Every one who for reason of age, sex, civil status, pregnancy, race, ethnic origins, language, religion, ideologies, sexual orientation, skin colour, nationality, social status or origin, profession or occupation, economic status, physical appearance, disability or health condition, or for any other reason attempts against the human dignity and has the purpose of suppress or damage the rights and liberties of the people, is liable to imprisonment for a term no exceeding three years and not less of one year, or will be obliged to perform twenty to one hundred days of community service, and a fine of fifty to two hundred days of the minimal wage will be impose:

I. Provokes or incites to hatred or violence;
II. Denies to other person a service or a benefit from which he has the right. For purposes of this point, it is understood that any individual has the right to any service or benefit that is offered to the general public.
III. Humiliates or excludes to other person or group of persons.
IV. Denies or limits the labour rights.

...All the measures aimed to protect the most vulnerable groups of peoples will not be considered as discriminatory.

This crime will be prosecuted by Querella. [Emphasis Added]

The standard of proof in the Mexican legal system for criminal proceedings is the principio de culpabilidad (principle of guilt), which establishes that the culpability or responsibility must be fully demonstrated, and if there is any doubt then the adjudicator shall acquit the defendant. The defendant is always presumed innocent until the Ministerio Público proofs he or she is guilty. Mr. X (that is the Ministerio Publico) bears the burden of proof in the

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67 Criminal Code, Article 5; Criminal Procedural Code, Article 247.
criminal proceeding. The defendant does not have to prove the legality of his or her acts or behaviour.

Human action must be performed with *dolo* or *culpa* in order to be illegal and punishable. An individual acts with *dolo* when he or she perfectly knew the objective elements of the crime, or foresaw as possible the consequences of his or her illicit acts; he or she wanted or accepted its execution. In other words, *dolo* is the conscious intention to commit the crime or to cause the illegal effects. The individual acts with *culpa* when he or she did not foresee the consequences of the action(s) resulting in the crime, but violated a duty of care that was objectively necessary to observe, or foresaw those consequences but assumed that they would not occur. Put differently, we can define *culpa* as reckless or negligent acts. *Dolo* and *culpa* are the essential elements of all crimes in the Mexican legal system. There is no objective responsibility in the Mexican criminal system. The discrimination crime (Article 206) must always be performed by the defendant with *dolo*.

Additionally, criminal conduct or behaviour must have the following three components: *tipicidad*, *antijuricidad* and *culpabilidad*. There is no crime if one of these components is missing. First, the defendant’s behaviour will not be a crime if it lacks *dolo* or

68 Criminal Procedural Code, Article 248; Tesis Aislada, Registro No. 220851: Prueba, Carga de la, en Materia Penal. (January 1992)

69 See Tesis Aislada Registro No. 175607: Dolo, Carga de la Prueba de su Acreditamiento (March 2006)

70 Criminal Code, Article 3.

71 Ibid. Article 18 para. 2.

72 Ibid. at para. 3.

73 Ibid. at Article 76 (the Criminal Code enlists all the crimes that can be performed with *culpa*, and Article 206 is not listed therein; thus the discrimination crime shall always be performed by the defendant with *dolo*).

74 Ibid. at Article 29
culpa, or any descriptive element of Article 206 is missing. This is the tipicidad component of the crime (typification of the crime). Only typified conduct or behaviour shall be punished. Second, there is no crime if the defendant has some legal reasons or excuses to justify his or her illicit conduct. This is the antijuricidad component of the crime (Illegality). It is the illegality per se of the actions or omissions due to the absence of specific legal excuses or exclusions. The legal exceptions or excuses are a) legitimate defence, b) extenuating circumstances, and c) the fulfillment of an order or use of a legal right.

Legitimate defence means that the defendant faced an unavoidable aggression and he or she acted or reacted in self-defence to protect his or her own rights or the legal rights of others. Extenuating circumstances means that the defendant violated the legal rights of others in order to avoid a greater violation on his or her own rights or the rights of others. And finally, the fulfillment of an order or use of a legal right means that the illegal behaviour was made in order to perform a legal duty or use a legal right. The jurisprudencia has established that the order or right exercised must be legislative, not contractual. For instance, in the present case, the HR Director cannot rely on the latter defence as he was performing a contractual order due to the contractual labour relationship between him and the company. By contrast, when a police officer has a judicial order to break into a private property and causes damage to the property, such actions will not be illegal since the order is legislative in nature, i.e. based on the Criminal Procedural Code.

75 Ibid. at para. I, II, III a), III b) and III c).
76 Ibid. at para. IV, V and VI
77 See Jurisprudencia, Registro No.: 389984. Cumplimiento de un Deber o Ejercicio de un Derecho, Naturaleza de las Excluyentes de. (1995); Tesis Aislada, Registro No. 906617: Legítima Defensa y no Cumplimiento de un Deber
78 See Criminal Procedural Code, Article 152 (in connection with judicial warrants and inspection orders).
The third component of a crime is the *culpabilidad* (culpability or reproachability). This is the degree of the defendant’s consciousness or awareness of his or her illicit behaviour, which determines the social reproachability of his or her illegal conduct.\(^7^9\) The Criminal Code determines that the *culpabilidad* component is absent in the following cases: \(^8^0\) a) when the defendant has a mental disorder or is a mentally retarded person [Sic.], b) when the defendant is unaware of or ignorant about the illegal nature of the impugned behaviour, provided that such ignorance is insuperable or insurmountable,\(^8^1\) and c) when in light of the specific and particular circumstances or facts, it would be unreasonable and illogical to demand alternate conduct from the defendant; e.g. illegal actions caused by tremendous and sound fear.

The *tipicidad*, *antijuricidad* and *culpabilidad* are logically interrelated so that each component presupposes the other.\(^8^2\) The *culpabilidad* presupposes the *antijuricidad* and subsequently the *antijuricidad* presupposes the existence of the *tipicidad*. Thus, the defendants normally try to create any doubt (using the *principio de culpabilidad* standard of proof) regarding the existence of any of the three components in order to cause a “domino effect” among all components. For instance, in the present case the defendant may try to raise several doubts about the *dolo* element of Article 206 – arguing that he did not have the evil and deliberate purpose to violate Mr. X’s human dignity – in order to eliminate the *tipicidad* component.

\(^7^9\) Not confuse the *principio de culpabilidad* with the *culpabilidad* component of the crime.

\(^8^0\) Criminal Code, Article 29 para. VII, VIII and IX.

\(^8^1\) See Jurisprudencia Registro No. 390017: *Error de Tipo y Error de Prohibición Indirecto o Error de Permisión*. (1995)

\(^8^2\) See the Final Sentence of the First Bench of the Supreme Court of Justice, Judicial Weekly of the Federation, Nine Period, Volume XXII, October 2005, at 182. (*Ejecutoria de la Primera Sala de la Suprema Corte de Justicia, Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXII, Octubre de 2005, Página 182*)
The *dolo* is the connection between the defendant’s conscious will to behave in certain typified manner (*tipicidad*) and his or her absolute awareness of the illegality of his or her acts (*antijuricidad*), such as to make the conduct in question reproachable (*culpabilidad*). Thus, the claimant in a criminal procedure has the burden of proof and must demonstrate without any doubt that the defendant – in the discrimination crime – deliberately wanted to infringe his or her human dignity and suppress his or her labour rights. Additionally, in order to demonstrate that the defendant’s behaviour is socially reproachable, the claimant must prove without any doubt that the defendant perfectly knew he was committing a crime – i.e. unlawful discrimination – and that the defendant had the reasonable option and possibility to avoid such criminal behaviour. Thus, in the present case, we believe that Mr. X would have a hard time demonstrating the *dolo*. Nonetheless, if Mr. X is able to demonstrate the *dolo* there is a strong possibility that a judge acting *sua sponte* at any time during the criminal procedure may apply the *principio de culpabilidad* to conclude that one of the three components of the crime is missing (*tipicidad*, *antijuricidad* or *culpabilidad*). Since the criminal legal system is structured on the basis of the *culpabilidad* principle, judges always have to use the *sua sponte* powers prescribed by law for the benefit of the defendant.

More precisely, Mr. X will need to demonstrate without any doubt:

a) That he has a particular *physical appearance*, a *disability* and/or a *health condition*. Or any other particular characteristic or feature.

b) And because of those reasons (or *any other reason* according to Article 206) the company’s officers consciously – with *dolo* – violated his *human dignity*.

c) With the mindful purpose to *suppress* or *infringe* his *labour rights*.

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83 *Criminal Code*, Article 29 (the judge has the authority to act *sua sponte* at any time during the process in favour of the defendant, if he/she finds any cause of exclusion of the crime).
d) And that Mr. X indeed suffered a violation of his human dignity and labour rights.

The Criminal Code does not define “disability”, “physical characteristics” or “health condition”. Mr. X would therefore need to demonstrate through scientific proof and expert witnesses that Diabetes Mellitus and obesity are disabilities, or at least that these two characteristics are in general a “health condition” or a “particular physical appearance”. However, using obesity or diabetes *per se* as grounds for unlawful discrimination will be relatively easy since Article 206 is broadly worded to allow for grounds of discrimination other than those specifically enumerated in the section. In such case, and avoiding the question of whether diabetes and obesity are disabilities, Mr. X would only need to prove that he is obese and that he was diagnosed with diabetes, and because of these *reasons* he suffered discrimination.

In order to procure an acquittal, the defendant may produce doubt about the components of the crime using methods of indirect proof.
practice of denying employment to people with disabilities. The latter conclusion would in turn suggest that the defendant acted with *culpa*, not *dolo*. To sum up, it would be very difficult to eliminate all possible doubts in demonstrating the defendant’s intention to discriminate.

Hence, the main questions in the discrimination claim at the criminal procedure will be: did the employer have the evil purpose or intention (*dolo*) to discriminate and violate the human dignity of the complainant? Are there any exculpatory elements or exceptions that eliminate the illegality and/or reproachability (*culpability*) of the defendant’s discriminatory behaviour?

In conclusion, the concept of discrimination in Mexican criminal law amounts to evil and wilful behaviour which infringes the human dignity of another individual on the basis of some particular and personal characteristics or features of the victim – such as age, sex, civil status, pregnancy, race, ethnic origins, language, religion, ideologies, sexual orientation, skin colour, nationality, social status or origin, profession or occupation, economic status, physical appearance, disability or health condition, or any other reason. The behaviour or conduct must also have the purpose and intention of suppressing or violating the rights and liberties of the victim – such as his or her labour rights. The victim has the burden of proof and he or she must demonstrate without any doubt the existence of blameworthy intention on the part of the defendant. Thus, indirect discrimination, i.e. the adverse effects approach of discrimination, is not protected by the Criminal Code. Only direct discrimination is protected by the criminal law. The criminal law uses the *intent* approach of discrimination. This criminal law’s discrimination concept is very narrow and rigorous. The main remedy and objective in the criminal law regarding unlawful discrimination is to punish the defendant, not to redress the human rights of the victim. Hence discrimination in the criminal law is a matter of public interest.
Civil Law Analysis

Mr. X will base his civil claim of unlawful discrimination on the extra-contractual obligation of the company, or more specifically, its *aquilian*, or delictual, civil responsibility – contained on Articles 1910 and 1918 of the Civil Code\(^{85}\) – for the losses and damages caused by the illegal acts of its legal representative (the HR Director). The courts have named “passive individual” (*sujeto pasivo*) the direct aggressor of the right, i.e. the civil delinquent; thus in this case the HR Director is the passive individual.\(^{86}\)

In the civil procedure the parties have the burden of proving their own claims. As a general rule, he who declares a fact is obliged to prove it, and the party that denies a fact is not

\(^{85}\) “*Article 1910*. He who, acting illicitly or against morality causes a damage to other, will be obliged to amend it; unless it can be proven that the damage was produced as consequence of the unavoidable victim’s fault or negligence.”

“*Article 1918*. Artificial persons [*personas morales*] will be accountable for the losses and damages caused by its legal representatives when performing their duties.” [Artificial person or *persona moral* is any legal entity created by individuals to achieve permanent and collective goals, such as private corporations, unions, universities, federal or state agencies, associations, etc.]

\(^{86}\) The “obligations born of illicit acts” (*obligaciones que nacen de actos ilícitos*) is one of the sources of the obligations in the Mexican civil system; Chapter V, Title I, Part I of the Fourth Book of the *Civil Code* contains what the jurisprudence and the doctrine named as civil responsibility (*responsabilidad civil*). The civil responsibility can be contractual or extra-contractual; for purposes of the present case we will study the extra-contractual civil responsibility, which, in contrast with the contractual civil responsibility, does not derive from a meeting of minds (or agreement) but from an action that infringed the law in the broadest sense of the word, that is, the infringement of an absolute right which is correlative of an abstention duty impose over the universal and indeterminate passive individual. In this context the passive individual is the aggressor of the right, is the civil delinquent (See *Tesis Aislada, Registro No. 174014: Responsabilidad Civil Contractual y Extracontractual. Sus Diferencias*. (October 2006))

Additionally, the civil responsibility can be subjective, objective or *aquilian*; articles 1910, 1913 and 1918 of the Civil Code respectively define these three types of civil responsibility. The subjective civil responsibility is caused by a licit or illicit behaviour of the passive individual, with fault or negligence, and which causes damage. The objective civil responsibility is the damage caused without the fault or negligence of the passive individual, but it was cause by a good or object which was in the control of the passive individual. And finally, the *aquilian* civil responsibility is when a third party must answer for the damage caused by the behaviour of the passive individual (See *Tesis Aislada, Registro No. 184018: Responsabilidad Civil Subjetiva, Aquiliana y Objetiva. Diferencias*. (June 2003))
obliged to prove it unless such denial refers to other proven facts.\textsuperscript{87} The civil adjudicator must assess the evidence altogether following the rules of logic and experience (\textit{las reglas de la lógica y de la experiencia}), and he must clearly and succinctly express the conclusions from and reasons for his assessment.\textsuperscript{88} This is the standard of proof in the civil procedure. The Civil Procedural Code allows the civil adjudicator to freely decide the matter, using principles of logic and his or her own experience – or the experience of others – as tools to assess the evidence. However, some specific forms of evidence are pre-assessed by law (i.e. by the legislator). The civil judge will therefore rely on such evidence in accordance with the law, not using his or her free judgement. For instance, the Civil Procedural Code states that all public documents – such as marriage or birth certificates – are conclusive evidence, or incontrovertible proof.\textsuperscript{89} Such forms of evidence are regarded as legal or fixed assessment of proof (\textit{valoración tasada} or \textit{valoración legal}).

However, neither the Civil Code nor the Civil Procedural Code defines what \textit{rules of logic and experience} exactly are. We did not find any relevant \textit{jurisprudencia} in this regard, but we did find several \textit{tesis aisladas} that study this issue as an \textit{obiter dictum}.\textsuperscript{90} According to a recent \textit{tesis aislada} (issued on January 2009), although the Civil Procedural Code does not state a definition for the \textit{rules of logic and experience} standard of proof, the standard of proof does not

\textsuperscript{87} See Civil Procedural Code, Article 281.

\textsuperscript{88} Ibid. at Article 402.

\textsuperscript{89} Ibid. at Article 403.

infringe the fundamental right of due process (Article 14 and 16 of the Constitution) and is therefore not unconstitutional.\footnote{Tesis Aislada, Registro No. 168056: Reglas de la lógica y la experiencia. La falta de definición legal para efecto de la valoración de pruebas en la decisión judicial, no infringe la garantía de seguridad jurídica contenida en los artículos 14 y 16 constitucionales (January 2009)} This tesis aislada also states that the adjudicator’s assessment based on the standard is not absolute; such power is limited by the rules and principles of logic and by experience. And finally, the tesis aislada also establishes that logic is an objective science, while experience is the accumulation of the knowledge of an individual or of the entire society acquired through the observation of the social, cultural, political and natural phenomena.

Other tesis aisladas have established that while the Mexican legal system follows a free-assessment-of-proof system (sistema de libre valoración de las pruebas), the civil judge’s assessment should not be dogmatic or arbitrary. Each judge must provide clear reasons for his assessment. The legal scholars in the Mexican legal system converge with those tesis aisladas, except that they claim that the Mexican legal system’s assessment of proof is not totally free, and in reality it is a mixed-assessment-of-proof system since several civil codes in the Mexican legal system use the legal or fixed assessment of proof system together with the free assessment.\footnote{See especially Spar Héctor Fix-Zamudio and José Ovalle Favella, Derecho Procesal (México, Universidad Nacional Autónoma de México, 1991) at 90. See also Víctor Fairén Guillén, Teoría General del Derecho Procesal (México, Universidad Nacional Autónoma de México, 1992) at 455-458.} The Civil Code for the Federal District establishes this mixed-assessment-of-proof system in Articles 402 and 403.

Thus, based on the Civil Procedural Code, tesis aisladas, and the abovementioned legal scholars, the civil judge must use the legal or fixed assessment of proof and the free-assessment-of-proof systems, that is, the mixed-assessment-of-proof system, in order to be completely convinced about the truthfulness of the parties’ claims. I agree with Fairén Guillén:
the civil judge cannot base the assessment of proof on probabilities, verisimilitude or suspicion.\textsuperscript{93} The civil standard of proof in the Mexican legal system is not based on a balance of probabilities. However, this standard of proof does not exclude the use of presumptions or inferences since this is one of the means of proof accepted by the Civil Procedural Code (\textit{presunciones}).\textsuperscript{94} The \textit{presunciones} are the factual consequences that the law or the judge deduces by using well known facts to discover the truthfulness of other unknown facts. In conclusion, the assessment of evidence of unlawful discrimination in the Mexican civil law system is not a matter of probabilities; it is a matter of absolute certainty. Presumptions and inferences (\textit{presunciones}) are valid means of proof to obtain such absolute certainty.

Mr. X will argue that the illegal actions of the passive individual caused him losses and damages by violating his fundamental rights established by the Constitution (Article 1) and the Discrimination Law. Since the passive individual is acting on behalf of the company, the company will be accountable for the damages caused by him, irrespective of whether he acted with fault or negligence (\textit{culpa civil}).

Relying on the Civil Code, \textit{jurisprudencias} and \textit{tesis aisladas}, I conclude that in order to advance his \textit{aquilian} civil responsibility claim of unlawful discrimination, the complainant must convince the judge, using the \textit{rules of logic and experience} standard of proof (according to the mixed-assessment-of-proof system), of the existence of the following elements:\textsuperscript{95}

\textsuperscript{93} Fairén Guillén, \textit{ibid.} 458 para. 2.

\textsuperscript{94} Civil Procedural Code, Articles 379 to 383.

\textsuperscript{95} Civil Code, Articles 1910 to 1934; Jurisprudencia, Registro No. 167736: \textit{Daño Moral. Presupuestos Necesarios para su Procedencia de la Acción Relativa (Legislación del Distrito Federal)} (March 2009); Jurisprudencia, Registro No. 167736: \textit{Daño Moral. Presupuestos Necesarios para su Procedencia de la Acción Relativa (Legislación del Distrito Federal)} (March 2009); Tesis Aislada, Registro No. 174112: \textit{Culpa en la Responsabilidad}
1) **Vicarious relations between the passive individual and the company.** Mr. X must demonstrate that the passive individual acted for the benefit of the company, with the result that he was were not representing his own interests but the company’s interests. It may be very difficult for the company to demonstrate the contrary. The company may argue that the passive individual pretended to be an employee or representative of the company.

2) **The existence of illicit acts.** Mr. X must show that the passive individual’s behaviour was *illicit*. Mr. X will claim that the actions of the HR Director infringed his fundamental right of equal opportunities established in the Constitution, the Discrimination Law and at the Treaty-law, by unlawfully discriminating against him due to his *disability* and/or *health condition*. Thus, Mr. X will use the Constitution, the Discrimination Law, and some key international instruments (and other related Mexican laws and regulations) to demonstrate the existence of his right not to be discriminated against, and then he will have to demonstrate that the passive individual infringed such legal rights.

The company can argue that the HR Director did not discriminate against Mr. X because he did not have the necessary physical capabilities for the job, and he was protecting the health and safety of Mr. X. Hence he didn’t damage any right of Mr. X because he never had that right on the first place due to his unsuitability for the job position.

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A clear example and analogy of such defence would be the discrimination of a visually impaired individual who is legally blind and which applies for a job as a taxi driver. It is evident in such case that the job applicant does not have the required physical qualifications.

3) **Damages.** Mr. X will claim that the passive individuals violated his human dignity, as protected by the laws noted in paragraph 2 above. Thus, Mr. X suffered a *moral damage*, i.e. harm to his feelings, affections, beliefs, dignity, reputation, privacy, body shape and physical appearance, or self-esteem.\(^96\) The Mexican legal system adopts an objective approach to proving moral damage.\(^97\) As such, Mr. X only need to demonstrate a) the existence of the illicit acts of the passive individuals, b) the existence of damage to his human dignity, feelings, self-consideration, etc., and c) the existence of an adequate causality between the acts and the damage.\(^98\) Mr. X does not need to prove or demonstrate *actual* moral damages.

4) **Causation relationship.** Mr. X must demonstrate that the behaviour of the passive individual was the direct cause of the damages. The company will need to demonstrate that if indeed Mr. X suffered damage, such damage was not caused by the behaviour of the passive individual. The company will need to demonstrate that Mr. X would have suffered the damage irrespective of the behaviour of the passive individual.\(^99\)

\(^96\) *Civil Code*, Article 1916.


As you may have observed, the fault or negligence (culpa civil) of the passive individual is not an element of the aquilian civil responsibility claim. It is important to clarify that the culpa civil does not have the same meaning as the culpa in the criminal law. The culpa civil involves the execution of acts with fraud, imprudence, lack of judgment or due care. The culpa civil can be intentional or unintentional. It is intentional when the acts are performed with fraud, that is, with evil intention. It is unintentional when the act is performed with imprudence or negligence, that is, when the passive individual should have foreseen the damage. The culpa civil merges the criminal-law concepts of dolo and culpa. However, since Mr. X’s claim is based on the aquilian civil responsibility of the company, the culpa element of the passive individual disappears. There is no subjective element in the aquilian responsibility because the behaviour that caused the damage is beyond the control of the party who is accountable for such damage (which in this case is the company). Nonetheless the company is deemed to have the fault (culpa) because of its lack of care in preventing its employee (the passive individual) from causing the damage.

In the case of Mr. X, the key issue is with proving the existence of the illicit acts, i.e., was Mr. X unlawfully discriminated? How then will a civil judge interpret the Constitution, the

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100 The courts has established that the elements in the subjective civil responsibility are 1) the material infringement of a law or rights, 2) the subjective element, that is, the fault of the passive individual, 3) the damage, and 4) the causality relation between the facts and the damage. See Tesis Aislada, Registro No. 174610: Responsabilidad Civil Subjetiva. Elementos que la Configuran. (July 2006); Tesis Aislada, Registro No. 174112: Culpa en la Responsabilidad Civil Subjetiva. Su Concepto y Clasificación. (October 2006). Additionally, the tribunals have interpreted that the second element, that is the fault (culpa civil) of the passive individual, is a necessary element of the subjective civil responsibility, but not in the aquilian civil responsibility. See Tesis Aislada, Registro No. 174180: Responsabilidad Civil Subjetiva. (September 2006)).

Discrimination Law and the international instruments? The civil judge will need to answer the following questions:

a) Are diabetes and obesity “disabilities” or “health conditions” for purposes of the Discrimination Law?

b) Is “discrimination” to be defined by appeal to the purpose behind the defendant’s conduct, or just the effects of that conduct?

c) What are the limits of the right to equal opportunity or of the right not to be discriminated against?

Neither Article 1 of the Constitution, nor Articles 4 and 5 of the Discrimination Law state explicitly whether the definition of discrimination must be construed by appeal to purpose or effects, and whether the right of equal opportunity is limited.\textsuperscript{102} These articles read as follow:


...  

...  

It is prohibited any discrimination based on ethnic or national origin, sex, age, disabilities, social status, health condition, religion, personal opinions, personal preferences, marital status or on any other kind that attempts against the human dignity and which its purpose is nullify or lessen the rights and freedoms of the persons. [Emphasis Added]

Federal Law to Prevent and Eradicate Discrimination

\textsuperscript{102} Articles 3 and 56 Labour Law stipulate that employers cannot make distinctions between employees based on race, sex, age, religion, political ideologies and social status, except in the cases determined by law (any law or legislation). Thus, the only limits to the equal opportunities principle under the Federal Labour Law are: Nationality: Article 7 requires that 90% of the employees must be Mexicans. Unionized Workers: According to Article 154 employers are obliged to prefer unionized workers on equal terms over non-unionized workers. Seniority: Additionally, the same Article 154 obliged employers to prefer workers with more years of service. Women: Article 164 to 172 establishes what positive actions employers must take in order to protect pregnant women. Minors: Article 173 to 180 stipulates the positive actions that employer shall take to protect the safety and health of minor workers. But the Federal Labour Law is silent regarding the right not to be discriminated against of people with disabilities or with particular health conditions; besides, the Federal Labour Law regulates the relationships between employers and employees and a job applicant technically is not an employee.
Article 4. For purposes of this Law, discrimination will be any distinction, exclusion or restriction that, based on ethnic or national origin, sex, age, disability, social or economical class, health condition, pregnancy, language, religion, opinions, sexual preferences, marital or legal status, or any other distinction, which has the effects of hinder or suppress the recognition or exercise of a right and the real equal opportunities of the people. [Emphasis Added]

Article 5. It will not be considered as discriminatory conducts the followings:
II. The distinctions based on the capabilities or specialized knowledge to perform certain activity.

...  
VIII. In general, any conduct that does not have the purpose of diminish or suppress the rights, freedoms or the equal opportunities right, and do not have the purpose of attempting against the human dignity.

Article 1 of the Constitution and the Article 5 of the Discrimination Law seem to define discrimination from the perspective of prohibited reasons and grounds. If this is the case, Mr. X first needs to demonstrate that diabetes and obesity are disabilities and/or health conditions respectively, and then show that the passive individual discriminated against him because of such characteristics and for evil reasons or prejudices. That would be a case of direct discrimination. Nevertheless, assuming that Mr. X is not able to demonstrate that diabetes or obesity are disabilities or health conditions, he can then argue that his obesity and/or diabetes per se are grounds for unlawful discrimination since, as stated previously, Constitution and Article 4 of the Discrimination Law allow for recognition of other grounds of discrimination other than those listed in the provisions. He will claim that he was discriminated against due to those particular distinctions or features. However, in order to better understand the concept of disability in the Mexican legal system, I will assume for the purpose of this analysis that Mr. X will rely on the disability or health condition grounds.
By contrast, Article 4 of the Discrimination Law uses the words “which has the effects of”, which implies that independently of the reasons, discrimination is any conduct that has the effects of damaging the equal opportunities right. Thus, taking only Article 4 into consideration, Mr. X would first need to demonstrate that he has a particular disability and/or health condition protected by the Discrimination Law (the ground), and then that the HR Director applied standards or criteria that had the effect of discriminating against people with diabetes and/or obesity. That would be a case of indirect discrimination.

Miguel Carbonell Sanchez, professor and legal researcher of the Juridical Research Institute of the Autonomous National University of Mexico and the CONAPRED, is of the opinion that Article 1 of the Mexican Constitution and the Discrimination Law in Mexico must be interpreted in an objective manner, not subjectively. Accordingly, the adjudicator must look for the real discrimination (effects approach) and not the subjective discrimination (which is the

103 Or that he has any other particular distinction or feature using the ‘on the basis of any other distinction’ ground.

104 Since the CONAPRED’s procedures are voluntary and arbitral just a few are published; nevertheless in those few published resolutions we saw that the CONAPRED applies the effects approach of discrimination in its resolutions. For example, in the complaint against Clubs Sport World [2007-002], a gym which denied service to the complainant who was a disabled-paralympic athlete arguing that they did not have the appropriate accessibility infrastructure, the CONAPRED concluded that despite the respondent did not purposively discriminate against the complainant for evil reasons or prejudice, the respondent [indirectly] discriminated against the complainant by not having the necessary accessibility infrastructure for people with disabilities. On the other hand, in the complaint of Hotel Emporio [2007-006], a hotel that denied accommodation to the complainant with visual impairment with a guide dog; the Hotel argued that the dog was a pet and pets were not allowed in the premises because it will affect the health and safety of the other guests. The CONAPRED concluded that the respondent did not discriminated against the complainant because of their “ignorant prejudice and actions”, but because the hotel’s general policies [indirectly] discriminated against people with visual impairment. See the CONAPRED’s Bulletin, Online: http://www.conapred.org.mx/boletines1.html.

It seems that in these cases the CONAPRED simply did not take into consideration the reasons provided by the respondents, the CONAPRED was only concerned about the effects of their actions. However the Discrimination Law or the CONAPRED do not defined what the limits of the discrimination are – like the Bona Fide Requirement or Qualification in the Canadian legal system; the CONAPRED did not answer any question regarding the undue hardship of Clubs Sport World of accommodating people with disabilities or the undue hardship of Hotel Emporio of accommodating people with guide dogs. The question would be then, how far the civil adjudicator will go in rejecting the reasons and arguments of the company in the present case since the judge cannot legislate?
voluntary or involuntary discrimination or the *reasons* approach). The legal doctrine on discrimination laws in the Mexican legal system converges to suggest that the adjudicator must apply the *effects* approach. The main arguments that these scholars use – such as Miguel Carbonell and Carlos de la Torre – are based on Articles 6 and 7 of the Discrimination Law.

Article 6 of the Discrimination Law establishes that the legal interpretation of the Discrimination Law shall be congruent with all applicable Mexican legislation, and with applicable international instruments regarding discrimination, including the recommendations and resolutions implemented by multilateral and regional bodies. Article 7 establishes that when there are two or more possible interpretations, the adjudicator must choose the interpretation that more effectively protects the alleged victims. Carbonell notes that Article 7 follows the *pro homine* (for the benefit of the person) hermeneutic principle which is customarily used in the international human rights field, with the result that the Discrimination Law would always be interpreted in the most beneficial way for the complainant. In the present case, the *effects* approach seems to be the more beneficial for people with diabetes and obesity because is more flexible. On the other hand, the judge must always interpret the law in a manner that eliminates

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106 There are a small number of legal scholars devoted to this subject; we studied the works regarding discrimination laws in Mexico and Latin-American developed by the Juridical Research Institute of the Autonomous National University of Mexico (Instituto de Investigaciones Jurídicas de la UNAM) (http://www.juridicas.unam.mx/) and the CONAPRED (http://www.conapred.org.mx/). These two institutions are the most influential on this subject among the Mexican legal and political community; on the other hand, the Juridical Research Institute of the UNAM is a well respected and influential institution among the legal community in Mexico, that generally its findings are used by the Mexican courts regarding new and unexplored areas of law.


108 *Supra* note 10.

109 Carbonell, “Ley Comentada”, *supra* note 105 at 41 para. 3.
contradictions, that is, to interpret the law harmoniously with the other laws,\textsuperscript{110} including the international law assimilated by the Mexican legal system. Thus, the civil adjudicator would need to use the effects approach as stipulated by Article 4 to define discrimination.

As mentioned in the preliminaries section of this work, treaty law plays a very important role in the Mexican legal system due to the Constitution (Article 133) and the jurisprudencia. The Discrimination Law is even more “sensitive to the international law”\textsuperscript{111} because it must be interpreted congruently with all international instruments.\textsuperscript{112} The Discrimination Law also is very sensitive to the other Mexican laws and regulations.\textsuperscript{113} Therefore, Mr. X must present all relevant laws and international instruments to the civil judge to aid the interpretation of the Discrimination Law, and to determine whether diabetes and obesity are disabilities or health conditions, whether there are limits on the equal opportunities right, and ultimately whether the passive individual’s actions infringed any law. The relevant international instruments include:

(1) United Nations Convention on the Rights of Persons with Disabilities (UN Convention 106);

(2) UN Resolution on the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UN Resolution 48/96);

\textsuperscript{110} Tesis Aislada, Registro No. 206005: Interpretación de la Ley (December 1988).

\textsuperscript{111} de la Torre Martínez, supra note 10 at 210-211.

\textsuperscript{112} Discrimination Law, Articles 6 and 7.

\textsuperscript{113} Because the Discrimination Law must also be congruent with them and the judge must interpret the Civil Code, the Constitution, the Discrimination Law and the international instruments altogether using the grammatical, analogical, historical, logical, systematic, causal and teleological methodologies (in some cases the adjudicator must take into consideration some political, social and economical aspects). See Jurisprudencia, Registro No. 205755: La Interpretación Directa de un Precepto Constitucional (November 1991); Tesis Aislada, Registro No. 223218: Interpretación de la Ley, Instrumentos al alcance del Organo Jurisdiccional para la (April 1991); Tesis Aislada, Registro No. 167105: Interpretación Directa (June 2009).
(3) Recommendation Concerning Discrimination in Respect of Employment and Occupation of 1958 (R111);\textsuperscript{114}

(4) Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities of the Organization of American States (OAS Guatemala Convention), and

(5) Annex 1 (Labour Principles) of the North American Agreement on Labour Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (NAALC).\textsuperscript{115}

International instruments (1) and (4) support the \textit{effects} approach interpretation of Article 4 of the Discrimination Law. These two instruments define discrimination using both approaches: \textit{reasons} and \textit{effects}. It is also likely that they both cover the two main types of discrimination (direct and indirect), which allows the States to freely choose any of those approaches.\textsuperscript{116} International instruments (1) (2) and (4) endorse that diabetes and obesity can be interpreted as disabilities or health conditions.\textsuperscript{117} And finally, the five instruments support the

\textsuperscript{114} In connection with the covenants of the \textit{Convention Concerning Discrimination in Respect of Employment and Occupation of 1958 (C111)}.

\textsuperscript{115} The NAALC was signed on September 14, 1993 and is one of the supplementary accords of the North American Free Trade Agreement.

\textsuperscript{116} See \textit{UN Convention 106}, Article 2; and \textit{OAS Guatemala Convention}, Article I-2 (a).

\textsuperscript{117} Instrument (1) in its paragraph (e) of the preamble declares that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”; the second paragraph of Article 1 estates that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

Instrument (2) in its paragraph 17 of the Introduction declares that the “term ‘disability’ summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature”.
interpretation that the passive individual should have to integrate Mr. X into the company’s job position if it was possible. Otherwise the company must demonstrate (with the legal means of proof of the Civil Code) that it was impossible to integrate Mr. X. In other words, the company must demonstrate (using logic and experience) that Mr. X’s disability will affect his performance on the job. We do not think that the civil judge would go beyond what we call *possible and real integration*. The civil judge cannot make any comment about the principles of *duty to accommodate* or *undue hardship* as the judge cannot perform an extensive interpretation of the law. Simply put, the judge cannot introduce novel concepts into the law.

Moreover, the same interpretation is supported by other laws and regulations. Article 1 of the LGPD (General Law for Persons with Disabilities) establishes that its purpose is to

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And instrument (4) at Article I-1 defines disability as a “physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment”.

118 “*UN Convention 106*. Article 2 *Reasonable accommodation* means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. ... Article 5 (3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”. [emphasis added]

*UN Resolution 48/96*. Section 2 of Rule 7 (Employment) establishes that the “States should actively support the integration of persons with disabilities into open employment... States should also encourage employers to make reasonable adjustments to accommodate persons with disabilities.” [emphasis added]

*ILO’s R111* at ss. 1 (2) establishes that “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.” [emphasis added]

*OAS Guatemala Convention*. At Article II establishes that the purpose of the convention is to promote the full integration of persons with disabilities into the society.

*NAALC’s Annex 1*. Its Seventh Principle establishes that the parties (in this case Mexico) must promote the elimination of employment discrimination on such grounds as race, religion, age, sex or other grounds, subject to certain reasonable exceptions, such as, where applicable, bona fide occupational requirements or qualifications and established practices or rules governing retirement ages, and special measures of protection or assistance for particular groups designed to take into account the effects of discrimination.
foster the full integration of people with disabilities into the society. Similarly, Article 13 paragraph IV states that the authorities must foster the labour integration of people with disabilities. Article 2, paragraph XI of the LGPD defines “People with Disability” as “any person who has a physical, mental or sensorial deficiency, whether it is permanent or temporal in nature, which limits his or her capabilities to perform one or more essential activities of the daily life, which can be caused or aggravated by the economical or social environment”.

In jurisprudencia 1a./J. 81/2004, the Supreme Court of Mexico held that the equality principle in the Mexican Constitution does not require that all individuals must always, at all times and in all circumstances, be in conditions of absolute equality. Instead the equality principle entails legal equality, which must be understood as the legal protection from suffering an unfair or unjustified damage or loss of a right.

The Ministry of Human Health (Secretaría de Salud) issued two Normas Oficiales Mexicanas, namely the NOM-015-SSA2-1994 in connection with the prevention, treatment and control of Diabetes Mellitus, and which defines Diabetes Mellitus as a heterogeneous group of systematic and chronic diseases which basically affect the metabolism of carbohydrates, proteins and lipids, causing abnormal glycaemia risings, and the NOM-174-SSA1-1998 for integral treatment and control of obesity, which defines obesity as a chronic disease associated with endocrine, cardiovascular, orthopaedic pathologies, characterized by an excess of adipose

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120 A Norma Oficial Mexicana (Mexican Official Standards) (NOM) is a technical, official and compulsory national standard issued by the competent national organizations and federal agencies (such as the Ministry of Human Health) which establishes rules, specifications, attributes, guidelines, characteristics or prescriptions of a product, process, installation, system, activity, service, production methodology or operation. The NOMs are regulated by the Federal Law of Metrology and Standardization (Ley Federal sobre Metrología y Normalización, Diario Oficial de la Federacion, July 1, 1992).

tissue in the organism, and present when in general an adult has a body mass (or body weight) equal or above 27 kg/m² or 25 kg/m² for persons of short stature.¹²²

Prior to an analysis of the possible remedies in the civil procedure, it is necessary to draw some preliminary conclusions about the law and the international instruments analyzed above. First, each party has the burden of proving their own claims. The complainant who asserts that the conduct of the passive individuals is illicit is obliged to prove that fact. Second, evidence is assessed on a balance of logic and experience, not on a balance of probabilities. Third, civil procedure is a multi-level process with multi-level questions. The first-level-question is very broad and general: is the discriminatory behaviour of the passive individual an illicit act? The second-level-question would be whether the behaviour of the passive individual violates the Discrimination Law. At the third level, the question is whether independent of his intentions, the respondent’s acts hindered or suppressed the labour rights or the complainant. If this last question is answered in the affirmative, then a fourth-level-question would be whether the possibility existed that the employer could “integrate” (or accommodate) the complainant in a reasonable way.

Fourth, the Discrimination Law does not define what “disability” or “health condition” are. Nevertheless, based on scientific proof, expert witnesses, national standards and regulations, and international human rights and antidiscrimination laws and instruments, it is possible to demonstrate that diabetes and obesity are disabilities or at least health conditions.

Fifth, the Civil Code does not, strictly speaking, define discrimination at all. However, taking our analysis above into account, discrimination would be defined as the illegal or illicit behaviour of making distinctions based on any grounds [ethnic or national origin, sex,

age, disability, social or economical class, health condition, pregnancy, language, religion, opinions, sexual preferences, marital or legal status, or any other distinction] which has the effect of hindering or suppressing a person’s right to equal opportunities (the effects approach). The respondent must have made reasonable attempts to “integrate” (or accommodate) the complainant. This is the limit to the right not to be discriminated against. There is no legal or jurisprudential definition of reasonable integration or accommodation of people with disabilities, but we believe that the following general principle of law (used by the Mexican adjudicators) would apply: An impossible obligation is null and void (Es nula la obligación de cosa imposible – Celso (Roman jurist of the classic era). The respondent must accommodate the claimant only if it is possible.

We will now assume that Mr. X was able to demonstrate that the passive individual’s behaviour was illegal – i.e. that he was unlawfully discriminated against by the passive individual. The following would be the possible remedies at law:

a) **Losses and damages.**

Assuming that Mr. X is able to demonstrate that the illegal actions of the passive individual are the only direct and logical cause of the damages suffered, he must compute the precise monetary amount of such damages and prove that such amount is truthful or factual. Mr. X has the option to just claim and prove general damages and losses without stating the monetary amount of such damages, and then in a second and separate execution-of-sentence legal procedure he would now declare the amount. The advantage of this would be that if Mr. X

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123 *Civil Code*, Article 1915.


declares the amount in the discrimination procedure he must demonstrate the accuracy of the monetary amount, since the monetary amount would be part of his main claim (*litis*) at the discrimination procedure, and if he cannot convince the judge about the truthfulness of the amount then the judge will not award any compensation for losses and damages. When determining the monetary amount of the losses and damages is very abstract (like they are in this case) it is better to “play safe” and ask for general damages, and later deal with the monetary amount of the damages in a separate and independent legal proceeding.

b) **Moral Damages.** Independent of the claim for losses and damages, Mr. X can ask for monetary compensation suffered for moral harm. But unlike the claim for losses and damages, the judge determines the amount of the monetary award for moral damages. Since Mexican civil procedure is not published, it is not possible to include judicial decisions on monetary compensation for moral damages for unlawful discrimination in our analysis. As a result, it is also not possible to assess the approximate monetary award that a judge would order in favour of Mr. X in our hypothetical case.

c) **Legal Fees and Litigation Costs.** Mr. X can also ask for the payment of all the legal fees, litigations costs and other related expenses.

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126 *Civil Code*, Article 1916.


128 *Civil Code*, Article 2118; *Civil Procedural Code*, Articles 138 to 142.
**Conclusions about the Mexican Legal System**

Criminal and civil courts are the most appropriate and convenient fora to institute claims for monetary compensation for horizontal labour discrimination in the private sector. The Mexican legal system thus creates two parallel approaches for dealing with horizontal discrimination in the private sector, namely the criminal and civil law approaches. The criminal law’s definition of discrimination uses the *intent* or *reasons* approach, based on proof of *dolo*. By contrast, the civil law defines discrimination from the *effects* approach perspective. In order to understand the concept of discrimination in the civil law, it is necessary to rely on international law. The limits of the right not to be discriminated against in the criminal law are determined by the defendant’s intention and purpose. The limits in the criminal law are therefore tied to the *dolo* element. In the civil law system, the limits are tied to the concept of reasonable “integration” or accommodation of the complainant. The main remedy for discrimination in the criminal law is punishment, but it is also possible to obtain monetary compensation for the victim. On the contrary, the civil law remedy for discrimination is monetary compensation for actual, general, or moral damages suffered by the complainant. Discrimination in criminal law is an issue of public interest and in the civil law is an issue of private interests, of private obligations.

**IV. CANADIAN TREATMENT**

1. **Forum**

Canada has three main federal courts which were created by Parliament in accordance with s. 101 of the Constitution Act 1867. These are the:  

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1. Supreme Court of Canada

2. Federal Court of Canada (Appeals Division)
   2.1. Federal Courts (Trial Division), and

3. Tax Court.

At the provincial level the court systems are as follow:

1. Provincial Superior Court  (Trial and appellate functions)
   In some provinces the superior court may be divided in:
   1.1. Court of Appeal (civil and criminal appeals from the superior court), and
   1.2. Superior Court or Court of Queen’s Bench (civil and criminal trial functions)

2. Provincial Courts (These courts have limited jurisdiction to try minor civil cases and most of the criminal cases).

In Ontario the court system is structured hierarchically as follows:

1. Court of Appeal for Ontario

2. Superior Court of Justice
   2.1. Divisional Court (Appellate functions)
   2.2. Civil Courts
   2.3. Criminal Courts
   2.4. Family Courts
   2.5. Small Claims Court

3. Ontario Court of Justice

In contrast to the Mexican court system where the states’ judicial systems are completely independent from the federal government, Canada’s federal and provincial governments share some responsibilities regarding the Provincial Courts of Appeals and the
Provincial Superior Courts. For instance, s. 96 of the Constitution Act 1867 requires the provincial governments to organize and administer those courts, but the federal government appoints and pays the salaries of the judges.\textsuperscript{130} However, similar to Mexico, the Provincial Courts in Canada are solely administered by provincial governments (s. 92 Constitution Act 1867).

Substantive law in the Canadian legal system is chiefly divided into public law and private law. Public law comprises constitutional law, criminal law, administrative law and tax law. Private law includes contracts, torts, property, business and corporate law. Civil and property rights, including human rights (and particularly the right not to be discriminated against), are under provincial jurisdiction.\textsuperscript{131} By contrast, as outlined earlier in this thesis, the right not to be discriminated against in the Mexican legal system is part of both public and private law.

Due to the “impact on public policies” regarding human rights, the Canadian human rights commission and other human rights tribunals were created as autonomous “specialized judicial bodies”, separate from the ordinary civil courts system, that deal with human rights violations.\textsuperscript{132} There is a federal Human Rights Act (FHRA) and a federal Human Rights Commission (FHRC).\textsuperscript{133} According to the FHRA, the FHRC investigates alleged human rights


\textsuperscript{131} See \textit{Constitution Act, 1867}, s. 92 (13).

\textsuperscript{132} Kritzer, supra note 130 at 256 – 257.

\textsuperscript{133} See \textit{Canadian Human Rights Act} (R.S., 1985, c. H-6 ).
violations committed by federally regulated employers under the *Employment Equity Act* (1995, c. 44). ¹³⁴ The provinces’ human rights legislations are similar to the FHRA.

The Supreme Court of Canada (SCC) in *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 (at 195) refused to recognize the common law tort of discrimination. And particularly in Ontario, due to its Human Rights Code (HRC) and its “specialized judicial bodies” named the Ontario Human Rights Commission (OHRC), the Human Rights Tribunal of Ontario (HRTO), and the Human Rights Legal Support Centre (HRLSC), the protection of the human rights was emancipated from the ordinary civil courts, i.e., from the Ontario’s Superior Court of Justice and the Ontario Court of Justice.

S. 46.1 (2) of the HRC clearly forbids the initiation of civil actions based solely on human rights violations. A complainant who wishes to sue the defendant for unlawful discrimination in a civil court must couple such claim with another civil claim. For instance, if an individual believes that he was unlawfully dismissed by his employer and that such dismissal was the result (directly or indirectly) of discriminatory behaviour, that individual can initiate a civil claim for wrongful dismissal (Employment Standards Act, 2000 [S.O. 2000, CHAPTER 41]) based on a human rights violation (unlawful discrimination in accordance with the Part I of the HRC.

The HRC at s. 29 states that the purpose of the OHRC is to:

> ...promote and advance respect for human rights in Ontario, to protect human rights in Ontario and, recognizing that it is in the public interest to do so and that it is the Commission’s duty to protect the

¹³⁴ Such as federal departments, agencies or Crown corporations; chartered banks; airlines; television and/or radio stations; interprovincial communication and telephone companies; buses and railways business-related-companies, other federally regulated industry, such as mining operations. To see the full list of federally regulated employers and service providers see s. 4 of the *Employment Equity Act* [1995, c. 44, s. 4; 2001, c. 34, s. 40(F); 2003, c. 22, ss. 163, 236(E)]
public interest, to identify and promote the elimination of discriminatory practices...

The OHRC can perform inquiries and make applications to the HRTO if it considers that it is in the public interest to do so. The purpose of the HRTO is to resolve all alleged claims of discrimination brought by individuals. The OHRC does not accept individual discrimination complaints. In some cases the OHRC may apply to the HRTO to have the tribunal refer a case to the Divisional Court. The decisions of the HRTO are final and not subject to appeal. The HRLSC provides advice and assistance (legal and otherwise) to complainants, particularly as regards a) preparing complaints to the HRTO; b) legal services in relation to proceedings before the HRTO; c) applications for judicial review; d) stated case proceedings, and e) the enforcement of the Tribunal orders. [Human Rights Code, R.S.O. 1990, c.H.19, s. 45.13 (1) (2); 2006, c. 30, s. 6.]

In Canada, the most appropriate and convenient forum to file Mr. X’s claim for monetary compensation for unlawful discrimination is the HRTO. Considering the hypothetical facts of Mr. X’s case, Mr. X may not able to couple his action for violation of his human rights with another civil action, and as such, cannot file a claim in the civil courts.

135 See HRC s. 31 (1), 35 and 45.3.

136 Ibid. at s. 45.6.

137 Ibid. at s. 45.8.

138 The HRLSC’s resources are very limited, and according to some researches, like the ones of the AODA-Alliance (http://www.aodaalliance.org/), the HRLSC does not have the sufficient economical and human resources and infrastructure to cope with all the cases properly. For more information see Avvy Go, David Lepofsky and Prof. Lorne Foster, Our Campaign for Strong, Effective Implementation of the AODA, Accessibility for Ontarians with Disabilities Act Alliance, Metro Toronto Chinese and Southeast Asian Legal Clinic, Presentation to Queens Park News Conference. July 2, 2008. Online: http://www.aodaalliance.org/strong-effective-aoda/07022008-2.asp [Mainly they claim that “Bill 107 privatized the enforcement of human rights in Ontario”]
In the Canadian legal system, the criminal court is not an appropriate and convenient forum since, in contrast to the Mexican legal system, discrimination in the Canadian legal system is not a crime *per se*, at least not in the context of our hypothetical case. The Canadian Criminal Code is a federal enactment, that is, under the control of the Canadian Parliament. Unlike the Mexican legal system where each state has its own criminal code, there is only one Criminal Code in Canada (Criminal Code C-46). The Canadian Criminal Code provides for only two crimes that might be similar to Article 206 of the Criminal Code. These include s. 318 (to 320.1) regarding Hate Propaganda\(^{139}\) and s. 425 relating to Intimidation and Discrimination Against Trade Unionists.\(^{140}\) However, s.318 and s. 425 are not as extensive as Article 206, and will certainly not suffice for our hypothetical case. It appears apt to conclude that the Canadian criminal law and system of criminal adjudication do not provide the means for settling Mr. X’s claim for monetary compensation for unlawful horizontal discrimination in the private sector.

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\(^{139}\) *Criminal Code C-46*, s. 318 *(1)* Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

*(2)* In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

\(a\) killing members of the group; or

\(b\) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

*(3)* No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

*(4)* In this section, “identifiable group” means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1.”

\(^{140}\) *Criminal Code C-46*, s. 425 “Every one who, being an employer or the agent of an employer, wrongfully and without lawful authority

\(a\) refuses to employ or dismisses from his employment any person for the reason only that the person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing, in a lawful manner, their interests and organized for their protection in the regulation of wages and conditions of work,

\(b\) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to any trade union, association or combination to which they have a lawful right to belong, or

\(c\) conspires, combines, agrees or arranges with any other employer or his agent to do anything mentioned in paragraph \((a)\) or \((b)\), is guilty of an offence punishable on summary conviction.

R.S., c. C-34, s. 382.”
To a certain degree, one can say that the HRC is the equivalent of the Mexican Discrimination Law, while the HRTO is comparable to the CONAPRED. The HRC and the Discrimination Law share the main purpose of eliminating unlawful discrimination, but, as we will see, they differ in kinds of remedies available. HRTO and the CONAPRED have in common the function of solving discrimination complaints. But the HRTO is an administrative tribunal that solves discrimination complaints through a mandatory proceeding, while the CONAPRED is an administrative commission (not a tribunal) that solves complaints through a voluntary arbitral process. The HRTO possesses enforcement capabilities and can award monetary compensation, while the CONAPRED is without enforcement power and cannot award monetary compensation.

In conclusion, there are differences between Mexico and Canada with respect to the forum for settling horizontal discrimination claims in the private sector. Considering the same hypothetical facts, in Mexico the most appropriate and convenient forum to look for monetary compensation for unlawful horizontal discrimination in the private sector will be the ordinary criminal courts and/or the ordinary civil courts. The complainant in the Mexican legal system can do forum shopping. Moreover, the complainant can use the two forums jointly with the CONAPRED’s conciliatory procedure. However, in Ontario – assuming that the complainant cannot couple his human rights action with another civil action – the complainant must use the HRTO. The forum in Mexico is an ordinary court where the adjudicator is a civil or criminal judge, and in Ontario an administrative tribunal that in most of the cases is adjudicated by a panel designated by the chair of the HRTO.\footnote{HRC, s. 33.1.}
2. Law and Remedy

In order to simplify the comparative analysis of the Canadian treatment, the following analysis adopts the same structure as the Mexican treatment. First, I analyse the burden of proof rules, then the standard of proof, and finally, the concept of discrimination and associated legal remedies.

In Ontario, the complainant has the burden of proving a *prima facie* case of discrimination. A *prima facie* case of discrimination is established when at first glance, in a simple and superficial analysis, the behaviour of the respondent appears to have discriminated against the complainant on the basis of a prohibited ground.

The evidence presented by the parties is analyzed by the HRTO on *a balance of probabilities*. This is the standard of proof in proceedings before the HRTO. The HRTO uses the same standard of proof used in the civil law. Proof on *a balance of probabilities* requires that the parties demonstrate their claims using circumstantial evidence since rarely the respondent will admit his discriminatory behaviour or the HRTO will find other direct evidence. The HRTO must make inferences from the circumstantial evidence presented by the parties.

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144 Howe & Johnson, supra note 11 at 46 para. 2.

145 *Shakes, supra* note 142 at 8916 and 8918.
Ultimately, all circumstantial evidence must be *balanced* by the HRTO in order to draw the most *probable* inferences.\(^{147}\)

Hence, the complainant must demonstrate *on a balance of probabilities* that:\(^{148}\)

a) he was qualified for the particular employment;

b) he was not hired, and that

c) someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

Once the complainant has passed the *prima facie* test on a *balance of probabilities*, then the onus shifts to the respondent and he or she must “provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the *Code* is not the correct explanation for what occurred.”\(^{149}\) That is, the respondent must pass the *bona fide occupational requirement* (BFOR) test.\(^{150}\) S. 17 of the HRC read as follow:

**Disability**

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

**Accommodation**

\(^{146}\) *Basi, supra* note 142 at 38483.

\(^{147}\) *Gaba, supra* note 142 at 20.

\(^{148}\) *Shakes, supra* note 142 at 1002.

\(^{149}\) *Ibid.* at 8918.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1); 2006, c. 30, s. 2 (1).

[Emphasis added]

More precisely ss. 24 (1) of the HRC lists the specific cases in which an employer does not infringe the right of equal treatment. These cases constitute statutory exceptions to discrimination. Additionally to the exceptions of ss. 24 (1), the BFOR is used as other reasons that evidence why the discrimination was lawful.

The adjudicator would likely use the Meiorin test proposed by Justice McLachlin to determine if the prima facie discriminatory standard is a valid BFOR. Adjudicators can also

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151 HRC, s. 24. “(1) The right under section 5 to equal treatment with respect to employment is not infringed where,
(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment;
(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment;
(c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person;
(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee;
(e) a judge or master is required to retire or cease to continue in office on reaching a specified age under the Courts of Justice Act;
(f) a case management master is required to retire on reaching a specified age under the Courts of Justice Act;
(g) the term of reappointment of a case management master expires on the case management master reaching a specified age under the Courts of Justice Act; or
(h) a justice of the peace is required to retire on reaching a specified age under the Justices of the Peace Act. R.S.O. 1990, c. H.19, s. 24 (1); 1999, c. 6, s. 28 (11); 2001, c. 32, s. 27 (5); 2005, c. 5, s. 32 (14); 2005, c. 29, s. 1 (2).”

152 Meiorin, supra note 150.
use the *Etobicoke* test,\textsuperscript{153} if it was a case of direct discrimination, or the *O’Malley* test if it was a case of adverse effects of discrimination.\textsuperscript{154} However, considering the facts of the hypothetical case, we are assuming that the adjudicator will use the *Meiorin* test because this test unifies the *Etobicoke* and *O’Malley* tests. The *Meiorin* test combines the direct discrimination and adverse effects tests into one single test.

*Meiorin* is a three-step test that allows the respondent to justify his BFOR on the balance of probabilities. The advantages of the *Meiorin* test are:\textsuperscript{155} a) the adjudicator does not have to make a distinction between direct and adverse effects discrimination, which is a very problematic task. b) The *Meiorin* test requires an employer to, as reasonably as possible, accommodate individual employees. And finally, c) the *Meiorin* test takes a strict approach to the “undue hardship” concept.

Thus, using the *Meiorin* test the defendant must prove on a balance of probabilities that:\textsuperscript{156}

1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
2. That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

\textsuperscript{153} *Etobicoke, supra* note 150 (The respondent must prove that “i) the standard was imposed honestly, in good faith; and ii) in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy; and iii) not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code”).

\textsuperscript{154} *O’Malley, supra* note 150 (The respondent must evidence that “i) here is a rational connection between the job and the particular standard, and ii) that it cannot further accommodate the claimant without incurring undue hardship”).

\textsuperscript{155} *Meiorin, supra* note 150 at 50.

\textsuperscript{156} *Ibid.* at 54.
The standard is reasonable necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonable necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.\(^\text{157}\)

[Emphasis added]

If the respondent passes the Meiorin test, then the final evidentiary burden returns to the complainant to show that the explanation provided is a “bogus” pretext.\(^\text{158}\) The burden of proof in a discrimination complaint is like a ping-pong match, it shifts from one party to the other, to and fro.

To the contrary, the burden of proof in the Mexican legal system varies. In Mexican criminal procedure, the onus is on the claimant at all times, since the defendant is not obliged to prove the legality of his or her acts. The only exception is when the defendant denies some proved facts, in which case the onus passes to him to prove otherwise. The standard of proof in criminal procedure is the culpabilidad principle, that is, there should not be any doubt. In civil procedure, each party has the onus of proving their own claims. One who declares a fact must prove it, and one who denies a fact is not obliged to prove anything unless such denial relates to a proven fact. The standard of proof is the rules of logic and experience. In Mexican civil procedure, strictly speaking, the standard of proof is not based on a balance of probabilities. However, since the adjudicator can use presunciones (presumptions) and inferences to obtain certainty on the facts, the standard of proof in Mexican civil procedure (as relates to unlawful discrimination) produces the same results as the standard of proof used by the HRTO: both

\(^\text{157}\) Ibid.

\(^\text{158}\) Basí, supra note 142 at 38480.
establish legal truth using a balance of probabilities based on circumstantial evidence, inferences and presumptions. The means may differ, but the results are same.

The burden and standard of proof in criminal proceedings in the Mexican legal system are evidently different from the HRTO. With respect to civil procedure, the Mexican legal system and the HRTO’s procedure have the same results but use different principles: rules of logic and experience on one hand, and a balance of probabilities on the other.

The Ontario law on discrimination is best conceptualized, as suggested by Professor Denise Réaume, as gravitating around the following 3 pillars:159

1. The grounds upon which an individual may not be denied a good or opportunity - or the bases of unlawful discrimination.
2. The type of good, benefit, or opportunity access to which is protected [Sic.] - or the spheres within which discrimination is prohibited -, and
3. What constitutes “discrimination” so as to make a denial unlawful - this is connected to what we might call the fault standard for discrimination.

Therefore, following the said general pattern Mr. X should structure his complaint as follows:

1. **Sphere**: Employment. The respondent infringed his right to equal treatment with respect to employment.

2. **Grounds/bases**: Disability. His diabetes mellitus 1 and perhaps his obesity (as perceived physical disability or as disability per se).

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159 See especially Réaume, supra note 143 at 59 (Réaume suggests that “a valid complaint will consist of a discrimination connected to a prohibited ground within a protected sphere”).
3. **Fault standard for discrimination:** Mr. X will argue that the respondent did not establish a *bona fide* defence since accommodating the complainant would not represent undue hardship for the respondent.

Mr. X’s main claim will be that the respondent infringed his human rights based on ss.5 (1) of the HRC: the respondent denied him the employment because of his disability and the respondent had the possibility of accommodating Mr. X without undue hardship. As we will see below, ss. 5 (1) of the HRC only recognizes 15 grounds of labour discrimination (race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability). Therefore, Mr. X must evidence that he fall into one of those grounds. He will use the *disability* ground. *Ss.5* of the HRC reads as follow:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. [Emphasis added]

Mr. X must demonstrate a *prima facie* case of discrimination. He will be able to prove, on a *balance of probabilities*,\(^\text{160}\) a) that he was qualified for the position, b) that he was not hired, c) that someone no better qualified was hired and, drawing inferences d) that he was discriminated because of a prohibited ground, namely his disability.

The Discrimination Law in the Mexican legal system does not define disability (or health condition), and for that reason the complainant in Mexico must demonstrate and convince the civil or criminal judge that his or her diabetes (or obesity) is a disability. In contrast, the HRC on ss. 10(1) (a) of the HRC defines disability as:

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\(^{160}\) He will use as evidences oral testimonies, documents, and other things relevant to the subject-matter of the proceeding. See *Statutory Powers Procedure Act* R.S.O. 1990, CHAPTER S.22, s. 15.
(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, ... [Emphasis added]

Whereas there is no doubt then that Mr. X’s diabetes mellitus qualifies as a disability under the HRC, it is less clear whether obesity does as well. Currently, Canadian courts are divided on whether obesity qualifies as a disability. Some courts have endorsed a narrow definition which holds that obesity is a physical disability caused by illness, as well as an ongoing condition effectively beyond the individual’s control which limits or is perceived to limit his or her physical capabilities. “Disability must be a physical disability suffered by the complainant, not the respondent”, that is, the disability is not the respondent’s perception of the complainant’s ability to perform the work. Disability is an actual handicap.

But other courts have defined disability more broadly, as the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors that determine whether the individual has a “handicap” for the purposes of the code.

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162 Davison, ibid. at para. 6.

163 Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission de droits) v. Boisbriand (City), [2000] 1 S.C.R. 665, (Mercier) [Boisbriand]
Under this broader interpretation, “handicap may be actual or perceived”.164 The social construct is what may turn Mr. X’s obesity into a handicap or disability.165

Considering that courts have yet to firmly establish whether or not obesity is a disability in terms of the HRC, we conclude that Mr. X has three options. He could either:

1. Institute his claim solely on the basis that diabetes is a disability, or
2. Include obesity in his claim as disability, but he would need to demonstrate that his obesity is a disability/handicap caused by illness; or
3. Include his obesity in his claim arguing that though obesity may be not a disability caused by illness, it is a disability because of the respondent’s perception, using a liberal and purposive interpretation of the HRC.166 Here, his claim will be based ss. 15 (1) of the Constitution Act 1982.167

Ss. 5 (1) of the HRC code limits to 15 the grounds of labour discrimination, whereas according to Article 206 of the Mexican Criminal Code and Article 4 of the Mexican Discrimination Law any distinction could be a ground for discrimination. The HRC “does not prohibit discrimination on the basis of appearance”.168 The Mexican Criminal Code and the Discrimination Law, due to their broad scope, prohibit discrimination on the basis of appearance.

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164 Ibid. at 81.
167 Constitution Act, 1982, ss. 15. “(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” (this ss. 15 (1) use a more broadly concept of equality: any kind of discrimination is prohibited, and particularly based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability)
168 Vogue Shoes, supra note 161 at 89.
Proving discrimination on the basis of obesity as disability, or health condition or physical appearance is highly possible in the Mexican legal system, but not in the Canadian.

Mr. X will likely be able to pass the *prima facie* test and the HRTO will not dismiss his claim. On a balance of probabilities standard, Mr. X could present evidence to establish a *prima facie* case of discrimination based at least on one disability – his diabetes mellitus – and perhaps for obesity as well on the grounds that it is an illness or perceived physical disability. The onus then will shift to the respondent.

Assuming that the respondent is not able to use any explicit exculpatory defence as provided by s. 24 (1) of the HRC, the respondent would need to pass the *Meiorin* test. The respondent must demonstrate that:

\[\text{(1) he or she adopted the standard of employing healthy people (that is people without an illness or disability) because there is a rational connection with the performance of the essential duties of the job. An obvious example in this regard would be employing only people with “healthy” vision for pilot positions in an airline company. Such a company would be right to reject any job applicant who is blind. In our hypothetical case, the respondent could argue and demonstrate that because of the particular nature of the company’s business, there are extremely high levels of pressure and stress above that of a “normal” company. Mr. X’s diabetes would be an obstacle when faced with challenging situations, such as when it is not possible to take a break between tasks. Assuming that the HRTO determines that obesity is a disability, the respondent may also argue that obesity is related to high-pressure and cardiovascular health.}\]

\[169\text{Meiorin, supra note 150.}\]
problems, which definitely puts Mr. X health or even his life at risk of a stroke or heart attack due to high levels of stress.

(2) That he or she adopted such standard honestly and in good faith, believing it necessary. From the foregoing analysis of statute and judicial decision, I conclude that the HRTO tends to be generous with the respondents at this stage; hence, if the employer in a balance of probabilities shows that the standard was put in place for the abovementioned reasons, the OHRT would infer that it was made in good faith.

(3) Finally, that the standard is reasonably necessary to accomplish a legitimate work-related purpose. The job position in question is Payroll Manager in a private company – an executive position in an office environment. The respondent will have to use all possible arguments and evidence to demonstrate that the fast-paced activities of the company, and in particular the job position in question, produces high levels of stress, more than in any other “normal” office environment. Therefore, it is not possible to accommodate Mr. X because the company cannot change or reduce its work pace, or reduce or eliminate the levels of stress of the job position because that would be against the nature of its business and of the job position in question. Mr. X will argue or demonstrate that despite any explanation, justification or “pretext”, on a balance of probabilities, there is no rational connection between the standard and the job, and that in his previous jobs he was exposed to the same or even more levels of stress.

In sum, the third step of the Meiorin test would be main point of controversy. In my view, Mr. X will have more success in advancing his claim if the respondent is just a “regular” company with “ordinary” business activities, and the job position has “habitual” levels of stress and responsibility. On the contrary, if we assume that the respondent is not really a “normal”
company with “ordinary” business activities and that the position is in fact exposed to abnormal levels of stress, then the respondent would be more successful in his or her defence.

Prior to discussing possible legal remedies in the Canadian legal system, some preliminary conclusions are necessary with respect to the comparative analysis.

As we have seen, the main points of controversy in the Canadian legal system pertain to the following questions: Is the standard reasonably necessary? If it is indeed necessary, can the respondent accommodate the complainant without undue hardship? In Mexican criminal procedure, the main questions would be whether the employer acted with evil purpose (dolo) in discriminating against or infringing the complainant’s human dignity. If the answer is yes, then, are there any exculpatory elements or exceptions that eliminate the reproachability or culpability of the defendant? In Mexican civil procedure, the main issues would be whether the discriminatory behaviour of the passive individual constitute an illicit act, and if so, whether such behaviour is in violation of the Discrimination Law. Also, it would be necessary to inquire into whether the acts of the passive individual have the effect of hindering or suppressing the labour rights of the complainant, and lastly, whether the passive individual could possibly accommodate the complainant in a reasonable way.

In the Canadian legal system discrimination can be understood as the right to equal treatment with respect to a protected sphere (services, accommodation, contracts, employment) without discrimination because of a protected ground (race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability). The respondent’s behaviour is discriminatory independently of his or
her intentions. The Canadian legal system follows the *adverse effects* approach similar to the Mexican civil procedure.

The limit of the right not to be discriminated against in the Canadian legal system is the duty to accommodate without undue hardship. In Mexican criminal procedure, such limits are determined by the exculpatory elements of the crime, and in civil procedure by the possibility of reasonable accommodation of the complainant.

In the Mexican legal system, the adjudicator must study and analyze international law in order to understand the concepts of discrimination. In the Canadian legal system the international law does not play any role in analyzing the concepts of discrimination.

Assuming that Mr. X is able to demonstrate a *prima facie* case of discrimination and the respondent is not able to establish a *bona fide* occupational requirement defence, what remedies could the HRTO order? S. 45.2 (1) of the HRC provides the following three possible remedies:

a) **Special Damages**: This is the pecuniary “tangible…pecuniary loss that ensued directly from the injury or loss that a complainant sustained”.

   In other words, special damages constitute the material loss directly caused by the discriminatory acts of the complainant. Special damages are determined on a case-by-case basis since each case has different facts and circumstances. Some examples would be lost wages and benefits caused by discriminatory dismissal, and increased rent or moving expenses caused by the denial of accommodation. Because of the tangible nature of special damages, they are easy to objectively assess. The HRC

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170 O’Malley, *supra* note 150.

defines special damages as the “monetary compensation paid to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect” [s. 45.2 (1) 1].

In our hypothetical case, Mr. X may be able to claim the following special damages:

i. **The loss of money.** Since Mr. X is unemployed, his fulltime activity is looking for a job. Every human resources specialist knows that such activity is extremely time-consuming and stressful. Mr. X can thus try to claim the amount of damages equal to the total number of hours spent preparing resumes and cover letters, for job interviews, etc.

ii. **Loss of position.** Mr. X can argue that based on the facts and evidence he would have obtained the Payroll Manager position if the respondent had not discriminated against him because of his disability, or if the respondent had diligently accommodated him. He would then, attempt to claim payment for lost wages for the period from the date of the second interview to the date the matter is resolved, or until he obtains a new job. While Mr. X’s primary remedy within the facts of our hypothetical case would be to obtain financial compensation, it is worth mentioning that he can also seek to be reinstated to the denied job position.

b) **General Damages:** This is the non-pecuniary “intangible loss that resulted directly from the respondent’s conduct [and] includes the injury or loss of the intrinsic value of the right to be free from discrimination and the physical, psychological or psychiatric injury or loss to a complainant as a result of the respondent’s discriminatory conduct.”¹⁷² General damages include the mental anguish suffered by the complainant. The HRC defines general damages as the “restitution to the party whose right was infringed, other than through monetary compensation,

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for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect” [s. 45.2 (1) 2].

Since there is no cap regarding the amount for general damages, and there is no need to prove that the violation was wilful or reckless in order to claim mental anguish, in theory Mr. X can claim more than $10,000, which was the former cap per each violated right before Bill 107. Then, Mr. X may be able to claim the following general damages:

i. **Non-pecuniary intangible loss:** Restitution for injury to his dignity, feelings and self-respect – loss caused by the infringement of s. 5 of the HRC.

ii. **Mental Anguish:** Restitution for the mental pain and distress suffered.

c) **Other Specific Remedies:** The HRTO may order the respondent to do anything to promote compliance with the HRC. It is an obligation to do something that assures the respondent’s compliance with the HRC. Based on this remedy the HRTO may order the respondent to reinstate the employee; or to provide specific needs in order to render the appropriate services, such as wheelchair access or ramps. [s. 45.2 (1) 3]

Additionally, in accordance with s. 45.3 of the HRC, the HRTO per request of the OHRC (s. 35) can order a public interest remedy. Under this remedy, the respondent is obliged to take some actions in order to prevent similar discriminatory actions from occurring in the future. For example, the HRTO may order the complainant to establish educational programs or eliminate some practices, or to change its policies and procedures.

And finally, although technically not a remedy per se, s. 46.2 (1) provides that a person who infringes any right protected under Part I of the HRC will be liable to a fine of not more than $25,000. And s. 46.2 (2) leaves open the possibility of prosecuting the respondent with the written consent of the Attorney General.
The special damages remedy is equivalent to the payment of losses and damages in the Mexican legal system, and the general damages remedy is analogous to the moral damages remedy. In the Canadian legal system, both special and general damages amounts are determined by the HRTO, while in the Mexican legal system losses and damages are determined by the complainant, who must demonstrate the reasonableness of the amounts. In Mexican civil procedure, the complainant must establish the amount of moral damages, and he also must prove the reasonableness of the amounts. In Mexican criminal procedure the judge determines the amounts of moral damages.

The principles used in both legal systems in connection with legal remedies are different, but they have the same result, which is to compensate or redress the rights of the complainant through monetary compensation.
V. CONCLUSIONS

The Mexican and the Canadian legal systems have a problem in common, namely unlawful horizontal labour discrimination in the private sector. Both legal systems provide monetary compensation remedies, but use different principles to award them. They differ on the appropriate and convenient forum. They have different concepts of discrimination. They use different standards of proofs and legal principles. In both jurisdictions, it is possible that an adjudicator would consider Mr. X a vulnerable individual that needs the protection of the antidiscrimination laws due to his disability. There is also a possibility that in both jurisdictions his obesity will be considered a disability. Both legal systems use different principles and concepts but, to some degree, provide similar limits to the right not to be discriminated against. Both jurisdictions use the effects or indirect discrimination approach, which is essentially a broad concept of discrimination. However, when the Canadian adjudicator faces a case of direct discrimination the approach relied on is similar to Mexican criminal procedure. With respect to the latter, both legal systems rely on the intent or reasons approach to discrimination.

The Mexican and the Canadian legal systems use different means to achieve the same result, which is to protect the equalization of opportunities and human rights of vulnerable persons and social groups by redressing infringed rights through monetary compensation.
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