THE LACK OF ACCESS TO THE COURTS TO ENFORCE CIVIL RIGHTS IN THE UNITED STATES:
A Violation of the Right to Effective Remedy Under Article 2(3) of the ICCPR

IN RESPONSE TO THE SECOND AND THIRD PERIOD REPORTS OF THE UNITED STATES OF AMERICA

NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS (NCRCR)

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Foreword and Acknowledgments

The National Campaign to Restore Civil Rights (NCRCR) is a collection of over one hundred organizations and numerous individuals that came together to address the rollback of civil rights in the courts. We believe that what happens in the courts affects the everyday lives of every American. It affects whether we can keep our air and water clean, our basic opportunities in life, and whether we can enforce our fundamental protections against discrimination.

We are scholars, lawyers, students, educators, organizers, and concerned citizens. We care about a fair future for all Americans, not just a select few. We connect people across the country, across disciplines, and through all the different work that we do, helping to share information and craft solutions, and to make sure that our laws are in step with the country we all envision for the future.

Our federal courts are increasingly not available for the average American to enforce rights. In many areas, the judiciary is adopting narrow conceptions of rights and, equally important, the enforceability of rights and the role of the courts, and we are all too often left with no available remedy for violations of civil rights.

The National Campaign to Restore Civil Rights and all our partners are working together to protect fairness, our freedoms and the enforceability of our rights.

NCRCR's submission of this report does not necessarily reflect the views of the individual groups affiliated with the Campaign.

We acknowledge and thank Cynthia Soohoo and Rose Cuison Villazor for the work that they put into this report. We also thank Lisa Crooms and Marianne Engelman Lado for their helpful comments and suggestions.

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I. EXECUTIVE SUMMARY

- Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) requires the availability of an effective remedy for violations of rights protected by the ICCPR.

- Millions of individuals in the United States do not have the right to remedy violations of federal civil rights laws as a result of Supreme Court opinions that restrict the private right of action of individuals.

- The inability to redress these civil rights violations constitutes a violation of Article 2(3) of the ICCPR.

    a. U.S. Supreme Court decisions that have prevented individuals from obtaining an injunction to stop ongoing discriminatory conduct violate Article 2(3) because under this provision of the ICCPR, remedies must be *accessible* to individuals whose rights are protected.

    b. U.S. Supreme Court decisions that have restricted the ability of individuals to obtain compensatory damages against state actors violate Article 2(3) because the provision requires remedies to be *effective* and the failure to compensate an individual for harms caused by civil rights violations means that the remedy is insufficient and thus inappropriate.

    c. Under the ICCPR, sovereign state immunity cannot be a defense against the imposition of corrective measures aimed to effectuate the requirements of Article 2(3).

    d. The implementation of the effective remedy requirements of Article 2(3) is particularly crucial when the individuals involved are vulnerable persons.

- We recommend that the Human Rights Committee require the U.S. to comply with its obligations under Article 2(3) of the ICCPR to ensure and protect the rights of individuals to an effective remedy.

II. Introduction

"Refusal of access to the tribunals of a country is considered a primary manifestation of the concept of denial of justice."[1]

The right of an individual to a remedy has long been considered integral to the concept of justice.[2] An effective remedy is intrinsic to the implementation of rights guaranteed by the International Covenant of Civil and Political Rights (ICCPR).[3] In particular, Article 2(3) provides that an "effective remedy" must be available to persons whose rights recognized under the ICCPR have been violated. Despite a long tradition recognizing and relying upon the individual right of action to protect and vindicate civil and political rights, recent Supreme Court cases threaten the right to an effective remedy in the United States.

In the United States (U.S.), the importance of access to a remedy was incorporated in U.S. constitutional jurisprudence as early as 1803 when the U.S. Supreme Court decided *Marbury v. Madison*.[4] In that case, the Court explained, "it is a well settled and invariable principle . . . that every right, when withheld, must have a remedy, and that every injury its proper redress."[5] *Marbury* also recognized the significant role of federal courts in implementing legal rights.[6] This recognition foreshadowed the historic function of federal courts in vindicating the civil and political rights of historically subordinated groups, including African-Americans, Latinos, people with limited English proficiency, women and people with disabilities.

Despite the promises of the original U.S. Constitution and its later amendments, specifically the 13th[7], 14th[8], and 15th[9] amendments (the Civil War Amendments), many

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[1] Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 8 (2004) (explaining that most legal systems today recognize the significance of ensuring "right of access to independent bodies that can afford a fair hearing to claimants who assert an arguable claim that their rights have been infringed").

[2] The right to a remedy is a principle that may be traced to the Magna Carta and English common law. English legal philosopher William Blackstone posited "where there is a right, there is a remedy" and this concept would later influence the implementation of rights within western legal systems including the U.S.

[3] *See* International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

[4] *See* 5 U.S. 137 (1803).

[5] *Marbury v. Madison*, 5 U.S. at 163 (citing William Blackstone and discussing the importance of access to court when a legal right has been violated).

[6] *See Marbury*, 5 U.S. at 177 (explaining that "it is the province and duty of the judicial department to say what the law is").

[7] This amendment abolished slavery.

people in the U.S. were historically denied equal protection of the laws and the privileges and immunities of citizenship. Amidst their struggles for equal justice, it was the judiciary branch, particularly federal courts, that provided an effective forum for obtaining relief from civil rights violations.[10]

Equal justice continued to be denied, however, for many years despite the passage of the Civil War Amendments. During the course of the civil rights movement in the second half of the Twentieth Century, federal courts played a crucial role in implementing equal justice for racial and ethnic minorities, women, immigrants, people with disabilities and the aging. The ability of individuals to file private lawsuits in courts led to the realization of constitutional and fundamental human rights and a range of remedies for violations of constitutional and statutory law.[11] Public interest litigation and the courts became the symbolic and real venues for obtaining "compensation for injuries and . . . address[ing] societal problems."[12] Indeed, the U.S. is somewhat unique in its "long tradition of public interest impact litigation filed by private parties to seek recognition of problems and changes in future behavior," rather than primarily relying on government to resolve such issues.[13] The primacy of the courts as a means to address and remedy rights in the U.S. makes the necessity of access to the courts all the more acute.

Despite its historic recognition of the importance of remedies, and the emphasis that the American system places on courts to vindicate and enforce rights, a series of Supreme Court cases have undermined access to judicial remedies. These cases have methodically carved away the ability of individuals to go to court to seek an injunction to prevent ongoing discriminatory acts as well as deprived individuals of the opportunity to obtain retroactive relief for harms that resulted from the violations of civil rights laws.

This report discusses the retrenchment of the right to seek an effective remedy in the courts, which have subsequently left the people in the United States without meaningful recourse for vindicating many of their civil rights. Importantly, this report aims to expose

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[8] This amendment provides a broad definition of citizenship and requires states to provide equal protection to all of its persons (not only citizens) within their jurisdiction.

[9] This amendment prohibits the states or the federal government from using a citizen's race, color, or previous status as a slave as reason to disqualify them from voting.

[10] *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 368 (1886) (holding that a San Francisco ordinance violated the Fourteenth Amendment because while it was facially neutral, it had a disparate impact on Chinese Americans).

[11] *See* Pamela S. Karlan, *Disarming the Private Attorney General,* 2003 U. ILL. L. REV. 183, 186 (contending that the Supreme Court "has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general") [hereinafter Karlan].

[12] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT. L. 1, 24 (2002) [hereinafter Stephens].

[13] *Id.* at 25; *see also* Karlan, *supra* note 10, at 186 (explaining that "Congress harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large").

the United States' failure to comply with the requirements of Article 2(3) of the ICCPR that there ought to be an effective remedy for violations of rights guaranteed by the ICCPR. The report focuses in particular on Supreme Court cases that have denied effective remedies for discriminatory claims on the basis of race, color, national origin, age and disability. It should be understood, however, that the report addresses the general obstacles to judicial remedies faced by victims of domestic violence, immigrant workers and other historically subordinated persons.

The necessity of compliance by the United States with Article 2(3) cannot be understated. The failure of the United States to comply with the effective remedy requirement of Article 2(3) has not only greatly diminished the meaning of the rights under the ICCPR, particularly the right to equal protection under Article 26, but has also rolled back the advancement of civil rights in the United States, many of which have been achieved only in the last forty years. It is important for the Human Rights Committee to require the United States to comply with its obligations under Article 2(3) and ensure that effective remedies are available for violations of equal protection of the laws.

III. ARTICLE 2(3) AND OBLIGATION TO PROVIDE EFFECTIVE REMEDY

Each State Party to the present Covenant undertakes:

*(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an **effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity;*

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.[14]

The individual right to an "effective remedy" within the domestic legal system provides a crucial and essential guarantee for the rights protected by the ICCPR. The Human Rights Committee has stated that because Article 2(3) provides the necessary framework for securing Covenant rights it is "essential to its object and purpose" and any reservation indicating non-compliance with Article 2(3) is unacceptable.[15]

Article 2(3)(a) requires that each State Party ensure an effective remedy to any person whose Covenant rights are violated, "notwithstanding that the violation has been committed by persons acting in an official capacity." Any person seeking a remedy "shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State" and the remedy granted must be enforced by competent authorities.[16]

a. *Effective Remedy Under Article 2(3)*

States must establish appropriate mechanisms for addressing claims of rights violations under domestic law.[17] In determining whether a remedy is effective, the Committee will look to whether an effective remedy is provided in fact, rather than

[14] ICCPR, Article 2(3).

[15] Human Rights Committee, General Comment 24(52), General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), ¶ 11.

[16] ICCPR, Art. 2(3)(b) & (c).

[17] General Comment 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ¶ 15.

whether a remedy is formally available. Thus, even when its legal system is "formally endowed with the appropriate remedy," a State Party is required to "provide information on the obstacles to the effectiveness of existing remedies."[18]

In determining what constitutes an effective remedy under Article 2(3), the Committee has stated that the domestic remedy provided must be (1) accessible and (2) effective to vindicate rights. In terms of the type of relief that should be made available through the domestic remedy, reparations should be made to individuals whose rights have been violated.[19] Appropriate reparation "can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes to relevant laws and practices . . . ."[20] The Committee has also noted that the "Covenant generally entails appropriate compensation" and that an obligation to prevent recurrence of the violation of the Covenant is integral to Article 2.[21]

While judicial remedies are not explicitly required, the drafting committee expressed a "strong sentiment . . . in favor of judicial remedies as the most effective means of protection within a national system." The Committee decided not to limit the effective remedy provision to judicial remedies in part, due to recognition that "developed independent judicial systems did not exist in many countries and that it would be impossible for such states to provide adequate judicial remedies quickly."[22] The drafters also sought to "ensure the broadest possible range of remedies for violations of human rights, and eschewed language implying that judicial remedies were the exclusive form contemplated by the Covenant."[23] However, the drafters' preference for judicial remedies is embodied in the requirement that States Parties develop the possibility of a judicial remedy.

Where non-judicial remedies are contemplated, their effectiveness must be on par with judicial remedies. Indeed, scholars have suggested that while the treaty leaves open an opportunity for official agencies to play a role in proving effective remedies, Article. 2(3) imposes a "requirement of independence and objectivity in the conduct of public

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[18] *Id.*, ¶ 20.

[19] *Id.,* ¶ 15, 16. In addition to specific provisions for compensation in Articles 9(5) and 14(6), the Committee has stated that "the Covenant generally entails appropriate compensation." *See* Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law in* INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 325 (ed. Louis Henkin)(1981) [hereinafter Schacter].

[20] *Id.,* ¶ 16.

[21] *Id.* ¶¶ 16, 17.

[22] *See* Schachter *supra* note 15, at 326; Sherrie L. Russell-Brown, *Out of the Crooked Timber of Humanity: the Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding 'Effective Remedies,'* 26 HASTINGS INT'L & COMP. L. REV. 227, 232 (2003).

[23] Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2570 (1991); Schachter, *supra* note 15, at 326.

officials responsible for granting remedies to individuals whose rights have been infringed."[24]

Article 2(3)(a) makes clear that the right to an effective remedy applies "notwithstanding that the violation has been committed by persons acting in an official capacity." Scholars have observed that this clause was "intended to override a possible claim of official immunity."[25] The Committee has confirmed that immunity for government officials is not consistent with Article 2(3). The Committee has also stated that the remedies must be adapted to "take account of the special vulnerability of certain categories of person, including in particular, children."[26]

[24] *See* Schachter *supra* note 15, at 331.

[25] *See id.* at 326.

[26] General Comment 31, ¶ 15.

IV. LACK OF ACCESS TO U.S. COURTS FOR VIOLATIONS OF CIVIL RIGHTS

> *"[W]e grew up in a country where the federal government, particularly the federal courts, could frequently be relied upon to promote equality and individual rights over private bigotry, corporate malfeasance, and state-enforced exclusion of some groups from social, political and economic power."*[27]

The struggle in the United States for equal justice and civil rights for individuals and groups - including people of color, women, immigrants, the aged, people with disabilities, the poor and other historically subordinated groups - provides an important lens for understanding the significant link between the implementation of a right and access to a remedy, particularly in a court of law. As explained in Section A, access to courts provided an important avenue for the vindication of the civil rights of these historically subordinated minority groups.[28] Yet, recent United States Supreme Court opinions have in many instances stripped the ability of these groups to obtain a remedy for both past discriminatory conduct as well as ongoing discriminatory actions. Part B examines and discusses these cases and how the opinions have resulted in a violation of Article 2(3) of the ICCPR.

A. Role of the Judiciary in Implementing Civil Rights in the United States

The history of the United States is replete with documented unlawful discrimination perpetrated against people of color, women, immigrants, the aged, people with disabilities and other persons (hereinafter referred to as historically subordinated groups or minority groups).[29] Although the United States Constitution guaranteed all persons basic fundamental rights, many individuals have been overtly treated differently by the government and private actors on account of various irrational factors including race, gender, age and disability. Laws that mandated segregation and the explicit denial of the right to vote are but mere shameful examples of the forms of discriminatory conduct encountered by racial minorities and women.

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[27] DENISE C. MORGAN, RACHEL D. GODSIL, JOY MOSES, INTRODUCTION, AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE xvi (2006) (Denise Morgan et al., eds.) [hereinafter MORGAN].

[28] For purposes of expediency, we use the term "minority" to denominate the many distinct and diverse persons who have been discriminated against by the government and public actors and treated and constructed as if they were a minority.

[29] *See, e.g., Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 977 (2001) (Breyer, J., concurring opinion) (providing in the Appendix a list of documented discrimination against people with disabilities in the U.S. by states); *Morrison v. United States*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting opinion) (explaining that Congress accumulated "a mountain of data" to support the enactment of the Violence Against Women Act, which sought to prevent gender-based domestic violence that states have been unable to address adequately).

Federal courts provided an important venue for the implementation of civil rights that were denied to minority groups.[30] The historic case *Brown v. Board of Education*[31] illustrated the important role of the judiciary in vindicating the constitutional right of African American children to equal protection under the 14th Amendment of the United States Constitution.[32]

Although *Brown* did not abolish all racial segregation, it did provide significant momentum for the civil rights movement, which led to the passage of several laws that guaranteed equal protection not only to racial and ethnic minorities but other historically subordinated groups as well.[33] Civil rights laws enacted post-*Brown* included the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, which were intended to prevent discrimination against people on the basis of race, color, national origin, gender and age. Later civil rights laws, including the Americans with Disabilities Act (1990) and the Violence Against Women Act (1994), sought to provide refuge to those persons who faced discrimination on account of their disability or who suffered from violence because of their sex.

In sum, access to courts performed a real and substantial role in ensuring that historically subordinated groups obtained an effective remedy when their rights were infringed upon. Both access to the courts as well as the availability of various forms of remedies – injunctive and compensatory relief, for example – provided individuals with the ability to force discriminatory actors to comply with the laws. In this sense, the importance of enabling individuals to privately enforce their civil rights reflects the understanding of an effective remedy under Article 2(3) of the ICCPR. As explained in the following section, recent Supreme Court cases that have narrowed severely the right of individuals to privately enforce various federal civil rights laws have substantially diminished the effectiveness of the rights guaranteed by the ICCPR.

B. Limiting Access to the Courts and Subsequent Denial of Right to an Effective Remedy under the ICCPR

Between 2000 and 2006, the Supreme Court issued several opinions that either foreclosed, or greatly limited, the ability of individuals to go to court and seek redress for past and ongoing discriminatory conduct. In particular, the Supreme Court decisions

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[30] *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregation in the public educational system constitutes a violation of the 14th Amendment's equal protection clause), *Shelley v. Kraemer*, 334 U.S. 1 (1948) (opining that state judicial enforcement of racially restrictive covenants violated the Equal Protection Clause of the 14th Amendment); *Buchanan v. Warley,* 245 U.S. 60 (1917) (invalidating as violative of the 14th Amendment a state law that limited the purchase of property on the basis of color).

[31] *See* 347 U.S. at 483.

[32] *See also Yick Wo*, 118 U.S. at 368.

[33] *See* Wade Henderson & Janell Byrd-Chichester, *Reversing the Retreat on Civil Rights in* MORGAN *supra* note 27 at 26-27.

curtailed both the procedural right of *accessibility* to the courts as well as the substantive right to *effective* remedies.

1. Lack of Access to Obtain an Injunction Against Discriminatory Conduct

Article 2(3) mandates that persons whose rights have been violated "shall have his right thereto determined by competent judicial, administrative or legislative authorities." Recent American jurisprudence contravenes this important ICCPR provision by denying racial discrimination and human rights violations claims from being litigated in court, which means in practical terms that they are not enforceable. The two leading cases that have led to the lack of private enforcement of rights guaranteed by the ICCPR and domestic laws are *Alexander v. Sandoval*[34] and *Gonzaga v. Doe*.[35] As discussed below, the *Sandoval* case[36] dramatically limited the enforceability of a broad range of rights in the United States.

In *Sandoval,* Martha Sandoval, a Spanish-only speaking woman, challenged an English-only policy in the administration of governmental services adopted by the State of Alabama. Mrs. Sandoval attempted to obtain a driver's license but was unable to read the test because it was written in English only. In bringing the case, she relied on Title VI of the Civil Rights Act, which provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[37] Title VI had been previously interpreted to ensure that people with limited English proficiency (LEP) have equal access to services regardless of their inability to speak English.[38] Federal regulations make clear that Title VI proscribes conduct with a discriminatory impact. In *Sandoval*, the Supreme Court held that there is no private right of action to stop the prohibited conduct in federal court. This conclusion was devastating because of its far-reaching ramifications. Many individuals seek equal access to a plethora of programs and services that receive federal funds, including health care programs, environmental services and education, and they can no longer seek a remedy for actions by recipients with an unjustified disparate impact on the basis of race or ethnicity in court.

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[34] *See* 532 U.S. 275 (2001).

[35] 536 U.S. 273 (2002) (holding that there is no private right of action to enforce a provision of a federal privacy law).

[36] For brevity purposes, we do not discus the *Gonzaga* case and discuss only the *Sandoval* opinion and its effect on the ability of individuals to privately enforce their statutory rights in court. Another significant case that eviscerated the ability to pursue discriminatory claims in court is *United States v. Morrisson*, 529 U.S. 598 (2000) (invalidating a civil rights remedy for gender-based domestic violence). This case is discussed in the shadow report submitted on gender equality.

[37] *See* 42 U.S.C. § 2000d.

[38] *See Lau v. Nichols*, 414 U.S. 563 (1974).

The inability of individuals to enforce their rights pursuant to Title VI constitutes a flagrant violation of Article 2(3)'s requirement of effective remedy for violation of the right to equal protection and non-discrimination under Articles 2 and 26. Post-*Sandoval,* there is no meaningful mechanism by which such discrimination claims can be addressed under current domestic law. Although individuals with disparate impact discrimination claims may file a complaint with federal civil rights offices that are charged with enforcing Title VI, federal agencies have been largely ineffective in addressing claims of discrimination.[39] Many federal agencies lack adequate staff and resources to investigate and proscribe unlawful discriminatory conduct.[40]

Sandoval does leave room for aggrieved parties who can demonstrate that they were intentionally discriminated against to bring these claims to court, but this fails to address the problems of systemic discrimination or other non-obvious forms of discrimination that the Constitution and Title VI were designed to address. Jurisprudence on intentional discrimination has required a high burden of proof in order to establish that a discriminatory conduct has occurred. Structural discrimination poses an ongoing problem, and discriminatory actors have become more sophisticated in hiding their motives. The disparate impact theory has enabled many persons to correct and remedy discriminatory programs in cases where they are unable to show intent. The *Sandoval* opinion unfortunately has obliterated this remedy.

The holding of the *Sandoval* case has already been applied in other cases, depriving many others of their pursuit to enforce their equality rights. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[41] a federal appellate court followed the *Sandoval* opinion and held that the plaintiffs did not have a cause of action against a state agency, which continued to issue permits to waste facilities despite discriminatory effects on communities of color.[42] For the children of color who live in the communities and attend schools located near these waste facilities, their right against discrimination has been rendered meaningless. This egregious result is in direct conflict with Article 2(3)'s concern for the availability of rights for vulnerable persons.

The Human Rights Committee has stated that "discrimination" prohibited by the ICCPR includes conduct that has a discriminatory purpose or effect.[43] The *Sandoval* case

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[39] *See* Rose Cuison Villazor, *Language Rights and Loss of Judicial Remedy: The Impact of* Alexander v. Sandoval *on Language Rights in* MORGAN, *supra* note 27 at 143 (criticizing the inability of the Office for Civil Rights in effectively addressing discrimination complaints).

[40] *See* U.S. COMMISSION FOR CIVIL RIGHTS, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Program* (1996) (critiquing the U.S. Health and Human Services Office for Civil Rights' inability to properly investigate and file resolve discriminatory cases).

[41] *See* 274 F.3d 771, 779 (3d Cir. 2001).

[42] *See* Olga Pomar & Rachel D. Godsil, *Permitted to Pollute: The Rollback of Environmental Justice in* MORGAN *supra* note 27 at 200 (analyzing the *South Camden* litigation).

[43] General Comment 18: Non-Discrimination:.10/11/89. CCPR General Comment No. 18 (General Comments), ¶ 7.

severely undermines the ability of many persons, specifically racial and ethnic minorities, to access an effective remedy for discrimination in violation of Article 2(3) of the ICCPR.

2. Denial of Retroactive Relief for Discriminatory Conduct

Article 2(3) requires not only that remedies are available but that they are effective and appropriate in redressing the particular harms encountered by those whose rights have been trammeled. For persons asserting claims of discrimination on the basis of their disability and their age, however, the Supreme Court has held that compensatory damages are unavailable if the perpetrator is the state or a state agency. Consequently, for many victims of these types of discrimination by states, the harms that resulted from discriminatory conduct cannot be redressed.

In *Garrett v. Board of Trustees of the University of Alabama*,[44] the Supreme Court held that the Americans with Disabilities Act (ADA) did not provide individuals with a private right of action to sue state employers for retroactive relief sustained for discrimination on the basis of disability. In *Kimel v. Florida Board of Regents*,[45] the Supreme Court ruled that persons do not have a right under the Age Discrimination in Employment Act (ADEA) to seek compensatory damages in a lawsuit against state employers for age discrimination. Congress enacted both the ADA and ADEA to address the historical discrimination faced by people with disabilities and older persons. It passed these laws pursuant to its authority under the 14th Amendment of the U.S. Constitution to ensure equal protection for all persons.

The conclusions in *Garrett* and *Kimel* holding that no compensatory remedies were available for state sponsored discrimination on the basis of disability and age were grounded on the Supreme Court's narrow interpretation of the powers of the U.S. Congress in abrogating the rights of states to immunity from lawsuits.[46] The inability to obtain damages, however, is contrary to the purpose of Article 2(3) of the ICCPR to ensure that aggrieved persons obtain appropriate remedies. While individuals may still seek an injunction against discriminatory conduct, the lack of monetary damages fails to make whole the person who has been injured by the violation of the law. Thus, the remedy available in these circumstances is ineffective.

The rationale provided by the Supreme Court - state sovereign immunity - does not insulate the results in these two cases from noncompliance with Article 2(3). In fact, broad immunity for state officials from human rights provisions explicitly violates Article

[44] *See* 531 U.S. 356 (2001).

[45] *See* 528 U.S. 62 (2000).

[46] *See also Alden v. Maine,* 527 U.S. 706, 711 (1999) (holding that states cannot be sued in state court either for back pay or damages under the Fair Labor Standards Act because they had not waived their sovereign immunity); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (opining that Congress lacks the authority to abrogate a state's sovereign immunity).

2(3), which provides that effective remedies must be available *despite* the fact that the violation occurred as part of state official business.

Conclusions

The Supreme Court's restrictions on the ability of individuals to enforce their legal right against discrimination seriously undermine the rights guaranteed under the ICCPR and the requirements of Article 2(3) of the ICCPR.

V. RECOMMENDATIONS

1. Require the United States to investigate the effects of the lack of private enforcement of Title VI of the Civil Rights Act of 1964 (CRA) on the overall effectiveness of this law in prohibiting discrimination on the basis of race, color, or national origin.

2. Require the United States to investigate the effects of the unavailability of monetary damages against state governments for conduct that violates the Age Discrimination in Employment Act (ADEA) with regard to the overall effectiveness of this law in proscribing discrimination on the basis of age.

3. Require the United States to investigate the effects of the unavailability of monetary damages against state governments for conduct that violates the Americans with Disabilities Act (ADA) with regard to the overall effectiveness of this law in proscribing discrimination on the basis of disability.

4. Recommend that the United States enact a federal law that would expressly allow a private right of action to enforce Title VI of the Civil Rights Act of 1964 and overturn *Alexander v. Sandoval*.

5. Recommend that the United States enact a federal law that would allow monetary damages against states and state officials for age discrimination and discrimination against people with disabilities.

6. Recommend that the United States provide federal agencies charged with enforcing the CRA, ADA and ADEA with sufficient and adequate funds and resources to ensure effective administrative enforcement of these laws.

VI. RELEVANT SECTIONS OF UNITED STATES FEDERAL CIVIL RIGHTS LAW DISCUSSED IN THIS SHADOW REPORT

A. 14TH AMENDMENT

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

42 U.S. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

C. REGULATIONS IMPLEMENTING TITLE VI

See e.g. Department of Justice Title VI Regulations, 28 C.F.R. 42.101 et seq.

Sec. 42.104 Discrimination prohibited.

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited.

(1) A recipient under any program to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance shall be deemed to include any portion of any program or function or activity conducted by any recipient of Federal financial assistance which program, function, or activity is directly or indirectly improved, enhanced, enlarged, or benefited by such Federal financial assistance or which makes use of any facility, equipment or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

D. AMERICANS WITH DISABILITIES ACT

42 U.S.C. § 12132. Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

E. AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 623(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.