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COMMENTARIES

A Consideration of International Differences in the Legal Context of Selection

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This article expands Myors et al. (2008) by identifying factors that may explain international differences in the legal context of selection. We assert that social, political, and scientific factors may interact to create the legal context of selection in each country and thus explain international differences. Importantly, it appears that the United States has a unique legal context for selection as compared to other countries, and we consider whether the above factors may explain this finding. Additionally, we reflect on whether it is reasonable to view the U.S. legal context as a "best practice policy."

International Differences in the Legal Context of Selection

One of the major patterns identified by Myors et al. is that the United States generally provides a unique legal context for selection as compared to most other countries. For example, results suggest that the United States is an outlier with regard to who is protected under law, whether preferential treatment methods are allowed, and whether evidence is required to prove and refute discrimination.

Differences in protected group status. Surprisingly, many of the countries discussed by Myors et al. had more liberal policy concerning which groups of people are protected under law. For example, it was interesting to see that sexual orientation, marital status, political affiliation, and even socioeconomic status (SES) were protected in many countries, which is not the case in the United States. Certainly, the issue of who is protected under U.S. federal law is one to keep an eye on, as current legislation may expand who is protected via federal laws. For example, the Employment Nondiscrimination Act, which would cover sexual orientation, was recently passed by the U.S. House of Representatives and would be consistent with some already available constitutional and state protections (see Stockdale, 2008, for a review of these protections). Protection against genetic testing and medical discrimination, which is provided by a number of

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countries surveyed by Myors et al. (e.g., France, the Netherlands), is also being considered at the federal level in the United States.

It was also interesting to find that SES is a covered status in many countries (e.g., India, Italy, Japan). SES is not formally a protected group under U.S. law, possibly because it is a difficult concept to define and measure. However, the notion that employment opportunities differ as a function of financial and social status is intuitive. Additionally, SES has played a role in some important case law in the United States in the context of educational opportunities, albeit often as an alternative to race/ethnicity. For example, in a number of recent Supreme Court cases concerning affirmative action as an operational need (i.e., *Grutter v. Bollinger*, 2003; *Gratz v. Bollinger*, 2003; *Parents v. Seattle School District*, 2007), the Supreme Court discussed the use of SES as a plus factor in narrowly tailored affirmative action policies used by educational institutions. It will be interesting to monitor the role of SES in the continued development of the legal context of employee selection in the United States.

Relatedly, the work of Myors et al. provides some interesting insight into the emergence of various protected classes over time. Table 1 of this response highlights some key developments over time. Interestingly, most of the pioneering countries had a sequential approach in which several pieces of legislation were enacted over time, each of which added a new protected class. For example, Australian legislation covered race in 1975, followed by sex in 1984, disability in 1992, and then age in 2004; U.S. legislation covered sex, race, religion, and national origin in 1964, age in 1967, and disability in 1990; The Japanese covered national origin in 1947, disability in 1960, age in 1971, and sex in 1999.

Some countries seemed to be ahead of the times in protecting certain groups. For example, Israel included sexual orientation as a protected class in 1988, 5 years ahead of New Zealand (1993) and 10 years ahead of Ireland (1998). The United States included age as a protected class in 1967, 4 years ahead of Japan in 1971, 13 years ahead of Spain in 1980, and 21 years ahead of Israel in 1988. Japan's protection of the disabled in 1960 was 20 years ahead of Spain in 1980 and 30 years ahead of the United States in 1990.

A degree of caution should be used when comparing the temporal emergence of employment laws across countries. Most countries include prohibitions against discrimination in their constitutions. Typically, these prohibitions only affect the public sector and at times do not include sanctions for violating these prohibitions. For example, it is difficult to compare Canada to other countries because employment laws are enacted by each province rather than by the national government. Members of the European community are also difficult to compare as each member had its own set of employment laws prior to 2000, but many had to create new ones or modify existing ones to be in compliance with the antidiscrimination provisions of Directive 2000/78/EC.

Differences in preferential treatment. The United States also appears to be an outlier when it comes to the status of preferential treatment methods in selection. It was somewhat surprising to see the number of countries that allow various forms of minority preference decision systems, including within group norming, separate cut scores for protected groups, and quota systems. Specifically, the vast majority of the participating countries (over $^{4}/_{5}$ths by our count) allow some sort of preference in their selection practices. As Myors et al. show, U.S. policy has generally considered quota systems, within group norming, and separate cut scores to be illegal since 1991. Even more flexible minority preference decision systems like minority preference sliding bands are illegal in the United States (Gutman & Christiansen, 1997). These international differences in preferential treatment may represent differential status of reverse discrimination across various countries, suggesting that this phenomenon is of more concern in the United States.

Importantly, preferential treatment and affirmative action may be some of the most

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Table 1. *A Summary of Protected Groups Over Time*

Year	Country	Race	Sex	Religion	National origin	Disability	Age	Sexual orientation	Statute
1947	Japan				x				Labor Standards Act
1960	Japan					x			Employment Promotion Act for the Physically Disabled
1964	United States	x	x	x	x				Civil Rights Act of 1964
1966	Italy			x					Act 604, 15 July 1966
1967	United States						x		Age Discrimination in Employment Act
1971	Japan						x		Law Concerning Stabilization of Employment of Older Persons
1972	New Zealand		x						Equal Pay Act
1975	Australia	x							Racial Discrimination Act
1975	United Kingdom		x						Sex Discrimination Act
1976	United Kingdom	x							Race Relations Act
1977	Italy		x						Act 903, December 9, 1977
1978	Belgium		x						Law Equality of Men-Women
1980	Spain	x	x	x	x	x	x		Workers' Statute Law
1976	The Netherlands		x						Act of Equal Treatment of Men and Women
1984	Australia		x						Sex Discrimination Act
1987	Finland		x						Equality Act
1988	Israel	x		x	x		x	x	The Employment (Equal Opportunity) Law
1988	Argentina	x	x	x	x		x		Anti Discrimination Law
1989	Brazil	x							Consolidation of Labor Laws
1990	United States					x			Americans with Disabilities Act
1990	Italy	x	x	x					Act 108, May 11, 1990
1990	Mexico	x	x	x			x		Federal Labor Law—Article 3
1990	Korea					x			Act of Employment Promotion and Vocational Rehabilitation for the Disabled
1991	Korea						x		Aged Employment Protection Act
1991	Czech Republic		x						Act No. 1/1991

(continued)

Table 1. (*continued*)

Year	Country	Race	Sex	Religion	National origin	Disability	Age	Sexual orientation	Statute
1992	Australia					x			Disability Discrimination Act
1992	Hungary	x	x	x	x		x		Act XXII of the Labor Code
1992	Taiwan	x	x	x	x	x			Article 5 of the Employment Services Act
1993	Singapore						x		Retirement Age Act
1993	New Zealand	x	x	x	x	x	x	x	Human Rights Act
1994	The Netherlands	x	x	x					General Equal Treatment Act
1995	Switzerland		x						Federal Law on Equality of Women and Men
1995	United Kingdom					x			Disability Discrimination Act
1998	Ireland	x	x	x	x	x	x	x	Employment Equality Act
1998	Israel					x			Equal Rights for Handicapped Persons Law
1998	South Africa	x	x	x	x	x	x	x	Employment Equity Act
1999	Fiji	x	x	x	x	x	x	x	Human Rights Commission Act
1999	Hungary					x			Rights of Handicapped Persons
1999	Belgium		x						Law of May 7, 1999
1999	Japan		x						Equal Employment Opportunity Act
1999	Korea		x						Gender Discrimination Prevention and Relief Act
2000	European Community			x		x	x	x	Directive 2000/78/EC
2002	Chile	x	x	x	x		x		Article 2 of Labour Code
2002	Taiwan		x						Gender Equality in Employment Law
2003	Ethiopia		x	x					Labour Proclamation No. 377/2003(Article 14)
2003	Kenya					x			Persons with Disabilities Act 14
2004	Switzerland					x			Federal Law on Equality of Disabled Persons
2004	Czech Republic	x	x	x	x		x	x	
2004	Australia						x		Age Discrimination Act
2005	Greece	x		x	x		x	x	Act 3304

misunderstood topics in the United States. Some misunderstanding may stem from the differences in how affirmative action programs are applied in the employment setting versus education, where different laws apply (e.g., Title IX) and protected group status has been used as a factor in case by case decision making, albeit controversially (e.g., the *Grutter* and *Gratz* cases). Additionally, various political and social groups in opposition to affirmative action may equate affirmative action with preferential treatment.

Regardless of the confusion, U.S. Executive Order 11246 requires that government contractors and subcontractors take affirmative action to advance and employ minorities and females in their organizations. The regulations require contractors to cast a wider net in the recruitment process to try and attract qualified minorities and females and get them to apply. Once those individuals apply for the position, equal employment law applies, and contractors are required to hire qualified applicants. We suspect that this could be an issue that is misunderstood in other countries as well.

Differences in evidence of discrimination. Another interesting pattern identified by Myors et al. is the role of adverse impact in the legal context of selection. Specifically, it appears that adverse impact theory plays a more prominent role in the United States than in other countries. Although a number of countries allow for adverse impact evidence in claims of discrimination, it is often necessary but not sufficient evidence of discrimination. Instead, disparate treatment appears to be the more generally accepted theory of discrimination internationally. Importantly, the United States provides a clear chronology of burden in the adverse impact judicial scenario and highly specific and scientific evidentiary rules for each phase (i.e., adverse impact detection via statistical or practical significance, evidence of job relatedness/business necessity, and identification of reasonable and less adverse alternatives). This structured process of scientific burden appears to be rare in other countries.

A Model Explaining the Legal Context of Selection

Why do the above differences exist? Figure 1 presents an interactive model that may explain some of these differences. The model shows how the zeitgeist and state of science in selection may interact with legal protection, technical authority, enforcement of the law, and various reactions to define the legal context of selection. We view this model as a first step in considering *why* there are differences between the United States and many other countries with regard to the legal context of selection.

As Figure 1 shows, the zeitgeist, or the moral, intellectual, and cultural climate of an era, serves as an intuitive starting point

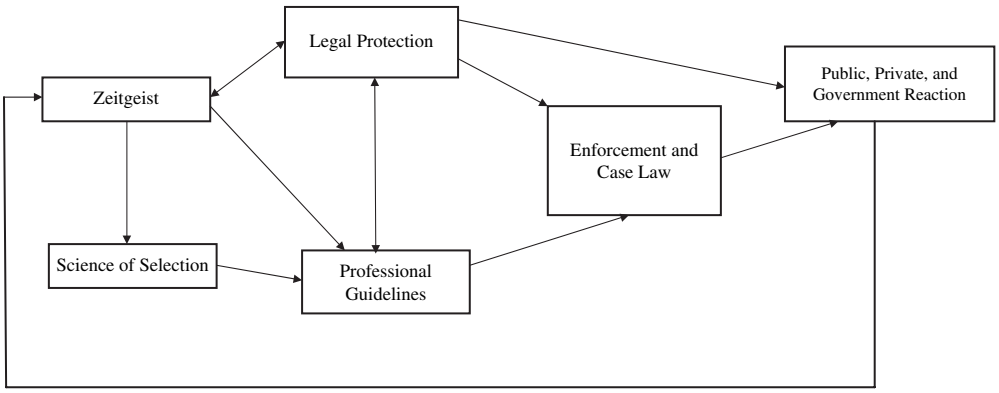

Figure 1. A model of factors to consider in the legal context of selection.

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for understanding legal context. For example, a country's values affect which individual characteristics are deemed important and which group(s) may be afforded protection from discrimination. Myors et al. demonstrated that ethnicity, race, sex, and disability status are universally important to many cultures around the world and are thus afforded protected class status regardless of country, but there is also international variability in who is protected.

Immigration is an issue that may be useful in considering the role of zeitgeist, particularly because it has become an issue for many European countries recently. As a result, these countries have responded to this issue by developing employment legislation that protects immigrants from discrimination. The importance of immigration in defining which groups are disadvantaged exemplifies the notion that "protected group" is a dynamic concept influenced by the current demographic makeup and social values.

Figure 1 also identifies other factors that may be useful in explaining similarities/differences in the legal context across countries. These include the enforcement landscape, court systems and relevant case law, and technical authorities stemming from understanding the science of selection. The discrimination enforcement landscape is a factor that was not surveyed by Myors et al. and may explain some of the differences they identified. In other words, the United States may have a more active and efficient enforcement environment relative to other countries. A number of federal agencies are charged with monitoring and enforcing employment discrimination in the United States. For example, the Equal Employment Opportunity Commission (EEOC) enforces claim-based discrimination primarily under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

As described elsewhere (e.g., Zink & Gutman, 2005), the EEOC investigates many discrimination claims in a given year and is very good at remedying those claims via identifying unsubstantiated claims, settling claims of merit in favor of the claimant, and taking a small number of claims to court, most often ending in plaintiff friendly resolutions. The EEOC has recently developed initiatives focusing on systemic discrimination that affect large classes of applicants and employees and as such employee selection continues to be an area of enforcement focus. A recent example of this focus is the EEOC's "selection procedure fact sheet" published late in 2007 (http://eeoc.gov/press/12-3-07.html).

The Office of Federal Contract Compliance Programs (OFCCP), an arm of the Department of Labor, also actively enforces antidiscrimination policy in the United States. The OFCCP proactively enforces Executive Order 11246, which requires that contractors working for the Federal Government implement affirmative action programs that ensure equal opportunity for previously disadvantaged groups like women and minorities. Toward that end, the OFCCP is audit based and proactively investigates the hiring practices of a subset of federal contractors. Like the EEOC, the OFCCP has recently developed initiatives intended to identify and remedy systemic discrimination and as such has focused on employee selection.

Thus, the OFCCP and EEOC together represent an active enforcement landscape that is both claim and audit based and is linked to multiple federal protections. These agencies have the power to enforce both financial and reputational consequences of discrimination via published compensatory and punitive settlements, as well as eventual litigation. Perhaps the active enforcement landscape of the United States partially explains the more stringent legal context of selection in the United States. Is the enforcement landscape in other countries similar?

The United States also has an active court system responsible for remedying those instances in which employment discrimination claims cannot be settled between enforcement agency and employer. Thus, courts provide an additional level of enforcement, and case law has even birthed judicial scenarios when they were not available via statute, as was the case for the adverse impact scenario

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via *Griggs v. Duke Power* (1971) and *Albemarle v. Moody* (1975). As discussed elsewhere (e.g., Gutman, 2000), the past 4 decades of U.S. case law is rich with precedent-setting decisions intended to ensure zeitgeist-consistent enforcement of antidiscrimination policy.

Taken together, the United States appears to have an active enforcement landscape and a court system designed to resolve discrimination cases where the enforcement landscape itself could not. Both systems can impose meaningful consequences if antidiscrimination policy is violated by an employer. If other countries do not have such a court system, this may also explain differences in the legal context. Perhaps Myors et al. exemplified this notion in their description of the legal context of selection in the Netherlands, where the zeitgeist appears to be ripe for antidiscrimination, but there is no legislative or enforcement framework to handle discrimination charges.

Additionally, Myors et al. hinted at the notion that international differences in the science of selection may explain differences in the legal context of selection. For example, Myors et al. concluded that (a) subgroup mean differences in various predictor and performance constructs were more clearly documented in the scientific literature in the United States as compared to the scientific literature in the other countries and (b) industrial and organizational (I–O) psychology was more affected by the legal context of selection in the United States as compared to other countries. The science of selection is used to develop technical authorities for the practice of selection, and, as such, may differentiate the United States from other countries.

For example, in the United States, there has been considerable research on and social debate about adverse impact. Adverse impact as a phenomenon was codified in the *Uniform Guidelines on Employee Selection Procedures* (UGESP, 1978), which is a technical authority published jointly by various enforcement agencies. The UGESP also delineates the technical requirements for legally defensible employee selection systems by establishing "minimum requirements" for research intended to show job relatedness or business necessity of selection procedures. These requirements are enforced as law by the OFCCP and are used often by the EEOC (Jeanneret, 2005). Additionally, Society for Industrial and Organizational Psychology (2003) has recently revised the *Principles for the Validation and Use of Personnel Selection Procedures*, which is a technical authority often used by practitioners as "best practices" in the design of selection systems. Further, multiple social science institutions have jointly published the *Standards for Educational and Psychological Testing* which is also often used by practitioners in the United States when designing selection systems.

All three of these technical authorities intend to capture the scientific state of selecting employees, although there is some debate over the usefulness of the UGESP given their age. Regardless, these technical authorities are used by the I–O community in the United States. Differences in legal context across countries may be explained by differential familiarity with the state of science in selection or differences in the application of these technical authorities in designing selection systems. Importantly, Myors et al. conclude that the practice of I–O psychology is relatively novel in many countries and, as such, perhaps the international development and use of these technical authorities will increase over time.

Some Final Thoughts

Given the above considerations, it seems reasonable to ask whether the legal context of selection in the United States should be viewed as a best practice policy. This question seems particularly important given recent civil rights activity in South Africa, where the United States has been used as a model of legal context for a country hindered by generations of discrimination. Viewing the United States as a best practice model seems reasonable along a number of dimensions surveyed by Myors et al. For example, it may be reasonable to consider

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the United States as a model of best practices concerning the burdens of proof in evidence of discrimination, accounting for reverse discrimination in preferential treatment policy, and enforcing meaningful consequences for discrimination. However, with regard to which classes are protected, the United States may be lagging, without federal protection for sexual orientation, political opinion, marital status, genetic testing, and so forth.

One additional factor to consider is where a country is along the continuum of events related to both the civil rights and the science of selection. For example, various social scientific communities have contributed to a long history of research on employee selection in the United States. Additionally, Title VII is 44 years old and the United States has experienced social and cultural shifts emphasizing civil rights during its existence. Further, U.S. enforcement agencies and court systems have been dealing with antidiscrimination enforcement for multiple decades. In many of the countries surveyed by Myors et al., legal protection is only now developing, as are enforcement agencies, court systems, and I–O psychology. Given time for science to develop and for legislative and enforcement structure to reach equilibrium, perhaps the legal context for selection will be much more similar across the international community 44 years from now.

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