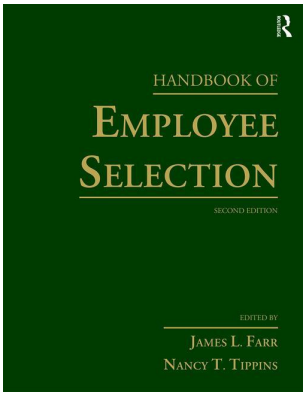

Handbook of Employee Selection

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A Consideration of International Differences in the Legal Context of Employment Selection

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A CONSIDERATION OF INTERNATIONAL DIFFERENCES IN THE LEGAL CONTEXT OF EMPLOYMENT SELECTION[1]

EMILEE TISON, KRISTEN PRYOR, MICHAEL AAMODT, AND ERIC DUNLEAVY

Chapter 29 in this Handbook does an excellent job of identifying and discussing international differences in employment law. In this chapter, we attempt to understand these differences by establishing a framework around the development and evolution of employment law as it relates to employee selection, promotion, and termination. We will first summarize three main categories of international differences in employment law, particularly in terms of primary differences from the U.S., and then propose a model to explain why these differences exist.

INTERNATIONAL DIFFERENCES IN THE LEGAL CONTEXT OF SELECTION

There seem to be three major categories in which the U.S. differs from most other countries in employment law:

- The groups that are defined as protected
- The legality of preferential treatment for underrepresented groups
- The evidentiary standard required to prove or refute charges of discrimination

Differences in Protected Group Status

Many of the countries discussed in Chapter 29 have more inclusive policies than the U.S. concerning which groups of people are protected under law. For example, marital status, political affiliation, and even socio-economic status (SES) are delineated as protected in many countries, but not in the U.S.[2]

SES is not formally a protected group under U.S. law, though it is a covered status in many countries (e.g., India, Italy, Japan). This is possibly because it is a difficult concept to define and measure in the context of U.S. culture, whereas in some other countries there is a more formal definition on which the protected status is based (e.g., the caste system in India, where lower castes are protected). However, the notion that employment opportunities may differ as a function of financial and social status is intuitive. Additionally, SES has played a role in some important case law in the U.S. in the context of educational opportunities, albeit often as an

alternative to race/ethnicity. For example, in several recent cases concerning affirmative action as an operational need (i.e., *Gratz v. Bollinger*, 2003; *Grutter 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. The recent resurgence of socio-economic class disparity discourse within the U.S. (e.g., the 2011 Occupy Wall Street movement protesting income inequality and a wave of federal, state, and local regulations implemented since 2014 to increase minimum wage rates), coupled with the discussion of SES as a legitimate factor in education, raises the possibility that SES may yet become a protected status in the U.S. Though SES is not yet a factor commonly discussed in employment selection, it will be interesting to monitor the role of SES in the ongoing development of the legal context of employee selection in the U.S.

Relatedly, Chapter 29 provides insight into the emergence of various protected classes over time, across the international community. Table 30.1[3] of this chapter highlights some of these key developments over time to illustrate international differences in the legal adoption of protected classes. This temporal presentation shows that most of the countries that were early to begin legally defining some protected class(es) went through a sequential process in which several pieces of legislation were enacted over time, each of which added a new protected class or classes. 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, color, and national origin in 1964, age in 1967, and disability in 1990; Japanese legislation covered national origin in 1947, disability in 1960, age in 1971, and sex in 1999.

Approximately two-thirds of the countries listed in Table 30.1 included sex as a protected class in the first regulation; however, only three of those countries enacted this protection as a stand-alone regulation. Approximately half of the countries, including the U.S., protected several classes in the first regulation, most commonly including sex, race, and religious protections. Protections for disability status and age were more likely to be found in stand-alone regulations for any given country.

In reviewing Chapter 29, some countries enacted protections for certain groups earlier than others. As examples, Israel, the U.S., and Japan each were early to adopt protections for a particular class well before the majority of the other surveyed countries. Israel included sexual orientation as a protected class in 1988, five years ahead of New Zealand (1993) and ten years ahead of Ireland (1998). The U.S. included age as a protected class in 1967, four 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 U.S. in 1990.

Many factors influenced when employment laws were enacted in various countries and can make cross-country comparisons difficult. For example, most countries listed in Table 30.1 include prohibitions against discrimination in their constitutions. Yet, typically these prohibitions only affect employees in the public sector and at times do not include sanctions for violating the prohibitions. Furthermore, employment law enforcement may be more or less centralized across countries. As another example, it is difficult to compare Canada to other countries because employment laws are enacted by each province rather than by the national government. Comparisons of member countries of the European Community are complicated by the fact that 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.

When discussing protected class status in the U.S., the focus here is on federally defined and enforced employment law issues.[4] Additionally, it is important to note that the U.S. identifies and interprets protected group status differently when referring to private businesses, federal contractors, or federal agencies. For example, political affiliation is a protected group when referring to employees of federal agencies, but not when referring to employees of private businesses. Figure 30.1 illustrates some of these differences. The base of the figure defines the foundation of protected class statuses in the U.S. These protected class statuses are enforced by the Equal Employment Opportunity Commission (EEOC),[5] regardless of industry. The middle of the figure defines those additional protected class statuses added for federal contractors and enforced

TABLE 30.1

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, 9 December 1977
1978	Belgium		x						Law Equality of Men-Women
1980	Spain	x	x	x	x	x	x		Workers' Statute Law
1976	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 (CLT)
1990	United States					x			Americans with Disabilities Act
1990	Italy	x	x	x					Act 108, 11 May 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

Year	*Country*	*Race*	*Sex*	*Religion*	*National Origin*	*Disability*	*Age*	*Sexual Orientation*	*Statute*
1991	Korea						x		Aged Employment Protection Act
1991	Czech Republic		x						Act No. 1/1991
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

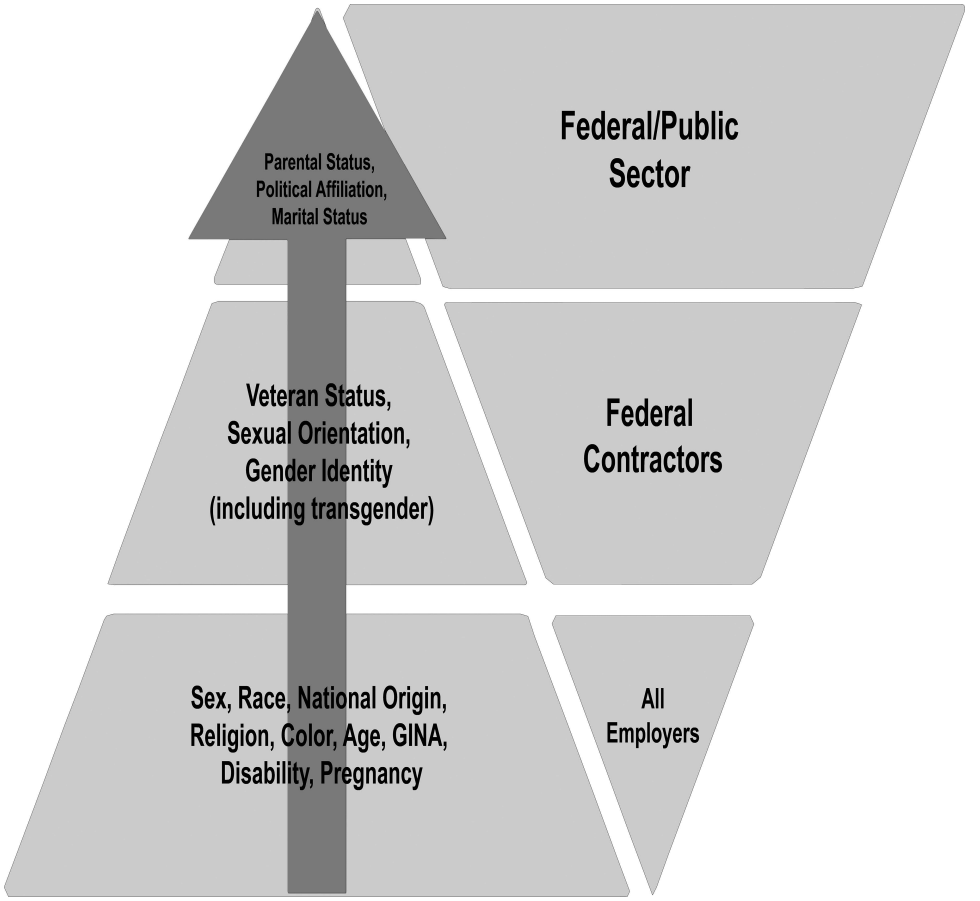

FIGURE 30.1 Protected Group Statuses in the U.S. Based on Employment Sector

by the Office of Federal Contract Compliance Programs (OFCCP).[6] The apex of the figure defines the additional protected class statuses added for federal employees that are enforced by the EEOC.[7] Figure 30.1 highlights the complicated manner of defining protected class status in the U.S.—without even considering the idiosyncrasies that may exist across state and local governments. It is important to note that nuances of this sort are likely to exist in other countries as well.

Differences in Preferential Treatment

U.S. law and regulation also appear to be different from other countries when it comes to the status of preferential treatment methods in selection. Preferential treatment in this context is referring to the differential treatment of a protected group, generally providing an advantage or special consideration. Many countries allow various forms of minority preference decision systems, including within-group norming, separate cut scores for protected groups, and quota systems. Specifically, a majority of participating countries allow some sort of preference in their selection practices. As Chapter 29 describes, since 1991, U.S. policy generally considers quota systems, within-group norming, and separate cut scores to be illegal. Even more flexible minority preference decision systems, such as minority preference sliding bands, also are

illegal in the U.S. (Gutman & Christiansen, 1997). These international differences in preferential treatment may represent the differential status of what may or may not be perceived as reverse discrimination across various countries, suggesting that this phenomenon is of more concern in the U.S.

Importantly, preferential treatment and affirmative action may be some of the most misunderstood topics in the U.S. (Aamodt, 2016). In contrast to preferential treatment, the concept of affirmative action is that focusing on efforts to identify and recruit more diverse qualified individuals will necessarily increase diversity over time (based on the assumption that the more diverse the pool to choose from is, the more diverse the selections will be). Some misunderstanding may stem from the differences in how affirmative action programs are applied in the employment setting versus in the education setting—where different laws apply (e.g., Title IX of the U.S. Educational Amendments of 1972, renamed the Patsy Mink Equal Opportunity in Education Act in 2002). For example, in educational admissions settings, protected group status has been used as a factor in case-by-case selection decision making, not just in outreach and recruitment, albeit controversially (e.g., the *Grutter* and *Gratz* cases). As discussed above, more recent U.S. Supreme Court cases have further limited the scope of the controversial aspects of affirmative action in the educational setting. Specifically, the courts have continued to define and limit the 'narrowly tailored' instances where race is an acceptable consideration as a factor in University admission processes. The courts require educational institutions to "verify that it is 'necessary' . . . to use race to achieve the educational benefits of diversity" (*Bakke*, 438 U.S. at 305). Furthermore, the courts have required that reasonable alternatives be sought before race is used as a factor (*Wygant v. Jackson Board of Education*, 476 U.S. 267, 280; *Grutter*, 539 U.S. at 339).

One such recent Supreme Court case is *Fisher v. University of Texas*. The initial Supreme Court ruling in 2013 remanded the case for a more 'strict scrutiny' of the extent to which the University's consideration of race is narrowly tailored to achieve diversity. The Fifth Circuit reaffirmed judgment for the University, noting that the University's holistic use of race in pursuit of diversity was not reliant on quotas or targets, and this was supported by the fact that racial considerations were not limited to furtherance or advancement of minority students (*Fisher v. University of Texas*, 2014). The case was heard again by the Supreme Court in December 2015; on June 23, 2016, the ruling was upheld – citing that the race-conscious admissions program was lawful under the Equal Protection Clause (*Fisher v. University of Texas*, 2016).

In the employment context, the focus of affirmative action is typically on outreach and recruitment, although analyses are conducted to evaluate the level of diversity in the workforce compared to the availability of qualified diverse individuals. There are specific instances, particularly when an organization is seeking to remedy past discrimination, where race considerations may be lawful, but those are exceptions more than the rule (e.g., court-ordered remedy or consent decree; CRA, 1991). These nuances to affirmative action in the U.S. (i.e., "narrow tailoring" of race considerations in educational settings, exceptions to the ban on preferential treatment to remedy past discrimination, and inappropriate implementation of action-oriented programs when affirmative action goals are set) contribute to the misconceptions that exist. Additionally, various political and social groups that oppose 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 assess the diversity of their workforce and set goals where it is determined a lack of diversity exists. However, an affirmative action goal in this context does not allow an employer to apply preferential treatment measures. Thus, the goal does not represent a target or quota that must be met. Rather, the employer must cast a wider net in the outreach and recruitment process to try to attract qualified minorities and females and encourage them to apply. Once those individuals apply for a position, equal employment law applies, and contractors are required to hire qualified applicants based on legitimate nondiscriminatory factors.

Differences in Evidence of Discrimination

Another pattern identified in Chapter 29 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 U.S. than it does in other countries. As a case in point, U.S. regulations require federal contractors and subcontractors to conduct adverse impact analytics proactively on a variety of personnel activities, including hiring and promotion selection decisions, as well as terminations. Furthermore, revisions to existing regulations and new regulatory requirements forthcoming in the U.S. may broaden the types of personnel activities required to be analyzed via an adverse impact framework (e.g., performance ratings, compensation, training, and transfer decisions).

The U.S. has developed 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). In contrast, although some 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.

This structured process of shifting burden in the U.S. appears to be rare in other countries. For example, Chapter 29 indicates that countries are still in the process of developing legal statutes and requirements, and relatively few cases have been brought under these still-developing legal frameworks. However, as noted in Chapter 29, a few countries are poised to take steps to refine and outline a more structured process for claims in the coming years. See Chapter 29 for more details.

A MODEL TO EXPLAIN THE LEGAL CONTEXT OF SELECTION

Chapter 29 outlines the most commonly protected individual and group characteristics and highlights them across nationalities and cultures. There is now an almost universal affirmation that ethnicity, race, sex, and disability status groups are afforded protected status. Despite this agreement, there is wide variability in additional characteristics that are afforded protection across cultures and nationalities, as well as variability in the temporal emergence of legally protected classes and employment laws across countries. So, why do these differences, and other legal context variations, exist?

Figure 30.2 presents an interactive model or framework that may explain some of these differences. The model depicts overarching forces at work in creating the catalysts for the development of legal protections and the accompanying enforcement/case law, as well as the advancement of the science of selection and the accompanying professional guidelines. We view this model as a preliminary first step in considering why there are differences between the U.S. and many other countries with regard to the legal context of selection.

This section will describe the components of the framework and illustrate how each portion interacts with the rest of the model to influence the legal context of selection. Case examples will be highlighted throughout this section to illustrate the components of the framework.

Zeitgeist[8]

Defined as the general intellectual, moral, and cultural climate of an era, the zeitgeist, in the context of discrimination, is an important consideration when assessing why certain differences and similarities in the other framework factors may exist across countries; it also provides an intuitive starting point, as a country's history and values clearly affect what characteristics are deemed important. Over time, the group(s) identified as needing protection from discrimination, as well as the enforcement of said protection, are likely to evolve as the country's values evolve. Therefore, the zeitgeist can be a driving force of change and evolution in the legal context of

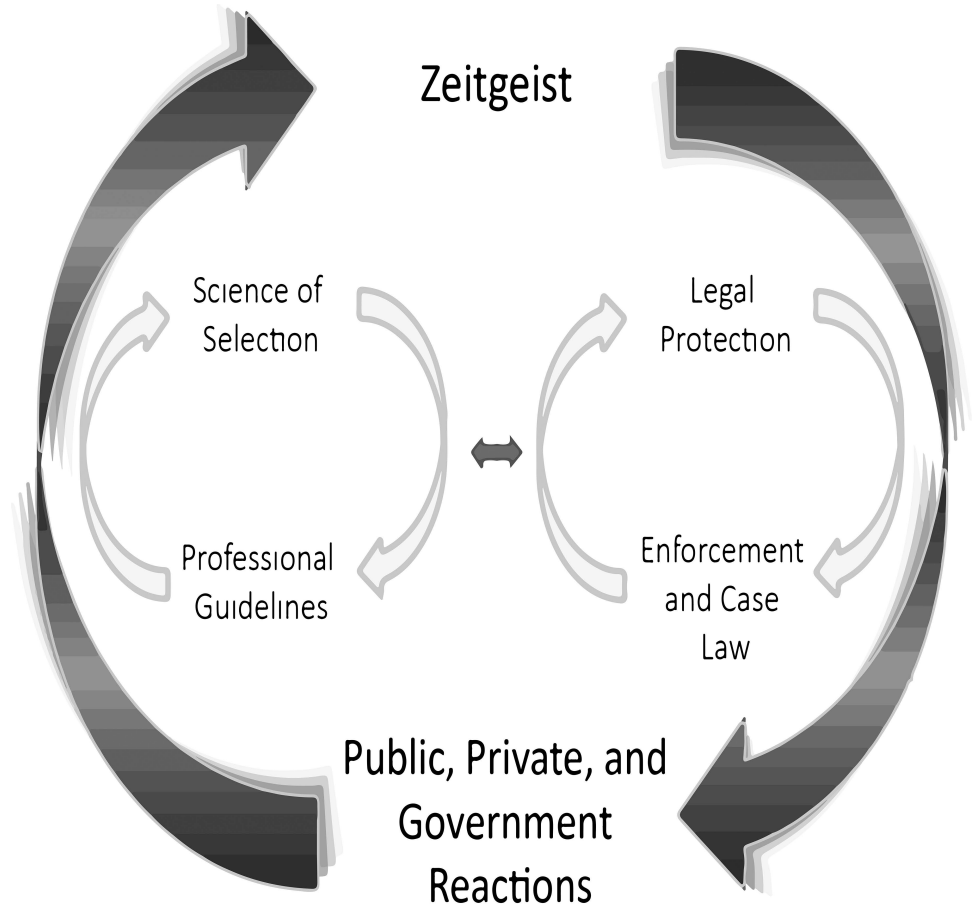

FIGURE 30.2 An Interactive Model to Explain the Legal Context of Selection

selection, and one critical component that fuels change in the legal arena is the general cultural understanding of fairness.

The zeitgeist can also change over time, as it is influenced by other framework factors. For example, a consistent opposition to the status quo—based on vocal public reactions—can influence the tone and tenor of the general cultural understanding. Over time, this opposition may in fact fundamentally alter or shift the country's values in such a way that changes to the legal context of selection are demanded.[9]

The U.S., as an example, recently experienced a zeitgeist shift in relation to perceptions of the LGBT community—where the general public opinion is now more favorable.[10] After this shift, public reactions to continued perceived injustices against the LGBT community resulted in the proposal of federal legislation to add sexual orientation as a protected group nationally (Employee Non-Discrimination Act, ENDA); adverse political reactions to the proposal, however, stalled enactment of the legislation. Despite this outcome, enforcement and case law have addressed the issue, as evidenced by the EEOC enforcement actions under existing sex discrimination guidance (EEOC directive and *Macy v. Holder*, 2012) and the Federal Courts (*Glenn v. Brumby*, 11th Circuit, 2011). It can be argued that these changes were demanded by the zeitgeist expressed through public demonstrations and petitions. Continued government responses to the zeitgeist have manifested as executive action (by amending Executive Order 11246) for federal contractors and individual state actions to adopt formally sexual orientation as a protected group.

Case Study 1: Preferential Treatment

In this case study, the U.S. and India both are taking action to rectify past discrimination; however, different interpretations of how selection activities fit into this understanding are applied.

United States. After the U.S. enacted the Civil Rights Act of 1964, several employers and academic institutions instituted preferential treatment systems in an effort to rectify the effects of past and ongoing discrimination against women and minorities. In other words, employers and academic institutions were making race- or sex-based decisions during the selection process to 'make up' for past discrimination and promote equality in the current selection systems. These preferential treatment systems created strong public reactions—a push for *all* individuals to be treated equally during the selection process.

Although preferential treatment allowed for the selection of qualified minority members, it also presented additional obstacles to overcome—namely, the negative reactions to selections under this system. Preferential treatment allowed other individuals selected (or not selected), who were not members of the minority group, to view the minority individual as less capable and/or having been given the job based on his/her minority status instead of based on his/her qualifications. In response to some of these concerns, the revisions to the Civil Right Act in 1991 made the differential standard form of preferential treatment illegal.

India. To alleviate discriminatory practices against historically disadvantaged groups, such as the Scheduled Castes and Tribes, India also employed programs to ensure their successful competition with the rest of society in the 1930s. Specifically, the Indian Constitution expressly allows "reservations" or quotas. This means that some employment opportunities, including selections and promotions, are reserved for individuals in the Scheduled Castes and Tribes. Unlike the U.S., this preferential treatment has been generally accepted by the Indian public, with additional demographic groups being added to the reservation system since the 1930s; however, recently there has been criticism of the reservation system. Opponents to the system claim that other, high-quality candidates are disadvantaged—such that they do not have a fair chance to attain advancement. Given the recent opposition, however, it will be interesting to see if any changes to the reservation system occur.

The zeitgeist inherently interacts with and reacts to other factors in the framework to influence and shape the legal context of selection. However, it is important to note that the zeitgeist, alone, cannot control the legal context of selection.

Reactions (Public, Private, and Government)

Reactions are defined as actions performed or feelings experienced in response to a situation or event (e.g., changes in the strength of a county's economy, political posturing, new or revised laws, case outcomes, enforcement). For example, the September 11, 2001, terrorist attacks in the U.S. resulted in anti-terrorism laws, regulations, and practices that would have been difficult to enact if the attacks had not taken place. Likewise, the 2015 mass murder of nine African Americans at a Charleston, South Carolina, church resulted in the South Carolina legislature overwhelmingly passing legislation to remove the Confederate flag from the State House grounds. Again, a law was passed whose approval was highly unlikely a week prior to the hate-based mass murder.

The model postulates that there is a near-constant feedback loop occurring between zeitgeist and reaction. Specifically, reactions to the same type of situation or event can vary over time, as the zeitgeist evolves. Consider that while there may be a general moral or intellectual understanding in an era, there will also be a minority voice that disagrees. Indeed, modern times have seen a rise in extreme polarity of ideas.

Case Study 2: Protected Groups

In this case study, the U.S. and South Africa both are taking steps to address ongoing racial discrimination; however, differential government reactions to this issue impact the legal context.

United States. After the abolishment of slavery, many former confederate states enacted laws to keep the races and those of color "separate but equal." However, during the 1950s a shift in reactions to segregation began to build, with increasing numbers of demonstrations and events expressing outrage with existing inequalities. These reactions were emboldened by court cases striking down the "separate but equal" laws, most notably the 1954 Supreme Court decision in *Brown v. Board of Education* (347 U.S. 483, 1954). Over the next decade, events driven by public, private, and government reactions led to the enactment of the Civil Rights Act of 1964, prohibiting discrimination based on color, race, sex, religion, or national origin. Although there was a growing push from the majority of the general public for equal rights, the involvement of the federal government was necessary to ensure enforcement, particularly in states where the local or state government was unwilling to enforce change.

South Africa. In 1948, the all-white government implemented apartheid, under which existing policies of racial segregation were enforced. As the majority of the population was being discriminated against openly, the zeitgeist of South Africa was one where there was an understanding that apartheid was wrong and needed to end. However, despite strong and consistent opposition to apartheid, no action was taken by the government to end the policy. Protests and demonstrations continued, with many ending in violence. This violence drew international attention, which, in the end, forced government action due in large part to external pressures for change. However, only small changes were enacted in the late 1980s. It wasn't until 1994 that a new constitution took effect enfranchising blacks and other racial groups.

In the context of this framework, public reaction is a collective response to changes in other aspects of the framework. In every facet of the framework there is an element of public reaction: in the minority reaction to the zeitgeist, in the often varying reactions to changes in legal protections and enforcement, and even in the science of selection, where we see public reactions to changes in the prevalence of certain selection methods. Reactions, however, are not unique to the general public. They can also originate from members of private organizations and the government. Private reaction has become more visible and vocal in this framework over time. This, in part, could be due to a rise in the available outlets for dispersing private reactions (e.g., social media, 24-hour news cycle). However, the rise in visibility is likely heavily influenced by the increased regulatory burden placed on the private sector, beginning with the 1964 Civil Rights Act and followed by several additional government actions (whether through affirmative legislation or court decree), up to the present day. Government reactions can also be the catalyst to changes in zeitgeist (i.e., enacting protections to facilitate a change in zeitgeist) or the response to zeitgeist (i.e., enacting protections or changing enforcement priorities because of the zeitgeist).

As the zeitgeist sets the general tone of how the legal context of selection is viewed, it is intuitive that the factors of the model or other events would constantly generate reactions from the public, private industry, and government. We argue that this aspect of the feedback loop often provides the impetus for changes in the entire framework.

Legal Protection, Enforcement, Case Law

Figure 30.2 also identifies other factors that may be useful in explaining similarities and differences in the legal context across countries. These include the enforcement landscape, court

systems, and relevant case law. The discrimination enforcement landscape is a factor that was not surveyed in Chapter 29 and may explain some of the differences the authors identified. For instance, the U.S. may have a more active and defined enforcement environment relative to other countries, as a number of federal agencies are charged with monitoring and enforcing employment discrimination in the U.S. (e.g., the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs [OFCCP]).

The EEOC enforces claim-based discrimination primarily under Title VII, the Americans with Disabilities Act (ADA/ADAAA),[11] and the Age Discrimination in Employment Act (ADEA). As described elsewhere (e.g., Zink & Gutman, 2005), the EEOC investigates many discrimination claims in a given year and seeks to address them by identifying unsubstantiated claims, settling claims of merit in favor of the claimant, and taking a small number of claims to court. The EEOC has recently developed initiatives focusing on systemic discrimination that affect large classes of applicants and employees. As such, employee selection has been the highest priority under the EEOC's Strategic Enforcement Plan as an area of enforcement focus since 2013.

The OFCCP, an arm of the Department of Labor (DoL), also actively enforces anti-discrimination policy in the U.S. The OFCCP proactively enforces Executive Order 11246 (women and minorities), Section 503 of the Rehabilitation Act of 1973 (Section 503, individuals with disabilities), and the Vietnam Era Veteran's Readjustment Act of 1974 (VEVRAA, certain classes of veterans), which requires contractors working for the federal government to implement affirmative action programs that ensure equal opportunity for previously disadvantaged groups. In 2013, revised regulations governing Section 503 and VEVRAA were finalized. These regulations went into effect in 2014 and required contractors, for the first time, to gather data on disability and veteran status at both applicant and employee stages. In addition, the regulations focused on more robust outreach and recruitment, as well as numerical assessments based on veteran and disability status (i.e., comparing employment of disabled individuals to an availability metric and assessing hiring of veterans against a benchmark figure). The OFCCP's work is primarily audit based; the Agency proactively investigates the employment practices (e.g., hiring, promotion, termination, compensation) of a subset of federal contractors each year. Like the EEOC, the OFCCP has recently developed initiatives intended to identify and remedy systemic discrimination and has focused on employee selection.

Thus, the OFCCP and EEOC represent an active enforcement landscape that together 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. Although the EEOC and OFCCP are the most widely recognized enforcement agencies, it is important to note that they are not the only ones in existence. In fact, the Civil Rights Division within the Department of Justice also investigates and seeks remedies for employment discrimination in the state and local government context. Perhaps the active enforcement landscape of the U.S. partially explains the more stringent legal context of selection in the U.S. Is the enforcement landscape in other countries similar? Chapter 29 provides more insight into this question (see Table 29.3).

Case Study 3: Levels of Authority

In this case study, the U.S. and the European Union are both seeking to clarify an overarching legal framework for addressing claims of discrimination. Despite similarities in the high courts' levels of authority—in the oversight and enforcement of discrimination—contextual factors can impact the legal context differently.

United States. An established hierarchical framework exists in the U.S. to interpret and enforce the legal context of discrimination. The U.S court system works to interpret a national, written constitution; therefore, the U.S. court system provides clarity and guidance to assist with interpretation issues on matters of federal law. Although states are

permitted to enact legislation that adds to federal laws/regulations, federal laws supersede state and local laws and regulations in instances where they are in conflict.

For example, protection against sexual orientation discrimination is new for the U.S. In 2015, the Supreme Court ruled against four state bans defining marriage as between a man and a woman. This ruling, coupled with the EEOC's stance (since 2012) that sexual orientation discrimination can be addressed under existing sex discrimination legislation (Title VII), opened the door for opportunities to redress instances of discrimination based on sexual orientation. Despite these developments, it is important to note that controversy is occurring on two fronts: (1) public reactions that there is conflict such that either an individual's right to religious beliefs or an individual's right to marry another of the same sex must be forsaken and (2) local and state government reactions either proactively invalidating their own same-sex marriage bans or asserting that the ruling does not explicitly strike down their existing laws, thereby seeking to maintain the status quo until such time as it is clear their particular laws must be changed.

In this case, the hierarchical nature of the legal framework for redressing claims provides state and local governments with interpretive guidance on enacting the legal context of discrimination—though that guidance may take some time to be incorporated.

The European Union. The EU has also established a framework to interpret and enforce the legal context of discrimination. However the Court of Justice of the European Union (CJEU) was created by treaty and is tasked with interpreting EU treaties and laws. Therefore, the CJEU spans multiple countries with sometimes differing legal interpretations or enforcement procedures. Similar to the U.S., EU directives supersede individual Member State laws and, in instances of conflict, the CJEU provides clarification and guidance. The European Commission can also review Member State laws to look for inconsistencies with EU Directives. That said, Member States' judicial systems are trusted to apply the laws, which can result in wide variability in addressing claims of discrimination across nations.

For example, although the Racial Equality and Employment Equality Directives were translated into national law by all 28 Member States, the CJEU launched infringement proceedings against 25 Member States between 2005 and 2007. The general finding was that the implementation of the required regulatory changes was (a) lacking in appropriately defining prohibited actions, (b) too limiting in scope, or (c) too interpretive in identifying exemptions. By 2013, only one Member State remained in breach of its obligation to transpose the Directives. Furthermore, there is considerable variability where application in case law is concerned, with some Member States (e.g., Germany, Denmark) regularly referring to the CJEU for case-law decision and overview, whereas other Member States have not received cases with which to test their newly translated laws (e.g., Estonia, Finland).

In this case, the legal framework for redressing claims empowers individual Member States with interpreting and enacting the legal context of discrimination through case law and regulations, which spans a variety of cultures, languages, and constitutions.

The U.S. also has an active court system responsible for remedying those instances where employment discrimination claims cannot be settled between enforcement agency and employer. Thus, courts provide an additional level of enforcement; case law has even given rise to judicial scenarios not available via statute, as was the case for the adverse impact scenario in *Griggs v. Duke Power* (1971) and *Albemarle v. Moody* (1975).

Taken together, the U.S. has an active enforcement landscape and a court system designed to resolve discrimination cases where the enforcement landscape cannot. Both systems can impose meaningful consequences if anti-discrimination law is violated by an employer. Differences in the role, functions, and powers of courts and regulatory agencies also may explain differences in the legal contexts across countries observed in Chapter 29.

Science of Selection, Professional Guidelines

Chapter 29 hinted at the notion that international differences in the science of selection may explain differences in the legal context of selection. For example, the authors noted that (a) subgroup mean differences in various predictor and performance constructs were more clearly documented in the scientific literature in the U.S. as compared to the scientific literature in other countries; and (b) I-O psychology was more affected by the legal context of selection in the U.S. as compared to other countries. The science of selection is used differently across countries and, as such, may differentially affect the legal context.

Advances in the science of selection include emerging research into methods for improving selection assessments, processes, and scoring and methods of assessing validity, reliability, and adverse impact. While these advances ideally inform enforcement as well as professional guidelines and technical authorities, they are also influenced by zeitgeist, reactions, and existing legal protections.

In the U.S., there has been considerable research on, and social debate about, adverse impact. In 1978, adverse impact as a phenomenon was memorialized in the *Uniform Guidelines for 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 and business necessity of selection procedures. These requirements are essentially enforced as administrative law by the OFCCP and are used often by the EEOC to evaluate selection programs (Jeanneret, 2005); earlier courts explicitly gave the UGESP 'great deference' in reaching decisions. Additionally, professional organizations have published their own documents. For instance, the Society for Industrial and Organizational Psychology (SIOP) published a revised edition of the *Principles for the Validation and Use of Personnel Selection Procedures* (Principles) in 2003.[12] The Principles are a technical authority often used by practitioners in the design of selection systems. Furthermore, multiple social science institutions have jointly published and recently updated the *Standards for Educational and Psychological Testing* (2014), which are also often used by practitioners in the U.S. when designing selection systems.

These three 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. While many of the tenets in UGESP remain relevant, there have been notable advances in validity evidence and statistics, as examples, that this document does not address. Regardless, these technical authorities are used by the I-O community[13] in the U.S. Differences in legal context across countries may be partially explained by differential familiarity among the legal and regulatory communities with the state of science in selection (e.g., technical authorities and their applications) or differences in the availability and application of these types of technical authorities in designing and evaluating selection systems. According to the analysis in Chapter 29, professional guidelines and technical authorities appear to be most prominent in countries where there is an active enforcement landscape and specific selection requirements to which systems must adhere. Importantly, the authors 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.

Given the nature of the UGESP—as codified professional guidelines—this document is uniquely situated as a direct bridge between the science of selection and legal enforcement and case law. Ideally, this type of document can inform enforcement agencies and courts of the best practices in selection, providing guidance on acceptable and unacceptable practices. Unfortunately, particular sections from the UGESP are likely in need of updates based on the contemporary science of selection (e.g., tripartite versus unidimensional theory of validity), and particular sections may be inconsistently interpreted in the legal context (e.g., some courts prefer significance tests over the four-fifths rule to measure adverse impact; some courts allow content-oriented approaches to validate measures of mental constructs but others do not).

SOME FINAL THOUGHTS

The purpose of this chapter is to establish a framework around the global development and evolution of employment law as it relates to employee selection, promotion, and termination. Therefore, the presented model is designed to foster an understanding of how or why international differences emerge in this legal arena. As mentioned in the chapter introduction, the U.S. is an outlier on various dimensions as compared to the majority of the countries surveyed in Chapter 29. The main variations appear to cluster around three main issues:

- Differences in protected group status
- The legality of preferential treatment for underrepresented groups
- The evidentiary standard required to prove or refute charges of discrimination

Our position is that these variations may be attributable to differences in relevant aspects of the presented model and interactions among model components. For example, will the focus on equity in compensation in the U.S. change the enforcement priorities of agencies charged with finding and remedying discrimination? New regulations impacting federal contractors may soon require additional analyses and focus in this area; new state regulations, including two that took effect in January 2016,[14] are already impacting organizations with operations in those states. The OFCCP has indicated that compensation equity is a priority, but the results of efforts to identify and remedy this form of discrimination are as yet unclear. The lack of results may be, in part, due to the complexity of compensation and the difficulty of determining whether and where discrimination in the various forms of compensation may be lurking. In recent years there has been a dramatic increase in the amount of reporting on wealth inequalities in general, and sex differences in compensation in particular, as a zeitgeist shift appears to be in progress. In reaction to this increased scrutiny, many organizations, including several technology companies, are now publically reporting their overall pay gap results. Several states are also adding to the regulatory impetus, with at least seven enacting gender pay equality measures over the last two years, and other states considering legislation moving forward.[15]

Current global and local events highlight the constantly shifting and evolving nature of this topic. Globally, the immigrant crisis creates a landscape ripe for testing of existing immigrant, religious, and national origin protections and strong reactions from all sides to these provisions as well as any suggestions for change. The recent (2016) terrorist attacks in Paris and subsequent calls for identifying and closing extremist mosques in the country, along with other reactive measures, will test the resolve of the *egalité* mindset. In the U.S., a recent example of potential change is the controversy surrounding the U.S. Supreme Court's ruling on same-sex marriage and the subsequent refusal of a county clerk in Kentucky to sign marriage certificates for any couples, to also avoid being required to sign certificates for gay or lesbian couples. Much of the controversy was created when the refusal was framed as an impasse between the rights of an individual with religious beliefs and the newly minted right of an individual to marry another of the same sex.

Although our intent is not to use the model to evaluate or place value on any identified differences, a logical next step is to seek information related to beneficial practices. Given U.S. activity in some areas of the model, it is reasonable to ask whether the legal context of selection in the U.S. should be viewed as a practice to model. This question seems particularly important given recent civil rights activity in South Africa, where the U.S. has been used as a model of legal context for a country that was hindered by generations of discrimination.

The U.S. seems like a useful model along a number of dimensions surveyed in Chapter 29, such as concerning the burdens of proof in evidence of discrimination, accounting for reverse discrimination in preferential treatment policy, and enforcing meaningful consequences for discrimination; it is clear that the U.S. has a highly developed legal system in place to evaluate and enforce protections. However, it is apparent that a developed legal system does not eliminate negative outcomes. Given the highly developed legal system in the U.S., the likelihood of a legal challenge is high—whether the challenge is merited or not. Take, for instance, the government's

approach to discrimination: to seek out discrimination and enforce sanctions against organizations found to discriminate. The issue arises when this stance is muddied with operational realities. Enforcement agencies' existence (i.e., funding) is linked to the agencies' success in making companies pay for discrimination, which can incentivize the identification of discrimination. Additionally, the advancements the U.S. has made in some areas of the legal arena are missing in others; in regard to which classes are protected, the U.S. is less inclusive than many countries as there is no federal protection for socio-economic status, political opinion, marital status, etc., although many U.S. states have these protections. Furthermore, the UGESP, the U.S. codified professional guidelines, is in dire need of updates based on the science of selection, as mentioned previously in this chapter.

One final factor to consider is a country's history and experience related to both civil rights and the science of selection, specifically within the legal context of selection. For example, various social scientific communities have contributed to a long history of research on employee selection in the U.S. That said, Title VII is 52 years old, and the U.S. has experienced social and cultural shifts emphasizing civil rights during its existence. Furthermore, U.S. enforcement agencies and court systems have been dealing with anti-discrimination enforcement for multiple decades. In many of the countries surveyed in Chapter 29, 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 50 years from now.

The model we present in this chapter is complex yet useful when attempting to understand how international differences emerge in the legal context of selection. In short, there is more to consider than just the establishment of employment laws; the broader context, including reactions and societal views, must also be considered.

NOTES

1. The first two authors contributed equally to this chapter. This chapter is an extension of Dunleavy, E. M., Aamodt, M. G., Cohen, D. B., & Schaeffer, P. (2008). A consideration of international differences in the legal context of selection. *Industrial and Organizational Psychology: Perspectives on Science and Practice, 1*, 247–254. Used with permission of the Society for Industrial and Organizational Psychology and Cambridge University Press.
2. In this chapter, discussions of protected group status focus primarily on those defined in the Federal Regulations. However, it is important to note that the U.S. also identifies protected group statuses through the use of presidential Executive Orders (EO), as well as state and local legislation and EOs. As an example, the Civil Service Reform Act of 1978 identifies political affiliation and marital status as defining protected groups when referring to federal employees (this point is discussed in more detail below).
3. This table does not list every law indicated in Table 29.3 of Chapter 29, but instead lists only some of the key laws enacted for some of those countries, and includes key laws enacted in countries not covered by Chapter 29 as well.
4. The responsibility of defining and enforcing employment law issues is split between the federal and state governments. Despite this, any individual state variations that may exist are not included in this discussion.
5. Enforced through Title VII of the Civil Rights Act of 1964 (as amended), the Equal Pay Act of 1963 (EPA), the Age Discrimination in Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA), the Civil Rights Act of 1991, and the Genetic Information Nondiscrimination of Act of 2008 (GINA).
6. Enforced through EO 11246, Section 503 of the Rehabilitation Act (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).
7. Enforced through the Civil Service Reform Act of 1978 and EO 13152 (applied under Title VII).
8. The term *zeitgeist* was selected, in part, due to the complexities associated with its definition. Although we use it in this context to refer to the "general intellectual, moral, and cultural climate of an era," our model highlights how the zeitgeist can change—and that change could occur rapidly due to other

factors in the model. Therefore, this word incorporates the fluidity that may exist with this factor of the model.

9. It is important to note that a discussion of values at the national level is a complex topic—and outside the scope of this chapter.
10. Based on Gallup trends for Gay and Lesbian Rights in the U.S. (http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx) and the Pew Research Center survey on homosexuality acceptance in the U.S. (http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/), the U.S. is generally accepting of the community and their marriage rights.
11. The ADA was amended in 2008 to provide a broader definition of disability and to clarify that the regulations are intended to be interpreted as erring on the side of inclusion.
12. Note that SIOP is currently working on another update to the Principles.
13. It is important to note that the legal community also uses these technical authorities, though the Uniform Guidelines is often given the most deference in the legal context.
14. California signed the California Fair Pay Act (CFPA) into law on October 6, 2015; New York signed "an act to amend the labor law, in relation to the prohibition of differential pay because of sex" into law on October 21, 2015.
15. https://www.shrm.org/legalissues/stateandlocalresources/pages/state-equal-pay-laws.aspx

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