Ius Comparatum – Global Studies in Comparative Law

Marie Mercat-Bruns
David B. Oppenheimer · Cady Sartorius
Editors

Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law

Challenges and Innovative Tools

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Editors
Marie Mercat-Bruns
Sciences Po Law School
Paris, France

David B. Oppenheimer
Berkeley Law
Berkeley, CA, USA

Cady Sartorius
Berkeley Law
Berkeley, CA, USA

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Introduction and General Report

Enforcement and Effectiveness of Antidiscrimination Law: Global Commonalities and Practices

Marie Mercat-Bruns, David B. Oppenheimer, and Cady Sartorius

As long as poverty, injustice and gross inequality persist in our world, none of us can truly rest.—Nelson Mandela

1 Introduction

Almost every nation in the world embraces the principle of equality and non-discrimination, in theory if not in practice. The bases that find protection are broader in some countries, narrower in others. The sources of the principle vary considerably. The methods of enforcement and remedies available cover a panoply of approaches. And the effectiveness of enforcement ranges broadly. But the principle is nearly universal.

How then, do we define, limit, and enforce the antidiscrimination principle. What works, where, and what doesn't? Is there a universal answer to a universal principle? This report explores the enforcement and effectiveness of antidiscrimination law from 23 nations, found on 6 continents, and 3 international or regional bodies. In French and English, from legal scholars and scholar/practitioners, we examine national, regional and international systems looking for common practices, and innovative approaches to long-standing problems.

What are the sources of antidiscrimination law? International and regional treaties and conventions; national constitutions; civil and criminal codes; administrative

M. Mercat-Bruns (✉)
Sciences Po Law School, Paris, France

D. B. Oppenheimer · C. Sartorius
Law School, University of California, Berkeley, CA, USA

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regulations; common law; religious law; natural law; municipal law; tradition; custom; private contracts; community practices; and more.

How is antidiscrimination law enforced? Through criminal prosecution; civil prosecution by the state, including but not limited to its equality bodies and ombudspersons; individual and class-wide civil lawsuits; administrative claims, including claims for rights of related wrongs; actions by unions and NGOs (non-governmental organizations); actions in religious courts; with claims for damages, changes in behavior, training, apologies, imprisonment, or fines; by arbitration, conciliation, mediation, meditation, and community resolution processes; with interventions by elders or neighbors or friends; and most often not at all.

Which of these methods of enforcement are effective? Compared to what? By any comparison, some countries experience far more success than others, and often in unexpected ways. In some places, there is hardly any success at all.

Moreover, we recognize that there is no single objective measure by which we can assess effectiveness. Effectiveness varies with legal and social cultures, expectations, and goals. If there were any doubt that there is no single measure of effectiveness, we need only turn to the two leading indexes of inclusiveness, each of which attempts to compare and rank states by their success at inclusion.

The first, the 2016 Inclusiveness Index for Measuring Inclusion and Marginality,[1] published by the Haas Institute for a Fair and Inclusive Society, ranks the Netherlands as the most inclusive nation-state in the world while ranking Canada as number ten. By contrast, the Migrant Integration Policy Index,[2] produced by the Migration Policy Group, ranks Canada first in the world in antidiscrimination practice and policy, while ranking the Netherlands number fourteen.

To examine the enforcement and effectiveness of antidiscrimination law we asked 27 national and regional reporters, representing 24 nations (including two reports from Canada, one in French, one in English), to address thirteen questions, which follow this introduction. Their reports are reproduced herein.

These enriching national and international reports, in unison, highlight the need for more creative, concrete and coordinated means of enforcement to ensure the effectiveness of antidiscrimination law, regardless of the legal tradition concerned, but in light of these traditions. We found each report remarkable, and learned something new and interesting from every report. We hope you will as well.

In attempting to synthesize the reports, five important themes emerged. First, the response to the enforcement and effectiveness of equality norms is ambivalent in every part of the world. Second, the enforcement and effectiveness of antidiscrimination law depends on a variegated treatment of the grounds of discrimination. Third, the laws of procedure and evidence are decisive to the enforcement of antidiscrimination law and access to justice. Fourth, resistance to effective remedies in antidiscrimination law is common. Finally, there is a shared concern as to whether

[1] See http://haasinstitute.berkeley.edu/sites/default/files/haasinstitute_2016inclusiveness_index_publish_sept26.pdf

[2] See http://www.mipex.eu/antidiscrimination

or how antidiscrimination law is transformative to further substantive equality today and in the future.

2 Enforcement, Effectiveness and the Ambivalent Reception of Antidiscrimination Law (Theme 1)

The most striking commonality in the reports from around the world is, on the one hand, the value of antidiscrimination law, and on the other the ambivalence and resistance to its enforcement. Nearly every reporter pointed to the constitutional and international foundations of antidiscrimination law, the extent of the antidiscrimination norm across the globe, and the often broad scope of antidiscrimination law. Yet there is also wide resistance to antidiscrimination law, varied in nature and in origin; resistance finds its strength in historical, institutional, cultural, political, and economic structures. This ambivalent reception to antidiscrimination law sets the stage for the general framework needed to evaluate globally the enforcement and effectiveness of antidiscrimination law.

In the European, South American and Asian reports, antidiscrimination prevails as a constitutional principle in most countries, coined as a fundamental right in countries like Argentina, Germany, Brazil, the Czech Republic, Israel, Spain, Japan, and India. A number of reports acknowledge the value of these higher norms for the reception and incorporation of antidiscrimination law that pervades the core of the rules of most legal systems. The important transnational dimension of this field of law puts it on a par with other human rights principles like liberty or dignity in Brazil, France, Canada, and Israel, among others, setting the stage for decisive interpretation by the Inter-American Court of Human Rights, the European Court of Human Rights (ECtHR) and the International Court at The Hague. This formal and imposing recognition justifies the broad scope of the antidiscrimination norm, which can cover civil and administrative law targeting illegal practices in housing, employment, education, or access to public and private spaces, for instance, in South Africa and the United States. Criminal sanctions exist in Turkey, Croatia, India, France, Korea, and Brazil, among others.

However, the laws' extensive scope in some countries does not prevent persistent hostility towards antidiscrimination law or resistance to its full implementation. Outside of strong explicit support for antidiscrimination in Canada, Portugal, and Brazil (defending a "racial democracy" and where "exclusion is harmful to all"), or high awareness of discrimination issues in the United States, South Africa, or Canada, the forms of resistance vary. Judicial hostility exists in countries like Australia and Croatia that consider antidiscrimination norms a threat to social cohesion, and in France where these norms are a menace to the Republican idea of equality. They are seen as infringing on the freedom of contract law in the Czech Republic. Specific groups also rally against discrimination law, from right wing political groups in Denmark and France, to religious opposition in Lebanon, Italy,

and Brazil. Economic interests also seem to thwart enforcement of antidiscrimination law that favors indigenous people in Brazil, or full application in the employment context when corporations attempt to resist its hold, as is the case in the United States.

3 Enforcement and the Disparate Treatment of Grounds of Discrimination (Theme 2)

Antidiscrimination law is highly contextual. Based on unequal treatment in the different countries, it refers most often to a specific list of grounds rather than an open-ended list, as is found in the ECHR Convention. A closer look at this ambivalent reception of antidiscrimination law in different countries reveals that the enforcement and effectiveness of antidiscrimination depends on how a specific ground of discrimination is protected. The ban on disability discrimination is vigorously enforced in Korea, for example, whereas in Argentina, women and transgender groups seem to benefit more from action against discrimination. Countries do not necessarily determine a hierarchy of grounds, though race and sex are often the focus of national policies, for example in Denmark for race. Coverage of a ground does not mean successful enforcement for certain particularly vulnerable groups like the Roma in Europe, gay, lesbian and transsexual people (LGBT) groups in Croatia, indigenous people in Brazil, migrants in the Czech Republic, or women in Lebanon. Some grounds do not benefit from the same legal protection. Exceptions exist for age, for example, in Europe or Quebec, and exemptions restrict the prohibition of religious discrimination, for instance, in the United States.

Among the recurring questions, does efficient enforcement justify covering a large number of grounds like in South Africa, Turkey, Australia, or Israel? In this regard, France recently added socio-economic status or place of residence as prohibited grounds. Some countries still do not cover sexual orientation discrimination (such as federal law in the United States) or encounter difficulties in enforcing the age discrimination prohibition (as in Spain and Portugal). Others fail to protect certain religions, such as Islam in the Czech Republic and France. Intersectional discrimination poses a challenge in terms of proving the effect of discrimination based on a combination of grounds, which the Inter-American Court report highlights.

4 Enforcement of Antidiscrimination Law, Evidence, and Procedural Rules (Theme 3)

Access to justice is a challenge in every country. All reports mention the effect of procedural rules and issues of evidence that apply to discrimination law. Some procedural norms are specific to antidiscrimination law, while others are general

rules that apply to all litigation. Some countries like Denmark, Japan, the Netherlands, and Israel note, for example, that it is difficult for victims to resort to the courts due to the high cost of representation in Denmark, court fees in the Czech Republic, or the need for an attorney in cases of racist insults in Israel. Other reports state that antidiscrimination law requires judicial action, which is often slow in places like Brazil. Proper enforcement of antidiscrimination law is sometimes hindered by a strong deference of the judiciary to the legislative power, as it is the case in Japan, or the will of the judges to avoid trial altogether and impose summary judgment, as is increasingly the case in the United States.

Other procedural issues raised in the reports are linked to the nature of discrimination itself. Some countries confine their enforcement to responding to individual action. Others have developed collective mechanisms like class actions to deal with systemic discrimination, including the United States, Brazil, Denmark, Canada, and France (with a new class action law recently adopted). Others, including Croatia and the Czech Republic, do not offer this tool for litigation.

What is equally at stake in discrimination law is how litigation or other means of conflict resolution may or may not demand proof of a discriminatory motive in the conscious or unconscious mind of the perpetrator. A key issue in antidiscrimination law and its effectiveness is the question of the allocation of the burden of proof of discrimination. European Union (EU) Member States report that the shift of the burden of persuasion to the defendant in these cases, as required by the EU directives, has facilitated better enforcement of law, as explained in the reports from France, Italy, the United Kingdom, and the Czech Republic. Yet it is criticized by legal doctrine in the latter country. The French report explains that this shift does not apply to criminal law because of the presumption of innocence favoring the defendant. Some countries have no shift of the burden of proof, like Australia, or a less favorable shift, like the United States, where in most disparate treatment cases only the burden of production shifts to the defendant. In certain legal systems, as exposed in the United States report, a useful rule of discovery generally requires the parties to disclose a copy of all documents, information, and objects that the disclosing party has in its possession, custody, or control that the producing party may use to support its claims or defenses. Perhaps because these initial disclosures help lawyers fully evaluate the likely outcome of their cases at an early point, most claims confidentially settle instead of going to trial. Under French law, by contrast, such disclosures cannot be used as evidence by civil courts, but the Defender of Rights can engage in an investigation, which may be useful for the plaintiff.

5 Enforcement and Variable Resistance to Effective Remedies in Antidiscrimination Law (Theme 4)

The challenge of effective enforcement also requires insight on the remedies awarded to victims of discrimination. In most countries, obtaining generous monetary compensation in court is often difficult, for example in France, Belgium, the

Czech Republic, and Denmark. There is a cap on the amount of compensation allowed in Turkey. Notable exceptions are Canada/Quebec, the United States, Spain, Israel, the United Kingdom, and South Africa. The limited amount of compensation awarded in most countries is a common concern among international courts, as described in the ECHR report.

The resistance to effective remedies also lies in the courts, which can reflect judicial hostility to antidiscrimination law, as the report on Croatia suggests. Fewer claims are introduced in civil courts, as in the Netherland and Denmark, where the preference is for Alternative Dispute Resolution (ADR). Numerous claims confidentially settle in the United States and Canada/Quebec or are abandoned in Australia. Criminal sanctions are available but rarely applied in Turkey, Croatia, France, and Brazil, with incarceration especially rare. In France, fines are mostly symbolic and often involve hate speech.

Effective remedies can depend on the ground of discrimination. Claims can be introduced more frequently for certain grounds like pregnancy, age, military reserve duty, and nationality, and discrimination based on family responsibility in Israel, and less frequently for other grounds like sexual orientation. For example, LGBT persons are subject to persistent discrimination in Brazil.

Constructive forms of sanctions and useful remedies exist in some countries. For example, decisions, recommendations, or investigations by equality bodies are reported as playing a significant role in obtaining successful compensation for victims of discrimination in many countries. Among the creative remedies reported, in Brazil injunctions to stop discriminating constitute an efficient alternative, and remedies for ethnic discrimination are allocated to a new fund for policies to promote ethnic equality. In the United States, public contracts require proper compliance with antidiscrimination law, and a specific public agency oversees contract compliance.

6 A Way Forward: Antidiscrimination Law as Transformative Law? (Theme 5)

The reports reveal a great diversity of enforcement tools to make antidiscrimination law more efficient, through strategies that involve many actors, including NGOs, public authorities, judges, equality bodies and unions.

To move forward, the common query in the reports, beyond acknowledging the quantitative or qualitative means of enforcement, is to wonder what exact role antidiscrimination law is meant to play in achieving substantive equality. If the goal is only to increase the number of successful claims or sanctions, the reports show the scope but also the limits of a constant battle to eradicate all forms of discrimination, regardless of the grounds, once the arbitrary treatment is revealed. Persistent criticism of antidiscrimination laws' effectiveness exists in certain countries such as the United States, France, India, Korea, and Australia. Eradicating individual biases is sometimes seen as perpetuating the status of victims of those

who should benefit from its application, instead of investing energy and money in traditional labor and social policies to further social and economic equality for all groups.

In light of the strong international consensus to support all fundamental rights, and despite cultural and economic resistance to antidiscrimination law in some countries, the reports disclose an increase in the number of alternatives to traditional modes of enforcement (namely through the court system).

To appreciate the effectiveness of these alternatives, consider whether these countries believe antidiscrimination law can be *transformative* for the individuals involved, keeping in mind the structural barriers which perpetuate discrimination in all areas including housing, education, health, public and private services, or employment.

The reports produce an inventory of the ways in which reform can affect the structural causes of discrimination through (1) procedural rules favoring Alternative Dispute Resolution (ADR), (2) preventive measures before discrimination arises, (3) systemic solutions based on affirmative action, (4) better detection of direct and indirect discrimination through monitoring or education, and (5) reasonable accommodation across the board for people with disabilities, parents, senior citizens, and members of religious minorities. A preliminary illustration of the diverse nature of these different actions is necessary. (1) Often public enforcement authorities do not exclusively favor litigation against discrimination. This is true in Australia, France, and Canada. The Canadian Human Rights Commissions diversify their mission to investigate, conciliate, mediate, and prosecute before special administrative tribunals. (2) The Japanese legal system approach to discrimination seems to favor a "soft approach" based on awareness-raising. (3) In Argentina, structural initiatives are sought by the Women's Office, created in 2009, which has promoted a comprehensive process for mainstreaming gender views in institutional planning and internal processes to achieve gender equality both in the judiciary and for those who use the justice system. In South Africa, there is a strong and explicit emphasis on affirmative action programs. (4) The Israeli Ministry of Justice focuses on racism: raising awareness with an information center for victims and giving legal tools and intensification of labor law enforcement especially in the area of antidiscrimination law. (5) The Czech Republic, through its Public Defender or the United States through its Equal Employment Opportunity Commission, among others, targets reasonable accommodation for people with disabilities.

Affirmative action is most present in South Africa, Brazil, the United States, Canada, India, and Turkey, even though it is often regarded as divisive and has been contested with variable success (for example, in the United States with regard to race). Brazil, South Africa, and India have racial quotas (called "reservations" in India), and the government is widely engaged, supporting social inclusion for all vulnerable groups. Other countries, such as Australia, do not allow affirmative action. Positive action based on disability and sex is less prone to criticism, for example in Spain and France, which both have rules on parity for women in elected office and for people with disabilities in the workforce.

In Lebanon, the emphasis is on developing training for judges to raise awareness about direct discrimination, not on indirect and systemic discrimination. The two reports on Canada emphasize how the government has made the fight against systemic discrimination one of its main goals. Mandatory or contractually binding ADR through arbitration can be found respectfully in Australia and the United States, as well as Germany, Greece, Portugal, and through a new reform (the multi-door courthouse system) in Brazil. As long as ADR does not prevent access to litigation (which is a current risk in the United States), it can be a positive alternative to litigation. Japan prefers measures like education to address hate speech against Koreans. Other countries such as Greece, Spain, and Portugal see either NGOs or unions as strong actors to promote antidiscrimination law and represent individuals and groups.

Institutional change can come from the administrative equality bodies' work in the United States and Spain, general human rights bodies in France (Defender of Rights) and the Netherlands (Human Rights Commission), the National Human Rights Commission in Korea, the Romanian Institute for Human Rights in Romania, the Ombudsman in Portugal and Australia, and the public defenders in the Czech Republic and Brazil. Some more specialized enforcement agencies exist like the National Institute Against Discrimination, Xenophobia and Racism in Argentina. These public authorities have a specific mandate on the question of discrimination and can often work from different angles (litigation, ADR, education) to combat inequalities. Courts often follow their rulings, as in Denmark and France. French authorities interviewed for the French-Dutch report, as well as Japanese authorities, seem keen on developing soft-law charters and codes of best practices, though none presently exist. Reports in some countries, like Denmark, confirm that there is generally a crucial need for more systematic statistical accounts on enforcement.

A major difficulty is to coordinate, without a global antidiscrimination policy, the more in-depth work on causes of discrimination before it arises in education, housing, health, and employment sectors, concludes the comparative French-Dutch political science study. Outside of awareness-raising in information centers for victims, local agencies or equal opportunity boards are not always equipped to deal with the more subtle forms of discrimination, for example in the Netherlands, where indirect discrimination is rarely detected.

The French-Dutch report, citing Dworkin, recommends "taking rights seriously" in matters of discrimination. This does not only depend on the nature of the legal system involved but the political impetus to implement coherent and diversified policies engaging public authorities, civil society, and judges, targeting both individual and systemic levels. Italy seems to embrace various scales of intervention. From early education to retirement policies, there is a need to mainstream the question of the risk of inequality when reflecting on any new public or private action. From the start, all tools of discrimination law (prevention, sanction, education, positive action) can contribute to social cohesion like any other policy (health, education, or labor). Yet schools, companies, and social services do not consider equality law as a top priority. This might be less true with disability, which generates positive policies of reasonable accommodation to avoid discrimination, as

the Quebec report demonstrates. On the other hand, racial, ethnic, and religious discrimination are still reported as prevalent in every country in the world from which a report was submitted.

7 Conclusion: From Enforcement to Effectiveness?

While every national and regional report points to widely adopted policies against discrimination, and myriad legal and social tools are deployed for the enforcement of antidiscrimination law, the work of antidiscrimination law is incomplete. The reports that follow bolster our conclusion that nation states and regional actors can learn through comparison, taking note of how legal and social systems will inevitably privilege some forms of enforcement over others, often at the expense of effectiveness. Lawyers, scholars, and policy makers should, at a minimum, consider the likely effectiveness within their systems of administrative enforcement, affirmative action, Alternative Dispute Resolution, civil litigation, conciliation, criminal enforcement, empowering NGOs and unions, equality bodies, mediation, and ombudspersons. And none should be self-satisfied in light of the continuing challenge. Bridging the enforcement gap is a recurring challenge of many fields of law but here especially we feel we must add a few final words on the notion of effectiveness of antidiscrimination, given that the fight for equality triggers such ambivalence.

There are several ways to understand the effectiveness of antidiscrimination law: from a narrow to a broader perspective, depending on the nature of the laws promoting equality.

Effectiveness of a law can be measured by the degree of compliance.[3] The degree of compliance depends on the type of law. "If the law is preventive, designed to discourage behavior which is disapproved of, the goal is to see if the behavior is diminished or absent."[4] Our first observation would be that overt discrimination is probably less prevalent in certain countries even though its nature has also changed: in those countries, it can take a subtler form.

Thus, if our measure is compliance, the twenty-nine reports reveal a degree of effectiveness, in the reduction of overt discrimination. But they also reveal nearly universal resistance, though the form of resistance varies considerably. They also reveal an unwillingness to accept the central premise of the need for antidiscrimination law—that in every one of our reports we see the recurring problem of reports of denial of discrimination as a systemic problem. Before we can measure success by compliance, there is still much to be done.

"If the law is curative, operating ex post facto to rectify some failing or injustice or dispute, the goal is to see if the law serves to achieve these ends."[5] In most

[3] Allott (1991), p. 234.

[4] Allott (1991), p. 234.

[5] Allott (1991), p. 234.

countries, disputes arise to react to discrimination, and litigation or mediation takes place. Does a rise in disputes triggered by violations of antidiscrimination law reflect an increase of its effectiveness? Not necessarily. But an increase in claims-making does suggest that there is an increasing belief that antidiscrimination law has curative power.

Lastly, "if the law is facilitative, providing formal recognition, regulation and protection for an institution of the law, such as marriage or contract, the measure of effectiveness is the extent to which the institution so regulated is in fact insulated from attack."[6] Equality laws have extended the scope of institutions like marriage, parental rights, and labor law to benefit certain groups, but it has also questioned the very nature of these institutions. And our observation that overt discrimination is reportedly far less common suggests that we have indeed given recognition to a social commitment to non-discrimination as an institution itself, albeit one to which we see continuing resistance.

So, all in all, the effectiveness of antidiscrimination law might have to be considered according to its inherent nature, its inherent logic. It is a useful vehicle to uphold fundamental rights but also to question indefinitely those in power (in the public and private spheres) who, consciously or unconsciously, do not promote inclusion as a beacon of democracy. And its progress moves in fits and starts, but it continues to spread and gain acceptance that outweighs its resistance. Thus, while we recognize that there is much work to be done and much progress to be made, we think we are justified in joining with Bishop Desmond Tutu of South Africa, who has famously described himself as 'a prisoner of hope.' As are we.

Reference

Allott A (1991) The effectiveness of law. Valparaiso Univ Law Rev 15:234

Marie Mercat-Bruns is an Affiliated Professor at Sciences Po Law School and a tenured Associate Law Professor at the Conservatoire National des Arts et Métiers where she copilots the Gender Program (LISE,CNRS). She holds an LLM from the University of Pennsylvania Law School and a prize winning, comparative PhD on Law and Aging from the University of Paris West Nanterre. She is the author of "Discrimination at Work: Comparing European, French, and American Law" UC Press, 2016. Her more recent articles cover systemic discrimination and racial harassment.

[6] Allott (1991), pp. 234–235.

David B. Oppenheimer is a Clinical Professor of Law at the University of California, Berkeley. He holds a JD from Harvard University and a BA from the University Without Walls, Berkeley. He is the author of several books and numerous articles on antidiscrimination law, civil rights history, and comparative antidiscrimination law.

Cady Sartorius was a sign language interpreter in New Mexico before attending law school at the University of California, Berkeley. She now practices law at the California Civil Rights Law Group—a plaintiff-side firm fighting workplace discrimination and civil rights violations.

Part II
National Reports

Argentina

Ursula Cristina Basset, Alejandra Rodriguez Galán, and Alfredo M. Vítolo

1 Introduction

This paper analyses the characteristics of the Argentine antidiscrimination laws and their enforcement in the context of the demand for equality, and the way in which such laws have been enforced from several perspectives. We begin this analysis with a section that introduces the basic principles underlying the subject.

The term "discrimination" came up in the international human rights texts only in the last century. The Universal Declaration of Human Rights of 1948, adopted in the context of the world's (late) reaction to the Holocaust, and developing one of the core purposes set out in the United Nations Charter of *"promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,"*[1] in its Article 7 states that *"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."*

[1]United Nations Charter, Article 1.3.

U. C. Basset (✉)
Universidad Austral, School of Law, Buenos Aires, Argentina

Pontifical Catholic University, School of Law, Buenos Aires, Argentina
e-mail: ubasset@austral.edu.ar

A. Rodriguez Galán
Universidad de Buenos Aires, School of Law, Buenos Aires, Argentina
e-mail: alejandrarodriguezgalan@derecho.uba.ar

A. M. Vítolo
National University of Buenos Aires, School of Law, Buenos Aires, Argentina
e-mail: avitolo@derecho.uba.ar

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It is in the International Labor Organization' Discrimination (Employment and Occupation) Convention—C111, adopted in 1958, where the term "discrimination" is defined for the first time in an international instrument. This Convention states in Article 1 that:

> 1. For the purpose of this Convention the term "discrimination" includes:
>
> (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.[2]

The same conceptual argument appears in other international instruments, among other, in the Convention against Discrimination in Education (1960),[3] the International Convention on the Elimination of all Forms of Racial Discrimination (1965)[4]; the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, 1979).[5]

Claudio Kiper, argentine jurist, author of a book on discrimination against minorities[6] distinguishes a popular use of the term discrimination, which consists of a distinction in favor of or against a person based on the group, class or category to which a person belongs, rather than on its own merits. But, he also states that there is a sociological sense of the term, where hostility in relations among people, directed against a group of them or against each of its members. This is the most pervasive use of the term.

The Argentine author Julio Martinez Vivot[7] points out that discrimination can be direct or indirect. Direct discrimination is linked to the difference in consideration or treatment without an objective circumstance or situation that justify or explain, injuring with such conduct dignity of the person and his guaranteed human rights. The concept of indirect discrimination, however, is related with the adverse effect, where the measure itself does not appear as discriminatory, but not doubt that entails that intention.

In Argentina, its Constitution, adopted in 1853, as most constitutions of its time, recognizes the principle of equality under law, without making any express reference to the term discrimination. Its Section 16 provides that:

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[2]Discrimination (Employment and Occupation) Convention, 1958 (C No. 111)—adopted on 25 June 1958 by the General Conference of the International Labour Organisation at its forty-second session; entry into force on 15 June 1960.

[3]Convention against Discrimination in Education (1960), Article 1.1.

[4]International Convention on the Elimination of all Forms of Racial Discrimination (1965), Article 1.1.

[5]Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1979), Article 1.

[6]Kiper (1998).

[7]Martínez Vivot (1981, 2000).

> The Argentine Nation admits neither blood nor birth prerogatives: there are neither personal privileges nor titles of nobility. All its inhabitants are equal before the law, and admissible to employment without any other requirement than their ability. Equality is the basis of taxation and public burdens.

Section 20, moreover, provides,

> Foreigners enjoy within the territory of the Nation all the civil rights of citizens; they may exercise their industry, trade and profession; own real property, buy and sell it; navigate the rivers and coasts; practice freely their religion; make wills and marry under the laws. They are not obliged to accept citizenship nor to pay extraordinary compulsory taxes.

The equality principle has been early defined by the federal Supreme Court. In a case decided in 1875, the highest court of the country indicated that it required that the law "*does not establish privileges or distinctions that exclude someone from what is given to others in similar circumstances.*"[8]

The constitutional amendment of 1994 added new contents to the concept, in line with international developments. The new Section 75 §22 gives most international conventions on human rights constitutional hierarchy, thus incorporating their provisions regarding the prohibition on discrimination; Section 75 §19 entrusts Congress with the task of promoting *the equality of opportunities and means without any discrimination whatsoever*; while §23 requires Congress, *"to legislate and promote proactive measures that guarantee true equality of opportunity and treatment, and the full enjoyment and exercise of the rights recognized by this Constitution and by current international treaties on human rights, in particular with respect to children, women, the elderly and people with disabilities."*

As regards political rights, Section 37 states, "*This Constitution guarantees full enjoyment of political rights, in accordance with the principle of popular sovereignty and with the laws dictated pursuant thereto. Suffrage is universal, equal, secret and mandatory. True equality of opportunity between men and women in running for elected and party offices shall be guaranteed through affirmative actions in the regulation of political parties and in the electoral system*," which substantially increased the level of protection by establishing a much stricter criteria for equality.

The federal Constitution also protects religious freedom by granting all residents, either nationals or not, the right *"to freely profess their faith,"*[9] notwithstanding that the federal government "*supports the Roman Catholic Apostolic Faith.*"[10] Prominent social leaders took positive steps to promote religious freedom and interreligious dialogue. Certain constitutional regulations that could be viewed as limiting religious freedom, such as the requirement for the President to be Catholic, or the mandate to Congress to promote the conversion of Indians to Catholicism, were abrogated by the 1994 constitutional amendment.

Based on these, it can be said that Argentina vigorously recognizes the principle of equality before law, and its Constitution and implementing laws (including

[8] Argentine Supreme Court, *Guillermo Olivar*, Fallos 16:156 (1875).

[9] Argentine Constitution, Sections 14 and 20.

[10] Argentine Constitution, Section 2.

affirmative actions) are directed towards achieving the principle of equal opportunities for all, eradicating discrimination at all stages.

2 The Antidiscrimination Act

Notwithstanding several isolated laws provided grounds to attack discrimination, it wasn't until the return of the country to democratic rule in 1983, which inaugurated a period of consolidation of democratic institutions and observance of constitutional guarantees, that the first specific law on discrimination was enacted, Law 23.592, passed in 1988. This Act—still in force—guarantees the right of all persons in the country to live in a plural and equal society, consistent with the principles of the Constitution, and sanctions the discriminatory acts that are motivated by religious or racial causes, nationality, ideological, sex and political opinion bias.[11]

The enactment of this law opened the question of discrimination in Argentina, as it involves the recognition of the State's obligation to provide answers to certain discriminatory practices.

3 The Scope of the Antidiscrimination Laws in Argentina

As mentioned earlier in this work, Argentina has adopted and became a party to the main international treaties dealing with antidiscrimination, some of which bear the same force as our Constitution, since they have been expressly named in Section 75 §22. As a consequence, every individual within Argentina benefits from and may demand compliance with antidiscrimination law because of the general prohibitions that can be found in documents such as the Universal and American Declarations on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the American Convention on Human Rights.

Section 75 §22 of the federal Constitution, also granted constitutional hierarchy to some conventions focused on vulnerable members of our society, thus increasing the scope of protection against discrimination. This is the case of women[12] and

[11]Law 23.592, *"Article 1 Whoever arbitrarily impedes, obstructs, restricts or in any way impairs the full exercise on an equal basis of the fundamental rights and guarantees recognized in the Constitution, shall be obliged, at the request of the victim, to repeal the discriminatory act or cease to perform and to repair the moral and material damage caused. For the purposes of this Article, certain discriminatory acts or omissions on grounds such as race, religion, nationality, ideology, political or union opinion, sex, economic status, social status or physical characteristics shall be particularly taken into consideration"*.

[12]Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979).

children[13] and those who might be targeted by racial discrimination[14] or genocide.[15]

Argentina also subscribed the International Convention on the Rights of Persons with Disabilities (2007)[16] and the Inter-American Convention on the Rights on the Elimination of All Forms of Discrimination against Persons with Disabilities.[17] On the other hand, concerning women, Argentina passed a law in order to ratify the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Bélem do Pará."[18] Migrant workers are also beneficiaries of a special treatment, since Argentina ratified the International Convention on the Protection of the Rights of All Migrant Workers.[19] All of these International Treaties have in our legal system—by constitutional mandate—superiority over federal and state law. In case of inconsistencies, they would prevail. Notwithstanding Argentina being a federal country, federal law is enforceable against the different components of the federation, the provinces.

Finally, we note that Argentina addressed in its laws several categories of vulnerabilities that might be subject to discrimination in order to provide protection against it.

At a systemic level, it is possible to identify the more vulnerable groups in the very sense define in the United States Supreme Court oft-cited case *"United States v. Carolene Products Co.* (304 U.S. 144 (1938)), footnote n°4 *"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry*" (citations omitted).

In Argentina, indigenous peoples, immigrants from border countries, senior citizens and women, disabled, among others, qualify under these groups.

Women are probably the most benefitted category. Law 26.171 adhered to the Additional Protocol of the CEDAW (1999), which permitted the Committee on the Elimination of Discrimination against Women to receive and consider communications from victims of a violation of any of the rights set forth in the Convention. More recently, Congress passed a specific antidiscrimination act to prevent, eradicate and punish any form of violence against women.[20] Moreover, in order to

[13]Convention on the Rights of the Child (1989).

[14]International Convention on the Elimination of all Forms of Racial Discrimination (adopted and opened for signature and ratification by General Assembly resolution 2106 of 21 December 1965; entry into force on 4 January 1969).

[15]International Convention on the Prevention and Punishment of Genocide (1948).

[16]Ley 26.378.

[17]Ley 25.280.

[18]Ley 24.632.

[19]Ley 26.202.

[20]Ley 26.485.

prevent gender-biased violence, a law required schools to dedicate a full day to reflect about gender violence and discrimination against women,[21] and a body of experienced practitioners was created in order to provide legal counseling and defend women victims of gender violence.[22] Argentina also became member of the ILO Convention C156 about Workers with Family Responsibilities, which concerns equal opportunities and equal treatment for men and women workers.[23] Finally, besides the special provisions in labor law concerning the dismissal of pregnant women, Argentina passed a law banning the exclusion of pregnant adolescents from high school.[24]

Another group that benefitted from the Argentine legislation are transgender people. A wide-scope law was enforced to recognize them not only for access to free public health and free health care by private health care services,[25] but also requiring to change the public records of their sexual assignation without having to undergo any kind of surgery to alter their secondary sexual characteristics.[26]

Children are probably the group that benefits least from direct antidiscrimination laws, despite the fact that the Convention on the Rights of the Child enjoys constitutional hierarchy. Federal law bans any form of discrimination against children. However, since school, as we will see below, is a space where discrimination practices may arise, we should attend to the application of two relatively new legal devices: a law to regulate conflicts within an educational establishment and the creation of a day of reflection on discrimination and violence.[27]

To sum up, from the standpoint of its legal protection against discrimination, Argentina has strong general clauses, but when it comes specific provisions in order to protect special groups, its approach is limited to women, transgender people, persons with disabilities, migrant workers and children at school.

4 Problems

The enforcement of antidiscrimination law in Argentina conflicts mainly with the rights of companies and business enterprises, educational establishments, particularly if they have certain restrictions, according to their ethos, and private and public health care services. Companies have eventually complained of having to reinstate a dismissed worker who they claim is not adapted to their particular needs. In a recent case against a bus company, to ensure positive measures to engage women as

[21]Ley 27.234.
[22]Ley 27.210.
[23]Ley 23.451.
[24]Ley 25.584.
[25]Decreto 903/2015.
[26]Ley 26.743.
[27]Ley 26.892.

drivers, the Supreme Court of Salta (a Province in Argentina) ruled as discriminatory the preference for men drivers; the same happened in connection with ice cream parlours. Transgender people may affect the ethos of educational establishments when they pretend to teach in private schools. Private and public health care services are said to be overloaded, since antidiscrimination law forces them to cover entirely in vitro fertilization treatments, expensive disability treatments or sex reassignment surgeries without any cost to be charged to the person who requires them. The issue becomes particularly sensitive when it comes to certain practices which might raise ethical concerns to the particular persons having to offer those practices, to the institutions if they have certain shared principles on the matter (e. g, if they have a religious adscription), or the society as a whole o to the members of a certain institution, if they have to pay ultimately for the services that others, because of their personal choices and notwithstanding their personal wealth, obtain freely.

5 Enforcement: The INADI and Other Agencies—Civil Society

The enforcement of antidiscrimination laws falls on the judiciary (who can only act upon a case is brought to them by an affected party) and on the administrative sanctions applicable by the INADI, the National Institute against Discrimination, Xenophobia and Racism, a federal decentralized agency created in 1995 by Law 24.515. Since 2005, the INADI functions within the orbit of the Ministry of Justice and Human Rights. This agency began its work in 1997, and is entrusted by the law to prepare reports and proposals in connection with discrimination, xenophobia and racism; prepare public awareness campaigns on the matter; receive denounces of violations of the requirements of Law 23.592; provide assistance to victims of discrimination, xenophobia or racism; and act before the judicial courts in the defense of victims. For these purposes, INADI has established agencies in the different provinces of our country.[28]

As part of its functions, the INADI targets several forms of discrimination by the creation of observatories and special public policies. As it arises from several reports published during the present year (2016),[29] we should note:

a) One of the main concerns in Argentina is the discrimination of migrant workers, which leads in turn to educational and social discrimination and poverty. Mostly against workers and their families and children coming from neighbour countries such as Bolivia and Paraguay, but also against those migrating from Peru.

[28]More information on INADI's functions can be found at www.inadi.gob.ar.

[29]See http://www.inadi.gob.ar/mapa-discriminacion/documentos/mapa-de-la-discriminacion-segunda-edicion.pdf.

There are several stereotypes of each of those migrants. Argentina is designing devices to target and combat such discrimination.

b) As regards discrimination against women, one of the main concerns is not only gender violence, but also the distribution of work and family responsibilities. Women continue to be the main carers in a family when there are children, family members with disabilities, diseased or aged persons. On the other hand, lot of progress has been made concerning the involvement of women in the labour market. However, those advancements conspire ultimately against equality because no adjustment has been made in order to give an answer to the special caring tasks women spontaneously assume. Divorce laws that have come to the point to treat equally men and women, despite their gender or sexual orientation, now face new inequalities, precisely because of women's caring position, they are disadvantaged. Women are also subject to stereotypes concerning their physical appearance (their weight, their age) that in turn leads to trauma and to illnesses such as anorexia, bulimia, and psychological trauma.
c) A subject yet needing to be addressed, is the maltreatment of older persons under the care of third parties.
d) Argentina has made enormous advancement on the protection of the rights of indigenous communities, however, their integration in society is not always exempt of tensions and stereotypes.
e) Persons with disabilities are often the target of several forms of discrimination, which need to be addressed taking into consideration the particularity of their disabilities, their needs and characteristics.
f) Discrimination studies should not be focused only on the group of persons that are suffering discrimination, but on the context where such discrimination takes place. INADI statistics show that discrimination occurs mostly in school and at work. Therefore, it realizes it should focus its work on promoting awareness in order to prevent such discrimination in those two frames.
g) Finally, the INADI has created three observatories in order to monitor compliance with antidiscrimination laws: the Observatory of Radio and TV Shows,[30] a Platform for an Internet Free of Discrimination[31] and the Observatory of Discrimination in Sports.[32]

Since 2001, Argentina took a commitment to prepare a national plan to fight discrimination, along the lines of the Declaration and Plan of Action of the Durban Conference, held the same year. In March 2004, the Ministry of Foreign Affairs, INADI and the United Nations Development Program (UNDP) signed and adopted the ARG/02/024 project entitled *Plan Nacional de Lucha contra la Discriminación*

[30] See http://www.inadi.gob.ar/politicas/observatorios-discriminacion/observatorio-radio-television/.

[31] See http://www.inadi.gob.ar/politicas/observatorios-discriminacion/plataforma-internet/.

[32] See http://www.inadi.gob.ar/politicas/observatorios-discriminacion/observatorio-deporte/.

(National Plan against Discrimination). On these basis, the document entitled "Towards a National Plan against Discrimination-Discrimination in Argentina. Diagnosis and proposals" was approved, which included a national call for discussion to different sectors of civil society, vulnerable groups, universities, parliamentary committees and the governmental areas involved.[33] This program commended INADI the task of coordinating the implementation of proposals designed therein. Since then, INADI has been developing updated versions of Maps of Discrimination showing patterns of discrimination in different areas such as Bolivian migrants, disadvantaged socioeconomic sectors, the overweight/obesity condition, LGBT, school and disco bullying, etc.

NGOs are active in promoting the antidiscrimination agenda among the community at large, as well as in lobbying government for the enactment of regulations on these long demanded claims.

This type of interaction between legal and institutional developments and the claims of social groups crystallized in measures such the creation of the National Program of Comprehensive Sex Education (Law 26.150); the Law for the eradication of violence against women (Law 26.485); the Law on Equal Marriage (Law 26.618); the Protection of Mental Health (Law 26.657). Similarly, instruments of relevant international importance, such as the Convention on the Rights of Persons with Disabilities (ratified by Argentina by Law 26.378) and the current discussion on the Convention on the Rights of the adult/senior citizens that have been formulated from the human rights and antidiscrimination perspective.

Besides INADI, other agencies are entrusted with the task of promoting equality and enforcing different laws regarding discriminatory practices and acts. The National Institute of Social Services for Pensioners, better known as PAMI—*Plan Asistencial Médico Integral*—(1971), was created to provide medical, social and welfare care for a specific group, the elderly.

In 2009, the Supreme Court created within its orbit, the *Oficina de la Mujer* (Women's Office).[34] Since its inception, this Office has promoted a comprehensive process for mainstreaming gender views in institutional planning and internal processes to achieve gender equality both in the judiciary and in those who use the justice system.

6 Enforcement: Case Law

As regards judicial enforcement of the antidiscrimination laws, it should be noted that, as mentioned, our Supreme Court has established the principle that the equality principle does not prevent the legislator to contemplate differently different situations, as far as there is not an arbitrary discrimination or unlawful persecution or

[33]Decree 1086 of 27 September 2005.

[34]Argentine Supreme Court, Acordada 13/2009.