

Broadening international perspectives on the legal environment for selection

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Abstract:

We are pleased that our article (Myors et al., 2008) prompted this most useful set of commentaries. The goal of our article was to highlight similarities and differences in the legal environment for personnel selection across a broad range of countries. Whereas some articles in this journal present a point of view that prompts considerable disagreement and challenge from commentators, our article is largely descriptive, and thus, the role of commentators is to expand upon the perspectives offered in our article rather than to take issue with them. We believe that the commentators have accomplished just that and they offer a most useful supplement to our article.

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Article:

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Dunleavy, Aamodt, Cohen, and Schaeffer (2008) offer an explanatory model for the differences across countries in personnel selection practices. Their commentary can be seen as a complement to our article, as it posits some interesting explanations based on the moral, intellectual, and cultural climate of each country (which they refer to as the “zeitgeist”). We find this a useful perspective and suggest that there is value in exploring national culture differences (e.g., in terms of Hofstede’s [2001] model) as potential explanatory factors for differences in both laws and their enforcement. In addition, we note that the term zeitgeist implies something rather unstable. However, cultural differences may often be quite stable. For example, our contributing author from Switzerland (König) suggests that the preference for solving conflicts by reaching a consensus, not by going to court, has been a culturally shared attitude in Switzerland for a long time. This attitude may be one reason why legal cases regarding personnel selection in Switzerland are so rare. Another example is the negative attitude toward bureaucracy (or, more precisely, the fear of too much bureaucracy). This fear has long been raised, at least in some European countries, and it may reduce the likelihood that laws are developed that force companies to extensively document issues related to adverse impact. Also, as a potential addition to Dunleavy et al.’s model, we suggest that economic conditions in each country can be influential. Most sociological theories would argue that we cannot ignore economic relationships as an important determinant of the legal principles in each country and how the law is implemented and enforced.

A particularly important issue raised by Dunleavy et al. is the distinction between the existence of the law and the enforcement of the law. Many countries have similar laws, but some countries enforce them more effectively than others. Similar to organizational level policies (e.g., performance management), execution is key (Aguinis, 2009). A useful follow-up to Myers et al. would be the study of the extent to which laws are enforced; such a study would provide researchers and practitioners with a more realistic picture of the various environments in addition to knowledge of the laws in existence in each country.

Gutman’s (2008) commentary outlines a set of features that help explain why the legal environment for selection is generally better developed and better enforced in the United States than in other countries. We agree with most of his points, but do offer a differing perspective in a few instances. Gutman’s first point is that the United States has a history of righting wrongs. He documents the gradual addition of one protected class after another over an extended period of time, and contrasts this with several European Union (EU) countries where there was little history of concern for such protected class issues prior to a mandate that they be addressed as a condition of joining the EU. Whereas this statement is descriptively true, contributing authors from various countries note that the United States is certainly not alone in having a history of righting wrongs, and in the case of offering legal protection to various groups, there are numerous instances of countries with broader sets of protected classes than the United States (our article documents the substantial number of countries in which categories such as sexual orientation, marital status, and political affiliation are included among the protected classes). There are also settings where other countries acted to right social wrongs earlier than the United States. For example, slavery was abolished in the United States in the mid-1860s, whereas it was abolished in Argentina in 1813, in Puerto Rico in the mid-1830s, and in other Latin American countries also earlier than in the United States. Similarly, applicant and employee rights have been recognized in many European countries since the 1920s, and European personnel selection

models (e.g., the one by De Wolff & van den Bosch, 1984) have been in advance of the United States in including applicant decision making as a part of the process. As an additional comment regarding the EU, note that the range of ethnic and other groups across the EU is arguably considerably broader than the groups of major concern in the United States. This will make attempts at legislation enforceable in every country very difficult, with the likely outcome a combination of EU and national legislation (just as the United States has a combination of national and state laws).

Gutman's conclusion is that laws related to personnel selection are strongest in the United States. We believe this is a sound conclusion if the focus is on the structural detail of the regulatory and evidentiary process for pursuing claims under the law, and we believe that this is the interpretation intended by Gutman. But laws in other countries may be viewed as stronger if the reference is to the range of groups protected by law or to the set of methods available to increase employment prospects for members of protected classes (e.g., the availability of preferential treatment as a remedy).

The remaining three commentaries address country-specific issues. Two provide information about countries not covered in our article: Praslova (2008) regarding Russia and Cozma and Woehr (2008) regarding Romania. This additional coverage broadens our perspective and is quite welcome. Premarajan, Thornton, and Pahdi (2008) offer useful amplification and further detail about the legal environment in India beyond what is presented in Myors et al. and point out areas of possible misinterpretation. The initiators and editors of the Myors et al. article (Sackett and Shen) attempted to extract useful information in a relatively small number of pages based on much lengthier initial write-ups provided by the authors from each country. Thus, this editing process is responsible for the lack of a full and complete picture. Most points raised by the commentators, such as the distinction between initial selection and promotion in the use of set-asides or quotas for protected groups, the citations to studies of group differences, and the lack of regulation in the private sector, were included in the full write-up, and thus, we agree that it is useful for the commentators to raise these points.

That said, we would like to provide certain clarifications with regard to some of their observations. First, the commentators observe, "Article 15 of the Indian Constitution prohibits discrimination in society, but it does not apply to employment in the public sector as Table 2 might suggest." Article 15 specifically addresses prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth. This article also gives powers to the government for making special provisions for women and children. The Myors et al. article had only mentioned certain provisions in the constitution of India having direct or indirect relevance to personnel selection practices. All the articles may not have direct relevance, but some of them, like Article 15, form the basis on which certain provisions such as affirmative action for disadvantaged groups have been made. Second, to our knowledge, no protection is given on the basis of race or place of birth. We addressed the other categories. Third, the statement in the Myors et al. article that psychological assessment as a part of personnel selection is mainly practiced in the armed forces was not meant to imply that elsewhere it is not practiced at all. In the Indian Armed Forces, personnel selection is firmly based on assessment of psychological attributes. This has been the practice for the past 5 decades or more. However, it is a recent development in private organizations. Even though psychometric testing has been recently introduced in

recruitment/selection in various private-sector enterprises, the tests that are used are sometimes not properly validated. Even in government hiring other than in armed forces, measurement of psychological attributes is not given adequate importance. Fourth, the commentators observe that organizations can rather easily rebut charges of discrimination. They need only to provide evidence that the selection procedures fully comply with organizational procedures. The fuller write-up had mentioned that there are no laws controlling selection/recruitment processes, especially in the private sector.

Finally, in reacting to the commentaries, questions arise as to whether we can turn to particular countries for “best practice” models. We believe that it is most useful to differentiate between “best” in terms of rigor and currency in incorporating the research methods and findings of the personnel selection field and best in terms of optimal policies regarding whom to protect and how to remedy historical wrongs. The first is a scientific question, and one can reasonably compare countries on this standard. The second is a question of values, and there is not a scientific or technical basis for determining whether, for example, a model that prohibits preferential treatment is “better” than a model that permits or requires it. Thus, we assert that it is important to keep this distinction clear and to avoid confounding the two. That a country is sophisticated in its incorporation of the field’s technical and scientific knowledge base does not imply that its policies regarding protected classes and remedies are to be preferred to those of other countries.

We close by again thanking the commentators for their useful additions to our understanding of the legal environment for selection. We hope that our focal article together with the commentaries proves useful to selection researchers and practitioners.

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