

NOTES

THE NAALC AND MEXICO'S LEY FEDERAL PARA PREVENIR Y ELIMINAR LA DISCRIMINACIÓN: FURTHER FAILURE UNDER A FLAWED TREATY OR THE BEGINNING OF MEANINGFUL PROTECTION FROM EMPLOYMENT DISCRIMINATION THROUGHOUT NORTH AMERICA?

*Philip DeHart**

TABLE OF CONTENTS

I.	INTRODUCTION	659
II.	SETTING THE STAGE FOR REFORM: INTERNATIONAL OBLIGATIONS, EXISTING DISCRIMINATION LAW, AND LEY FEDERAL PARA PREVENIR Y ELIMINAR LA DISCRIMINACIÓN	662
	<i>A. Employment Discrimination Under the Constitution and the Federal Labor Law</i>	<i>663</i>
	<i>B. The Contours of Ley Federal Para Prevenir y Eliminar la Discriminación</i>	<i>665</i>
III.	LIMITS TO MEXICO'S EMPLOYMENT DISCRIMINATION LAW AND THE RISK OF FURTHER NON-COMPLIANCE WITH THE NAALC	669
	<i>A. The Limited Range of Statutory Employers</i>	<i>670</i>
	<i>B. Available Theories of Discrimination</i>	<i>672</i>
	1. <i>A Comparison to U.S. Law: Benefits of Group Theories of Discrimination</i>	<i>672</i>
	<i>i. Benefits of a Systemic Disparate Treatment Theory</i>	<i>673</i>
	<i>ii. Benefits of a Disparate Impact Theory</i>	<i>675</i>
	2. <i>Existence of Group Theories of Discrimination in Mexico ..</i>	<i>676</i>
	<i>i. Existence of a Systemic Disparate Treatment Theory in Mexico</i>	<i>676</i>

* J.D. University of Georgia School of Law, 2006; B.A., Pennsylvania State University, 2003.

ii. *Existence of a Disparate Impact Theory in Mexico* 679

C. *CONAPRED: The Agency of Implementation* 681

IV. CONCLUSION 684

I. INTRODUCTION

In 1995 Human Rights Watch interviewed women in Tijuana maquiladoras.¹ These workers—along with their employers and local Tijuana officials—revealed a widely-adopted system of requiring prospective female employees in Mexico to undergo pregnancy testing. Women who were pregnant were denied employment. Women found to be pregnant soon after being hired were also discharged.² Employers such as Zenith Electronics Corporation and General Motors admitted pregnancy discrimination; however, they contended that Mexican law “implicitly condoned this practice—by refusing to extend maternity benefits to women with fewer than 30 weeks tenure in the social security system—as part of a wider policy initiative to control population growth.”³

Zenith and General Motors were operating in Mexico largely under free trade agreements adopted by the Mexican and American governments. In the early 1990s, Mexico agreed to both the North American Free Trade Agreement (NAFTA)⁴ and the North American Agreement on Labor Cooperation (NAALC).⁵ The NAALC, a side agreement to NAFTA, arguably falling

¹ “A maquiladora is a Mexican corporation operating under a special customs regime which allows the corporation to temporarily import duty-free, raw materials, equipment, machinery, replacement parts, and other items needed for the assembly or manufacture of finished goods for subsequent export.” JORGE A. VARGAS ET AL., *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* 182-83 (Jorge A. Vargas ed., 1998).

² See Submission Concerning Pregnancy-Based Sex Discrimination in Mexico’s Maquiladora Sector to the United States National Administrative Office, Submission No. 9701 (U.S. Dep’t of Labor, Bureau of Int’l Affairs May 15, 1997) (submitted by Human Rights Watch Women’s Rights Project et al.), available at <http://www.dol.gov/ilab/media/reports/nao/submissions/Sub9701.htm> [hereinafter NAO Submission No. 9701].

³ *Id.*

⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (2003) [hereinafter NAFTA]. The stated goals of NAFTA are to (1) eliminate barriers to transnational trade between the member nations; (2) promote fair competition within the jurisdiction of the member nations; (3) increase investment in the territory of member nations; (4) protect and enforce the intellectual property rights in each nation’s territory; (5) make procedures to implement, jointly apply, and resolve disputes under the Agreement; and (6) establish a framework for other trilateral, regional and multilateral cooperation to further the benefits of the Agreement. *Id.* art. 102.

⁵ North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

within the original NAFTA purpose of ensuring fair competition, contains specific provisions for protecting workers.⁶ The goals of the NAALC are to:

- (a) improve working conditions and living standards in each Party's territory, (b) promote . . . the labor principles set out in annex C, (c) encourage cooperation to promote innovation and rising levels of productivity and quality, (d) encourage publication and exchange of information to enhance understanding of the laws . . . in each Party's territory, (e) pursue cooperative labor-related activities on the basis of mutual benefit, (f) promote compliance with, and effective enforcement by each party of, its labor law, and (g) foster transparency in the administration of labor law.⁷

Not falling within these express purposes, the anti-discrimination provisions form only one part of the larger agreement.

Since becoming a party to NAFTA and the NAALC, Mexico has faced accusations of failing to adequately prevent employment discrimination and of failing to protect other labor and employment rights, as exemplified in the cases of Zenith and General Motors.⁸ In response to its perceived failure in addressing employment discrimination, Mexico's Congress passed *Ley Federal para Prevenir y Eliminar la Discriminación* (Federal Law to Prevent and Eliminate Discrimination).⁹

In comparison to the United States' prohibition on employment discrimination contained in Title VII of the Civil Rights Act of 1964,¹⁰ the new

⁶ *Id.* art. 1.

⁷ *Id.*

⁸ The U.S. National Administrative Office lists submissions alleging violations of the NAALC and its employment discrimination provisions. U.S. Dep't of Labor, U.S. NAO Submissions, http://www.dol.gov/ilab/programs/nao/public_submissions.htm (last visited Apr. 18, 2006).

⁹ Decreto por el que se expide la Ley Federal para Prevenir y Eliminar la Discriminación [Decree by Which the Federal Law of Prevent and Eliminate Discrimination Is Issued], *Diario Oficial de la Federación* [D.O.], 11 de Junio de 2003 (Mex.) [hereinafter *Ley para Prevenir la Discriminación*]. Scholarly articles on pre-act discrimination are abundant, yet should be distinguished for not discussing the new law or the new law's effect on NAALC performance.

¹⁰ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2003). Title VII prohibits discrimination in hiring, discharging, or any act with regard to compensation, terms, conditions, or privileges of employment, "because of such individual's race, color, religion, sex, or national origin." *Id.* Separate statutes address other forms of group discrimination: the Age

Mexican statute has a far greater scope of protection. The Mexican statute prohibits discrimination based on ethnic or national origin, sex, age, disability, social or economic condition, health condition, pregnancy, language, religion, opinion/political persuasion, sexual preference, marital status, xenophobia, anti-Semitism, or “any other distinction that has the effect of impeding or annulling the recognition or exercise of rights and equal opportunities.”¹¹

Despite the expansive scope of statutory protection,¹² the issue remains whether enforcement of the law will occur, thereby satisfying Mexico’s treaty obligations under the NAALC. There are a number of potential problems that could serve to undermine Mexico’s efforts. For example, it is unclear whether appropriate resources are directed for enforcement of the Mexican law. Furthermore, the law might exceed constitutional limitations,¹³ fail to include a ban on discrimination against groups,¹⁴ and be ineffective against discrimination at the state and municipal levels.¹⁵ In fact, these potential flaws—in the aggregate—so undermine *Ley Federal para Prevenir y Eliminar la Discriminación* as to render enforcement and actualization of the spirit behind the law potentially meaningless. Consequently, fulfillment of Mexico’s treaty obligations under the NAALC remains tenuous at best.

Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967) [hereinafter ADEA]; Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (Oct. 31, 1978) (amending Title VII § 701(k) to include pregnancy); and Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990) [hereinafter ADA].

¹¹ Ley para Prevenir la Discriminación art. 4.

¹² Different policy rationales underlie each of the three major U.S. statutes (ADEA, ADA, and Title VII). Equal protection from all forms of discrimination might make the Mexican statute suspect to fairness arguments, however that is a matter of discussion for future study.

¹³ Raymundo Gil Rendón, *Comentarios a la Ley Federal Para Prevenir y Eliminar la Discriminación* [Comments to the Federal Law to Prevent and Eliminate Discrimination], REVISTA ELECTRÓNICA DEL DEPARTAMENTO DE CIENCIA POLÍTICA Y DERECHO, Enero-Junio 2004, at 165, <http://www.ccm.itesm.mx/dhcs/juripolis/archivos/RaymundoGil.pdf>. The author, Coordinator of the Human Rights Commission for the Mexican Bar Association and President of El Consejo Nacional para Prevenir la Discriminación (the agency responsible for administration of the new Mexican law), contends that the law is beyond the scope of Congress’s authority. *Id.*

¹⁴ Edgar Cortez Moralez, *La Ley Contra la Discriminación, ¿Una Ley de Buenos Deseos?* [The Law Against Discrimination, A Law of Good Intentions?], Centro de Derechos Humanos “Miguel Agustín Pro Juárez” (June 13, 2003), <http://www.sjsocial.org/PRODH/Sala%20de%20prensa/Posicion/Postura%20del%20Centro%20Prodh-Ley%20contra%20la%20discriminaci%F3n.htm>.

¹⁵ *Id.*

This Note will conclude that, despite the new law, Mexico fails to comply with the NAALC. In reaching that conclusion, this Note will provide an overview of the NAALC and its treaty obligations in order to establish, first, the NAALC treaty relationship between the United States and Mexico, and, second, the effect of non-compliance by Mexico. Thereupon, a sketch of traditional Mexican discrimination law and enforcement will demonstrate the failure of Mexico, historically, to provide equal opportunity in employment—even after the assumption of obligations under the NAALC. After summarizing previous Mexican efforts toward anti-discrimination, this Note will discuss *Ley Federal para Prevenir y Eliminar la Discriminación*, with particular attention given to: its definition of discrimination, the range of employers covered by the law, the mechanism by which the law was promulgated, and the creation of a government enforcement agency.

Once this Note establishes the background in Mexican employment discrimination law, it will provide an assessment of the new law's viability in fulfilling Mexico's obligation under the NAALC. First, this Note will consider the issue of its applicability only to federal employers. Second, this Note will argue that only individual discrimination cases (as opposed to group discrimination cases) might be allowed under the statute. Third and finally, this Note will probe the constitutionality of Congress' passing such a law, and contend that the law stands on questionable—though likely sufficient—constitutional ground. These inquiries will lead to the conclusion that the viability of the Mexican law is so undercut by practical concerns as to render the law insufficient to fulfill NAALC obligations.

II. SETTING THE STAGE FOR REFORM: INTERNATIONAL OBLIGATIONS, EXISTING DISCRIMINATION LAW, AND LEY FEDERAL PARA PREVENIR Y ELIMINAR LA DISCRIMINACIÓN

Signed in 1993 as a side agreement to NAFTA, the NAALC established a goal of fighting employment discrimination while maintaining the ability for each member state to choose its own means of countering said discrimination. The NAALC respects each member nation's constitution and right to set its own domestic labor standards. It demands that each party "ensure that its labor laws and regulations provide for high labor standards" and "continue to strive to improve those standards in that light."¹⁶ Further, each party is required to promote compliance and effectively enforce its labor law, including (if

¹⁶ NAALC, *supra* note 5, art. 2.

necessary) "initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law."¹⁷

Mexican treaty law, along with the laws of the Mexican Congress, is the "supreme law of the union."¹⁸ Consequently, when the NAALC was signed by the President and approved by the Senate, Mexico adopted a binding treaty obligation to promote compliance with and to effectively enforce—at the very least—its own employment discrimination laws. When a party fails to fulfill treaty obligations under the NAALC, the violating party may not only be subject to consultations from the other member states,¹⁹ but also may be open to investigation by the Evaluation Committee of Experts (ECE).²⁰

Regardless of whether challenges to a violating member state's enforcement of its labor laws are likely to result in timely or significant changes for the victims of the adverse employment actions,²¹ lack of enforcement is a violation of the NAALC and exposes a party to remedial actions by the other member nations.²² A "violation" is assessed relative to the domestic law of the individual member states.²³ Before deciding whether current law and enforcement satisfy the NAALC, the body of Mexican employment discrimination law must first be explored, both under Mexico's constitutional mandates and under Mexico's new statute.

A. Employment Discrimination Under the Constitution and the Federal Labor Law

The *Constitución Política de los Estados Unidos Mexicanos* (Constitution) was formed largely in response to societal discrimination that has existed since colonial times.²⁴ The Constitution of 1917 provides that all people are equal,²⁵

¹⁷ *Id.* art. 3(1)(g).

¹⁸ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const.], as amended Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917, art. 133 (Mex.).

¹⁹ NAALC, *supra* note 5, art. 22 (stating that consultation is the preferred route of resolution).

²⁰ *Id.* art. 23 (stating that ECE investigation only is to be conducted only if consultations fail).

²¹ See, e.g., John P. Isa, Note, *Testing the NAALC's Dispute Resolution System: A Case Study*, 7 AM. U. J. GENDER SOC. POL'Y & L. 179, 216-17 (1999) (concluding that the United States and Canada should strive "to add more 'teeth' to the NAALC, or dispose of the agreement altogether").

²² NAALC, *supra* note 5, arts. 22, 23.

²³ *Id.* art. 3.

²⁴ Beatriz Elena Paredes Rangel, *Dictamen Expide la Ley Federal para Prevenir y Eliminar*

and, specifically, that salary discrimination based on sex and nationality is prohibited.²⁶ The remaining body of text in Article 123 provides a laundry list of protections and rights of workers, ranging from limited hours of nighttime labor, to the right to strike, to protection from unfair contractual conditions.²⁷ The Constitution, subsequently, has been amended in Article 4 to reflect guarantees against discrimination by placing men and women on equal footing in the eyes of the law,²⁸ and by recognizing and protecting the value of indigenous cultures and languages.²⁹

A 2001 amendment to Article 1 most precisely shows the expanded scope of constitutional protection. Whereas the original article stated that "*todo individuo*" (every individual) will enjoy the constitutional guarantees,³⁰ the amended article specifically prohibits discrimination motivated by ethnic or national origin, gender, age, disability, social condition, health condition, religion, opinion/political persuasion, preference, marital status, or "whatever other reason that affronts human dignity and has as its object to annul or diminish the rights and liberties of the people."³¹ By better defining the scope

la Discriminación, 58th Leg., 10 de Abril de 2003 (statement of Representative Paredes Rangel to the Cámara de Diputados), available at <http://diputados.pan.org.mx/web/pan/hoycam/despliega.asp?id=374804>.

²⁵ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 1 ("*Todo individuo gozará de las garantías que otorga esta Constitución.*") [Every individual will enjoy the guarantees that this Constitution grants.].

²⁶ *Id.* art. 123, cl. VII.

²⁷ *Id.* art. 123, cl. I, XVII, XXVII.

²⁸ Decreto que Reforma y Adiciona los Artículos 4o., 5o., 30 y 123 de la Constitución Política de los Estados Unidos Mexicanos en Relación con la Igualdad Jurídica de la Mujer [Decree that Reforms and Adds to Articles 4, 5, 30 and 123 of the Constitution of Mexico in Relation to the Legal Equality of Women], Diario Oficial de la Federación [D.O.], 31 de Diciembre de 1974 (amending article 4) *El varón y la mujer son iguales ante la ley. Ésta protegerá la organización y el desarrollo de la familia.* [Man and woman are equal under the law. This will protect the organization and development of the family.]

²⁹ Decreto por el que se Reforma el Artículo 2o. de la Constitución Política de los Estados Unidos Mexicanos [Decree by Which Article 4 of the Constitution of Mexico Is Reformed], Diario Oficial de la Federación [D.O.], 28 de Enero de 1992.

³⁰ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 1.

³¹ Decreto por el que se Aprueba el Diverso por el que se Adicionan un Segundo y Tercer Párrafos el Artículo 1o., se Reforma el artículo 2o., se Deroga el Párrafo Primero del Artículo 4o.; y se Adicionan un Sexto Párrafo al Artículo 18, y un Ultimo Párrafo a la Fracción Tercera del Artículo 115 de la Constitución Política de los Estados Unidos Mexicanos [Decree by Which Diversity is Approved, and by Which Second and Third Paragraphs Are Added to Article 1, Article 2 Is Reformed, the First Paragraph of Article 4 Is Repealed, and a Sixth Paragraph to Article 18 and a Last Paragraph to the Third Part of Article 115 Are Added to the

of constitutional protection, the 2001 amendment reveals a greater awareness of the need to protect disadvantaged group members.

Ley Federal del Trabajo (Federal Labor Law) was enacted in 1931 to effectuate the labor standards proclaimed in the Constitution of 1917.³² The Federal Labor Law furthers the anti-discriminatory goals within the Constitution by prohibiting employment discrimination on the basis of race, sex, age, religion, political persuasion, or social condition.³³ Unfortunately, both the Federal Labor Law and the Constitution itself lack the needed mechanisms to enforce Mexico's employment discrimination policy.³⁴

B. The Contours of Ley Federal Para Prevenir y Eliminar la Discriminación

Ley Federal para Prevenir y Eliminar la Discriminación was passed unanimously by the Cámara de Diputados, Mexico's Congress.³⁵ Before it passed, statements were made by several representatives highlighting the reasons for the law. Initially, two social justice reasons were given for the new law: first, that everyone (by necessarily being a member of at least the protected classes of age and sex), potentially, is subject to adverse discrimination,³⁶ and, second, that democracy falters absent protection from

Constitution of Mexico.], *Diario Oficial de la Federación* [D.O.], 14 de Agosto de 2001.

³² LEY FEDERAL DEL TRABAJO [L.F.T.] [Federal Labor Law], *as amended*, *Diario Oficial de la Federación* [D.O.], 1 de Abril de 1970, art. 1 (Mex.).

³³ *Id.* art. 3.

³⁴ Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years of Operation and Suggested Improvements*, 16 LAB. LAW. 319, 335-36 (2001) (observing that Mexican workers are unaware of their rights and that Mexican institutions for enforcement suffer from administrative indifference and bias). *But see* Michael Joseph McGuinness, *The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico*, 21 U. PA. J. INT'L ECON. L. 1, 19 (2000) (arguing that many contemporary condemnations of the enforcement of Mexican labor laws are based on stereotypes of Mexican public officials and incomplete research, that a lack of funding largely is responsible for under-enforcement, and that new anti-corruption programs largely resolve many of the fears of bias regarding the Ministry of Labor).

³⁵ *Votación del Dictamen por el que se Expide la Ley Federal para Prevenir y Eliminar la Discriminación*, 58th Leg., 10 de Abril de 2003, *available at* <http://diputados.pan.org.mx/web/pan/hoycam/despliega.asp?id=374817> (there were absences); *see also* José Manuel del Río Virgen, *Dictamen Expide la Ley Federal para Prevenir y Eliminar la Discriminación*, 58th Leg., 10 de Abril de 2003, *available at* <http://diputados.pan.org.mx/web/pan/hoycam/despliega.asp?id=374797> (statement by the Representative on the need for a rhetorical message of a unanimous vote).

³⁶ Hortensia Aragon Castillo, *Dictamen Expide la Ley Federal para Prevenir y Eliminar la Discriminación*, 58th Leg., 10 de Abril de 2003, *available at* <http://diputados.pan.org.mx/web/>

discrimination³⁷ and risks spiraling into an atrocity.³⁸ Additionally, a structural argument was raised: the Constitution (specifically Articles 1 and 4) demands the implementation of anti-discriminatory measures; thus, the law is a renewed effort at achieving the stated goals of the Constitution.³⁹ Finally, international legal reasons were addressed: by enacting the law, Mexico not only would be viewed more favorably by the international community, but also would be taking a significant step toward fulfilling several of its treaty obligations.⁴⁰

The text of *Ley Federal para Prevenir y Eliminar la Discriminación* builds from these justifications to create an expansive prohibition on employment discrimination, enforced by a new government agency, and designed to interact with international law. First, the scope of protection offered (i.e., the defined set of protected classes) is far greater than the scope offered under Title VII in the United States.⁴¹ While this does not inherently make Mexico's law sufficient, it does show that the scope of Mexico's law offers comparable protection from discrimination to that afforded by another party to the NAALC.

Second, the law coordinates domestic and international law on employment discrimination. It states that "interpretation of the content of this law, and the actions of the federal authorities, will be congruent with the applicable international instruments on discrimination of which Mexico is a part."⁴² Further, when there are different interpretations of the law and its coordination with international agreements, the interpretation that most efficaciously protects the victims of discrimination is to be preferred.⁴³ Consequently,

pan/hoycam/despliega.asp?id=374800.

³⁷ German Arturo Pellegrini Perez, *Dictamen Expide la Ley Federal para Prevenir y Eliminar la Discriminación*, 58th Leg., 10 de Abril de 2003, available at <http://diputados.pan.org.mx/web/pan/hoycam/despliega.asp?id=374795>.

³⁸ Aragon Castillo, *supra* note 36 (the Representative observed that the Holocaust was the product of extreme discrimination against Jews).

³⁹ See Paredes Rangel, *supra* note 24; see also Aragon Castillo, *supra* note 36, and Pellegrini Perez, *supra* note 37.

⁴⁰ Paredes Rengel, *supra* note 24. Specifically, the Representative suggests that *Ley Federal Para Prevenir y Eliminar la Discriminación* will satisfy Mexico's treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, and the Discrimination (Employment and Occupation) Convention, 1958. No express mention is made of Mexico's treaty obligations under the NAALC. *Id.*

⁴¹ See *supra* notes 9-10 and accompanying text.

⁴² *Ley para Prevenir la Discriminación* art. 6.

⁴³ *Id.* art. 7.

whichever law is more protective—whether it is international or domestic in nature—is the one that provides the rule of interpretation.

Third—and perhaps most significant—Mexico's law provides for the creation of a new administrative agency for the purposes of implementing the law: *El Consejo Nacional para Prevenir Discriminación* (National Council to Prevent Discrimination) (CONAPRED).⁴⁴ CONAPRED is a decentralized organization under the Secretary of Government, with a juridical nature and a budget all its own.⁴⁵

Historically, Mexican workers have been unaware of their rights, and prior efforts at administration have been subject to bias toward employers.⁴⁶ Anti-discrimination principles in the Constitution were to be enforced by both the state and local governments, but no further specification on administration was given.⁴⁷ Mexico's 1976 *Ley Orgánica de la Administración Pública Federal* placed the burden of enforcing the federal labor law on the Ministry of Labor and Social Welfare.⁴⁸ However, allegations of corruption⁴⁹ and a lack of resources⁵⁰ plagued the prior administrative system. Arguably, CONAPRED can be seen largely as a new chance for execution of employment discrimination law in Mexico.

⁴⁴ *Id.* art. 16.

⁴⁵ *Id.*

⁴⁶ LaSala, *supra* note 34, at 335-36.

⁴⁷ McGuinness, *supra* note 34, at 19.

⁴⁸ *Ley Orgánica de la Administración Pública Federal* [L.O.A.P.F.] [Executive Branch Law], Diario Oficial de la Federación [D.O.], 29 de Diciembre de 1976 (directing in Article 40, § 1 that the Secretary of Labor oversee the application of relevant constitutional provisions (including Article 123) to the Federal Labor Law); *id.*

⁴⁹ McGuinness, *supra* note 34, at 19 (maintaining that fear of administrative corruption is primarily the result of unfair stereotypes). However, as recently as 1998, there have been accusations of impartiality by the Conciliation and Arbitration Boards responsible for adjudicating labor disputes. *See, e.g.*, Submission to the United States National Administrative Office (NAO) Regarding Impending Irreparable Harm Against the Right to Freedom of Association, Protection of the Rights to Organize and the Right to Bargain Collectively and Persistent Pattern of Failure to Enforce Labor Law: The Case of Han Young de Mexico, S.A. de C.V., Submission No. 9702 (U.S. Nat'l Admin. Office, Bureau of Int'l Labor Affairs, U.S. Dep't of Labor Apr. 28, 1998) (submitted by International Labor Rights Fund et al.) [hereinafter NAO Submission No. 9702], available at <http://www.dol.gov/ilab/media/reports/nao/pubrep9702.htm>.

⁵⁰ Stephen F. Befort & Virginia E. Cornett, *Beyond the Rhetoric of the NAFTA Treaty Debate: A Comparative Analysis of Labor and Employment Law in Mexico and the United States*, 17 COMP. LAB. L.J. 269, 300 (1996) (arguing that limited administrative resources inhibited general enforcement of Mexico's labor and employment laws).

CONAPRED is responsible for proposing and evaluating the execution of Mexico's anti-discrimination law.⁵¹ The evaluative function is reminiscent of the Equal Employment Opportunity Commission's (EEOC) ability to create regulations and issue interpretations of Title VII in the United States.⁵² However, CONAPRED might actually have a stronger role than the EEOC has in the legislative process. Unlike the EEOC, criticism by CONAPRED constitutes a stage in the creation of new anti-discrimination law: CONAPRED may express opinions on employment discrimination laws proposed by the President even before those laws are submitted to Congress.⁵³ Additionally, CONAPRED's opinions and regulations are to be made based entirely on its own files, independent of the instructions of any other authority or public servant.⁵⁴

The great degree of autonomy granted to CONAPRED, combined with the agency's position within the legislative process, strongly suggest that, going forward, CONAPRED will play a very powerful role in crafting and executing discrimination law. Increased autonomy will likely make CONAPRED less susceptible to allegations of corruption by facially distancing the agency from potential detracting. The agency's power to interject its opinions when the President proposes legislation, effectively, means the agency will have its mouth to the ear of the Executive. Thus, via the President, CONAPRED can best design the rules under which it will work.

Finally, it should be noted that, as of June 2004, CONAPRED claimed to have an operating budget that was too limited, and requested more funding for 2005.⁵⁵ Whether the 2004 funding truly was inadequate and whether further

⁵¹ Ley para Prevenir la Discriminación art. 20.

⁵² Congress gave the Equal Employment Opportunity Commission (EEOC) the power to issue procedural regulations, but withheld the power to issue substantive regulations under Title VII. *See* *United States v. Mead Corp.*, 533 U.S. 218 (2001). Further, the United States Supreme Court has afforded little deference to EEOC substantive interpretations of discrimination law. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481 (1999) (declining to apply an EEOC interpretation of substantive law to the Americans with Disabilities Act of 1990).

⁵³ Ley para Prevenir la Discriminación art. 20, cl. VI.

⁵⁴ Estatuto Orgánico del Consejo Nacional para Prevenir la Discriminación [Law of the National Board for Preventing Discrimination], *Diario Oficial de la Federación* [D.O.], 26 de Abril de 2004. Distinct autonomy is given to the administrative agency: "In the performance of its functions and in the exercise of its autonomy, El Consejo will not receive instructions from any authority or public servant. Its resolutions will be based solely on the records that constitute its files." *Id.* art. 3.

⁵⁵ *Demanda Conapred más Presupuesto para 2005* [Conapred Demands Greater Funding for 2005], *DIARIO DE MÉXICO*, June 29, 2004, available at http://www.diariodemexico.com.mx/?module=displaystory&story_id=29181&edition_id=357&format=html. CONAPRED fears that

budget requests will be met are political decisions for the Mexican Congress to address. Although inadequate funding might ultimately condemn the anti-discrimination law to the same fate as its predecessors, this Note will focus on the textual scope of the statute (e.g., which employers are eligible to be defendants and whether individual discrimination cases may be brought) and the constitutionality of the law.

III. LIMITS TO MEXICO'S EMPLOYMENT DISCRIMINATION LAW AND THE RISK OF FURTHER NON-COMPLIANCE WITH THE NAALC

Due to the relative youth of *Ley Federal para Prevenir y Eliminar la Discriminación* in the larger history of Mexican discrimination law, the law has not been subject to extensive criticism. To date, the author could find only one article in an United States legal journal that has even mentioned the law.⁵⁶ Discourse within the Mexican legal community has presented three particular critiques of the law. First, only federal employers are subject to the broad prohibitions within Article 4 (an argument as to the range of statutory defendants).⁵⁷ Second, only discrimination against individuals, and not against groups, is actionable (an argument as to the number of viable theories of recovery).⁵⁸ Third, the law is unconstitutional since federal discrimination law

its ability to adequately educate the public and investigate claims will be compromised if funds are not increased. *Id.*

⁵⁶ See Natara Williams, Note, *Pre-Hire Pregnancy Screening in Mexico's Maquiladoras: Is it Discrimination?*, 12 DUKE J. GENDER L. & POL'Y 131 (2005) (briefly mentioning the new law).

⁵⁷ Cortez Moralez, *supra* note 14.

⁵⁸ *Id.* Although presuming American law to be ideal would be imprudent, U.S. law might serve as a guide to what theories of recovery are available and to what pertinent evidentiary burdens and potential remedies exist. There are three overarching approaches to proving employment discrimination in the United States. First, individual disparate treatment theory (that the plaintiff, individually and without regard to others, has been the victim of discrimination) is available under Title VII, the ADEA, and the ADA. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Second, systemic disparate treatment theory (that the plaintiff has been the victim of a pattern or practice of discrimination adopted expressly or impliedly by the employer) is also available under Title VII, the ADEA, and the ADA. See, e.g., *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). Third, disparate impact theory (that the defendant's policy has a discriminatory effect against the plaintiff—regardless of motive) is available under Title VII and the ADA, but may not be under the ADEA. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Should the latter two theories not be available in Mexico, plaintiffs who suffered, for example, from a facially neutral hiring policy with an inadvertent discriminatory effect would have no available theory for recovery. Consequently,

is properly legislated only by the Human Rights Commission (a constitutional argument on the limit of congressional power).⁵⁹

Clearly, an unconstitutional law would prove unenforceable, and therefore Mexico's NAALC treaty obligations would remain unfulfilled, just as before the enactment of the new law. In addition, should the law excessively limit the class of eligible defendants or unduly restrict the number of available theories for recovery under the act, the internal constitutional mandates against discrimination might remain unfulfilled. Consequently, Mexico would be deemed to have inadequately adhered to its employment discrimination law, and would be in violation of the NAALC. Only by overcoming each of these hurdles—the textual limits and the constitutional limit—can Mexico fulfill its constitutional mandate of protection and thus make meaningful progress towards satisfying the NAALC.

A. The Limited Range of Statutory Employers

Ley Federal para Prevenir y Eliminar la Discriminación contains various provisions suggesting the range of employers eligible to be defendants for purposes of the statute. On the one hand, Article 9 specifically states “*queda prohibida toda práctica discriminatoria que tenga por objeto impedir o anular el reconocimiento o ejercicio de los derechos y la igualdad real de oportunidades*” (all discriminatory practices whose object is to impede or annul the recognition or exercise of rights and real equality of opportunity are prohibited).⁶⁰ Certainly, this broad prohibition—stated after the definition of discrimination for purposes of the statute—is not expressly limited to federal and other state employers. Further, if the Congress wanted to limit the scope of the law only to governmental employers, it would have made sense to include such language within Article 9.⁶¹ Consequently, the lack of express limitation to governmental employers within the general statutory ban on employment discrimination suggests that the law is not so limited, and that private employers (such as Zenith and General Motors)⁶² are also liable.

if large portions of the work force would need to make use of an impact theory, but would be precluded from doing so, the constitutional goals of protection from discrimination and equality between the sexes would remain unfulfilled, as would Mexico's NAALC obligations.

⁵⁹ Gil Rendón, *supra* note 13, at 165-66.

⁶⁰ Ley para Prevenir la Discriminación art. 9.

⁶¹ See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2003) (exhibiting that Article 9 functions much like § 2000e-2(a) of the Civil Rights Act of 1964).

⁶² NAO Submission No. 9701, *supra* note 2.

On the other hand, different provisions suggest—but do not expressly state—that Article 9 is limited to government employers. Articles 10 through 15 are worded in primarily the same way: “public organs and federal authorities, within their jurisdiction, shall carry into effect, among others, the following measures in favor of equal opportunity”⁶³ for women,⁶⁴ for children,⁶⁵ for people over sixty,⁶⁶ for disabled persons,⁶⁷ and for the indigenous population.⁶⁸ Further, a catch-all provision is tacked onto the end of the list, providing that those public organs and federal authorities also must “adopt the means that tend to favor the real equality of opportunity and that tend to favor the prevention and elimination of the forms of discrimination against all other persons protected under Article 4.”⁶⁹ Roughly 10% of the total text of the Mexican law is devoted to these government-specific proscriptions. Consequently, it would appear that the Congress—by focusing on the requirements for governmental employers, but neglecting to extend the same list to private employers—has narrowed the scope to prevent suits against such private employers under the law.

If the law is limited to government employers, innumerable potential plaintiffs (including the women in Tijuana complaining against Zenith and General Motors) would have no claim under the new Mexican law.⁷⁰ On that basis alone the number of people who could succeed in enforcing their constitutional rights against discrimination is substantially limited. Countless other victims of discrimination will go without remedy. Thus, the new law may fail to satisfy the NAALC since Mexican constitutional rights will be only partially protected.

⁶³ Ley para Prevenir la Discriminación arts. 10-15 (“*Los órganos públicos y las autoridades federales, en el ámbito de su competencia, llevarán a cabo, entre otras, las siguientes medidas positivas y compensatorias a favor de la igualdad de oportunidades.*”).

⁶⁴ *Id.* art. 10.

⁶⁵ *Id.* art. 11.

⁶⁶ *Id.* art. 12.

⁶⁷ *Id.* art. 13.

⁶⁸ *Id.* art. 14.

⁶⁹ *Id.* art. 15 (“*Los órganos públicos y las autoridades federales adoptarán las medidas que tiendan a favorecer la igualdad real de oportunidades y a prevenir y eliminar las formas de discriminación de las personas a que se refiere el artículo 4 de esta Ley.*”).

⁷⁰ See Cortez Moralez, *supra* note 14 (arguing that the new statute neglects the discriminatory practices that men and women suffer daily in their localities and municipalities).

B. Available Theories of Discrimination

Even though Mexico's new discrimination law might only apply to federal employment relationships, admittedly, some discriminatory employment practices would be covered by the new law. Thus, some benefit from the law (even if no state, municipal, or private employers are covered) might be had. However, there is another limitation upon the practical scope of the law: it does not seem to apply to group claims of discrimination.⁷¹ A comparison to the employment discrimination law of the United States may prove fruitful in showing the importance of a group claim.⁷² U.S. law can reveal weaknesses in Mexican law by showing the potential effect of not having a group discrimination theory.

1. A Comparison to U.S. Law: Benefits of Group Theories of Discrimination

Under Title VII in the United States, there are two group discrimination theories available to plaintiffs: systemic disparate treatment theory and disparate impact theory. Individual disparate treatment theory,⁷³ the most common U.S. theory of employment discrimination, appears to be authorized by the Mexican statute.⁷⁴ Whether theories similar to systemic disparate

⁷¹ Mexican case law on this topic could be illustrative of trial procedures and available theories, but the general non-precedentary nature of Mexican law (Mexico is a civil law jurisdiction), combined with the recency of the new law and the lack of existing case law, make observations on theories of recovery impossible at the current time. Neither the reports of the Supreme Court of Mexico nor the recommendations of the National Human Rights Commission have yet revealed case law involving the new statute. However, when case law becomes available, it should be given weight as a guide for future litigation. See Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1353 (2004).

⁷² Before suggesting the contours of group discrimination claims, there is a need to highlight the limits in making comparisons to United States discrimination law. As previously noted, U.S. discrimination law serves as only one example of how to set up and enforce employment standards. To read any observations about U.S. law as prescriptions for Mexican compliance with the NAALC is inappropriate.

⁷³ Individual disparate treatment litigation in the United States explores whether an employer's action has discriminated against an individual employee on the basis of her or his protected class status. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁷⁴ Title VII expressly divides intentional discrimination (i.e., employment practices that either expressly or impliedly discriminate) from employment practices that have a disparate impact based on protected class status. Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1)

treatment and disparate impact actually exist in Mexico is unclear. Their absence would greatly diminish the chances of recovery for abused workers.

i. Benefits of a Systemic Disparate Treatment Theory

In the United States, systemic disparate treatment theory enables employees to sue under two fact patterns: first, where the employer has an announced, formal policy of discrimination; second, when the employer engages in a pattern or practice of seemingly discriminatory employment decisions.⁷⁵ Systemic disparate treatment theory is specifically addressed by statute.⁷⁶ While the rebuttable presumptions and shifting burdens of U.S. law⁷⁷ need not be adopted by another nation, other more universal benefits remain.

First, and most simply, having a systemic disparate treatment theory means that a pool of plaintiffs—not just one individual plaintiff—can cover the cost of litigation if attorneys fees are required. Second, increasing the number of member plaintiffs with similar stories of suspected discrimination helps strengthen the inference of actual discrimination. Third, different types of evidence (such as statistical evidence) might be admissible under a systemic disparate treatment theory in support of an inference of discrimination.⁷⁸

Fourth, especially where the complainants still work for the alleged discriminating employer, having a group theory might reduce psychological

(1991). Individual disparate treatment cases are expressly grounded in the language of the general prohibition against discrimination: “fail or refuse to hire or to discharge any individual,” which clearly focuses on an individual suffering an adverse employment practice. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2003). Mexican discrimination law, in contrast, broadly prohibits basing employment decisions on any one of the various protected class statuses, yet makes no distinction between discrimination against individuals and that against groups. The statute provides a long list of prohibitions, but they just as easily could apply to individuals or to groups. *Ley para Prevenir la Discriminación* art. 9.

⁷⁵ MICHAEL ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 199 (6th ed. 2003).

⁷⁶ The Equal Employment Opportunity Commission (EEOC) (instead of the Attorney General, per Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(c)) may bring suit against “any person or group of persons engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title.” The fact that such employers are repeat violators presumably increases the public’s interest and warrants litigation by the EEOC in place of private counsel. Civil Rights Act of 1964, 42 U.S.C. 2000e-6(a) (2003).

⁷⁷ See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

⁷⁸ See *id.* While the type of and weight given to statistical evidence could vary from jurisdiction to jurisdiction, the very presence of any statistical evidence would help bring plaintiffs one step closer to a judgment in their favor.

barriers to suit. The risk of retaliation might better be dispersed among a pool of employees rather than just one, and complainants might not feel like they alone suffered the abuse, but might be bolstered from a sense of being in a "community of abused." Both of these psychological benefits could stem from a sense of group identity established by not having to litigate alone.

Fifth, in the case of an unintentional discriminator,⁷⁹ having a group of plaintiffs bring a complaint could prove to the employer that her decisions—what she previously thought might have resulted in isolated gripes by unsatisfied employees acting for other reasons—were in fact discriminatory. In that situation, should internal complaint mechanisms not be used for whatever reason (or should they be used by an employee, but not be adequately considered by an employer), a group claim might help prompt the employer to resolve the dispute at an early stage in the litigation.

Sixth, while individual disparate treatment cases might typify discrimination among smaller employers,⁸⁰ larger employers tend to make more employment decisions. Consequently, rather than face a flood of individual disparate treatment suits, utilizing a group discrimination theory, such as systemic disparate treatment, would be more efficient because it would condense the number of times a defendant's counsel needs to examine evidence common to each case, and would reduce the total hours spent in court, thereby decreasing both court and attorneys' fees.

Seventh, there is a sense, borrowed from the English evidentiary tradition of *res gestae*, wherein the full story might need to be told for a more complete picture of the alleged unlawful acts. Without that complete picture, a court might be unable to meet any deterrent goals in its judgment. If, for example, an employer is found to discriminate only once (i.e., an individual disparate treatment case), a court might be less secure in its determination that unlawful discrimination actually occurred and that full punishment is necessary. However, where a pattern or practice is established, the pervasiveness of the employer's acts might suggest to the court that more severe punishment is warranted. In this sense, only enabling individual disparate treatment claims might under-deter employers from discriminating. Having a group theory would better prevent future acts of individual discrimination and employer policies or patterns of discrimination.

⁷⁹ For example, an unintentional discriminator might include an employer who bears no animus based on protected class status, but instead inadvertently discriminates.

⁸⁰ Smaller employers seem less likely to have a need to adopt formal employment policies or to have made enough employment decisions to reveal a pattern of discrimination.

Consequently, permitting systemic disparate treatment theory would strengthen anti-discrimination law. Not having such a theory exposes individual plaintiffs to the full costs of litigation, gives them less inferential support, provides them with fewer forms of relevant evidence, and strands them as individuals subject to the wrath of employer retaliation. Additionally, employers are less likely to discover their inadvertent discrimination, are forced to pay higher court costs and attorneys fees (should they lose), and are under-deterred from future discrimination. In summary, the increased ease and likelihood of success under systemic disparate treatment makes it a useful theory for victims of discrimination.

ii. Benefits of a Disparate Impact Theory

The second group discrimination theory available under U.S. law is disparate impact theory. Disparate impact theory—like systemic disparate treatment theory—is expressly authorized by statute.⁸¹ Impact theory requires the plaintiff to show that the defendant used a particular employment practice that caused a disparate impact on a protected class.⁸² For example, where an employer requires intelligence tests as a condition of employment and those tests (1) are not significantly related to successful job performance, and (2) have the effect of disqualifying members of a protected class at a higher rate than members of the majority class, there is a disparate impact upon the protected class members.⁸³ Further, discriminatory intent is not required for a finding of disparate impact since impact is the focus.⁸⁴

Impact theory provides notable benefits to plaintiffs. First, unlike systemic disparate treatment theory, impact theory does not rely on any finding of discriminatory intent. The only thing that matters is a finding of discriminatory effect.⁸⁵ On an evidentiary level, statistical evidence (readily obtainable from a statistician) could easily show a discriminatory effect, and the need for direct evidence (which is often difficult to obtain) or for other circumstantial evidence would be limited.⁸⁶ Second, impact theory could also

⁸¹ Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (2003).

⁸² *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁸³ *Id.*

⁸⁴ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988).

⁸⁵ *Griggs*, 401 U.S. 424, 431.

⁸⁶ MICHAEL ZIMMER ET AL., *supra* note 75, at 366-73.

be brought by individuals or by groups,⁸⁷ and thus would garner all of the other advantages listed above under systemic disparate treatment theory.

2. *Existence of Group Theories of Discrimination in Mexico*

In his exigent observation the day after Mexico passed *Ley Federal para Prevenir y Eliminar la Discriminación*, Cortez Moralez, Director of the "Miguel Agustín Pro Juárez" Center for Human Rights, stated that the new law "only observed discrimination against individuals, excluding that against groups or collectives."⁸⁸ Although one might venture that Moralez made an undeveloped, knee-jerk reaction to the new law,⁸⁹ a close analysis of the law reveals that the statute almost certainly does not make a systemic disparate treatment theory available in Mexico, nor is it likely that a disparate impact theory is available.

i. *Existence of a Systemic Disparate Treatment Theory in Mexico*

Systemic disparate treatment theory is almost certainly unavailable under Mexican law. Unlike the prohibition against employment discrimination in the United States,⁹⁰ Mexico's ban lacks an explicit reference to the singularity or plurality of plaintiffs.⁹¹ The general purpose of the law, as stated in Article 1, "is to prevent and eliminate all forms of discrimination" against any person.⁹² The sweeping stance from Article 1 is echoed in Article 9: a catch-all provision that states, in general, that any discriminatory conduct not specifically listed in the preceding twenty-eight provisions might still be prohibited.⁹³ The breadth of these two articles suggests that, despite the absence of express authorization for either group discrimination theory, if, in the interest of prohibiting discrimination, such a theory is needed, then it is authorized by the statute.

⁸⁷ Compare *Watson*, 487 U.S. 977, with *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478 (3d Cir. 1999).

⁸⁸ Cortez Moralez, *supra* note 14.

⁸⁹ Moralez's observations are listed as six brief complaints regarding the new law, none of which are supported or explained. *Id.* Additionally, scholarly writings on the new law have not focused on this aspect of the statute.

⁹⁰ See *supra* note 10 and accompanying text.

⁹¹ *Ley para Prevenir la Discriminación* art. 4.

⁹² *Id.* art. 1 ("El objeto . . . es prevenir y eliminar todas las formas de discriminación").

⁹³ *Id.* art. 9(XXIX).

However, some language in Article 1 cuts against the inclusion of a group theory, despite the broad policy against discrimination. Although the general policy goal seems clear by itself, the members of Mexico's Congress qualified the policy goal as follows: "against any person in the terms of Article 1 of the Constitution."⁹⁴ The text of the statute clearly specifies "*cualquier persona*" (any person) and does not include a plural form in the alternative. The question becomes how to interpret "*cualquier persona*"—whether it is limited to single plaintiffs or is intended to cover plaintiffs in the aggregate.

Articles 6 and 7 provide the interpretive guidelines that (1) interpretation of the law will be congruent with the applicable international instruments to which Mexico is a party,⁹⁵ and (2) when different interpretations are possible, the courts should prefer that reading which better protects the persons or groups affected by the discriminatory conduct.⁹⁶ Given the language of the interpretive guidelines, group discrimination theories seem plausible, first, as a way to ensure that international obligations, such as those arising from the NAALC, are met, and, second, as a way to better protect the rights of employees. The laundry list of advantages previously articulated for both systemic disparate treatment and disparate impact theories certainly suggests that worker rights would be best protected by recognizing group discrimination theories under the interpretive guidelines.

In spite of the broad language used in the interpretive guidelines of Articles 6 and 7, the practical effect of those provisions is likely limited. As to Article 6, the operative word is "congruent,"⁹⁷ suggesting that Mexico's statute should not be construed in such a way as to conflict with treaties to which Mexico is a party. However, the NAALC does not require that Mexico have individual and systemic disparate treatment theories, nor a disparate impact theory. The

⁹⁴ *Id.* art. 1 ("*prevenir y eliminar todas las formas de discriminación que se ejerzan contra cualquier persona en los términos del Artículo 1 de la Constitución Política*").

⁹⁵ *Id.* art. 6.

⁹⁶ *Id.* art. 7. Note that, while "protects with better efficacy the persons or groups that would be affected" includes "persons or groups" (and seemingly allows for a group discrimination theory), the language refers to the practical impact of discrimination upon individuals in the aggregate. However, Article 7 does not expressly authorize, nor even make mention of, a group discrimination claim. Inclusion of the plural "persons or groups" simply mirrors the reality of class status per Article 4: that multiple people form the classes of sex, age, disability, etc. Consequently, Article 7 only has value as guidance for how to best protect those individuals who suffer discrimination.

⁹⁷ *Id.* art. 6.

principle requirement of the NAALC is that the member nations uphold their own employment discrimination laws.⁹⁸

Likewise, Mexico is not obligated to apply those alternative theories under other treaties. Clearly, fulfilling certain treaty obligations was on the minds of at least some of Mexico's lawmakers at the time of drafting.⁹⁹ However, no such references to these alternative theories exist. Consequently, a more realistic reading of Article 6 is that Mexico's statute is not to be interpreted to contradict (i.e., be incongruent with) the terms and spirit of Mexico's treaties. Since there is no international legal requirement for group discrimination theory, Mexico's efforts would be congruent without such a theory. Article 6 merely seems to be a general guide confirming the spirit of the law, while referencing Mexico's renewed intent to uphold its employment discrimination standards.

Article 7, initially, also seems to favor the acceptance of group discrimination theories, since the legislature mandates that the law be interpreted—where there is conflict—to better protect those discriminated against (i.e., err in the favor of the plaintiff in matters of statutory interpretation).¹⁰⁰ Central to reading Article 7 is the rule concerning conflicts of interpretation ("*cuando se presenten diferentes interpretaciones*").¹⁰¹ As a matter of simple logic, admittedly unreasonable interpretations under any law should not be given credence; even under a loose standard, utterly unsupported interpretations will not stand.

The issue becomes whether either group discrimination theory can reasonably be read from Mexico's statute. On the one hand, the availability of group discrimination theories furthers the general purpose of preventing and eliminating discrimination.¹⁰² On the other hand, that purpose is limited via the language of the statute to individuals, not groups.¹⁰³ Additionally, at no point in the statute is either group theory discussed. Surely, if Mexico's legislature wanted to make such theories available, it would have so stated. Further, if group theories were within the concern of the legislature, specific references to those theories might be expected. However, in my review of the statements of the *diputados* (members of Congress), no concern was expressed over the absence of a group to employment discrimination. Consequently, not

⁹⁸ See *supra* text accompanying note 7.

⁹⁹ See *supra* note 40.

¹⁰⁰ Ley para Prevenir la Discriminación art. 7.

¹⁰¹ *Id.*

¹⁰² *Id.* art. 1.

¹⁰³ *Id.* ("*contra cualquier persona*").

only is there no explicit textual basis for an interpretation allowing for either group discrimination theory, there also is no argument from legislative history or purpose. Articles 6 and 7 will likely be ineffective in providing a group discrimination theory.

ii. *Existence of a Disparate Impact Theory in Mexico*

While the prior observations pertain to both systemic disparate treatment and disparate impact theories, certain provisions might be read in support of impact theory. However, it does not follow that those provisions would permit the group theory.

Furthermore, Article 5 cuts against the existence of impact theory by allowing "in general, all those [acts] that do not have the purpose of annulling or reducing the rights, liberties, or equal opportunities of people."¹⁰⁴ The Article 5 provision sets forth a general rule that, unless an employment decision has the purpose of discrimination, it is not prohibited discriminatory conduct under the Mexican statute. Hence, as a general rule (and as a conflicting rule for interpretative battles), impact theory should be unavailable since it does not operate from discriminatory intent.¹⁰⁵

On the other hand, two provisions support the availability of a disparate impact theory. First, Article 9 prohibits "contents," methods, or pedagogical instruments that assign roles contrary to equality or that propagate a condition of subordination.¹⁰⁶ Second, Article 4 prohibits any distinctions, exclusions, or restrictions based on a protected class status that have the effect of impeding or annulling the recognition or exercise of rights or equality.¹⁰⁷ Almost unquestionably, these two provisions seem to support the incorporation of an impact theory into the Mexican statute.

With regard to the Article 9 provision, the introductory passage to that article gives a general prohibition of discrimination that includes a motive requirement.¹⁰⁸ Clause 2 of the article is listed as one example of discriminatory conduct within the general prohibition, which, as previously stated, included a motive requirement. Two reasonable interpretations

¹⁰⁴ *Id.* art. 5, cl. VIII.

¹⁰⁵ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988).

¹⁰⁶ Ley para Prevenir la Discriminación art. 9, cl. II (note especially, "*papeles contrarios a la igualdad o que difundan una condición de subordinación*").

¹⁰⁷ *Id.* art. 4 ("*distinción . . . que tenga por efecto impedir o anular el reconocimiento o el ejercicio de los derechos.*").

¹⁰⁸ *Id.* art. 9 ("*que tenga por objeto impedir o anular . . . los derechos.*").

therefore exist. On the one hand, Mexico might demand strict adherence to a motive requirement. Such a position textually is supported with the language "*que tenga por objeto*" (to have as its effect).¹⁰⁹ Since Clause 2 is an example of the general prohibition, the requirement under Article 9 extends to each of the examples, including Clause 2; thus, motive would be required.

In favor of impact theory, one might argue that Clause 2 exists as an example of the general discrimination prohibited. In that case the motive requirement would be satisfied wherever methods or instruments (e.g., education tests) that propagate subordination are found. A finding of effective subordination or inequality would suffice for the motive requirement. Under that interpretation an impact theory would exist.¹¹⁰

Article 4 further supports that conclusion. On the one hand, Article 4 defines as discrimination those employment decisions that have as their effect impeding or annulling rights.¹¹¹ On the other hand, the prohibition is conditioned on the employment decision being "based on" a protected class status.¹¹² Standing alone, the text of Article 4 would probably be insufficient to recognize an impact theory, since the most reasonable interpretation would likely be that intended discriminatory effects were (but not unintended effects) prohibited. However, in conjunction with the text of Article 9, the statutory intent seems to extend not just to intended discriminatory acts, but also to discriminatory effects. Together with Article 9, Article 4 seems to evidence the legislature's desire for an impact theory.

The remaining issue is defining the contours of any impact theory that might exist under the Mexican statute. Even if an impact theory exists, by no means must it mirror the U.S. impact theory. In the United States, impact theory commonly (although not necessarily) is used by multiple plaintiffs in the same suit.¹¹³ The idea of not requiring proof of intent to discriminate is common to both arrangements; the focus is on effect. Given the fact that nowhere in Mexico's statute is there any reference to multiple plaintiffs using impact theory, nor is there any evidence in the legislative history of discussion of impact theory, said theory seems limited to individual plaintiffs. Thus, even

¹⁰⁹ *Id.*

¹¹⁰ This conclusion is further supported by Article 7, which mandates that splits in interpretation are to be resolved in favor of the interpretation that better protects individual rights.

¹¹¹ Ley para Prevenir la Discriminación art. 4 ("*tenga por efecto impedir o anular*").

¹¹² *Id.* ("*basada en . . .*").

¹¹³ Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (multiple plaintiffs), with *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (single plaintiff).

though individual victims of employment discrimination can prevail by showing that an employer engaged in a practice, such as requiring certain tests or standards with a discriminatory effect, the theory still may not be used by a group of plaintiffs. Thus, all of the benefits of group litigation are not had under the version of impact theory available in Mexico.

Mexico might not have a treaty obligation to allow group litigation, but it does have NAALC obligations to promote compliance with, and to enforce effectively, its labor law. The purpose of the new law would be better served if group theories were available in Mexico. Individual victims of discrimination might otherwise be deterred from suit, and those victims willing to risk suit may otherwise be less likely to prevail. Without group theories, Mexico will fail to meet its NAALC obligations.

C. CONAPRED: The Agency of Implementation

The third main criticism mounted against Mexico's law is that the statute is unconstitutional due to its delegation of responsibilities to CONAPRED. There are two arguments made as to unconstitutionality: one of duplicity and another of exceeding authority. The first problem arises from the fact that many of the powers granted to CONAPRED were previously delegated in the Constitution to the National Commission for Human Rights expressly.¹¹⁴ The National Commission for Human Rights is given autonomy as to its administration and budget, legal character, and its own assets.¹¹⁵ Other commissions and agencies have a subordinate role in the field of human rights, given that the Commission is the only one with an explicit constitutional basis, and exclusive power to hear cases for violations of human rights.¹¹⁶ Commentators, such as Raymundo Gil Rendón, argue that "neither the Congress nor any other federal legislative body has the power to create other organs that protect human rights" beyond those foreseen in Articles 102(b) and 1 of the Constitution.¹¹⁷

The second problem is that Mexico's Congress may not have had the authority to make the new law in the first place. "The Congress . . . lacks both express and implicit power to legislate federal material on the prohibition of

¹¹⁴ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 102(b).

¹¹⁵ *Id.* ("El organismo que establezca el Congreso de la Unión se denominará Comisión Nacional de los Derechos Humanos; contará con autonomía de gestión y presupuestaria, personalidad jurídica y patrimonio propios.").

¹¹⁶ *Id.*; Gil Rendón, *supra* note 13, at 165-66.

¹¹⁷ Gil Rendón, *supra* note 13, at 166.

discrimination since it is not a power of Congress under Article 73, but rather of the federal entities under Article 124.”¹¹⁸

In response to these arguments, one might argue that while CONAPRED is not envisioned within Article 102(b), the overriding system of rights from Article 1 is most important. Since Article 1 gives a general prohibition of discrimination against a variety of class statuses,¹¹⁹ and since Article 1 was amended as recently as 2001, it makes sense that a new organ be made to best address the new constitutional scope of Article 1. The Commission's previous workings were in a pre-2001 amendment world. Mexico's subsequent focus on discrimination (and, in large part, the effects of discrimination on employment) is radically different from other forms of human rights abuses, such as unlawful detention and police brutality. Indeed, the best way to reflect the decision of the amenders is to give substance to the new Article 1 by creating a new agency centered on employment discrimination, as opposed to discrimination and human rights in general. Further, Article 102(b) should not be read to exclude the existence of all other agencies; the first paragraph of the article specifically states that “Congress . . . will establish organs for the protection of human rights.”¹²⁰ Thus, since other organs may be created and since the purpose and scope of CONAPRED and the Commission are not necessarily overlapping, there may not be any real duplicity problem. This conclusion is bolstered by the fact that, over the last two years, one is hard pressed to find a single employment discrimination case among the *Recomendaciones* published by the Commission.¹²¹

Even if there is no practical duplicity problem, the issue remains whether Mexico's Congress had the power to create an organ to combat employment discrimination. Admittedly, there is conflict on this point. On the one hand is Gil Rendón's argument that, since the Commission is the constitutional body on point per Article 102(b) and since the Commission is given rule-making and judicial authority over human rights concerns, the legislature is powerless. Gil

¹¹⁸ *Id.* at 169.

¹¹⁹ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 1.

¹²⁰ *Id.* art. 102(b).

¹²¹ Although there is no engine for searching the *Recomendaciones*, glossing through the facts of the first half of the published cases for 2004 and 2005 revealed not a single employment discrimination claim. *Recomendaciones*, Comisión Nacional de los Derechos Humanos (an informal posting of Recommendations from the reporter, *Gaceta*) (2005), available at <http://www.cndh.org.mx>.

Rendón stresses that nothing in Article 73 specifically authorizes the Congress to legislate on discrimination.¹²²

In response to Gil Rendón, three Article 73 provisions can be cited. First, Mexico's Congress is authorized "to create and eliminate federal public employment positions, and designate, increase, or reduce personnel to those positions."¹²³ This provision suggests that federal employment relationships are within Congress' power to regulate; whether Congress choose to delegate that power to another organ is its choice (as so opted in the case of CONAPRED).

Second, the Congress may "define the crimes against the federation and set the punishments that must be imposed for them."¹²⁴ This provision might be used if the national legislature decided to make employment discrimination a crime against the federation. Admittedly, such rhetoric rings close to a threat of treason, but if Congress defined employment discrimination as a crime against the people, and thus against the state (as the embodiment of the people), then perhaps the second provision could apply.¹²⁵

Third, the Congress may "make laws for the national planning of economic and social development."¹²⁶ This provision, combined with the first provision, seems most convincing in arguing that Congress has a legitimate power of legislation here. Especially in light of the legislative findings—as seen through the *dictámenes* (Congressional record)—that discrimination has unnecessarily hindered meaningful employment for countless minority members, it seems that Congress recognized that discrimination is against any national plan for social development.¹²⁷ Consequently, CONAPRED and the Mexican statute can be seen as the embodiment of that policy decision, as made under Article 73(XXIX-D).

In conclusion, CONAPRED and the new Mexican law are consistent with the constitutional goal of protecting against discrimination (not overstepping the bounds of the National Commission on Human Rights) and are likely

¹²² Gil Rendón, *supra* note 13, at 165-66.

¹²³ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 73 cl. XI.

¹²⁴ *Id.* art. 73 cl. XXI.

¹²⁵ This argument seems more tenuous and may not be supported by constitutional interpretations in Mexico. The above reading seems to fly in the face of the relatively clear intent behind "crimes against the federation," however it is at least one possible source of counter-argument.

¹²⁶ *Id.* art. 73 cl. XXIX-D.

¹²⁷ See Paredes Rangel, *supra* note 24; Aragon Castillo, *supra* note 36; Pellegrini Perez, *supra* note 37.

within the limits of Congressional action under Article 73(XI) and (XXIX-D). Thus, of the three primary concerns among commentators, the new law seems best able to respond to a challenge of unconstitutionality. Since unconstitutionality would instantly terminate the benefits of the new law (at least in pertinent part), this conclusion is the most favorable for any hope of Mexico's compliance with the NAALC.

IV. CONCLUSION

Ley Federal para Prevenir y Eliminar la Discriminación sets forth ambitious proscriptions against discrimination, including discrimination in the workplace. Employer decisions made on the basis of race, sex, age, disability, social or economic condition, health condition, pregnancy, language, religion, opinion or political persuasion, sexual preference, marital status, xenophobia, anti-Semitism, or "any other distinction that has the effect of impeding or annulling the recognition or exercise of rights and equal opportunities" are prohibited.¹²⁸ The breadth of the statute is even broader than that of U.S. law—either by Title VII, the adjoining statutes, or the case law interpreting those statutes.¹²⁹ However, the breadth of the statute only ensures that a broad range of individuals can be eligible plaintiffs under the statute. Enforcement is one historic plague of employment rules in Mexico,¹³⁰ yet deeper textual and constitutional concerns might hamper the expansive intent of the Mexican law to the extent that it becomes meaningless in light of Mexico's treaty obligations, such as those under the NAALC. Despite noted concern among Mexico's legislators for fulfillment of treaty obligations regarding discrimination,¹³¹ issues as to the applicability of the statute to non-federal employers, the existence and contours of group discrimination theories, and the constitutionality of the law and its enforcement agency, CONAPRED, mire the law in controversy surrounding its actual value and effect.

First, as to the range of defendants, Mexico's law may only cover federal employers. Despite the fact that the legislature didn't specifically limit the statute to federal employers, the language of the prohibitions focuses on "public organs and federal authorities, within their jurisdiction."¹³² The fact

¹²⁸ *Ley para Prevenir la Discriminación* art. 4.

¹²⁹ For example, discrimination on the basis of sexual preference is not prohibited in the United States. *See, e.g.,* *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

¹³⁰ *See generally* McGuinness, *supra* note 34, at 4.

¹³¹ *See* Paredes Rangel, *supra* note 24.

¹³² *Ley para Prevenir la Discriminación* arts. 10-15.

that 10% of the total statute is devoted exclusively to government employers strongly suggests a federal limit to the law. However, this issue indicts the new statute, rather than wholeheartedly undermines it.

Second, as to the number of theories available to plaintiffs, group theories of discrimination are not entirely available. Systemic disparate treatment theory (by comparison to its contours and benefits in the United States) almost assuredly does not exist under the Mexican statute. Further, any disparate impact theory, although available to an individual plaintiff as a means of escaping a requirement of discriminatory intent, seems unlikely to be available to group plaintiffs. The unavailability of a theory of discrimination for a group of plaintiffs means that, as previously noted, (1) costs of litigation will not be spread, (2) the strength of the inference of actual discrimination will not be as strong, (3) various types of evidence (such as statistics) will likely be less relevant, (4) psychological barriers to suit (such as the risk of retaliation and the fear of being alone in victimization) will not be alleviated, (5) the unintentional discriminator will likely be less aware of her or his offense at an early stage in the litigation, (6) larger employers will not have the benefit of an efficient defense, and (7) plaintiffs will not have the full benefit of *res gestae* (or any comparable approach) to show the extent of discrimination against them.

Third, and most perilous for the continued existence of the Mexican statute, its constitutionality has been made suspect. Although the law and CONAPRED still exist,¹³³ the law seems to directly violate Article 102(b) of Mexico's Constitution. Support for the law must be drawn from links to other enumerated powers of the legislature under Article 73. In an interpretive battle—despite the best intentions of Congress, the clear constitutional mandate that the National Commission on Human Rights be given control over the issue of human rights to the exclusion of other bodies might prevail. However, of the three main challenges to the new law, Mexico at least has viable defenses to the issue of unconstitutionality.

The final remaining issue is defining the consequences of these problems. This raises three issues in itself. First, what degree of compliance with the NAALC is required for Mexico to fulfill its treaty obligations? Second, what degree of compliance will Mexico attain with its new law? Third, what impact does non-compliance have on the other member nations?

The Vienna Convention on the Law of Treaties states the general rule of compliance in international law: "every treaty in force is binding upon the

¹³³ However, note that little (if any) litigation has yet transpired over this issue.

parties to it and must be performed by them in good faith."¹³⁴ Two separate sub-issues are raised: (1) are Mexico and the United States both subject to the rule articulated in the Vienna Convention, and (2) is the NAALC a treaty in force between those parties?

As to whether both nations are subject to the Vienna Convention rule, it should be observed that Mexico ratified the treaty September 25, 1974; the treaty went into effect in Mexico on January 27, 1980.¹³⁵ The United States, on the other hand, signed the convention April 24, 1970, but has never ratified or otherwise caused the treaty to take effect.¹³⁶ However, this potential issue is resolved since, under customary international law, the United States is considered to have accepted various terms of the Vienna Convention.¹³⁷ Thus, most likely, Mexico must in good faith perform its obligation under the NAALC.

The second issue is whether Mexico has indeed performed under the NAALC in good faith. It is clear from the language of the Vienna Convention that complete or perfect performance is not needed, so long as a nation's actual performance is in good faith. Even discounting gaps in enforcement prior to the new Mexican law, and disregarding potential issues as to the future funding of CONAPRED, Mexico's anti-discrimination statute likely fails to constitute good faith performance. To fulfill its promise under the Vienna Convention, Mexico must in good faith "promote compliance with and effectively enforce its labor law through appropriate government action."¹³⁸

Since the supreme law of the land, the Constitution of Mexico, prohibits discrimination,¹³⁹ enforcement of the NAALC and the Vienna Convention requirements effectively means that the anti-discrimination provisions of the Constitution must be "effectively enforce[d]" in good faith. Where there are gaps in that effective enforcement, Mexico's treaty obligations will remain unmet. The first two attacks mounted against the Mexican statute (as to the

¹³⁴ Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339.

¹³⁵ *Id.* at 483.

¹³⁶ *Id.*

¹³⁷ Robert F. Turner, *US and UN: The Ties that Bind*, Letter to the Editor, WALL ST. J., Dec. 1, 1997, at A23 ("[E]very single one of the . . . states that are members of the United Nations, and every single one of the few states that are not, acknowledge(s) . . . Article 26.") (Professor Turner is Associate Director of the Center for National Security Law at the University of Virginia School of Law).

¹³⁸ NAALC, *supra* note 5, art. 3(1).

¹³⁹ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANO art. 1.

scope of employers and as to the number of available theories) demonstrate gaps in the enforcement of the law. First, if only federal employers are subject to the new law, then the previous level of treaty performance as to private and state employers would remain unchanged. Thus, Mexico would still not have honored its duty. Second, if individuals may not group together to sue discriminators, then, not only will they likely be deterred,¹⁴⁰ but they might also be less likely to prevail.¹⁴¹ Since Mexico's statute tenuously applies to Mexico's states and to private employers, and since the statute, likely, does not have any group claim (even though an impact theory might be available to individual plaintiffs), the Constitution's mandate against discrimination is probably not substantially fulfilled.

The greatest risk comes with the argument on constitutionality. Whereas the prior two attacks decrease the relative likelihood that Mexico will fulfill its NAALC obligations, should the law prove unconstitutional, absolutely no advance in satisfying NAALC obligations will have been made from the *status quo ante*. In that scenario, Mexico is as much in violation now as it was prior to the new statute. Since the argument that Congress has overreached its constitutional power by trying to legislate where Article 102(b) expressly provides that another organ is to have exclusive judicial and law-making power, there is a risk that the law is unconstitutional. However, as a practical matter, CONAPRED continues to exist and the law has not been deemed unconstitutional. Thus, any benefits of the new law can be realized in attempting to meet Mexico's NAALC obligations.

Finally, in addition to any moral quandary raised by failing to keep international promises, Mexico also risks unfairly disadvantaging other members of the NAALC. If, for example, older, disabled, or pregnant workers receive benefits and accommodations in the United States, but not in Mexico, then production can be accomplished at less cost in Mexico. All other factors being equal, goods manufactured in Mexico could be sold more cheaply on the market and manufacturers could pocket any price disparity as profit. While corporations manufacturing in Mexico might benefit from any imbalance in employment discrimination laws, manufacturers and laborers with operations solely in the United States and Canada might face unfair competition as a result of Mexico's failure to fulfill its NAALC obligations.

¹⁴⁰ This deterrence includes both the psychological deterrents and the costs of litigation.

¹⁴¹ Decreased likelihood of success stems from, for example, the smaller pool of relevant evidence, the weaker inference of discriminatory intent, and the inability to present *res gestae* evidence.

These conclusions have been made with primary dependence upon the text of the new law and the body of the Constitution. The relative youth of the statute, thus far, has meant little discussion on the merits and potency of Mexico's statute. Even despite these methodological hurdles, the texts and limited commentary do speak for themselves: Mexico's new law has serious ailments as to its range of defendants and available theories of recovery. In light of these conclusions and Mexico's pre-existing treaty obligations, Mexico—via *Ley Federal para Prevenir y Eliminar la Discriminación*—likely falls short once again in fulfilling its obligations under the NAALC.