



**INTER-AMERICAN CONVENTION AGAINST
RACISM AND ALL FORMS OF DISCRIMINATION
AND INTOLERANCE**

POSITION PAPER No.2

***AN EXAMINATION OF 28 GROUNDS OF
PROHIBITED DISCRIMINATION IN THE DRAFT
INTER-AMERICAN CONVENTION AGAINST RACISM
AND ALL FORMS OF DISCRIMINATION AND
INTOLERANCE***

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Preface

The Organization of American States is discussing the adoption of an “Inter-American Convention against Racism and All Forms of Discrimination and Intolerance” (Draft Convention). The University of Texas School of Law Human Rights Clinic, in partnership with the Observatorio de Discriminación Racial (Racial Discrimination Observatory) of the University of Los Andes, Colombia, has prepared the following series of papers to inform the negotiation process of the Draft Convention. The purpose of the papers is to further and strengthen the negotiation process of the Draft Convention and to facilitate the participation of civil society organizations. The papers analyze particular areas of the Draft Convention identified as problematic.

The first paper, drafted by Kimberly Kamienska-Hodge and John Lajzer, explains the benefits of a narrowly focused convention that only addresses racial discrimination, and the detriments of a broad scoped convention that addresses multiple forms of discrimination. The second paper, drafted by Sara Leuschke, examines the 28 grounds currently included in the Draft Convention in the context of the international community’s approach to discrimination. The first and second papers advocate for a Draft Convention focused only on racial discrimination. The third paper, drafted by Juan Zarama and Héctor Herrera, highlights the importance of recognizing collective dimensions of discrimination, particularly with regard to historically marginalized groups, like indigenous peoples and afrodescendants, and exposes the arguments in favor of the inclusion of collective rights in the Draft Convention. The fourth paper, drafted by Annie Depper, surveys the collective claims mechanisms available in international and domestic laws, and advocates the inclusion of a collective claims mechanism in the Draft Convention. The fifth and final paper, drafted by María Laura Rojas and Camila Soto, identifies the need of the inversion of the burden of proof in cases of discrimination, and advocates for a broad regulation of the burden of proof in the Draft convention. The first, second and fourth papers were written under the supervision of Ariel E. Dulitzky. The third and fifth papers were written under the supervision of César Rodríguez Garavito, Nelson Camilo Sánchez León and Isabel Cavalier Adarve.

1. Introduction

Article 1.1 of the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance (Draft Convention) includes 28 different grounds upon which discrimination cannot be based.¹ While this is a larger number of grounds than any single convention addressing discrimination has yet included, the list is simultaneously underinclusive and overinclusive, presents no clear basis upon which some grounds were included while others were not, and creates an overly complicated system of addressing discrimination. Thus, the final Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance (Inter-American Convention) should focus on racial discrimination alone, in order to strengthen its provisions, eliminate internal contradictions, and create a more effective instrument.

2. The Draft Convention in Comparison with other International Instruments

Some of the international documents that include a list of discrimination grounds are: the American Declaration of the Rights and Duties of Man (ADRDM), Article 2; the American Convention on Human Rights (ACHR), Article 1; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, “Convention of Belem Do Para” (IACVW), Article 9; the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Article 2; the International Covenant on Civil and Political Rights (ICCPR), Article 2; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 1; the Convention on the Rights of the Child (CRC), Article 2; the Convention Relating to the Status of Refugees (CRSR), Articles 1, 3 and 33; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), Article 1; the African Charter on Human and Peoples’ Rights (ACHPR), Article 2; the African Charter on the Rights and Welfare of the Child (ACRWC), Article 3; and the European Convention on Human Rights (ECHR), Article 14. A chart comparing prohibited discrimination grounds can be found in Table 1.

Comparing the Draft Convention to other instruments of its type is useful for a number of reasons. Other instruments adopted in the region of the Americas point toward issues

¹ As of Revision 11 prepared February 18, 2009, the proposed 28 grounds are: race, color, heritage, national or ethnic origin, nationality, age, sex, sexual orientation, gender identity and expression, language, religion, political opinions or opinions of any kind, social origin, socioeconomic status, educational level, migrant, refugee, repatriate, stateless, or internally displaced status, stigmatized **infectious-contagious condition or any other mental or physical health-related condition**, genetic trait, disability, debilitating psychological condition, or any other social condition. OEA/Ser.G, CAJP/GT/RDI-57/07 rev. 11.

particular to the Americas, grounds on which discrimination is most prevalent and most universally objected to by the states of the region. The Draft Convention does not include the grounds property, birth or other status, economic position, descent, marital status, pregnancy, or fortune, which are included in other international instruments mentioned above. Arguably, some of the missing grounds, such as property, economic position, and fortune, may be included in the Draft Convention's "Socioeconomic Status." Descent may in some circumstances fall under the Draft Convention's "Ethnic Origin" or "Heritage." Creed, mentioned in the American Declaration of the Rights and Duties of Man, may fall under "Religion" in the Draft Convention. Pregnancy could arguably be encompassed by the Draft Convention's prohibition of discrimination based on sex, since it affects women only, but the U.S. Supreme Court specifically denied this argument in *General Electric v. Gilbert*.² In *General Electric*, the U.S. Supreme Court held that denial of benefits for pregnancy-related disability was not discrimination based on sex.

The Draft Convention introduces heritage, sexual orientation, gender identity and expression, educational level, repatriate status, stateless status, stigmatized infectious-contagious condition or any other mental or physical health-related condition, genetic trait, and debilitating psychological condition. None of these have been included in other conventions.

Furthermore, we agree with Clare Roberts, Special Rapporteur on Afro-Descendant People of the Inter-American Commission on Human Rights when he explained that the Inter-American Convention should go *beyond* the instruments already extant. Starting with ICERD as a minimum, the Inter-American Convention should fill in gaps to provide more comprehensive protection from discrimination.³

As such, the omission of ICERD's "descent" ground counteracts any expansion by the addition of new grounds. The history of Afro-Descendant people in the Americas is unique, remarkable, and directly connected to the racism and racial discrimination experienced in the region. The elimination of racial discrimination with its roots in this descent is one of the primary purposes of this Draft Convention. The Draft Convention's departure from the norm in international human rights instruments is problematic, particularly here, where the omission refers to a ground that is relevant to the history and current status of racial discrimination in this region.

² *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

³ Presentation by Dr. Clare Roberts Special Rapporteur on the Rights of Persons of African Descent and Racial Discrimination of the Inter-American Commission on Human Rights and President of that Commission (Presented at session of the Working Group held on October 20, 2005) OAS Doc. CAJP/GT/RDI-14/05

3. The Draft Convention in Comparison with Member States' Constitutions

Each of the member states has a non-discrimination clause in its constitution. Some of them express a blanket prohibition of discrimination without enumerating grounds.⁴ Most of the member states' constitutions, however, do include a list of specific grounds on which discrimination is prohibited. A chart comparing the grounds included in these constitutions can be found in Table 2.

The inferences drawn from this table support those indicated above with regard to other international instruments. Again, the 28 grounds chosen do not accurately represent member states' constitutional protection of equality. Though this may be a matter of semantics for some grounds, not all disparities can be explained by differences in terminology.

The 28 grounds included in the Draft Convention prove to be a poor representation of the member states' current laws. The Draft Convention omits grounds that one or more member state has included in their constitution: Place of Origin, Economic Origin, Origin, Philosophy, Place of Birth, Cultural Identity, Judicial Past, Physical Difference, Creed, Class, Handicaps, Health, Preferences, Social Condition, Marital Status, Birth, Birth Out of Wedlock, and Religious Origin. At the same time, the Draft Convention includes six grounds that no member state has addressed: Educational Level, Refugee Status, Repatriate Status, Stateless Status, Internally Displaced Status, and Debilitating Psychological Condition.

4. Why These Grounds?

The list of grounds included has no apparent coherent logic behind it. The characteristics upon which each protected group is defined are not universally immutable. To the contrary, they span the spectrum between status-based discrimination and conduct-based discrimination.⁵ Below is an examination of possible unifying factors for the grounds included in the Draft Convention.

⁴ Argentina, Belize, Canada, Chile, Costa Rica, Guatemala, Haiti, Paraguay, the United States, and Uruguay do not list specific grounds, and have been omitted from Table 2 for this reason.

⁵ Aaron Xavier Fellmeth, State Regulation of Sexuality in International Human Rights Law and Theory, 50 WMMLR 797, 876-78 (2008).

4.1 Immutability

Often discrimination is prohibited on the basis of characteristics that are immutable and irrelevant to the interest affected.⁶ For example, the European Court of Human Rights combines two justifications for strict scrutiny protection, one of which is where those involved have been discriminated against based on characteristics that are “‘natural’ or ‘immutable’ in classical terms.”⁷ Race, color, heritage (presumably), national origin, ethnic, origin, age, sex, sexual orientation, genetic trait, disability, and debilitating psychological condition all involve no choice on the part of the person suffering discrimination. Even within those grounds that are immutable, some (race, color, heritage, et al.) are permanent and others (age, some types of disabilities⁸) are not. However, some other grounds, such as nationality, language, religion, political opinions, other opinions, migrant status, refugee status, and internally displaced status all are the effects of certain situations or decisions, rather than immutable characteristics of an individual. Again, in this second group the mutable characteristics are not uniform in whether the protected person or group has the power to change them. There is no consensus as to whether other grounds, such as gender identity, socioeconomic status, educational level, stigmatized infectious-contagious condition, or other social status are immutable or not, and including them is bound to be controversial and inconsistent with any discrimination theory. In addition, and even if some of the grounds are mutable, there are important differences in how central those grounds are to the core identity of the individual or the group. Voluntary changes in some of these grounds would alter the main personality of the person or the group.

4.2 History of Violent Discrimination

Some of the grounds in the Draft Convention describe persons who have experienced a history of violence, which is used as a common characteristic of protected groups.⁹ It is unclear, however, that all groups protected in the Draft Convention share a history of violence. The Declaration and Plan of Action of the Third World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (Durban Declaration), from which the idea of this Convention largely originated, expressly

⁶ Aaron Baker, *Proportional, Not Strict, Scrutiny: Against a U.S. “Suspect Classifications” Model under Article 14 ECHR in the UK*, 15 AMJCL 847, 849 (2008); Heather R. James, *If You Are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employers’ Discretion*, 42 VALULR 629, 633, 660 (2008).

⁷ Oddny Mojl Arnardottir, *Multidimensional equality from within: Themes from the European Convention on Human Rights*, in EUROPEAN NON-DISCRIMINATION LAW 53, 62 (Dagmar Schiek and Victoria Chege, eds. 2008).

⁸ See Article I, 1 of the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities.

⁹ Baker, *supra* note 6, at 868, 877.

indicates that slavery and the slave trade are among the major sources and manifestations of racism and discrimination, and points out that Africans, Asians, indigenous peoples, and their descendants are those mainly affected by its legacy,¹⁰ implicating only six of the 28 grounds (Race, Color, Heritage, National Origin, Ethnic Origin, and Migrant Status). The Durban Declaration further gives credence to the importance of a group's history of violence by mentioning colonialism,¹¹ apartheid, genocide,¹² armed conflict,¹³ and centuries of mistreatment,¹⁴ which have not touched all groups listed in the Draft Convention. Indeed, the Draft Convention itself makes explicit reference in the introduction to violence (indicating only one of the 28 grounds), and hate crimes (indicating only eight of the 28 grounds).¹⁵ These distinctions in the Draft Convention appear to indicate that history of violence is not the unifying explanation of the Draft Convention's chosen prohibited grounds.

In fact, if violence were the factor common to all these grounds, it is important to note that the OAS has already adopted the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, which covers at least two of the grounds included in the Draft Convention (Gender and Sex).

4.3 Traditionally Marginalized Sectors

All of the 28 categories describe sectors of society that have been traditionally marginalized, which is at times a basis for discrimination protection.¹⁶ However, the groups identified and protected by the 28 grounds have not experienced the same kinds of historic marginalization. Neither do those groups face the same type of marginalization today. Their disparate histories merit different protective mechanisms, which is impossible in one Convention. As mentioned earlier, the European Court of Human Rights combines two justifications for strict scrutiny protection, the first being immutability. The second justification is having characteristics related to "group identities which may equally be characterised by reference to a history of social marginalisation and structural disadvantage."¹⁷ The ECHR refers to the most prevalent of these as 'suspect' discrimination grounds: gender, ethnic origin, religion, etc.¹⁸

¹⁰ Durban Declaration, para. 13

¹¹ Durban Declaration, para. 14

¹² Durban Declaration, para. 15

¹³ Durban Declaration, para. 20

¹⁴ Durban Declaration, para. 34, 39

¹⁵ Draft Convention, Rev. 11, *supra* note 1, at Introduction.

¹⁶ Cohn, Marjorie, Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of its International Obligations, 43 VAJIL 249, 271 (2002).

¹⁷ Arnardottir, *supra* note 7, at 62.

¹⁸ *Id.*

However, victims of discrimination based on one ground may also be privileged based on another, and by contrast, “the claims of applicants in situations of social privilege who claim to be victims of discrimination meet very lenient scrutiny, as can be seen in the claims of companies, lawyers, and landlords.”¹⁹ It is the different types of historic and current exclusions that require different approaches in terms of possible standards of scrutiny and redress measures. As written, the Draft Convention does not leave room for such considerations, giving all the grounds one level of protection, irrespective of the different social history of each group.

4.4 Discrete and Insular²⁰

Oftentimes anti-discrimination law is defended on a theory that groups for which the political system alone does not afford enough power need extra protection in order to level the playing ground. This is based on a conception of certain groups as “particularly disadvantaged and socially and politically underrepresented.”²¹ But there is no regional or domestic consensus that the 28 grounds cover discrete and insular groups. For instance, the case law of the United States does not include gender, age, sexual orientation, mental retardation, or disability in this category.²²

5. Complications and Negative Consequences of Including 28 Diverse and Unrelated Grounds

The complications caused by including the 28 grounds now listed in the Draft Convention are manifold, and are likely to render the document too unwieldy to be effective. The obligations States will need to assume in adopting this convention at this point would be littered with exceptions, duplications, qualifications, and contradictions.

As Oddny Mojil Arnardottir explains in his essay on multidimensional equality, there are three variables (elements) to any discrimination claim:

1. A claim of a particular type of discrimination;
2. Based on a particular discrimination ground; and
3. Relating to a particular type of interest.

¹⁹ *Id.*

²⁰ The phrase, “discrete and insular,” originated in the United States Supreme Court case *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and has since been used to describe those who were likely to be victims of prejudice and lacked sufficient power to protect their rights in the political arena. In the United States, discrimination against discrete and insular groups receives strict scrutiny and is rarely justifiable.

²¹ Fellmeth, *supra* note 5, at 874.

²² Baker, *supra* note 6, at 868.

Arnardottir goes on to explain that these “three influencing factors exist in interplay with each other and may function to support or negate the influence of each other.”²³ Herein, the expansion of the Draft to cover more than “all forms of racial discrimination,” as in ICERD, or “racism, racial discrimination, xenophobia and related intolerance,” as in the World Conference Against Racism (WCAR), creates a document that is weakened by its own complexity and inconsistency. In addition, it compromises its potential effectiveness. A lack of coherence and complexity in rules are not conducive to effective implementation.²⁴

The Inter-American Court of Human Rights has articulated a crucial difference the Draft Convention seems to ignore. It explains that differences in treatment in otherwise similar circumstances are not necessarily discriminatory.²⁵ A distinction based on “reasonable and objective criteria” may serve a legitimate interest.²⁶ This is explored below through examples of problematic situations that may arise from this multiplicity of grounds.

5.1 Curtailing Political Organizing, and Public Debate

Section xi of Article 5 of the Draft Convention prohibits “Preparing and introducing teaching materials, methods, or tools that portray stereotypes or preconceptions,” based on the 28 grounds listed in Article 1.1. Section xi in the context of political opinions would effectively impede political organizing or community conversation, where teaching materials involving righteousness are necessarily involved. And with regard to other opinions, prohibiting teaching the ways in which stereotypes or preconceptions express, interact, or manifest makes a full educational process impossible. Exceptions would be needed to allow education to encompass the full spectrum of beliefs and opinions.

5.2 Disallowing Educational Loans and Fellowships Based on Educational Level is Counterproductive

Article 5(xii) of the Draft Convention bans “Denying access to public or private education, to fellowships, or to educational loan programs, based on any of the criteria set forth in Article 1.1 of this Convention.” Prohibiting the denial of access to fellowships and educational loans based on grounds that are not relevant to educational capability and

²³ Arnardottir, *supra* note 7, at 58.

²⁴ LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* (1992), *quoted in* Karin Mickelson, *International Human Rights Law: The Dilemma of Individual Responsibility*, 4 *Crim. L. F.* 557 (1993).

²⁵ Inter-American Court of Human Rights *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 (Sept. 17 2003) ¶¶ 84-91.

²⁶ *Id.*

goals, like race, ethnicity, color, nationality, or sex, is appropriate. However, prohibiting the denial of access to fellowships and educational loans based on one's educational level precludes the provision of appropriate prerequisites for higher education programs. In order to maintain a standard of progressive education that effectively places students with similar knowledge bases together, another exception would have to be established for this combination. Additionally, limiting state-funded fellowships or educational loans to people under a certain age may be a reasonable reflection of the most effective use of state resources vis-à-vis benefits to the state and its taxpayers.²⁷

5.3 Prohibiting Permissible and Necessary Distinctions

The right to participate in government should not be limited based on certain of the 28 grounds, but is regularly and necessarily restricted to persons of a certain age and citizenship status. In fact, Article 23 of the American Convention on Human Rights allows for the limitation of the right to vote on grounds of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings. In contrast, the Draft Convention threatens to restrict political rights based on inappropriate grounds as well.

The right to work also reasonably could be limited, for instance, by one's education level, language, an infectious-contagious condition (in the healthcare field, for example), and debilitating psychological condition, in order to be able to perform the required tasks (which may include a certain knowledge base or communication with certain persons). Similarly, age restrictions within pension plans are a reasonable way of protecting employees' financial security by allowing sustainable business practices.²⁸ Furthermore, it is often justifiable to base employment decisions solely on religion, for example, in religious schools and religious institutions. In *Board of Governors of St. Matthias Church v. Crizzle*, the UK Employment Appeal Tribunal found that discrimination was justified where an applicant for a head teacher position was not a "communicant" in the Church of England or the Catholic Church, because duties of the position involved spiritual leadership.²⁹ Setting insurance rates based on membership in certain age groups that are known to be riskier to insure may also be justifiable, in that there is not yet a more reasonable way to ensure business expediency in the insurance industry.³⁰ In contrast, the use of different employment practices based on color or race is always arbitrary and unreasonable.

²⁷ Baker, *supra* note 6, at 849.

²⁸ *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* [2008] Supreme Court of Canada 45.

²⁹ Baker, *supra* note 6, at 852-53.

³⁰ *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321.

6. Conclusion and Recommendations

As written, the Draft Convention is unlikely to achieve the goals it sets out to accomplish. The Inter-American Convention should include only the grounds (i) that have a coherent logic, such as immutability, and (ii) that protect groups that lack societal power and that have also faced (and still face) a similar history of violent discrimination, social marginalization and exclusion. This will make the document more coherent, more effective, and more likely to be widely ratified. Thus, a convention focusing only on racial discrimination would better achieve the goals of the Inter-American Convention.

TABLE 1:
 GROUNDS PROHIBITED IN THE DRAFT CONVENTION
 AND IN OTHER INTERNATIONAL INSTRUMENTS

TABLE 2:
GROUNDS PROHIBITED IN THE DRAFT CONVENTION
AND IN OAS MEMBER STATES CONSTITUTIONS

	DRAFT	Antigua & Barbuda	Bahamas	Barbados	Bolivia	Brazil	Columbia	Cuba	Dominica	Ecuador	El Salvador	Grenada	Guyana	Honduras	Jamaica	Mexico	Nicaragua	Panama	Peru	St. Kitts & Nevis	St. Lucia	St. Vincent	Suriname	Trinidad & Tobago	Venezuela	
Race	●	●	●	●	●	●	●	●	●		●	●	●	●	●		●	●	●	●	●	●	●	●	●	
Color	●	●	●	●		●		●	●			●	●		●						●	●	●		●	
Heritage	●						●																			
National Origin	●						●	●								●										
Ethnic Origin	●									●						●										
Nationality	●										●						●									
Age	●					●				●						●										
Sex	●	●		●	●	●	●	●	●	●	●	●		●		●	●	●	●	●	●	●	●	●	●	●
Sexual Orientation	●									●																
Gender Identity & Expression	●									●																
Language	●				●		●										●			●				●		
Religion	●				●		●	●			●					●	●	●	●	●					●	
Political Opinion	●	●	●	●	●		●		●	●		●	●		●		●	●		●	●	●	●	●		
Other Opinions	●				●											●	●			●						
Social Origin	●				●																					
Socioeconomic Status	●									●							●			●				●		
Education Level	●																									
Migrant	●									●																
Refugee	●																									
Repatriate	●																									
Stateless	●																									
Internally Displaced	●																									
Stigmatized Infectious-Contagious Condition	●									●																
Any other Mental or Physical Health-Related Condition	●									●																
Genetic Trait	●																									
Disability	●									●									●							
Debilitating Psych. Cond.	●																									
Place of Origin		●	●	●					●			●	●		●						●	●	●			
Economic Origin					●																					
Origin					●	●											●			●					●	
Philosophy							●																			
Place of Birth										●																
Cultural Identity										●																
Judicial Past										●																
Physical Difference										●																
Creed		●	●	●					●			●	●		●						●	●	●			●
Class														●				●								
Handicaps																●										
Health																●										
Preferences																●										
Social Condition																●	●									●
Marital Status																●										
Birth																	●	●								
Birth out of Wedlock																				●						
Religious Origin																							●			