

Gillian MacNaughton, JD, MPA, MST, is a DPhil candidate in the Faculty of Law at the University of Oxford, UK, and a tutor in international human rights law at several colleges and programs affiliated with the University.

Please address correspondence to Gillian MacNaughton, St Antony's College, 62 Woodstock Road, Oxford, OX2 6JF, UK, email: gillian.macnaughton@law.ox.ac.uk.

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UNTANGLING EQUALITY AND NON-DISCRIMINATION TO PROMOTE THE RIGHT TO HEALTH CARE FOR ALL

Gillian MacNaughton

ABSTRACT

Equality and non-discrimination are core principles in international human rights law, and all members of the United Nations have legal obligations to promote these principles. Although widely adopted into law, interpretations of the rights to equality and non-discrimination, as well as their relationship to each other, vary considerably across jurisdictions. At the international level, there are separate provisions on equality and non-discrimination in the human rights treaties, yet legal scholars tend to treat the two concepts as one. This article examines the equality and non-discrimination provisions in the International Bill of Human Rights to consider their potential for addressing economic and social inequalities. The article proposes a legal framework that recognizes positive equality as distinct from status-based non-discrimination. Finally, it argues that both of these distinct rights have important roles in contributing to realizing social rights, in particular, a right to health care.

INTRODUCTION

Equality and non-discrimination are the most widely recognized human rights in international law. In fact, all countries that are members of the United Nations have undertaken legal obligations to promote and protect the rights to equality and non-discrimination.¹ Yet, the understanding of these rights, as well as their relationship to each other, varies considerably across jurisdictions. At the international level, the picture is particularly puzzling. Despite separate provisions on equality and non-discrimination in human rights treaties, legal scholars and UN treaty bodies alike have generally conflated the two concepts, thereby greatly reducing their potential for addressing social inequalities.² This article examines the concepts of equality and non-discrimination, focusing on the International Bill of Human Rights.³ It addresses three questions. First, what do these two terms mean? Second, what is their relationship to each other? And third, how can each be employed to realize social rights, in particular, the right to health care?

Over the past three decades, legal scholars have often affirmed that equality and non-discrimination are equivalent concepts in international human rights law.⁴ They further describe these concepts as “two sides of the same coin,” or as negative and positive forms of the same principle.⁵ Positive and negative concepts of the principle of equality, however, are not equivalent. Matthew Craven distinguishes between the two concepts: “In positive terms, the principle would require that everyone be treated in the same manner unless some alternative justification is provided. In negative terms, the principle might be restated to allow differences in treatment unless they are based upon a number of expressly prohibited grounds.”⁶

Thus, positive and negative forms of equality are very different. When positive equality is the norm, any inequality must be justified. When negative equality is the norm, most inequalities are accepted; only inequalities based upon one of the prohibited grounds, for example, race, sex, language or religion, must be justified.⁷

Importantly, in international law, the equality principle is usually stated in the negative form, which is commonly known as “non-discrimination.”⁸ By equating the two forms of equality in international human rights law and calling them “non-discrimination,” the positive right to equality has disappeared. This article considers the drafting history of the equality and non-discrimination provisions in the overall framework of the International Bill of Human Rights and proposes that positive equality and non-discrimination (or negative equality) should be understood as two distinct concepts, each with an important role in realizing social rights.

Legal scholars have described various relationships between equality rights and social rights. Many have limited their discussion, however, to non-discrimination, relying on judicial decisions in which status-based groups are denied social rights.⁹ Moreover, in these discussions, rarely, if ever, do courts or scholars acknowledge that poverty and economic status are prohibited grounds of discrimination under international human rights law.¹⁰ Outside the United States, where social rights are more widely recognized, positive equality is almost entirely unknown.¹¹ This article considers the potential of both negative equality (status-based non-discrimination) and positive equality (without regard to group status) to contribute to realizing social rights. It illustrates this potential by examining cases of inequality and discrimination in education systems and then drawing analogies to inequality and discrimination in health care systems. It thereby aims to contribute toward recognizing a right to universal provision of health care, like the right to universal provision of schooling, on an equal basis for all.

EQUALITY AND NON-DISCRIMINATION

Equality for whom?

The principle of equality is central to human rights, and yet its meaning continues to be widely debated. To explain the multiple meanings of equality, theorists often begin with the simplest form of one-to-

one equality.¹² This type of equality is best illustrated in law by the example of one-person, one-vote.¹³ The UN Human Rights Committee explains that this principle requires that each elector have one vote and that the vote of each elector be equal to the vote of each other elector.¹⁴ In his book *Equalities*, Douglas Rae explains that this same form of simple one-to-one equality applies generally to civil and political rights, such as the rights to freedom of opinion and expression, the right against arbitrary arrest, and the right to a fair trial.¹⁵ It also applies in the laws requiring free and compulsory school for all children.¹⁶ Finally, general rules, such as no-parking signs and speed limits, also apply equally to everyone.¹⁷

Beyond the one-to-one conception, the meaning of equality is not so simple.¹⁸ Rae identifies another form of equality that is frequently addressed in law as “bloc equality.”¹⁹ Bloc equality requires equality between blocs but not within blocs. For example, bloc equality might require that the incomes of women on average be equal to the incomes of men on average.²⁰ Similarly, bloc equality might require equality in the rate of men and women entering medical school. The important point is that the achievement of bloc equality does not imply the achievement of simple one-to-one equality.²¹ For example, the average income of women and men might be equal, yet there might be gross inequality in incomes within the blocs among men and among women.²²

These two types of equality — simple individual equality and bloc equality — respond to the question, “equality for whom?” The answer to “who will be equal to whom?” is what Rae refers to as the “subject of equality.”²³ Importantly, when there is simple individual equality, there must also be bloc equality. On the other hand, bloc equality does not require simple individual equality; rather, bloc equality is completely consistent with gross inequalities within a bloc as long as, on average, the two blocs are equal. Specific blocs are enumerated in the International Bill of Human Rights, which prohibits unjustified distinctions on the basis of certain statuses, with the goal of creating equality between some types of blocs.²⁴

Equality of what?

Separate from the question of “equality for whom?” is the question, “equality of what?” Rae refers to the class of things to be allocated equally as the “domain of equality.”²⁵ He points out that this is often the point

of disagreement among ideologies. Rae describes market liberals as *narrowly* egalitarian, meaning that they support equal distribution of minimal property rights and certain civil and political rights.²⁶ “[T]hey oppose the *broadening* of equality beyond the narrow limits of this domain.”²⁷ Left-leaning ideologies “seek to broaden the domain to which equality is to be applied.”²⁸ Thus, Rae contends that the conflict often construed between “equality” and “liberty” is really between “equality in the narrow” and “equality in the broad.”²⁹

Much of the dispute about the breadth of the domain of equality is already resolved by the International Bill of Human Rights, which mandates the scope of the equality and non-discrimination protections it contains. In other words, a compromise was reached, at least to some extent, in the International Bill of Human Rights over what must be distributed equally and what must be distributed without discrimination. Although there is some leeway in interpretation, states accept this compromise when they become parties to the international human rights treaties. The task ahead is, therefore, to clarify the precise meanings of the non-discrimination and equality provisions in the International Bill of Human Rights, rather than to debate whether the Bill encompasses “equality in the narrow” or “equality in the broad.”

Over the past 60 years, international human rights law has focused primarily on bloc equality, more often known as non-discrimination.³⁰ There has been substantially less scholarly work devoted to considering how individual one-to-one equality applies with respect to social rights or other economic and social fields regulated by the government. Legal scholars concerned with social rights have thus focused primarily on demonstrating that people denied their social rights, most often poor people, are disproportionately defined by race, sex, language, religion, or other legally recognized status.³¹ Equality and non-discrimination provisions in the International Bill of Human Rights might be more helpfully employed, however, by recognizing “poverty” itself as a status and one-to-one equality as a complement to social rights.³² There is support for both these approaches in the International Bill of Human Rights.

INTERNATIONAL BILL OF HUMAN RIGHTS

Together, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil

and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) form the International Bill of Human Rights, which contains multiple provisions on both equality and non-discrimination.³³ While the principles of equality and non-discrimination are expressed throughout the UDHR, there are two key provisions.³⁴ The first is Article 2, which entitles everyone to all the rights in the UDHR “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁵ This provision prohibits status-based discrimination, which correlates to Rae’s notion of bloc equality.

Importantly, the non-discrimination provision lists “property” as one of the prohibited grounds of distinction. The drafting history to the UDHR indicates that the word “property” was proposed in the Sub-Commission by the expert from the Soviet Union as part of a larger amendment extending the grounds — race, sex, language, or religion — from the UN Charter.³⁶ Later in the Commission, the United Kingdom proposed deleting the word “property,” but the Soviet Union objected, stating that “it was most important that rich and poor should have the same rights.”³⁷ The drafters then made further amendments to the list but left the term “property” without further discussion.³⁸ That “property” in the non-discrimination provision refers to economic status — in other words, wealth or poverty status — is well recognized by commentators.³⁹ Indeed, the official Spanish version of the UDHR employs “posición económica” for “property,” rather than “propiedad” or “patrimonio,” in the Article 2 list of prohibited grounds of distinction.⁴⁰

Accordingly, the non-discrimination provision in the UDHR prohibits wealth-based distinctions. Additionally, this provision applies to all of the rights enumerated in the UDHR, which means that it prohibits wealth-based distribution of education, health care, and social security, just as it prohibits wealth-based access to voting in public elections or to justice in the courts. Nonetheless, public financing systems frequently do precisely that — discriminate against poor people in the delivery of social rights.⁴¹ According to Johannes Morsink, the drafters of the UDHR understood that the non-discrimination provision, as it attaches to all the rights in the UDHR, calls for far-reaching egalitarianism.⁴² Article 2 in both the ICCPR and the ICESCR con-

tains a similar non-discrimination provision, requiring state parties to respect and ensure the rights in the Covenants without distinction on the basis of these same enumerated grounds, including “property” or economic status.⁴³

The second key provision in the UDHR is Article 7, which entitles everyone to “equality before the law” as well as “equal protection of the law.”⁴⁴ While these clauses could be interpreted to require positive equality, their precise meanings were never clarified by the drafters and continue to be debated today.⁴⁵ Despite continuing controversy, it is clear that most of the drafters understood that there was a difference among the concepts of non-discrimination, equality before the law, and equal protection of the law.

There is no equality provision in the ICESCR similar to Article 7 of the UDHR. However, the ICCPR, like the UDHR, contains a second key provision on equality and non-discrimination. Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁶

The drafting history of Article 26 of the ICCPR, like that of Article 7 of the UDHR, reveals much debate on the meaning of the terms, “non-discrimination,” “equality before the law,” and “equal protection of the law.”⁴⁷ In the end, there was no consensus on any precise interpretation of these various provisions.⁴⁸ Manfred Nowak maintains that “equality before the law” here means simply that the law must be applied in the same manner to all.⁴⁹ In other words, this provision contains no guarantee of substantive equality but is rather aimed exclusively at enforcement.⁵⁰ According to Nowak, “equal protection of the law,” on the other hand, is directed at the national legislature and imposes both negative and positive obligations.⁵¹ Such an interpretation, he notes, is consistent with the his-

torical roots of the two phrases, “equality before the law,” which derives from the French Revolution, and “equal protection of the law,” from the Fourteenth Amendment to the US Constitution.⁵²

Although the terms “discrimination” and “equality” are not defined in the ICCPR, several points can be drawn from the express language of Articles 2 and 26 in conjunction with the controversial drafting history. First, Articles 2 and 26 of the ICCPR were intended to protect distinct rights.⁵³ Second, the express language of the non-discrimination provision in Article 2 obligates state parties to provide legal protection against status-based discrimination with respect to the rights in the ICCPR.⁵⁴ By comparison, the equality clauses in Article 26 are not limited to the rights in the ICCPR but extend beyond, to any field in which the government acts.⁵⁵ Otherwise, “it is difficult to identify a consensus among the [drafting] Committee on the meaning of the text that was finally agreed.”⁵⁶

The lack of clarity on the meaning of the equality provisions leaves considerable scope for the Human Rights Committee, which is responsible for monitoring compliance with the ICCPR, as well as other human rights scholars and practitioners, to interpret the rights to equality and non-discrimination.⁵⁷ In 1989, the Human Rights Committee issued General Comment No. 18, in which the Committee details its interpretation of Articles 2 and 26 as well as other references to equality and non-discrimination in the ICCPR.⁵⁸ As the term “discrimination” is not defined in the ICCPR, the Committee drew on the definitions provided in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and defined discrimination in the ICCPR to be

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁵⁹

Although recognizing that the principles of equality before the law and equal protection of the law are also guaranteed by Article 26, the Committee did not define these rights or explain how they might be distinguished from the principle of non-discrimination.⁶⁰ The Committee did confirm that the scopes of Articles 2 and 26 are distinguishable:

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or fact in any field regulated and protected by the public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.⁶¹

Thus, Article 26 is not limited to ensuring equality of the rights in the ICCPR but extends the equality guarantees to the rights in the ICESCR.⁶² Even states that are not party to the ICESCR must adhere to the Article 26 equality guarantees when they regulate the social sectors.

Despite the myriad of equality and non-discrimination provisions in the ICCPR, the Human Rights Committee has largely limited its discussion to one type of equality, bloc equality. The Committee addresses bloc equality under the non-discrimination provisions in the ICCPR.⁶³ In its concluding observations on the United States, for example, the Committee notes its concern “with reports that some 50% of homeless people are African American although they constitute only 12% of the United States population.”⁶⁴ It therefore recommends that the State party “take measures, including adequate and adequately implemented policies, to bring an end to such de facto and historically generated racial discrimination.”⁶⁵

The Human Rights Committee comments frequently on bloc equality. For example, in its Concluding Observations on Brazil, the Committee “is concerned about the lack of information on the Roma community and allegations that this community suffers discrimination, in particular with regard to equal access to health services, social assistance, education and employment.”⁶⁶ Similarly, in the Concluding Observations on Canada, the Committee “is con-

cerned by information that severe cuts in welfare programs have had a detrimental effect on women and children, for example, in British Columbia, as well as on Aboriginal people and Afro-Canadians.”⁶⁷ As to New Zealand, the Committee regrets that “Maori still experience disadvantages in access to health care, education and employment.”⁶⁸ As to Japan, the “Committee is concerned about discrimination against lesbian, gay, bisexual and transgender persons in employment, housing, social security, health care, education and other areas regulated by law.”⁶⁹ These are all concerns about bloc inequality.

In addition to the UDHR and the two Covenants, ICERD and CEDAW also address bloc inequality. ICERD addresses distinctions “based on race, color, descent or national or ethnic origin.”⁷⁰ CEDAW addresses distinctions on the basis of sex that impair the enjoyment of rights by women.⁷¹ The CEDAW Committee explains that CEDAW goes beyond “discrimination,” with a view to achieving de jure and de facto equality between women and men.⁷² The Committee interprets de facto equality as “substantive equality,” with the logical corollary of “equality of results” between women and men.⁷³ These non-discrimination treaties address various forms of inequality between groups, including direct and indirect discrimination, intentional and disparate impact discrimination, and de facto and de jure discrimination. They are, by definition, focused on bloc inequalities.

The Committee on Economic, Social and Cultural Rights has adopted the same understanding of non-discrimination and equality as the Human Rights Committee and the CEDAW and ICERD Committees, namely that both principles refer to bloc equality.⁷⁴ The ICCPR, however, also has a free-standing equalities provision in Article 26, which is not linked to particular groups or particular rights. This is, therefore, a likely foundation for a positive right to equality, meaning one-to-one equality. Other human rights treaty bodies could, nonetheless, recognize one-to-one equality as implied in the substantive rights, just as the right to vote implies a right to one vote of equal weight to other votes. The diversity of equality and non-discrimination provisions in international human rights law and their drafting history highlights the possibility that these multiple provisions might well guarantee more than bloc equality. Indeed, Justice La Forest of the Supreme Court

of Canada had the same concern with that Court's interpretation of the non-discrimination and equality provisions of the Canadian Charter. Section 15(1) of the Canadian Charter, like the International Bill of Human Rights, includes several distinct equality provisions. Section 15(1) states: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."⁷⁵

In *Andrews v. Law Society of British Columbia*, the Canadian Supreme Court construed Section 15(1) to cover only bloc equality, despite multiple distinct equality provisions.⁷⁶ The *Andrews* Court decided that, to bring a claim under Section 15(1), a plaintiff must show: 1) differential treatment, 2) an enumerated ground, and 3) discrimination in a substantive sense involving factors such as prejudice, stereotyping, and disadvantage.⁷⁷ In so doing, the Court seems to nullify the four equality clauses, reducing them all to the one meaning of the non-discrimination clause.

Justice La Forest wrote a separate decision in *Andrews*, in which he disagreed with the limited construction of Section 15(1). Although he agreed that it was possible to read Section 15 as the Court did, he nonetheless maintained "that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them."⁷⁸ In other words, Justice La Forest was reluctant to conflate all the equality clauses into the non-discrimination clause as the Canadian Court did.⁷⁹ Current interpretations of the equality and non-discrimination provisions in the International Bill of Human Rights raise the same concerns.

Significantly, status-based non-discrimination claims impose substantial hurdles for claimants. Proving that a specific differentiation correlates to an enumerated or similar status, and then showing that this differentiation also involves stereotype, prejudice, or disadvantage, are not trivial burdens.⁸⁰ In contrast, if one vote is not equal in weight to another vote, there is no need to also prove that the differentiation is based on a particular status or historical disadvantage. One-to-one equality of votes is required regardless of one's status. And so it might be with economic and social rights as well.

In sum, the principles of equality and non-discrimination are reiterated throughout the International Bill of Human Rights. Specific provisions recognize the rights to non-discrimination, equality before the law, and equal protection of the law, as well as equality and non-discrimination with respect to certain rights, such as equality before the courts and in marriage. Despite the enumeration of several distinct provisions, legal scholars and human rights treaty bodies alike generally conflate them all to mean bloc equality — in other words, status-based non-discrimination. Nonetheless, other forms of equality, such as one-to-one equality, which are more usually recognized in conjunction with civil and political rights, such as the right to vote, might prove helpful to those concerned with realizing social rights. Additionally, the prohibition against discrimination on the basis of economic status, in conjunction with social rights, might also help in securing a more equal distribution of financing for social rights, including the right to health care.

HEALTH CARE SYSTEMS

Inequalities in health care systems implicate the right to health, which is enshrined in the majority of national constitutions, the Constitution of the World Health Organization, and many international human rights treaties.⁸¹ The Universal Declaration of Human Rights includes the right to health as a component of the right to an adequate standard of living.⁸² The ICESCR also contains the right to health and requires the countries that are parties to the Covenant to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁸³ Additionally, the Covenant calls for countries to take steps, for example, to reduce infant mortality, to improve environmental conditions, to ensure workplace safety, to prevent and treat epidemics, and to secure health care services for all.⁸⁴

In 2000, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 14, which explains in more detail the content of the right to health.⁸⁵ The Comment states that "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."⁸⁶ Further, it clarifies that the right to health includes both timely and

appropriate health care and the underlying determinants of health, such as potable water, adequate sanitation, nutritious food, secure housing, healthy working and environmental conditions, and access to health-related education and information.⁸⁷

Importantly, parties to the Covenant must ensure equal access for all to health care and the underlying determinants of health.⁸⁸ Accordingly, payment for health care services must be based on the principle of equity, meaning that “poorer households should not be disproportionately burdened with health expenses as compared to richer households.”⁸⁹ Additionally, health resource allocations should not favor expensive curative health care, often accessible to only a privileged few, at the expense of primary and preventative health care, benefiting the larger population.⁹⁰ The Covenant acknowledges that governments have constraints due to limited resources and thus allows for progressive realization of the right to health; however, it imposes an immediate obligation upon governments to guarantee the exercise of the right to health without discrimination of any kind.⁹¹ Further, governments have the immediate obligation “to ensure equitable distribution of all health facilities, goods and services.”⁹²

Like the Human Rights Committee, the Committee on Economic, Social and Cultural Rights is troubled by bloc inequalities, and it is particularly disturbed by inequalities that adversely impact poor people. For example, in its 2004 Concluding Observations on Colombia, the Committee indicated concern about the reduction in subsidies for health care, which made access to health care in rural areas more difficult and adversely impacted women and indigenous groups.⁹³ The Committee urged the government “to allocate a higher percentage of its GDP to the health and education sector and to ensure that its system of subsidies does not discriminate against the most disadvantaged and marginalized groups.”⁹⁴ Similarly, in 2004, the Committee urged the government of Ecuador to allocate a higher percentage of its GDP to the health sector and to address discrimination against indigenous peoples and Afro-Ecuadorians in health, among other fields.⁹⁵ In its 2006 Concluding Observations on Canada, the Committee noted “with particular concern that poverty rates remain very high among disadvantaged and marginalized individuals and groups such as Aboriginal peoples,

African Canadians, immigrants, persons with disabilities, youth, low-income women and single mothers,” and it urged the government to reconsider the reduction of federal transfers for social assistance and social services to the provinces.⁹⁶

More recently, in 2009, the Committee indicated concern because health inequalities had widened in the United Kingdom among various social classes, “especially with regard to health care goods, facilities and services.”⁹⁷ The Committee recommended that the government “intensify efforts to overcome the health inequalities and unequal access to health care” and urged the government to “reduce health inequalities by 10% by 2010, measured by infant mortality and life expectancy at birth.”⁹⁸ As to Brazil, in 2009, the Committee noted with concern “a significant discrepancy between the respective life expectancies of the black and white populations” and recommended that the government take a sharper focus on health and poverty eradication programs to address this discrepancy.⁹⁹ In 2009, the Committee also noted with concern the gap in key health indicators between indigenous and non-indigenous people in Australia, in particular, among women and children, and called on the government to take immediate steps to improve their health situation.¹⁰⁰

In General Comment No. 20 on non-discrimination, the Committee highlights several areas of concern with health care systems. For example, the Committee states, “In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.”¹⁰¹ Denial of access to health insurance on the basis of health status may also amount to discrimination.¹⁰² Further, the exercise of rights should not be qualified by a person’s place of residence. Thus, governments must ensure “even distribution in the availability and quality of primary, secondary and palliative health care facilities” in all localities and regions, including urban and rural areas.¹⁰³ Overall, the Committee’s approach to non-discrimination and equality seeks to eliminate bloc inequalities, both formal and substantive.¹⁰⁴ It understands “other status” to be flexible and commonly recognizes new blocs for social groups that are vulnerable and suffer marginalization.¹⁰⁵ Beyond the Committee’s work, Paul Hunt, UN Special Rapporteur on the right to health from 2002 to 2008, also elaborated on the content of the right to health

and, in particular, on a right-to-health approach to health systems. In his 2008 Annual Report to the Human Rights Council, he stated:

At the heart of the right to the highest attainable standard of health lies an effective and integrated health system encompassing health care and the underlying determinants of health, which is responsive to national and local priorities, and accessible to all. Without such a health system, the right to the highest attainable standard of health can never be realized.¹⁰⁶

Hunt also expressed his views on equality and non-discrimination as core features of a health system.¹⁰⁷ In the same report, he stated that governments have “a legal obligation to ensure that a health system is accessible to all without discrimination,” and “that disadvantaged individuals and communities enjoy, in practice, the same access as those who are more advantaged.”¹⁰⁸

Accordingly, both the Committee on Economic, Social and Cultural Rights and the Special Rapporteur on the right to health consider equality and non-discrimination to be important features of a human rights-respecting health system. Additionally, they are both acutely concerned with ensuring that adequate resources are allocated to health systems so that poor people have access to equal health facilities, goods, and services. These concerns might be addressed by promoting the ideas that economic status is a prohibited ground of discrimination and that positive equality requires health systems to offer the same health facilities, goods, and services to all. Both ideas may help to equalize health care systems.

EQUALIZING HEALTH CARE

Equality and non-discrimination provisions in the International Bill of Human Rights apply to domestic health care systems primarily via two avenues. For the 160 countries that are parties to the ICESCR, Article 2 requires them to ensure non-discrimination with respect to the rights in that Covenant, including the right to health care.¹⁰⁹ Additionally, for the 164 countries that are parties to the ICCPR, Article 26 recognizes that the rights to non-discrimination, equality before the law, and equal protection of the law apply to government regulation in any field,

including health care.¹¹⁰ Thus, even those states that do not formally recognize the right to health or to health care must abide by the rights to non-discrimination and equality when they act in this field.

As Special Rapporteur, Paul Hunt often compared the health system to other core social institutions, such as the court system or the political system.¹¹¹ As he explains, the “right to a fair trial underpins a good court system,” and “the right to vote underpins a democratic political system.”¹¹² In the same way, he maintains, the right to health underpins an effective health system accessible to all.¹¹³ The analogy between court systems, political systems, and health care systems can also be extended to education systems, as the right to education similarly is essential for an equal and effective school system.¹¹⁴ This analogy is helpful here as there are several decades of equality and non-discrimination cases involving school systems to draw upon in considering how these principles might apply to health systems. In this manner, the brief illustrations below demonstrate that some inequalities in national health care provision might well be in violation of the rights to non-discrimination and equality, particularly the prohibition against discrimination on the grounds of economic status and the notion of positive equality.

BLOC EQUALITY

The idea of bloc equality is well illustrated in the 1954 case, *Brown v. Board of Education*, in which the US Supreme Court held that a state law segregating children in the public schools on the basis of race, even if the physical facilities and other tangible factors were equal, deprives minority children of equal education opportunities in violation of the Equal Protection Clause of the US Constitution.¹¹⁵ Today, such a two-tiered system of schools that discriminates on the basis of race also would also violate the non-discrimination provisions in the ICESCR and the ICCPR, which came into effect in 1976.

Tiered health care systems also exist in many countries.¹¹⁶ In apartheid South Africa, for example, the two-tiered health care system was race-based in a similar fashion to the two-tiered school system in the US case.¹¹⁷ Health care systems are, however, more often tiered on the basis of economic status. Indeed, the World Bank has supported “segmenting out” middle- and high-income groups into private health insurance schemes, leaving the public sector

health services to focus on poor people.¹¹⁸ Such a segmented health care system results in separate health care systems for rich and poor people.¹¹⁹ Not surprisingly, segmentation is likely to result in unequal health services, reflecting and reinforcing socioeconomic inequalities.¹²⁰

The report *Dignity counts: A guide to using budget analysis to advance human rights* explains that health care in Mexico, for example, is delivered via two separate systems.¹²¹ The social security system provides services to individuals who are formally employed and to their families. This system covers about half of the population of Mexico. The Ministry of Health provides services for the remaining population, including individuals who are informally employed, occasionally employed, and unemployed, as well as their families.¹²² The report asserts that in 2002, about 65% of health spending was allocated to the formally employed population and only 35% to the informally employed and unemployed, although each group contained about 50% of the population.¹²³ Although the informally employed and unemployed population was likely to have more health care needs as a result of their precarious employment, their health care system received significantly less per capita funding. This is an example of bloc inequality.

Dignity counts condemns the disparity in funding as a violation of human rights because it fails to prioritize the most vulnerable population.¹²⁴ It does not, however, question the two-system approach to health care established by the Mexican government.¹²⁵ Nonetheless, the division of health care into two systems on the basis of employment status and as a result of the fees paid through employment appears to be discrimination on the basis of economic status. While the intent may be entirely different than the intent in *Brown v. Board of Education* or apartheid South Africa, under international human rights law, prejudicial intent is not necessary to show status-based discrimination.¹²⁶ Rather, any distinction that has the “purpose or effect” of impairing the enjoyment of rights by a protected group amounts to discrimination. Thus, under Article 2 of the ICESCR, it should be difficult to justify the delivery of health services through separate facilities for a status-based group as this is not a positive measure to provide additional benefits to the disadvantaged group.¹²⁷

The Constitutional Court of Colombia examined a similar two-tiered system of health care in a recent case.¹²⁸ In Colombia, the health care system was divided

along similar lines as the health care system in Mexico, a “contributory” system for formally employed people and their families and another “subsidized” system for other people, which included substantially fewer benefits than the contributory system. In July 2008, the Court issued a decision ordering the government to unify the benefits in the two systems, first for children, and then progressively for adults.¹²⁹ It indicated that it had been fifteen years since the legislature had passed a law requiring such unification, and thus it was unconstitutional not to have begun to address the inequality.¹³⁰ In reaching this decision, the Court relied upon ICESCR Article 12 on the right to health as well as the Committee’s General Comment No. 14, recognizing the right to a health system that provides equal opportunity for people to enjoy the highest attainable standard of health.

It is not difficult to reach the conclusion that public health care delivered in two tiers, as exemplified in Mexico and Colombia, without a concrete plan for progressive unification, does not comply with ICESCR Article 2 on non-discrimination in conjunction with Article 12 on the right to health. It may be less clear whether other types of two-tiered systems, such as those in Germany and Chile, which allow the wealthier population to opt out of the public system, also violate the right to non-discrimination on the basis of economic status.¹³¹ This issue, as well as others concerning multi-tiered health care systems, needs more attention from human rights scholars and practitioners, especially the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

INDIVIDUAL ONE-TO-ONE EQUALITY

There is no single case that exemplifies the right to one-to-one equality in the way that *Brown v. Board of Education* exemplifies the right to bloc equality.¹³² Several less well-known cases brought under state constitutions in the US, however, have required one-to-one equality in school financing. In *Brigham v. State of Vermont*, for example, the Vermont Supreme Court ruled that the state system for funding public education, which was largely based on local property taxes and resulted in wide disparities in funding per pupil across school districts, violated the Common Benefits Clause of the Vermont Constitution.¹³³ In that case, the 1995 per-pupil spending varied from US\$2,979 to US\$7,726, depending on the school district. Further, the richer school districts taxed them-

selves at a lower rate than the poorer districts and still achieved revenues allowing more than twice the funding per student. This school financing system failed to protect individual one-to-one equality of the students in violation of the right to equality under the Vermont Constitution. Several state supreme courts in the US have reached similar conclusions.¹³⁴

The Constitutional Court of South Africa, in *Mashaba v. President of the Republic of South Africa*, reached a similar conclusion concerning unequal disbursement of disability benefits across the provinces.¹³⁵ In that case, the Court held invalid a presidential proclamation made under the Interim Constitution that assigned administration of social services to provincial governments. The Court recognized that, historically, gross inequalities had been legally imposed on the basis of race and also on the basis of geographical area, and that therefore, “the need for equality could not be ignored” in interpreting the Interim Constitution.¹³⁶ Accordingly, the Court stated that it would offend human dignity and the fundamental right of equality to allow higher old age pensions or child benefits in one province than was allowed in another. Such a system would “create different classes of citizenship and divide South Africa into favoured and disfavoured areas.”¹³⁷ In so doing, the Court recognized a right to individual one-to-one equality with respect to social benefits.

The Human Rights Committee and the Committee on Economic, Social and Cultural Rights both view such sharp disparities in spending on health care or education across geographic locations as discrimination.¹³⁸ Yet, neither committee has explicitly called for one-to-one equality in spending. In general, the notion of such individual one-to-one equality is rarely recognized outside the US.¹³⁹ At the federal level in the US, where social rights are generally not recognized, one-to-one equality is primarily applicable to civil and political rights, like the right to vote.¹⁴⁰ There has been some success, as demonstrated by the school funding cases, under state constitutions, all of which recognize at least some social rights.¹⁴¹ Although several state constitutions contain some form of a right to health, they have received little interpretation by the courts.¹⁴² The best possibilities for developing a positive right to equality in health care may be under these state constitutions or others that include welfare provisions.¹⁴³ Even where there is no substantive provision on health or welfare, how-

ever, the positive right to equality is still applicable in any area in which the government regulates.

Outside the US, individual one-to-one equality also has considerable potential to equalize health care spending, which, in many countries, is highly skewed toward the wealthier population.¹⁴⁴ The *Brigham* case suggests that a national health care system funded by locally raised revenues is likely to violate a positive right to equality because communities have very different abilities to raise revenues. Even where revenues are centralized, *Mashaba* suggests that decentralized health care resource allocations may raise concerns about one-to-one equality. Indeed, inequality in the availability of medicines across health districts, for example, implicates this positive right to equality.¹⁴⁵

Similarly, many individual claims for publicly funded health benefits implicate the positive right to equality, when a decision results in the claimant receiving a benefit that others do not receive. Such violations of one-to-one equality may also amount to violations of bloc equality when such individual claims are widespread. In Brazil, for example, poorer individuals may not have equal access to the medicines that wealthier individuals obtain from the public health care system, given that the latter have better access to courts and are able to bring right-to-health claims, which are routinely granted.¹⁴⁶ As Siri Gloppen notes, individual claims for the right to health may skew health spending in favor of more privileged sectors of society, reducing the overall equity of the system.¹⁴⁷ Courts should balance this collective right to equality in health care against individual claims for health benefits.¹⁴⁸ The positive right to one-to-one equality provides this balance by requiring that benefits available to one be available to all.

Accordingly, both equality rights and social rights, particularly for poorer people, could be advanced at the international level by the human rights treaty bodies, as well as at the national level by courts, adopting the notion of one-to-one equality, especially in the vast majority of countries that recognize social rights.¹⁴⁹

CONCLUSION

Equality and non-discrimination are the most widely recognized human rights in law, and they have great potential to complement social rights. Often the rights to equality and non-discrimination are conflated, however, into the single notion of bloc equality. As

a result, human rights scholars and practitioners may overlook other forms of equality, such as individual one-to-one equality. This article clarifies the difference between one-to-one, or positive equality, and non-discrimination, or negative equality. After doing so, it presents two avenues to pursue equality claims for social rights, which may be helpful to human rights scholars and practitioners seeking to equalize health care systems. First, non-discrimination provisions in the International Bill of Human Rights prohibit discrimination on the basis of “property” or “economic status,” which is a frequent ground for denying poor people equal access to health care. Second, one-to-one equality, already recognized for civil and political rights, ought to be extended to social rights, including the right to health care. Both avenues are well grounded in the text, the history, and the overall framework of the International Bill of Human Rights, and both avenues lead toward universal provision of health care on an equal basis for all.

REFERENCES

1. One of the purposes of the United Nations is to promote respect for human rights without distinction as to race, sex, language, or religion. UN Charter (1945), Article 1(3). Available at <http://www.un.org/en/documents/charter/>. See also, UN Charter, Articles 55 and 56 (members pledge to take action to promote human rights for all without distinction).
2. See, for example, UN Human Rights Committee (HRC), General Comment No.18, Non-discrimination (1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. No. HRI/GEN/1/Rev.6 (2003), p. 146.
3. The International Bill of Human Rights is composed of the Universal Declaration of Human Rights (UDHR), G.A. Res 217A (III) (1948) (available at <http://www.un.org/en/documents/udhr/index.shtml>), the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966), (available at <http://www2.ohchr.org/english/law/ccpr.htm>), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI) (1966) (available at <http://www2.ohchr.org/english/law/cescr.htm>).
4. A. Lester (Lord Lester of Herne Hill) and S. Joseph, “Obligations of non-discrimination,” in D. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and the United Kingdom* (Oxford: Clarendon Press, 1995), p. 565; W. McKean, *Equality and discrimination under international law* (Oxford: Clarendon Press, 1983), p. 288.
5. See, for example, J. Morsink, *The Universal Declaration of Human Rights: Origins, drafting and intent* (Philadelphia, PA: University of Pennsylvania, 1999), p. 45; P. Hunt, *Reclaiming social rights: International and comparative perspectives* (Aldershot: Dartmouth Publishing, 1996), p. 92; A. F. Bayefsky, “The principle of equality or non-discrimination in international law,” *Human Rights Law Journal* 11/1–2 (1990), p. 1, n. 1.
6. M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford: Clarendon Press, 1995), p. 154.
7. These are the four grounds of discrimination prohibited by the UN Charter. See UN Charter (see note 1), Art. 1(3).
8. McKean (see note 4), p. 285.
9. See, for example, S. Fredman, *Human rights transformed: Positive rights and positive duties* (Oxford: Oxford University Press, 2008) (focusing on India and South Africa); R. O’Connell, “From equality before the law to the equal benefit of the law: Social and economic rights in the Irish constitution,” in O. Doyle and E. Carolan (eds), *The Irish Constitution: Governance and values* (Dublin: Thomson Round Hall, 2008), pp. 327–346 (focusing on Ireland); D. Meyerson, “Equality guarantees and distributive inequity,” *Public Law Review* 19 (2008), pp. 32–51 (focusing on Australia, Canada, and the United Kingdom); M. Langford, “The justiciability of social rights: From practice to theory,” in M. Langford (ed), *Social rights jurisprudence: Emerging trends in international and comparative law* (Cambridge, UK: Cambridge University Press, 2008), pp. 24–27 (surveying both international and domestic cases).
10. See, for example, Fredman (see note 9), p. 176; O’Connell (see note 9), p. 344.
11. As of May 1, 2009, 160 countries had ratified the ICESCR. United Nations Treaty Collection, ICESCR. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-3&chapter=4&lang=en. The United States is one of

the few countries that has not ratified the ICESCR. Additionally, rights to education and health or health care are recognized in the majority of national constitutions. Katarina Tomaševski, Special Rapporteur on the right to education, Annual Report Submitted in Accordance with Commission on Human Rights Resolution 2000/9, E/CN.4/2001/52 (January 11, 2001), paras. 66 and 67 (right to education constitutionally guaranteed in 142 countries); E. D. Kinney and B. A. Clark, "Provisions for health and health care in the constitutions of the countries of the world," *Cornell International Law Journal* 37/2 (2004), p. 287 (67.5% of countries have provisions on health or health care).

12. See, for example, D. Rae, *Equalities* (Cambridge, MA: Harvard University Press, 1981), p. 21; A. Phillips, *Which equalities matter?* (Cambridge, UK: Polity Press, 1999), p. 3.

13. Rae (*ibid.*), p. 21; Phillips (*ibid.*), p. 27.

14. UN Human Rights Committee, General Comment No. 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25), UN Doc. No. CCPR/C/21/Rev.1/Add.7 (1996), para. 21.

15. Rae (see note 12), p. 21.

16. *Ibid.*, p. 41.

17. *Ibid.*, p. 22.

18. Phillips (see note 12), p. 27.

19. Rae (see note 12), p. 32.

20. *Ibid.*, p. 34–35.

21. *Ibid.*, p. 35.

22. *Ibid.*

23. *Ibid.*, p. 20.

24. See, for example, ICCPR (see note 3), Article 2 (prohibiting "distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

25. Rae (see note 12), p. 45.

26. *Ibid.*, p. 47.

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*, p. 48.

30. The term "discrimination," in both common usage and in domestic law generally, refers to suspect classifications or unreasonable status-based distinctions. See McKean (see note 4), p. 10 ("The word 'discriminate' taken alone is now commonly used in the pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction, not only in English but in other languages."). *Black's Law Dictionary*, for example, defines "discrimination" as "[t]he effect of a law or established practice that confers privileges on a certain class or denies privileges because of race, age, sex, nationality, religion, or handicap." B. A. Garner (ed), *Black's Law Dictionary* (St. Paul, MN: Thomson West Group, 8th ed., 2004), p. 500.

31. Fredman (see note 9), p. 176 ("the focus is on groups defined by race, gender or other status rather than their poverty or socio-economic position").

32. As Fredman (*ibid.*) acknowledges: "Prohibiting differentiation according to socio-economic status would inevitably lead to a concept of equality with distributive connotations, bringing a positive duty in its wake."

33. UDHR (see note 3), Articles 2 (non-discrimination) and 7 (equality); ICCPR (see note 3), Articles 2 (non-discrimination) and 7 (equality); ICESCR (see note 3), Article 2 (non-discrimination).

34. Equality and non-discrimination are reiterated in many provisions of the Declaration. See, for example, UDHR (see note 3) Articles 1 ("All human beings are born free and equal in dignity and rights."), 10 ("Everyone is entitled in full equality to a fair and public hearing . . ."), 16 (Men and women "are entitled to equal rights as to marriage."), and 23 (Everyone "has the right to equal pay for equal work.").

35. UDHR (see note 3), Article 2.

36. UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, First Session, UN Doc. No. E/C.4/52 (1947), p. 4.

37. UN Commission on Human Rights, Third Session, Summary Record of the Fifty-Second Meeting, UN Doc. No. E/CN.4/SR.52 (June 8, 1948), p. 5.

38. *Ibid.*

39. Morsink (see note 5), p. 113; S. Skogly, “Article 2,” in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights* (The Netherlands: Kluwer Law International, 1999), p. 79; M. Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (Kehl, Germany: N.P. Engel, 1993), p. 52; but see Craven (see note 8), p. 175 (wealth “could hardly be considered ‘suspect’”).
40. Interestingly, Article 1 of the American Convention on Human Rights (1969) has the same list of prohibited grounds of discrimination as the UDHR, the ICCPR, and the ICESCR, except that “property” is replaced by “economic status” in the English version. Article 1(1) of the Convention of the Rights of Migrant Workers and their Families (1990) lists both “economic position” and “property” as prohibited distinctions.
41. World Bank, *World development report 2004: Making services work for poor people* (Washington, D.C.: World Bank, 2003), pp. 38–39 (documenting countries in which rich people benefit more than poor people from public spending on health and education); see also Morsink (see note 5), p. 113 (substantial differences in financing of education based on property tax in the US is discrimination based on property status).
42. Morsink (see note 5), pp. 113–114.
43. ICCPR (see note 3), Article 2(1); ICESCR (see note 3), Article 2(2). The Committee on Economic, Social and Cultural Rights (CESCR) has urged governments to protect poor people from discrimination on the basis of “economic status.” See, for example, CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Canada, UN Doc. No. E/C.12.1/Add.31 (1998), para. 51. Oddly, the CESCR does not recognize that “property” in Article 2 of the ICESCR means “economic status” but has chosen to recognize “economic status” instead, under “other status.” See CESCR, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Article 2, para. 2), UN Doc. No. E/C.12/GC/20 (2009), paras. 25 (property) and 35 (economic and social condition). This is unfortunate as the grounds explicitly enumerated are likely to require higher scrutiny than those covered by “other status.” W. Vandenhoe, *Non-discrimination and equality in the view of the UN human rights treaty bodies* (Antwerpen/Oxford: Intersentia, 2005), p. 134.
44. UDHR (see note 3), Article 7. Article 7 provides in part: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”
45. J. Möller, “Article 7,” in Alfredsson and Eide (see note 39), p. 153.
46. ICCPR (see note 3), Article 26.
47. Nowak (see note 39), p. 462.
48. T. Choudhury, “The drafting of Article 26 of the International Covenant on Civil and Political Rights,” *European Human Rights Law Review* 5 (2002), p. 602.
49. Nowak (see note 39), p. 466.
50. *Ibid.*
51. *Ibid.*, p. 468.
52. *Ibid.*, p. 459.
53. Choudhury (see note 48), p. 598 (“equal protection of the law and nondiscrimination were seen as fundamentally different notions”).
54. ICCPR (see note 3), Article 2(1) (State Party to present Covenant undertakes to respect and ensure “the rights recognized in the present Covenant, without distinction of any kind”).
55. Nowak (see note 39), p. 465.
56. Choudhury (see note 48), p. 598.
57. *Ibid.*, p. 602.
58. HRC (see note 2). The UN Human Rights Committee has also issued general comments on Article 3 (equal right of men and women) and Article 14 (right to equality before the courts).
59. HRC (see note 2), para. 7.
60. “None of the [human rights] Committees has paid much attention to a conceptual distinction between the principles of equality and non-discrimination.” Vandenhoe (see note 43), p. 86.
61. HRC (see note 2), para. 12.
62. See *ibid.*
63. ICCPR (see note 3), Articles 2 and 26.
64. HRC, Concluding Observations of the Human Rights Committee, United States of America, UN

- Doc. No. CCPR/C/USA/CO/3/rev.1 (2006), para. 22.
65. *Ibid.*
66. HRC, Concluding Observations of the Human Rights Committee, Brazil, UN Doc. No. CCPR/C/BRA/CO/2 (2005), para. 20.
67. HRC, Concluding Observations of the Human Rights Committee, Canada, UN Doc. No. CCPR/C/CAN/CO/5 (2006), para. 24.
68. HRC, Concluding Observations of the Human Rights Committee, New Zealand, UN Doc. No. A/50/40 (1995), para. 182.
69. HRC, Concluding Observations of the Human Rights Committee, Japan, UN Doc. No. CCPR/C/JPN/CO/5 (2008), para. 29.
70. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965). Available at <http://www2.ohchr.org/english/law/cerd.htm>.
71. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979). Available at <http://www2.ohchr.org/english/law/cedaw.htm>.
72. CEDAW, General Recommendation No. 25, on Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc. No. HRI/GEN/1/Rev.7. (2004), p. 282, paras. 3 and 4.
73. *Ibid.*, paras. 8 and 9.
74. See CESCR (2009, see note 43); CESCR, General Comment No. 16, Article 3, The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. No. E/C.12/2005/3 (2005).
75. Canadian Constitution Act 1982, Canadian Charter of Rights and Freedoms § 15(1).
76. *Andrews v. Law Society of British Columbia* (1989), 1 S.C.R. 143.
77. *Law v. Canada* (1999), 1 S.C.R. 497, para. 88 (revisiting *Andrews*).
78. *Andrews* (see note 76), para. 72 (decision of Justice La Forest).
79. *Ibid.*, para. 92.
80. S. Fredman, *Discrimination law* (Oxford: Oxford University Press, 2002), p. 70 (discussing non-enumerated groups attempts to define themselves as enumerated groups); *Gosselin v. Quebec* (2002) 4 S.C.R. 429 (proving distinction on the enumerated basis of age, but failing to prove stereotype, prejudice, or disadvantage).
81. Kinney and Clark (see note 11). The preamble to the WHO Constitution (1946) states, “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”
82. UDHR (see note 3), Article 25.
83. ICESCR (see note 3), Article 12(1).
84. *Ibid.*, Article 12(2).
85. CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health, UN Doc. No. E/C.12/2004/4 (2000).
86. *Ibid.*, para. 9.
87. *Ibid.*, para. 11.
88. *Ibid.*, paras. 19, 34–36.
89. *Ibid.*, para. 12(b) (iii).
90. *Ibid.*, para. 19.
91. *Ibid.*, para. 30.
92. *Ibid.*, para. 43(e).
93. CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Colombia, UN Doc. No. E/C.12/1/Add.74 (2001), para. 26.
94. *Ibid.*, para. 47.
95. CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Ecuador, UN Doc. No. E/C.12/1/Add.100 (2004), paras. 34, 36, 54.
96. CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Canada, UN Doc. No. E/C.12.CAN/CO/4 (2006), paras. 15 and 52.
97. CESCR, Concluding Observations of the

- Committee on Economic, Social and Cultural Rights, United Kingdom, UN Doc. No. E/C.12/GBR/CO/5 (2009), para. 32.
98. *Ibid.*
99. CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Brazil, UN Doc. No. E/C.12/BRA/CO/2 (2009), para. 11.
100. CESCR, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Australia, UN Doc. No. E/C.12/AUS/CO/4 (2009), para. 28.
101. CESCR (see note 43), para. 29.
102. *Ibid.*, para. 33.
103. *Ibid.*, para. 34.
104. *Ibid.*, para. 8. Formal equality is equality is law. For example, laws must not deny equal social security to women on the basis of marital status (*ibid.*). Substantive equality is equality in fact. Achieving equality in fact will require more than repealing laws that deny equality. It will require laws that prohibit discriminatory practices, and in some cases may require special measures, such as affirmative action, until de facto equality is achieved (*ibid.*).
105. *Ibid.*, para. 27.
106. See, for example, P. Hunt, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Annual Report to the Human Rights Council, UN Doc. No. A/HRC/7/11 (2008), para. 15. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/105/03/PDF/G0810503.pdf?OpenElement>.
107. *Ibid.*, para. 42. The Special Rapporteur understood the health concept of “equity” — meaning equal access to health care according to need — to be akin to equality and non-discrimination in human rights law (*ibid.*, para. 43).
108. *Ibid.*, para. 42.
109. United Nations Treaty Collection (see note 11), 160 parties; see ICESCR Article 12(2) (d) (State parties shall take steps necessary for “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”).
110. United Nations Treaty Collection, ICCPR, 164 parties as of April 14, 2009. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.
111. See, for example, P. Hunt, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Annual Report to the Commission on Human Rights, UN Doc. No. E/CN.4/2006/48 (2006), para. 20. Available at <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.
112. *Ibid.*
113. *Ibid.*
114. See ICESCR, Article 13(2) (e) (parties to the Covenant agree to actively pursue the development of a system of schools).
115. *Brown v. Board of Education*, 347 US 483 (1954). Available at <http://supreme.justia.com/us/347/483/>.
116. A. M. Gross, “The right to health in an era of privatisation and globalisation: National and international perspectives,” in D. Barak-Erez and A. M. Gross (eds), *Exploring social rights: Between theory and practice* (Portland, OR: Hart Publishing, 2007), pp. 289–339.
117. D. McCoy, “Financing health care: For all, for some, for patients or for profits?” in The North-South Institute, *The global right to health: Canadian development report 2007* (Ottawa: Renouf Publishing, 2006), pp. 59–83, 66.
118. *Ibid.*, p. 70.
119. People’s Health Movement, Medact and Global Equity Guage Alliance, *Global health watch 2005–2006* (London/New York: Zed Books, 2005), p. 63.
120. *Ibid.*, 64–65.
121. Fundar–Centro de Análisis e Investigación, International Budget Project and International Human Rights Internship program, *Dignity counts: A guide to using budget analysis to advance human rights* (2004), p. 10. Available at http://www.iie.org/IHRIP/Dignity_Counts.pdf. The system is considerably more complicated than presented here. See *ibid.*, p. 12; see also, A. González Rossetti, “Change

teams and vested interests: Social security reform in Mexico,” in R. Kaufman and J. Nelson, *Crucial needs, weak incentives: Social sector reform, democratization, and globalization in Latin America* (Baltimore, MD: Johns Hopkins University Press, 2004), pp. 70–71 (identifying two additional tiers, private health care for the wealthy and a complete lack of health care for a rural population of mostly indigenous people).

122. Fundar (see note 121), pp. 10–11.

123. *Ibid.*, pp. 50–51.

124. *Ibid.*, p. 13.

125. *Ibid.*; see also, D. Elson, *Budgeting for women’s rights: Monitoring government budgets for compliance with CEDAW* (New York: UNIFEM, 2006), p. 25 (relying on *Dignity Counts*).

126. See J. Frenk and O. Gómez-Dantés, “Ideas and ideals: Ethical basis of health reform in Mexico,” *Lancet* 373/9673 (April 25, 2009), pp. 1406–1408 (explaining that the intent of the second tier of the health care system was to provide health care protection to 50 million people who had none).

127. See CESCR (2009, see note 43), para. 13 (justification for differentiation based on prohibited grounds must be reasonable and objective; measures adopted must be proportional to a legitimate aim that is compatible with the Covenant).

128. *Corte Constitucional de la República de Colombia, Sala Segundo de Revisión* (2008), Constitutional Court of Colombia, Sentencia No T-760 de 2008.

129. A. Yamin and O. Parra-Vera, “How do courts set health policy? The case of the Colombian Constitutional Court,” *PLoS Medicine* 6/2 (2009). Available at <http://www.plosmedicine.org/article/info:doi/10.1371/journal.pmed.1000032>

130. Sentencia No T-760 (see note 128), p.185 (continuance of two systems of health care violates the constitutional right to equality).

131. See *Chaoulli v. Quebec Attorney General* (2005) 1 S.C.R. 791, para. 78 (discussing national public health care systems that allow some people to opt out by purchasing private insurance).

132. The US Supreme Court decided in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that there is no right to education under the

US Constitution and, therefore concluded under a minimal level of review that the highly unequal school financing system at issue was not a violation of equal protection.

133. *Brigham v. State of Vermont*, 166 Vt. 246 (1997).

134. National Access Network, State By State. Available at http://www.schoolfunding.info/states/state_by_state.php3 (listing state cases challenging school funding systems).

135. *Mashava v. President of the Republic of South Africa*, Case CCT 67/03 (September 2, 2004).

136. *Ibid.*, para. 51.

137. *Ibid.*

138. CESCR (2009, see note 43), para. 34: CESCR, General Comment No. 13, The Right to Education (Article 13 of the Covenant), UN Doc. No. E/C.12/1999/10 (1999), para. 35; HRC, Concluding Observations of the Human Rights Committee, Suriname, UN Doc. No. CCPR/CO/80/SUR (2004), para. 19; HRC, Concluding Observations of the Human Rights Committee, Mongolia, UN Doc. No. CCPR/C/79/Add.120 (2000), para. 15.

139. O’Connell (see note 9), p. 337.

140. For example, *Reynolds v. Sims*, 377 U.S. 533 (1964) (one person, one vote ruling for state legislatures).

141. M. Davis, “The spirit of our times: State constitutions and international human rights,” *New York University Review of Law and Social Change* 30 (2006), pp. 372–374 (documenting positive rights to welfare, health, education, and work in state constitutions).

142. C. Albisa and J. Schultz, “The United States: A ragged patchwork,” in Langford (see note 9), p. 245.

143. *Ibid.*, pp. 245–246 (suggesting strategies for asserting health care rights under state constitutions).

144. World Bank (see note 41).

145. See C. Newdick, “Accountability for rationing — theory into practice,” *Journal of Law, Medicine and Ethics* 33/4 (2005), p. 662; see, for example, *Rogers v. Swindon Primary Care Trust* (2006) EWCA Civ. 392 (plaintiff was denied the Herceptin recommended by her doctor, although the drug was funded for all those who had doctor’s recommendations in other health care districts). There is no positive right to

equality in the UK; therefore, the plaintiff claimed that denial of the drug was arbitrary.

146. V. Afonso da Silva and F. Vargas Terrazas, “Claiming the right to health in Brazilian courts: The exclusion of the already excluded,” *Social Science Research Network* (2008). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133620; see also, F. F. Hoffmann and F. R. N. M. Bentes, “Accountability for social and economic rights in Brazil,” in V. Gauri and D. M. Brinks (eds), *Courting social justice: Judicial enforcement of social rights in the developing world* (Cambridge, UK: Cambridge University Press, 2008), pp. 142–143 (middle class has appreciably better access to courts than poorer class because they may bring right to health claims via private counsel).

147. S. Gloppen, “Litigation as a strategy to hold governments accountable for implementing the right to health” *Health and Human Rights: An International Journal* 10/2 (2008), pp. 21, 25, and 31–32.

148. Gross (see note 116), pp. 337–339; see, for example, *Soobramoney v. Minister of Health, KwaZulu-Natal* (1998) 1 *South African Law Report* 765 (South African Constitutional Court), para. 33 (to manage limited resources, sometimes state will need “to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals”).

149. O’Connell (see note 9), p. 333 (suggesting this avenue for interpreting the Irish Constitution).