

# Healthcare Systems and Equality Rights

Gillian MacNaughton<sup>1</sup>

## Introduction

Health and equality are inextricably linked. As Richard Wilkinson and Kate Pickett document in *The Spirit Level: Why More Equal Societies Almost Always Do Better*, inequality is simply unhealthy.<sup>2</sup> More unequal societies are associated with lower life expectancy, higher rates of infant mortality, lower birth weight, and greater rates of depression, among other poor health indicators.<sup>3</sup> Additionally, for individuals, lower social status correlates to worse health outcomes at every level of the social hierarchy.<sup>4</sup> In short, inequality at both the individual and societal level impacts adversely on health. Moreover, unequal healthcare systems in most countries – so-called tiered systems – exacerbate unequal health outcomes and other inequalities in society because they inevitably provide the least healthcare benefits to those most in need of healthcare.<sup>5</sup> In this light, this article proposes that equality rights – both negative and positive equality rights – could contribute more to promoting the right to health for all.

This article also serves to illustrate the importance of integrating equality rights with social rights. The rights to equality and non-discrimination have great potential to advance social rights, including the right to health. Yet, the relationship between equality and social rights remains underdeveloped and controversial.<sup>6</sup> Indeed, legal scholars have struggled for decades to create a framework that integrates these rights.<sup>7</sup> Commonly, they limit the discussion of equality and social rights to status-based or

“negative equality”. Thus, they rely on data to demonstrate the close correlation of status-based discrimination to socio-economic disadvantage and judicial decisions in cases in which status-based groups are denied social rights.<sup>8</sup> The U.N. Committee on Economic, Social and Cultural Rights similarly asserts that “individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination”.<sup>9</sup> Importantly, these discussions reveal the close connections between marginalised groups and marginalized rights.<sup>10</sup>

While recognising that women and other disadvantaged groups are often disproportionately denied their social rights, this article focuses particularly on those disadvantaged in socio-economic terms, poor people. Rather than asserting that the denial of social rights has a disparate impact on legally protected groups – such as women, people with disabilities or certain religious, racial or ethnic groups – it first seeks to establish “economic status” or “poverty” in and of itself as a legally prohibited ground of discrimination in the International Bill of Human Rights.<sup>11</sup> Then moving beyond the notion of status-based or “negative equality”, the article proposes that the International Bill of Human Rights also recognises a positive right to equality.

Legal scholars have long recognised the difference between negative and positive concepts of equality.<sup>12</sup> Mathew Craven, for example,

has explained that positive equality “would require that everyone be treated in the same manner unless some alternative justification is provided”.<sup>13</sup> On the other hand, negative equality would “allow differences in treatment unless they are based upon a number of expressly prohibited grounds”.<sup>14</sup> In other words, positive equality demands equality as the norm and requires justification for any inequality. In contrast, negative equality allows all inequalities and requires justification only in the limited circumstance when a specific inequality is shown to be based on a particular ground that is prohibited in law.

In international human rights law, equality is generally recognised only in its negative form, commonly known as “non-discrimination”.<sup>15</sup> Indeed, numerous international human rights treaties address non-discrimination, including the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention of the Elimination of All Form of Discrimination Against Women.<sup>16</sup> Conversely, the positive right to equality is rarely recognised in international or domestic law. This article proposes recognising that the positive right to equality, derived from Article 26 of the International Covenant on Civil and Political Rights, applies to social rights just as it applies to civil and political rights.<sup>17</sup> In this manner, the article argues that a right to social equality is enshrined in the holistic human rights framework established in the International Bill of Human Rights.

The U.N. Committee on Economic, Social and Cultural Rights asserts: “Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.”<sup>18</sup>

This article proposes ways in which the rights to equality and non-discrimination in the International Bill of Human Rights may be interpreted to more fully protect social rights, particularly the right to health. Only by addressing these rights in an integrated and holistic human rights framework can the challenges of realising them be fully understood.

## 1. Health and Inequality

Inequality is closely connected to poor health outcomes and reduced life expectancy. The disparity in life expectancy between countries is well known. In 2008, the World Health Organization (WHO) Commission on Social Determinants of Health reported that a child born in Lesotho has a life expectancy at birth of 42 years, while a child born in Japan or Sweden has a life expectancy greater than 80 years.<sup>19</sup> Less well known is that there are also enormous health gaps within countries, where life expectancy between social groups varies as much as twenty years.<sup>20</sup> In Australia, for example, the life expectancy for indigenous people is about sixteen years less than the life expectancy for all Australians.<sup>21</sup> In the United States, there is a similar life expectancy gap between blacks living in poor areas and whites living in rich areas.<sup>22</sup> Wilkinson reports the shocking fact that the death rates in the poorest areas of the United States are higher than those in Bangladesh, one of the poorest countries in the world.<sup>23</sup>

The WHO Commission concluded that the “health gap” is caused by inequalities in the social determinants of health, including education, living conditions, employment, social protection and healthcare.<sup>24</sup> It reported that 200 million children globally are not achieving their full development potential because of inadequate nutrition, lack of maternal and

child healthcare, and limited developmental and educational opportunities.<sup>25</sup> Further, urbanisation and the spread of slums are adversely impacting on the quality of air, water and other living conditions.<sup>26</sup> The rise in temporary and part-time work to create a “flexible” and competitive workforce results in employment insecurity for workers adversely impacting on their health.<sup>27</sup> Poverty is a major obstacle to improving population health and reducing health inequality; yet, four out of five people in the world lack basic social security coverage.<sup>28</sup> Finally, 1.3 billion people have no access to healthcare because they cannot afford to pay for it when they need it, while over 100 million people per year are driven below the poverty line due to catastrophic healthcare costs.<sup>29</sup>

In response to these inequalities, the WHO Commission recommended that governments (1) implement universal early childhood development programmes; (2) provide quality universal, compulsory and free primary and secondary education; (3) ensure greater availability of affordable housing and upgrade slums by providing water, sanitation and electrical services for all; (4) provide quality work for men and women with a living wage that takes into account the real cost of healthy living; (5) establish and strengthen universal social protection that supports income sufficient for healthy living; and (6) ensure universal access to healthcare regardless of ability to pay.<sup>30</sup> Notably, these “social determinants of health” correlate closely to the economic and social rights in the International Bill of Human Rights, including the rights to education, adequate housing, clean water and adequate sanitation, social security, full employment and decent work, and the highest attainable standard of health.<sup>31</sup> There is no doubt that ensuring the enjoyment of these human rights by all would im-

prove the health and lives of many people in the world today.

Beyond advancing social rights, Wilkinson and others argue that inequality in a society also impacts adversely on health. In rich countries, he maintains, differences in health outcomes are related to inequalities in income and social status, rather than to an absolute standard of living.<sup>32</sup> To support this contention, Wilkinson documents studies showing that in Taiwan, Canada and the United States, death rates are lowest in areas with the smallest income differentials, rather than in areas with the highest incomes.<sup>33</sup> He maintains that the data “shows very clearly that it is the most egalitarian states and provinces, rather than the richest, that are the healthiest”.<sup>34</sup> Similarly, Wilkinson reports that “at all levels of economic development infant mortality rates tend to be lower in more egalitarian countries”.<sup>35</sup> Even in developing countries, infant death rates are higher for more unequal societies.<sup>36</sup> In sum, there is much evidence to show that “there is indeed a strong tendency for more unequal societies to have lower average standards of health and shorter life expectancies”.<sup>37</sup>

Not only are infant mortality rates greater and life expectancy shorter in more unequal societies, but individuals lower down the social hierarchy have greater social and psychological stress, including depression and anxiety, and shorter life expectancies.<sup>38</sup> Life is shorter and the quality is poorer the farther down the social hierarchy people live.<sup>39</sup> For Wilkinson, these extreme health inequalities must be equated to violations of the right to life.<sup>40</sup> Highlighting this assertion, he suggests: “perhaps we should liken the injustice of health inequalities to that of a government that executed a significant portion of its population each year without cause”.<sup>41</sup>

Indeed, where social policy results in health inequalities that significantly reduce life expectancy, the rights to equality, health and life are all implicated.

In sum, the evidence leaves no doubt that inequality, poor health and low life expectancy are closely connected in many complex ways. In this light, this article discusses avenues for linking equality rights and social rights – particularly the right to health – in a holistic human rights legal framework.

## **2. The Rights to Equality and Non-discrimination**

### **2.1 Meanings of Equality**

Although the right to equality is central to human rights, the meaning of the term continues to be widely debated. Theorists often consider the simplest form of equality to be one-to-one equality.<sup>42</sup> This type of equality is best illustrated in law by the example of one-person-one-vote.<sup>43</sup> The UN Human Rights Committee explains that this principle requires that each elector have one vote and further that each vote count equally.<sup>44</sup> Any inequality between two votes is a violation.<sup>45</sup> This same form of simple one-to-one equality applies to many civil and political rights, such as the rights to freedom of opinion and expression, rights against arbitrary arrest and the right to a fair trial.<sup>46</sup> It also applies in the laws requiring free and compulsory school for all children,<sup>47</sup> and to general rules, such as no-parking signs and speed limits, which also apply equally to everyone.<sup>48</sup>

Another form of equality frequently addressed in law is “bloc equality”.<sup>49</sup> 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.<sup>50</sup> The achievement of bloc equality, however, does not imply the achievement of simple one-to-one equality.<sup>51</sup> Thus, the average incomes of women and men might be equal and yet there might be gross inequality in incomes within each bloc between the men and between the women.<sup>52</sup> Bloc equality is completely consistent with gross inequalities within a bloc as long as, on average, the two blocs are equal.<sup>53</sup> These two types of equality – simple individual equality and bloc equality – respond to the question “equality for whom?”

Separate from the question “equality for whom?” is the question “equality of what?”<sup>54</sup> This is often the point of ideological disagreement. Market liberals can be described as narrowly egalitarian, meaning that they support the equal distribution of minimal property rights and certain civil and political rights.<sup>55</sup> They oppose, however, any broadening of equality beyond the narrow limits of this sphere.<sup>56</sup> More leftward ideologies seek to broaden the spheres to which equality applies.<sup>57</sup> Thus, as Douglas Rae explains in *Equalities*, the conflict often construed between “liberty” and “equality” is really between “equality in the narrow” and “equality in the broad”.<sup>58</sup>

Much of the dispute about the breadth of equality is resolved in the International Bill of Human Rights because it mandates the scope of its equality and non-discrimination provisions. Basically, the International Bill of Human Rights enshrines the compromise reached on what it is that States must distribute equally and without discrimination. States accept this compromise when they become parties to the international human rights treaties. The next step therefore is to clarify the precise meanings of the non-dis-

crimination 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”.

## 2.2 International Bill of Human Rights

Over the past sixty years, international human rights law has focused primarily on bloc equality, also called non-discrimination, status-based equality or negative equality.<sup>59</sup> There has been little scholarly work on individual one-to-one equality, also called positive equality, and much less on how it applies to social rights or other economic and social fields regulated by the government. Legal scholars, as noted above, have focused on demonstrating that people denied their social rights, most often poor people, are disproportionately defined by race, sex, language, religion or other legally recognised status. The equality and non-discrimination provisions in the International Bill of Human Rights could address social rights more directly, however, if “poverty” were recognised as a status and one-to-one equality as a complement to social rights.<sup>60</sup> Both approaches find support in the International Bill of Human Rights.

### 2.2.1 Negative Equality

Together, the Universal Declaration on 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 equality and non-discrimination.<sup>61</sup> There are two key provisions in the UDHR.<sup>62</sup> 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”.<sup>63</sup> This provision prohibits discrimination based on an enumerated or other status. Importantly, “property” is one of the grounds of distinction prohibited.

According to the drafting history of the UDHR, 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 – that were recognised in the UN Charter.<sup>64</sup> Later in the Commission on Human Rights, 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”.<sup>65</sup> It is well recognised by commentators that “property” in the non-discrimination provision refers to economic status, in other words wealth or poverty status.<sup>66</sup> In fact, the Spanish version of the UDHR states “*posición económica*” in the place “property” in the Article 2 list of prohibited grounds of distinction.<sup>67</sup>

The non-discrimination provision in the UDHR, therefore, prohibits wealth-based distinctions. It also applies to all of the rights in the UDHR. This means that it prohibits wealth-based distribution of education, healthcare and social security just as it prohibits wealth-based access to voting in public elections or to justice in the courts. 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.<sup>68</sup> Both the ICCPR and the ICESCR contain similar non-discrimination provisions, requiring State Parties to ensure the rights in the Covenants without distinction on the

basis of these same enumerated grounds, including “property” or economic status.

Nonetheless, public financing systems frequently do discriminate against poor people in the delivery of social rights. In response, the Committee on Economic, Social and Cultural Rights has urged governments to protect poor people from discrimination on the basis of their “economic status”.<sup>69</sup> Oddly however, the Committee on Economic, Social and Cultural Rights does not recognise that “property” in Article 2 of the ICESCR means “economic status” but has chosen to recognise “economic status” instead under “other status”.<sup>70</sup> This is unfortunate as the grounds explicitly enumerated in Article 2 are likely to require higher scrutiny than those covered by “other status”.<sup>71</sup> Moreover, it is certainly easier for states to refuse to recognise an “other status” than it is for them to ignore a status that is explicitly listed in the Covenant. Whether under “property” or “other status”, however, the prohibition against discrimination on the basis of economic status should serve to secure social rights for people most in need of these rights.<sup>72</sup>

### 2.2.2 Positive Equality

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”.<sup>73</sup> Although the drafters did not clarify or define the meaning of these terms, it is clear that most of them understood that there is a difference between the concepts of non-discrimination, equality before the law and equal protection of the law.<sup>74</sup> Indeed, the presence of separate provisions indicates that they viewed these rights as distinct. The ICCPR contains a similar provision recognising “equality before the law” and “equal protection of the law”. 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.”<sup>75</sup>

The drafting history of Article 26 of the ICCPR reveals considerable debate and no consensus was reached on the meaning of the terms non-discrimination, equality before the law and equal protection of the law.<sup>76</sup> According to Manfred Nowak, “equality before the law” means simply that the law must be applied in the same manner to all.<sup>77</sup> In his view, this provision contains no guarantee of substantive equality but is rather aimed exclusively at enforcement.<sup>78</sup> On the other hand, “equal protection of the law”, is directed at the national legislature and imposes both negative and positive obligations.<sup>79</sup> Nowak maintains that this interpretation reflects the historical roots of the two phrases, “equality before the law” originating from the French Revolution, and “equal protection of the law” from the Fourteenth Amendment to the US Constitution.<sup>80</sup>

Two conclusions about the meanings of these terms can be drawn certainly from the express language of Articles 2 and 26 of the ICCPR in conjunction with the drafting history. First, Articles 2 and 26 of the ICCPR were intended to protect distinct rights; the notion of non-discrimination as well as the ideas of equality before the law and equal protection of the law.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>

In 1989, the Human Rights Committee, responsible for monitoring the implementation of the ICCPR, issued General Comment 18, interpreting Articles 2 and 26 as well as the other references to equality and non-discrimination in the ICCPR.<sup>84</sup> As the term “discrimination” is not defined in the ICCPR, the Committee drew on the definitions in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) and defined discrimination in the ICCPR to be:

“[A]ny 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.”<sup>85</sup>

Although recognising 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.<sup>86</sup> 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.”<sup>87</sup>

In other words, Article 26 is not limited to ensuring equality of the rights in the ICCPR but extends the equality guarantees to any field the government regulates.<sup>88</sup> Because the government is obligated to regulate the fields involving the rights in the ICESCR, the equality guarantees in ICCPR Article 26 extend to the rights in the ICESCR for those states that have ratified it.

Despite multiple equality and non-discrimination provisions in the ICCPR, the Human Rights Committee has limited its discussion to one type of equality - non-discrimination. In its concluding observations on the United States, for example, the Committee notes its concern “that some 50% of homeless people are African American although they constitute only 12% of the United States population”.<sup>89</sup> Similarly, in the concluding observations on Canada, the Committee:

“(…) is concerned 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”.<sup>90</sup>

For New Zealand, the Committee regrets that “Maori still experience disadvantages in access to healthcare, education and employment”.<sup>91</sup> 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”.<sup>92</sup>

These are all concerns about status-based discrimination.

This overview of the equality and non-discrimination provisions in international human rights law, as well as the drafting history, raises the possibility that the multiple provisions might well guarantee more than status-based non-discrimination. Indeed, a similar argument has been made in Canada, where the Charter of Rights and Freedoms (the Charter) contains multiple provisions on equality and non-discrimination. Section 15(1) of the 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.”<sup>93</sup>

Despite multiple equality provisions, in *Andrews v. Law Society of British Columbia*,<sup>94</sup> the Canadian Supreme Court construed Section 15(1) to cover only status-based non-discrimination. In *Andrews*, the 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.<sup>95</sup> In so doing, the Court reduced four different equality clauses to one meaning – non-discrimination. As one Justice wrote, “it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them.”<sup>96</sup> Indeed, the drafting history of the equality provisions in the Charter amply evidences

the intent for the equality clauses to address more than status-based discrimination.<sup>97</sup>

Current interpretations of the equality and non-discrimination provisions in the International Bill of Human Rights raise the same concerns.<sup>98</sup> Multiple provisions, intended to protect distinct rights, are conflated to protect only against discrimination, in other words, negative equality. Moreover, non-discrimination claims often impose significant hurdles for claimants. Proving that a specific differentiation correlates to an enumerated or similar status, as well as showing that this differentiation also involves stereotype, prejudice or disadvantage, are not trivial burdens.<sup>99</sup> 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 any particular status or historical disadvantage. One-to-one equality of votes is required regardless of one’s status. This concept of one-to-one equality, often recognised in conjunction with civil and political rights, such as the right to vote, might prove helpful to realising social rights.

### 3. The Right to Health

The inequalities in the enjoyment of one social right – the right to health – reveal the complex relationship between equality rights and social rights. The right to health is enshrined in the UDHR, numerous international human rights treaties and the majority of national constitutions.<sup>100</sup> The ICESCR, however, provides the most comprehensive legal obligation as it applies to all the people in the 160 countries that are currently parties to the Covenant.<sup>101</sup> Article 12 of the ICESCR requires these countries to “recognize the right of everyone to the enjoyment of the highest standard of physical and mental health.”<sup>102</sup>

Further, it calls on the governments to take steps to achieve this right by providing maternal and child healthcare, ensuring safe workplaces, maintaining a healthy environment, preventing and controlling epidemics and securing healthcare for all.<sup>103</sup>

In 2002, the Committee on Economic, Social and Cultural Rights issued General Comment 14, which provides additional detail on the normative content of the right to health.<sup>104</sup> 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”.<sup>105</sup> It also clarifies that the right to health includes both timely and appropriate healthcare 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.<sup>106</sup>

Significantly, parties to the ICESCR must ensure equal access for all to healthcare and the underlying determinants of health.<sup>107</sup> Accordingly, payment for healthcare services must be equitable; governments should not burden poor households disproportionately, compared to rich households, with health expenses.<sup>108</sup> Additionally, health resource allocations should not favour expensive curative healthcare, which is often accessible only to privileged people, at the expense of primary and preventative healthcare, which benefits the larger population.<sup>109</sup> The ICESCR acknowledges that governments have constraints due to limited resources, and thus it allows for progressive realisation of the right to health. Nonetheless, it imposes an immediate obligation upon governments to guarantee the enjoyment of the right to

health without discrimination.<sup>110</sup> Further, governments have the immediate obligation “to ensure equitable distribution of all health facilities, goods and services”.<sup>111</sup>

The Committee on Economic, Social and Cultural Rights is troubled by status-based inequalities and notably by inequalities that adversely impact on poor people. For example, in its 2004 Concluding Observations on Colombia, the Committee indicated concern about the reduction in subsidies for healthcare, which made access to healthcare in rural areas more difficult and adversely impacted on women and indigenous groups.<sup>112</sup> The Committee urged the government:

“(...) [T]o 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”.<sup>113</sup>

Similarly, in 2004 the Committee urged the government of Ecuador to allocate a higher percentage of GDP to the health sector, and to address discrimination against indigenous peoples and Afro-Ecuadorians in health and other fields.<sup>114</sup>

To the United Kingdom, the Committee indicated its concern in 2009 that health inequalities had widened among social classes, “especially with regard to health care goods, facilities and services”.<sup>115</sup> It therefore 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”.<sup>116</sup> As to Brazil, the Committee noted with concern a significant difference in life expectancies between the black and white populations and recom-

mended that the government take a sharper focus on health and poverty eradication programmes to address this discrepancy.<sup>117</sup> 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.<sup>118</sup>

Additionally, the Committee highlights, in General Comment 20 on non-discrimination, several areas of concern for healthcare 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.”<sup>119</sup> Further, denial of access to health insurance on the basis of health status may also amount to discrimination.<sup>120</sup> Notably, the Committee indicates that governments should not discriminate on the basis of 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 regions, including urban and rural areas.<sup>121</sup> Overall, the Committee seeks to eliminate status-based inequalities, both formal and substantive.<sup>122</sup> It understands “other status” to be flexible and commonly recognises new social groups that are vulnerable and suffer marginalisation.<sup>123</sup>

In addition to the Committee, Paul Hunt, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health from 2002 to 2008 (Special Rapporteur on the right to health), addressed, in particular, a right-to-health approach to health systems. In his 2008 annual report to the Human Rights Council, he explained:

“At the heart of the right to the highest attainable standard of health lies an ef-

fective 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.”<sup>124</sup>

Hunt also views equality and non-discrimination as core features of a health system.<sup>125</sup> In the 2008 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”.<sup>126</sup>

In sum, both the Committee on Economic, Social and Cultural Rights and the Special Rapporteur on the right to health deem equality and non-discrimination to be important features of a health system that respects human rights. Further, they both urge governments to ensure that adequate resources are allocated to health systems so that poor people have equal access to health facilities, goods and services and the underlying determinants of health. To realise the right to health for all people, however, governments must recognise that “economic status”, in other words “poverty”, is a prohibited ground of discrimination and that positive or one-to-one equality requires health systems to offer the same health facilities, goods and services, as well as the same underlying determinants of health, to all.

## 4. Equality Rights in Healthcare Systems

### 4.1 Negative Equality

Non-discrimination in healthcare is guaranteed by the non-discrimination provision in Article 2 of the ICESCR, and it is also a

key feature of the right to health in Article 12. Even those States that do not recognise the right to health are prohibited by Article 26 of the ICCPR from discriminating in any field in which the government acts. Virtually every national government acts in the field of health and is therefore prohibited from discriminating in that field. Nonetheless, structural inequalities are widespread in domestic healthcare systems, which are often purposefully designed to allocate benefits on the basis of status.

One strikingly obvious example was the two-tiered healthcare system in apartheid South Africa,<sup>127</sup> which discriminated on the basis of race much like the education system challenged in *Brown v. Board of Education*,<sup>128</sup> which the United States Supreme Court held violated the Equal Protection Clause of the United States Constitution. Such two-tiered systems for health, education or social security, which discriminate on the basis of race, violate the equality and non-discrimination provisions in the ICCPR and the ICESCR. Healthcare systems are, however, more often tiered on the basis of economic status. Tiered healthcare systems, also called “segmented” systems, exist in numerous forms.<sup>129</sup>

In Mexico, for example, healthcare is delivered via two separate systems.<sup>130</sup> The social security system provides services to individuals who are formally employed and to their families. 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.<sup>131</sup> A group of non-governmental organisations conducting an analysis of the 2002 health budget discovered that about 65% of health spending was allocated to the formally employed population while only 35% to the informally employed and unemployed, although each

group contained about 50% of the population.<sup>132</sup> Thus, the informally employed and unemployed population received significantly less per capita funding for healthcare, although they were likely to have more healthcare needs.

This two-tiered healthcare system, by distinguishing between groups on the basis of employment status, discriminates essentially on the basis of economic status. Although the government’s intent in creating the “second” tier was to provide healthcare to millions of people who had none,<sup>133</sup> this cannot justify continuation of such a discriminatory system.<sup>134</sup> A national plan to progressively realise the right to health, including equality in access to and the provision of healthcare, is a key component of the right to health.<sup>135</sup>

In 2008, the Constitutional Court of Colombia was faced with a challenge to a similar two-tiered system of healthcare.<sup>136</sup> In Colombia, the healthcare system is divided along similar lines as the healthcare system in Mexico; a “contributory” system for formally employed people and their families and a separate “subsidised” system for other people, providing substantially less benefits than the contributory system.<sup>137</sup> The 1993 law establishing this scheme, however, also called for the unification of the two systems by 2001.<sup>138</sup> Nonetheless, the two systems were never unified. In a July 2008 decision, the Constitutional Court ordered the government to unify the benefits in the two systems, first for children and then progressively for adults.<sup>139</sup> In reaching this decision, the Court relied upon ICESCR Article 12 as well as the Committee’s General Comment 14 on the right to health.<sup>140</sup> In particular, the Court noted that the right to health includes the right to a system of health protection that provides equal opportunity for all to enjoy the highest attainable level of health.<sup>141</sup> The continued

inequality of the two-tiered system was simply unacceptable to the Court.<sup>142</sup>

Another type of two-tiered system is created by “segmenting out” middle and high-income groups into private health insurance schemes, leaving the public sector health services to focus on poor people.<sup>143</sup> Indeed,

“[t]he World Bank and others have encouraged private healthcare financing in recent years as a way of allowing the diminished public sector to concentrate on providing comprehensive coverage for a ‘basic’ or ‘minimum’ package of services”.<sup>144</sup>

This type of segmented health care system also creates separate systems for rich and poor people.<sup>145</sup> Not surprisingly, segmenting out is likely to result in unequal health services, reflecting and reinforcing socio-economic inequalities.<sup>146</sup> According to David McCoy,

“[a] significant private medical sector weakens the public provision of healthcare, especially as the resources to patient load is more favourable in the private sector – it sucks out more health resources than it relieves the public sector of workload”.<sup>147</sup>

The World Health Report 2010 also confirms that multiple pools, each with their own administrations, “are inefficient and make it difficult to achieve equity”.<sup>148</sup>

It is not difficult to reach the conclusion that public healthcare delivered in two tiers, as exemplified in Mexico and in Colombia, does not comply with Article 2 of the ICESCR on non-discrimination or with Article 12 on the right to health. The evidence suggests that other types of two-tiered systems, such as those that allow the wealthier population to opt out of the public system, might also

violate the right to non-discrimination on the basis of economic status by resulting in unequal health facilities, goods and services for the two populations. These systems might also conflict with the obligation to use maximum available resources to progressively realise the right to health because the administrative costs for multiple systems are higher than for a single system as they lose resources to inefficiency. These issues, as well as many others concerning the structure and financing of multi-tiered healthcare systems, require more attention from human rights scholars and practitioners, as well as the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

## 4.2 Positive Equality

The positive right to equality, one-to-one equality, is not linked to status. In the two International Covenants, Article 26 of the IC-CPR has the only provision that is not linked to particular groups or particular rights. This is, therefore, the most likely foundation from which to derive a positive right to equality. On the other hand, one-to-one equality could be implied in the substantive rights of the ICESCR, just as the right to vote implies a right to one vote of equal weight to other votes. Indeed, a universal system of primary education, compulsory and free to all, which is guaranteed by Article 13 of the ICESCR, also implies one-to-one equality. Similarly, Article 12 of the ICESCR should require a universal system of healthcare that provides equal benefits to all, enshrining the right to one-to-one equality. On these bases, healthcare systems that do not provide universal and equal benefits to all do not comply with the positive right to equality or the right to health.

Decentralisation is one threat to positive equality.<sup>149</sup> For example, in *Mashavha v. President of the Republic of South Africa*, the Constitutional Court of South Africa held invalid a presidential proclamation made under the Interim Constitution that assigned the administration of social services to provincial governments.<sup>150</sup> The Court recognised 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.<sup>151</sup> Accordingly, the Court found 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 that allowed in another. Such a system would “create different classes of citizenship and divide South Africa into favoured and disfavoured areas”.<sup>152</sup> In so doing, the Court recognized a right to individual one-to-one equality with respect to social benefits.

*Mashavha* demonstrates that decentralisation of resource allocations may raise concerns about one-to-one equality. Similarly, inequality in the availability of services and medicines across districts in the United Kingdom implicates the positive right to equality.<sup>153</sup> Christopher Newdick points out that with so many Primary Care Trusts in the country, “there is potential for significant differences in policy between them”.<sup>154</sup> And he questions whether this is desirable in a national health service.<sup>155</sup> In response, Newdick suggests that, in the absence of guidance from the central government, Primary Care Trusts should form consortia to increase equity and consistency throughout the National Health Service.<sup>156</sup> As he notes, it is important to be able to explain decisions on individual requests, as well as to “demonstrate that like cases are treated alike”.<sup>157</sup> To do so, Primary

Care Trusts must balance individual rights against the needs of a community system.<sup>158</sup>

In the same vein, the positive right to equality also has considerable potential to equalise health care spending in Brazil and Colombia where individual right-to-health claims are widespread. In Brazil, for example, poorer individuals may not have equal access to the medicines that wealthier individuals obtain from the public healthcare system as the latter have better access to courts and are able to bring right-to-health claims, which are routinely granted.<sup>159</sup> Similarly, in Colombia, the great number of individual right-to-health claims – 674,612 health-related constitutional claims between 1999 and 2008 – risks jeopardising one-to-one equality.<sup>160</sup> Most of these claims were brought by individuals in the healthcare tier with better benefits, skewing the system more than the two tiers system already did.<sup>161</sup>

When courts grant health benefits to one individual that cannot also be universalised, this violates the positive right to equality. This results from a failure to balance the individual right to health with the collective right to a system of equal health benefits.<sup>162</sup> As the Constitutional Court of South Africa stated in *Soobramoney v. Minister of Health, KwaZulu-Natal*, to manage limited resources sometimes the State will need “to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals”.<sup>163</sup> Importantly, to ensure the positive right to equality, the state will need to ensure it can universalise any health benefit it provides.

The Canadian case *Chaoulli v. Quebec* is likely the most notable case raising the issue of one-to-one equality in healthcare.<sup>164</sup> In that case, the claimants challenged as unconsti-

tutional the Quebec statutes that prohibited private insurance for healthcare services that were available in the public system. They argued that given the serious delays in the public healthcare system the statutes preventing them from buying private insurance violated their rights to life and personal security under the Canadian and Quebec Charters of Rights and Freedoms.<sup>165</sup> At trial, the court found that the purpose of the statutes was “to guarantee equal and adequate access to health care for all Quebecers”, which “was motivated by considerations of equality and dignity”.<sup>166</sup> Although the waiting lines were long, the trial court found, as a matter of fact based on the expert testimony, that creating a parallel private system would not solve the waiting times.<sup>167</sup> Indeed, the evidence at trial indicated that a parallel private system would have a negative impact on waiting times.<sup>168</sup> Accordingly, the trial court dismissed the claims, as did the court of appeal.

The Supreme Court of Canada, however, held in a four-to-three decision, that the Quebec statutes infringed on the rights to life and security under the Quebec Charter by denying the claimants a solution to avoid the waiting lines.<sup>169</sup> Moreover, after surveying the systems in other provinces and OECD countries, the Court held that the government had failed to justify the infringement on these rights as there were a number of other measures available “to protect the integrity of Quebec’s health care plan”.<sup>170</sup> In contrast, the dissent agreed with the findings of the trial judge that “[t]he only way to guarantee that all the health care resources will benefit all Quebecers without discrimination is to prevent the establishment of a parallel private health care system”.<sup>171</sup> Thus, the dissent concluded that the claimants had failed to show that the Quebec statutes were arbitrary.<sup>172</sup> “Indeed, the evidence prove[d] the contrary.”<sup>173</sup>

*Chaoulli* has been severely criticised.<sup>174</sup> Among the concerns, commentators maintain that the majority found facts contrary to the evidence at trial, failed to defer to the Legislature on a social policy issue, and mischaracterised the government interest as preserving the *existence* of the Quebec health care system as opposed to the *equality* of the system.<sup>175</sup> Martha Jackman contends that the Court’s decision “is directly at odds with the underlying equality-based premises of the Canadian medicare system”.<sup>176</sup> Here, the government chose to establish a one-tier system of healthcare that provides equity between the wealthy and the poor, as well as between the healthy and the ill.<sup>177</sup> Against this system of equalised health care, the majority would have the government create a two-tiered system in which those with the ability to do so purchase healthcare in a private system, while those who cannot pay or who are denied private insurance because they are already ill or disabled “are left to languish and die on public waiting lists”.<sup>178</sup>

According to Jackman, *Chaoulli* violates equality rights under both the Quebec and Canadian Charters as well as under international human rights law.<sup>179</sup> She sums it up this way:

“The majority’s reasoning and remedial order in *Chaoulli*, which recognize only the health care rights of the advantaged, and which ignores the rights of those who, by reason of poverty, chronic illness, or disability, are forced to rely exclusively on the public system, is profoundly at odds with the right to life, right to health, and equality guarantees set out under both the ICCPR and the ICESCR.”<sup>180</sup>

Notably, the Canadian and Quebec Charters do not include positive social rights such as

the right to healthcare. In such circumstances, there is the danger that the civil and political rights, which have constitutional status, will outweigh economic and social “interests” such as healthcare. As Jeff King points out, had the Charters recognised a positive right to healthcare, the *Chaoulli* Court would have had to confront the competing “right” of Quebecers to equality in healthcare.<sup>181</sup>

These cases illustrate that the positive right to equality in healthcare may be threatened by decentralisation of resource allocations, the absence of constitutional social rights and even the right to bring individual claims for healthcare services and goods. The holistic approach in the International Bill of Human Rights, however, points the way toward a balanced approach in which the right to equality applies across all the rights – not only civil and political rights – and to all people – not just those who can afford to exercise their individual rights. One-to-one equality is an essential aspect of the right to healthcare, no less than it is an essential aspect of the right to vote.

## Conclusion

Legal scholars, courts and human rights bodies are exploring the relationship between equality rights and social rights but are often restricted by some legal impediment in the jurisdiction. In some instances, the constitutional framework lacks social rights. In others, the right to equality is limited by legal precedent that has merged the right to equality with the right to non-discrimination, obliterating any positive right to equality. In the holistic human rights framework estab-

lished in the International Bill of Human Rights, however, equality and non-discrimination are distinct and are also intrinsically related to social rights. The interrelation of these rights is reflected in the text of the human rights instruments and in their drafting history. Moreover, the language, the overall framework and the historical record all support the notion that the unrestricted equality provisions – those that are not explicitly limited to specific rights – apply across all rights, including the social rights. Indeed, the positive right to equality applies to all fields in which the government acts.

Over the past decade, a renewed recognition of social rights as “real” human rights combined with empirical evidence that the denial of equality with respect to these rights impacts on all human rights, presents a new context for defining a positive right to equality. Additionally, experience has shown that civil and political equality is simply not possible without some level of social equality. In this context, drawing on the original holistic human rights framework of the International Bill of Human Rights promotes a broader understanding of the right to equality, one that is linked to all the human rights in the Bill, a positive right to equality that is distinct from non-discrimination. This positive right to equality demands one-to-one equality with respect to social rights – such as the right to healthcare – just as it demands one-to-one equality with respect to civil and political rights – such as the right to vote. In this holistic human rights framework, both negative and positive rights to equality are essential complements to social rights.

<sup>1</sup> Gillian MacNaughton is the Executive Director of the Program on Human Rights and the Global Economy at Northeastern University School of Law in Boston, USA. This article draws on her previous article, MacNaughton, G., "Untangling Equality and Non-Discrimination to Promote the Right to Healthcare for All", *Health and Human Rights: An International Journal*, Vol. 11(2), 2009, pp. 47-63.

<sup>2</sup> Wilkinson, R. and Pickett, K., *The Spirit Level: Why More Equal Societies Almost Always Do Better*, Allen Lane Penguin Group, 2009.

<sup>3</sup> *Ibid.*, p. 81.

<sup>4</sup> *Ibid.*, pp. 75-76.

<sup>5</sup> The World Bank, *World Development Report 2004: Making Services Work for Poor People*, The World Bank and Oxford University Press, 2003, p. 3; Gross, A. M., "The Right to Health in an Era of Privatization and Globalization: National and International Perspectives", in Barak-Erez, D. and Gross, A.M. (eds.), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing, 2007, pp. 307-327 (which discusses the concept of tiered healthcare systems in the domestic contexts of Canada, South Africa and Israel).

<sup>6</sup> Fredman, S., "Engendering Socio-Economic Rights", *South African Journal of Human Rights*, Vol. 25(3), 2009, p. 1.

<sup>7</sup> See, for example, Porter, B., "Expectations of Equality", *Supreme Court Law Review*, 33 S.C.L.R. (2d), 2006 (which documents the debates on equality and social rights in the early 1980s in Canada).

<sup>8</sup> See, for example, Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008 (which focuses in particular on India and South Africa); O'Connell, R. "From Equality before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution", in Doyle, O. and Carolan E. (eds.), *The Irish Constitution: Governance and Values*, Round Hall Press, 2008 (which focuses on Ireland); Meyerson, D., "Equality Guarantees and Distributive Inequity", *Public Law Review*, Vol. 19, 2008, p. 32 (which focuses on Australia, Canada and the United Kingdom).

<sup>9</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights (Art. 2, Para 2)*, UN Doc. E/C. 12/GC/20, 2 July 2009, Para 1.

<sup>10</sup> Hunt, P., *Reclaiming Social Rights: International and Comparative Perspectives*, Dartmouth Publishing, 1996, p. 71 (in which Hunt states that "it is no coincidence that rights with special relevance to marginalized groups are also those which are juridically marginalized").

<sup>11</sup> The International Bill of Human Rights is composed of the Universal Declaration of Human Rights (UDHR), G.A. Res. 217A (III) (1948), the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A (XXI) (1966).

<sup>12</sup> See, for example, McKean, W., *Equality and Discrimination under International Law*, Clarendon Press, 1983, p. 285.

<sup>13</sup> Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, 1995, p. 154.

<sup>14</sup> *Ibid.*

<sup>15</sup> See above, note 12, p. 285.

<sup>16</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979).

<sup>17</sup> See above, note 11, ICCPR, Article 26.

<sup>18</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UN Doc E/C. 12/1998/24, 3 December 1998.

<sup>19</sup> WHO Commission on the Social Determinants of Health, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, World Health Organization, 2008, p. 26.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, p. 29.

- <sup>22</sup> Wilkinson, R., *The Impact of Inequality: How to Make Sick Societies Healthier*, Routledge, 2005, p. 15.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> See above, note 19, p. 3.
- <sup>25</sup> *Ibid.*
- <sup>26</sup> *Ibid.*, p. 4.
- <sup>27</sup> *Ibid.*, p. 5.
- <sup>28</sup> *Ibid.*, p. 7.
- <sup>29</sup> World Health Organization, *Health Systems Financing: The Path to Universal Coverage, The World Health Report 2010*, Chapter 1, p. 5.
- <sup>30</sup> See above, note 19, pp. 202-206.
- <sup>31</sup> See above, note 11, ICESCR Articles 6-14.
- <sup>32</sup> See above, note 22, p. 103.
- <sup>33</sup> *Ibid.*, p. 103-107.
- <sup>34</sup> *Ibid.*, p. 105.
- <sup>35</sup> *Ibid.*, p. 111.
- <sup>36</sup> *Ibid.*, p. 110.
- <sup>37</sup> *Ibid.*, p. 101.
- <sup>38</sup> *Ibid.*, p. 18.
- <sup>39</sup> *Ibid.*
- <sup>40</sup> *Ibid.*
- <sup>41</sup> *Ibid.*
- <sup>42</sup> See, for example, Rae, D., *Equalities*, Harvard University Press, 1981, p. 21; Phillips, A. *Which Equalities Matter?*, Polity Press, 1999, p. 3.
- <sup>43</sup> *Ibid.*, Rae, p.21; *Ibid.*, Phillips, p. 27.
- <sup>44</sup> 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 (Art. 25)*, UN Doc. No. CCPR/C/21/Rev. 1/Add. 7, 1996, Para 21.
- <sup>45</sup> See above, note 42, Rae, p. 21.
- <sup>46</sup> *Ibid.*
- <sup>47</sup> *Ibid.*, p. 41.
- <sup>48</sup> *Ibid.*, p. 22.
- <sup>49</sup> *Ibid.*, p. 32.
- <sup>50</sup> *Ibid.*, p. 34-35.
- <sup>51</sup> *Ibid.*, p. 35.
- <sup>52</sup> *Ibid.*
- <sup>53</sup> For example, see above, note 11, ICCPR, Article 2 (which prohibits “distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).
- <sup>54</sup> See above, note 42, Rae, p. 45.
- <sup>55</sup> *Ibid.*, p. 47.
- <sup>56</sup> *Ibid.*
- <sup>57</sup> *Ibid.*
- <sup>58</sup> *Ibid.*, p. 48.

<sup>59</sup> The term “discrimination”, in both common usage and in domestic law generally, refers to such suspect classifications or unreasonable status-based distinctions. See above, note 12, 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.”).

<sup>60</sup> See above, note 8, Fredman, p. 176-177 (“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.”); Fiss, O., “Foreword”, in Gargarella, R., Domingo, P. and Roux, T. (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Ashgate Publishing 2006, p. xii (which argues that “economic status” or “poverty” should be “an independent and sufficient basis for corrective action”).

<sup>61</sup> See above, note 11, UDHR, Articles 2 (non-discrimination) and 7 (equality); ICCPR, Articles 2 (non-discrimination) and 26 (equal protection); ICESCR, Articles 2 (non-discrimination) and 3 (equality of men and women).

<sup>62</sup> Equality and non-discrimination are reiterated in many provisions of the UDHR. See for example UDHR 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”).

<sup>63</sup> See above, note 11, UDHR, Article 2.

<sup>64</sup> UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, First Session, UN Doc. No. E/C. 4/52, 6 December 1947, p. 4.

<sup>65</sup> Commission on Human Rights, Third Session, Summary Record of the Fifty-Second Meeting, UN Doc. No. E/CN. 4/SR. 52, 8 June 1948, p. 5.

<sup>66</sup> Morsink, J., *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania, 1999, p. 113; Skogly, S., “Article 2”, in Alfredson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, Kluwer Law International, 1999, p. 79; Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N. P. Engel, Kehl, 1993, p. 52; but compare Craven, see above, note 13, p. 175 (in which it states that wealth “could hardly be considered ‘suspect’”).

<sup>67</sup> Additionally, 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.

<sup>68</sup> See above, note 66, Morsink, pp. 113-114.

<sup>69</sup> 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.

<sup>70</sup> See above, note 9, Paras 25 (property) and 35 (economic and social condition).

<sup>71</sup> Vandenhoe, W., *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, 2005, p. 134.

<sup>72</sup> See Fredman, S., “Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage into the Equality Agenda”, *European Human Rights Law Review*, Vol. 3, 2010, pp. 290-304 and specifically p. 292 (which discusses the importance of the Equality Act 2010 including a positive duty on public bodies in relation to socio-economic disadvantage).

<sup>73</sup> UDHR, Article 7, which provides in part: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

<sup>74</sup> Möller, J., “Article 7”, in Alfredson, G. and Eide, A. (eds.), *The Universal Declaration of Human Rights*, Kluwer Law International, 1999, p. 153.

<sup>75</sup> ICCPR, Article 26.

<sup>76</sup> Choudhury, T., “The Drafting of Article 26 of the International Covenant on Civil and Political Rights”, *European Human Rights Law Review*, Vol. 5, 2002, p. 591.

<sup>77</sup> See above, note 66, Nowak, p. 466.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, p. 468.

<sup>80</sup> *Ibid.*, p. 459.

<sup>81</sup> See above, note 76, p. 598 (which states “equal protection of the law and non-discrimination were seen as fundamentally different notions”).

<sup>82</sup> ICCPR, Article 2(1), which states that any State Party to the ICCPR undertakes to respect and ensure “the rights recognized in the present Covenant, without distinction of any kind”.

<sup>83</sup> See above, note 66, Nowak, p. 465.

<sup>84</sup> UN Human Rights Committee, *General Comment 18: Non-discrimination*, U.N. Doc. No. HRI/GEN/1Rev. 6, 2003. The UN Human Rights Committee has also issued general comments on Article 3 (equal rights of men and women) and Article 14 (right to equality before the courts). The Committee on Economic, Social and Cultural Rights, responsible for monitoring the ICESCR, has issued general comments on Article 3 (equal rights of men and women) and Article 2(2) (non-discrimination).

<sup>85</sup> *Ibid.*, UN Human Rights Committee, *General Comment 18: Non-discrimination*, Para 7.

<sup>86</sup> See above, note 71, p. 86. (“None of the [human rights] Committees has paid much attention to a conceptual distinction between the principles of equality and non-discrimination.”)

<sup>87</sup> See above, note 84, UN Human Rights Committee, *General Comment 18: Non-discrimination*, Para 12.

<sup>88</sup> *Ibid.*

<sup>89</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, UN Doc. No. CCPR/C/USA/CO/3/rev. 1, 2006, Para 22.

<sup>90</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, UN Doc. No. CCPR/C/CAN/CO/5, 20 April 2006, Para 24.

<sup>91</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: New Zealand*, UN Doc. No. A/50/40, 3 October 1995, Para 182.

<sup>92</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Japan*, UN Doc. No. CCPR/C/JPN/CO/5, 2008, Para 29.

<sup>93</sup> Canadian Constitution Act 1982, Canadian Charter of Rights and Freedoms § 15(1).

<sup>94</sup> *Andrews v. Law Society of British Columbia* (1989), 1 S.C.R. 143.

<sup>95</sup> *Law v. Canada* (1999), 1 S.C.R. 497, Para 88 (which revisits *Andrews*).

<sup>96</sup> See above, note 94, Para 72, (see particularly the decision of La Forest J.).

<sup>97</sup> See above, note 7, p. 226. Bruce Porter explains that the first draft on the equality provision presented by the Trudeau government was labeled “non-discrimination rights”. In response to concerted lobbying over the next year, the provision was renamed “equality rights” and included – in addition to equality before the law, equal protection of the law and non-discrimination – two new provisions, equality under the law and equal benefit of the law. The broad wording adopted by Canada was considered the most expansive in the world.

<sup>98</sup> *The Declaration of Principles on Equality*, promulgated by The Equal Rights Trust, also presents, in Principle 1, a “right to equality” substantially broader than non-discrimination by including, in addition to non-discrimination, the rights to equality before the law, the right to equal protection of the law and the right to equal benefit of the law.

<sup>99</sup> Fredman, S., *Discrimination Law*, Oxford University Press, 2002, p. 70 (which documents the attempts of non-enumerated groups to define themselves as enumerated groups). See, for example, *Gosselin v. Quebec* (2002) 4 S.C.R. 429 (which proved a distinction on the enumerated basis of age, but failed to prove a distinction based on stereotype, prejudice or disadvantage).

<sup>100</sup> UDHR, Article 25; ICESCR, Article 12; Kinney, E. D. and Clark, B. A., “Provisions for Health and Healthcare in the Constitutions of the World”, *Cornell International Law Journal*, Volume 37(2), 2004, p. 287 (which states that 67.5 % of all countries have constitutional provisions on health or healthcare). The right to health is also recognised in the preamble to the Constitution of the World Health Organization, which states that “[t]he 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”.

<sup>101</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to highest attainable standard of health*, U.N. Doc. E/C. 12/200/4, 2000, Para 2.

<sup>102</sup> ICESCR, Article 12(1).

<sup>103</sup> *Ibid.*, Article 12(2).

<sup>104</sup> See above, note 101.

<sup>105</sup> *Ibid.*, Para 9.

<sup>106</sup> *Ibid.*, Para 11.

<sup>107</sup> *Ibid.*, Paras 19, 34-36.

<sup>108</sup> *Ibid.*, Para 12(b)(iii).

<sup>109</sup> *Ibid.*, Para 19.

<sup>110</sup> *Ibid.*, Para 30.

<sup>111</sup> *Ibid.*, Para 43(e).

<sup>112</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. No. E/C. 12/1/Add. 74, 2001, Para 26.

<sup>113</sup> *Ibid.*, Para 47.

<sup>114</sup> UN Committee on Economic, Social and Cultural Rights, *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 and 54.

<sup>115</sup> UN Committee on Economic, Social and Cultural Rights, *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.

<sup>116</sup> *Ibid.*

<sup>117</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brazil*, UN Doc. No. E/C. 12/BRA/CO/2, 2009, Para 11.

<sup>118</sup> UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. No. E/C. 12/AUS/CO/4, 2009, Para 28.

<sup>119</sup> See above, note 9, Para 29.

<sup>120</sup> *Ibid.*, Para 33.

<sup>121</sup> *Ibid.*, Para 34.

<sup>122</sup> *Ibid.*, Para 8.

<sup>123</sup> *Ibid.*, Para 27.

<sup>124</sup> Hunt, P., *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.

<sup>125</sup> *Ibid.*, Para 42. The Special Rapporteur understands the health concept of “equity” – meaning equal access to healthcare according to need – to be akin to equality and non-discrimination in human rights law. (*Ibid.*, Para 43.)

<sup>126</sup> *Ibid.*, Para 42.

<sup>127</sup> McCoy, D., “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.

<sup>128</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>129</sup> See above, note 127, p. 66.

<sup>130</sup> 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. The system is considerably more complicated than presented here. See *ibid.*, p. 12; See also González Rossetti, A., “Change Teams and Vested Interests: Social Security Reform in Mexico”, in Kaufman, R. and Nelson, J. (eds.), *Crucial Needs Weak Incentives: Social Sector Reform, Democratization and Globalization in Latin America*, Baltimore: John Hopkins University Press, 2004, pp. 70-71 (which identifies two additional tiers, private healthcare for the wealthy and a complete lack of healthcare for a rural population of mostly indigenous people).

<sup>131</sup> *Ibid.*, Fundar – Centro de Análisis e Investigación, pp. 10-11.

<sup>132</sup> *Ibid.*, pp. 50-51.

<sup>133</sup> See Frenk, J. and Gómez-Dantés, O., "Ideas and Ideals: ethical basis of health reform in Mexico", *The Lancet*, Vol. 373, Issue 9673, 2009, pp. 1406-1408 (which explains that the intent behind the second-tier healthcare system was to provide healthcare protection to 50 million people who had none).

<sup>134</sup> While the intent is entirely different than the intent in *Brown* or apartheid South Africa, under international human rights law prejudicial intent is not necessary to show status-based discrimination. Rather, any distinction that has the "purpose or effect" of impairing the enjoyment of rights by a protected group amounts to discrimination.

<sup>135</sup> See above, note 101, Para 43(f).

<sup>136</sup> *Corte Constitucional de la República de Colombia, Sala Segundo de Revisión* (2008) Constitutional Court of Colombia, Judgment No T-760/2008.

<sup>137</sup> Yamin, A. and Parra-Vera, O., "Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates", *Hastings International and Comparative Law Review*, Vol. 33(2), 2010, pp. 101-129.

<sup>138</sup> *Ibid.*, p. 105.

<sup>139</sup> See above, note 136, Para 2.2.3, p. 10.

<sup>140</sup> *Ibid.*, Para 3.4, pp. 36-37.

<sup>141</sup> *Ibid.*, Para 3.4.2.3, p. 38.

<sup>142</sup> *Ibid.*, Para 6.1.2.1.1, p.185 (two systems of healthcare violate the constitutional right to equality).

<sup>143</sup> See above, note 127, p. 70.

<sup>144</sup> *Ibid.*

<sup>145</sup> People's Health Movement, Medact and Global Equity Gauge Alliance, *Global Health Watch 2005-2006: an alternative world health report*, Zed Books, 2005, p. 63.

<sup>146</sup> *Ibid.*, pp. 64-65.

<sup>147</sup> See above, note 127, p. 71.

<sup>148</sup> See above, note 29, p.13.

<sup>149</sup> See above, note 42, Rae, p. 25.

<sup>150</sup> *Mashavha v. President of the Republic of South Africa* (2004) CCT 67/03.

<sup>151</sup> *Ibid.*, Para 51.

<sup>152</sup> *Ibid.*

<sup>153</sup> See Newdick, C., "Accountability for Rationing – Theory into Practice," *Journal of Law, Medicine and Ethics*, Vol. 33(4), 2005, p. 662; see also *Rogers v. Swindon Primary Care Trust* (2006) EWCA Civ. 392 (in which the plaintiff was denied Herceptin which was recommended by her doctor, even though the drug was funded for all those with a doctor's recommendation in other healthcare districts).

<sup>154</sup> *Ibid.*, Newdick, p. 662.

<sup>155</sup> *Ibid.*, p. 662.

<sup>156</sup> *Ibid.*, p. 667.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> Afonso da Silva, V. and Vargas Terrazas, F., "Claiming the Right to Health in Brazilian Courts: the exclusion of the already excluded", 2008, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1133620](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133620); see also Hoffmann, F. F. and Bentes, F. R. N. M., "Accountability for Social and Economic Rights in Brazil", in Gauri, V. and Brinks, D. M. (eds.), *Courting Social Justice: Judicial Enforcement of Social Rights in the Developing World*, Cambridge University Press, 2008, pp. 142-143 (which states that the middle class has appreciably better access than the poorer class to courts because they are able to bring right-to-health claims via private counsel).

<sup>160</sup> See above, note 137, p. 114.

<sup>161</sup> *Ibid.*

<sup>162</sup> See above, note 5, Gross, pp. 337-339.

<sup>163</sup> *Soobramoney v. Minister of health, KwaZulu-Natal*, 1 South African Law Report 765 (1998).

<sup>164</sup> *Chaoulli v. Quebec Attorney General* (2005) 1 SCR 791.

<sup>165</sup> *Ibid.*, Para 6.

<sup>166</sup> *Ibid.*, Para 241 (translation of trial court decision in dissenting opinion of Binnie and LeBel, JJ.).

<sup>167</sup> *Ibid.*, Para 7.

<sup>168</sup> *Ibid.*, Paras 243-254.

<sup>169</sup> *Ibid.*, Para 45.

<sup>170</sup> *Ibid.*, Para 84.

<sup>171</sup> *Ibid.*, Para 242 (translation of trial court decision in dissenting opinion of Binnie and LeBel, JJ.).

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> King, J., "Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision", *The Modern Law Review*, Vol. 69(4), 2006, p. 632 (which states that *Chaoulli* "may well be the most controversial case yet decided under the Charter").

<sup>175</sup> *Ibid.*, pp. 631-643.

<sup>176</sup> Jackman, M., "'The Last Line of Defence for [Which] Citizens': Accountability, Equality, and the Right to Health in *Chaoulli*", *Osgoode Hall Law Journal*, Vol. 44, 2006, p. 359.

<sup>177</sup> *Ibid.*, p. 359.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*, pp. 360-361.

<sup>180</sup> *Ibid.*, p. 361.

<sup>181</sup> See above, note 174, p. 639.