# Conceptions of Equality and the Distribution of Wealth in Human Rights Adjudication

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'All human beings are born free and equal in dignity and rights' declares the Universal Declaration in its opening article.[1] Equality is a central pillar of human rights law. However, questions of *which kind of equality* remain unsettled. Status equality, i.e., the prohibition of discrimination based on personal or group characteristics, is clearly a key concern of human rights law. Material equality, i.e., economic inequality of income and wealth, however, has until a recent lively debate, remained unaddressed.[2] Over the last several decades most economies have witnessed a drastic rise in economic inequality, a statement that has become almost a cliché after the Piketty-mania following *Capital in the 21st Century*.[3] The ascendancy of neoliberalism since the 1970s has coincided with human rights' lead role as a moral language and set of principles on the international stage. Some have argued that these parallel timelines are no coincidence as human rights have facilitated, been coopted by, or at least not challenged, neoliberalism.[4] Samuel Moyn has argued influentially that human rights have failed to register economic inequality as a moral problem, as human rights, including the often neglected socio-economic rights, place a moral emphasis on 'sufficiency', i.e., a floor of basic needs, rather than material equality.[5] Human rights are therefore, in Moyn's account, not concerned with the ceiling of economic inequality and fail to disrupt the neoliberal economic structures that facilitate it. Others refute Moyn's arguments and claim that human rights are (or should be) concerned with economic inequality, either intrinsically or because of the instrumental adverse effects of inequality on the enjoyment of rights, and that human rights are (or could be) useful as a tool to reduce inequality.[6] Indeed,

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1 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1.

2 UNHRC 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (27 May 2015) UN Doc A/HRC/29/31 para 3 (Philip Alston). For the debate, see, e.g., the material cited in n 5-7 infra and summaries in Daniel Brinks, Julia Dehm and Karen Engle, 'Introduction: Human Rights and Economic Inequality' (2020) 10 Humanity 363 and Julia Dehm, Ben Golder and Jessica Whyte, 'Introduction: "Redistributive Human Rights?" Symposium' (2020) 8 London Review of International Law 225.

3 Thomas Piketty, *Capital in the 21st Century* (translated by Arthur Goldhammer, Harvard UP 2013).

4 See, e.g., Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 Law and Contemporary Problems 147; Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019); Susan Marks, 'Human Rights and Root Causes' (2011) 74 Modern LR 57; John Linarelli, Margot E Salomon, and Muthucumaraswamy Sornarajah, *The Misery of International Law* (OUP 2018); Amy Kapczynski, 'The Right to Medicines in an Age of Neoliberalism' (2019) 10 Humanity 79; David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in Rob Dickinson et al. (eds), *Examining Critical Perspectives on Human Rights* (CUP 2012).

5 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard UP 2018).

6 See, e.g., Gráinne De Búrca, 'Book Review. "Not Enough: Human Rights in an Unequal World"' (2018) 16 I•CON 1347; Philip Alston, 'Extreme Inequality as the Antithesis of Human Rights' Open Global Rights (Aug. 27, 2015) <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/> [https://perma.cc/CCM3-6WRP] accessed 24 August 2021; UNHRC 'Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepulveda Carmona' (22 May 2014) UN Doc A/HRC/26/28; Margot E. Salomon, 'Why Should It Matter That Others

in very recent years some human rights bodies have begun to address economic inequality explicitly.[7] Another related strand of scholarship is concerned with the role of domestic courts, i.e., how could courts apply human or constitutional rights or other constitutional principles, to reduce inequality?[8]

The present chapter contributes to these debates by considering the material distributional effects of equality norms and the role of competing conceptions of equality in that context.[9] The existing literature on equality and non-discrimination in human rights law frequently refers to different conceptions of equality (e.g., formal equality vs. substantive equality) but usually not focused on material distribution.[10] My examination of these different conceptions emphasizes the place of economic inequality. The existing literature also often draws connections between specific conceptions and corresponding policies or legal outcomes. For example, formal equality is linked to a prohibition of direct discrimination, notions of substantive equality are linked to a prohibition of indirect discrimination and so-called affirmative action programs are said to be compatible with substantive equality but not with formal equality.[11] This chapter similarly draws lines between conceptions of equality and legal outcomes, but focusing on material distribution, i.e., effects on economic inequality. I highlight

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Have More? Poverty, Inequality, and the Potential of International Human Rights Law' (2011) 37 Review of International Studies 2137; Gillian MacNaughton, 'Equality Rights Beyond Neoliberal Constraints' in Gillian MacNaughton and Diane F. Frey (eds), *Economic and Social Rights in a Neoliberal World* (CUP 2018); Gillian MacNaughton, Diane F. Frey and Catherine Porter (eds), *Human Rights and Economic Inequalities* (CUP forthcoming 2021).

7 Kári Hólmar Ragnarsson, 'Humanising not Transformative? The UN Committee on Economic, Social and Cultural Rights and Economic Inequality in OECD Countries 2008-19' (2020) 8 London Review of Int'l Law 261.

8 Rosalind Dixon & Julie Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 University of Chicago LR 369; Mark Tushnet, 'The Inadequacy of Judicial Enforcement of Constitutional Rights Provisions to Rectify Economic Inequality, and the Inevitability of the Attempt' in Salman Khurshid et al. (eds), *Judicial Review: Process, Powers and Problems* (CUP 2020); and Ganesh Sitaraman, 'Economic Inequality and Constitutional Democracy' in Mark A. Graber et al. (eds) *Constitutional Democracy in Crisis?* (OUP 2018).

9 By 'equality norms' I refer to clauses on equality and non-discrimination in bills of rights, either international human rights instruments or national constitutions, which are sometimes also referred to as the right to equality.

10 See, e.g., Daniel Moeckli, 'Equality and Non-discrimination' in Daniel Moeckli et al. (eds), *International Human Rights Law* (3rd ed OUP 2018); Olivier De Schutter, *International Human Rights Law* (CUP 2019) 722-61; and, in the context of disability in particular, Oddný Mjöll Anrardóttir, 'A Future of Multidimensional Disadvantage Equality?' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009). To be clear, efforts have been made to analyze theories of distributional equality in the context of rights adjudication, see, e.g., Sandra Liebenberg, 'Toward an Equality-promoting Interpretation of Socio-economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition' (2015) 132 South African Law Journal 441; Maija Aalto-Heinilä, 'Social Rights and Equality: From Universal Formalism to Individualized Conditionality' in Toomas Kotkas and Kenneth Veitch (eds), *Social Rights in the Welfare State. Origins and Transformations* (Routledge 2017). The present chapter contributes to these efforts.

11 See, e.g., Moeckli (n 10) 151.

that equality norms may lead to a range of material distributional outcomes in concrete cases. Examples are drawn from a variety of courts and human rights bodies applying equality norms. The high-level principle of equality has not in practice required uniform distributional outcomes. The first part of the argument focuses on identifying the various mechanisms of distributional effects of equality adjudication. The second part of the argument is that, while the fit is by no means tight, different conceptions of equality affect the distributional outcome in specific cases. For example, formal equality is more likely than other conceptions of equality to accept or even lead to regressive distributional outcomes.

For the purposes of the argument, I set up categories of distributional outcomes and trace the relationship between these categories and certain conceptions of equality. Neither my discussion of conceptions of equality nor my categorization of distributional outcomes are intended to be exhaustive but rather illustrative of a causal relationship: our conception of equality matters. This argument highlights that courts and human rights bodies can apply equality norms to reduce economic inequality through several different types of material distributional effects.[12] Whether or not a court is likely to reach such a conclusion may depend in part on the prevailing conception of equality. Those interested in reducing inequality through rights should thus, in devising legal strategies, consider the variety of distributional outcomes and how the desired outcome fits with prevailing conceptions of equality.

The chapter proceeds as follows: Section 1 discusses conceptions of equality, explaining that what is meant by equality can differ significantly. I flesh out three conceptions; *formal equality*, *substantive equality* and *social equality* and highlight the place of economic inequality in each of these conceptions. Section 2 turns to the practice of courts and human rights bodies and explains how the application of equality norms can lead to a variety of material distributional outcomes. I do this by categorizing distributional outcomes as *regressive*, *de-commodifying*, *pre-distributive,* and *redistributive*, and explain these categories through examples from various courts and human rights bodies. Section 3 then explores the relationship between different conceptions of equality and the categories of distributional outcomes. Section 4 briefly concludes.

## 1 Conceptions of Equality: Formal, Substantive, or Social

The literature developing different conceptions of equality is vast.[13] For the purpose of arguing that conceptions of equality matter to the distributional outcomes of adjudication, I outline three well-known conceptions, focusing on the stance of these conceptions towards economic inequality.

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[12] I do not discuss at any length questions of desirableness or potential unintended consequences of such conclusions. On those questions, see, e.g., Dixon and Suk (n 8).

[13] For a useful review see Stefan Gosepath, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), <https://plato.stanford.edu/archives/sum2021/entries/equality/> accessed 24 August 2021.

*Formal equality* emphasizes treating people equally. Harking back to Aristotelian ethics, formal equality demands that likes must be treated alike.[14] Outcomes are less important than the process by which the outcome was produced. State institutions should strive towards neutrality towards all its citizens and govern through rules of general application. Non-discrimination based on factors such as race and gender are key, with the emphasis that, for example, women should be treated the same as men. In the context of race, formal equality supports policies described by their proponents as 'color-blind'.[15]

As to the place of economic inequality, the strongest version of the political economy of formal equality is found in neoliberal theory, most evidently in Hayek:

> From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them into equal position would be to treat them differently. Equality before the law and material equality are therefore not only different but are in conflict with each other; and we can achieve either the one or the other, but not both at the same time. The equality before the law which freedom requires leads to material inequality.[16]

This constitutes a central plank in the neoliberal ideological opposition to redistribution. Economic inequality is seen as inevitable. As explained by Jessica Whyte, while the early neoliberal thinkers accepted that social welfare policies, at the very least, at times made pragmatic sense, such policies must not distort market distribution and familial responsibility. In practice this meant that social assistance should be targeted at the poorest, limited to a mere basic substance, not in the form of 'rights', but discretionary and reversable, and welfare policies must not involve redistribution for the sake of reducing inequality.[17]

*Substantive equality* comes in many versions with the central distinction from formal equality being that process-oriented equal treatment is insufficient for the demands of justice. Some versions emphasize equal opportunities, acknowledging that people in fact start from different positions. Others go further and demand equal outcomes, demanding some modicum of equality in the actual distribution of some defined social good.

Depending on the precise formulation, substantive conceptions of equality will require some degree of material equality. In a literal version, substantive equality would be associated with full equality in material conditions. However, few if any egalitarians subscribe to such demands of absolute equality.

To take the example of perhaps the most influential egalitarian thinker, John Rawls's first principle of justice focuses on equal basic liberties (including what

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[14] Aristotle, *The Nicomachean Ethics of Aristotle* (JM Dent, 1911) Book V3, paras 1131a-b.

[15] Famous examples from the U.S. Supreme Court are *Plessy v Ferguson*, 163 U.S. 537, 559 (1896) (Harlan J (dissenting)) ('There is no caste here. Our Constitution is color-blind') and *Parents Involved v Seattle*, 551 U.S. 701, 748 (2007) (Roberts CJ) ('The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.')

[16] Friedrich A. Hayek, *The Constitution of Liberty. The Definitive Edition* (Ronal Hamowy (ed) Routledge 2012 [1960]) 150.

[17] Whyte (n 4).

we would think of as civil and political human rights) while his second principle focuses on social and economic inequalities. Specifically, Rawlsian justice demands equality of opportunity and, through the 'difference principle', that, in a just society, inequality is tolerated only to the extent that it contributes to the welfare of the least well-off.[18] Thus, Rawls would place a limit on economic inequality. Other answers to the question of 'equality of what?' produce different views of which levels of economic inequality should be tolerated. Proposals include equality of capabilities,[19] welfare[20] or opportunities for welfare,[21] with the common theme that some sort of equality has moral value.

Sandra Fredman provides a sophisticated framework to think about a right to substantive equality in human rights law based on four dimensions: (1) redressing disadvantage, (2) countering 'prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic', (3) enhancing voice and participation, 'countering both political and social exclusion', and (4) accommodating difference and achieving structural changes.[22] Fredman's multi-dimensional account of substantive inequality has a direct bearing on poverty, especially by emphasizing the close relationship between status inequality and economic inequality. For anti-poverty programs, this conception of substantive equality also adds important factors, for example that such programs must be free of any stigma and humiliation often associated with needs-based programs, and accommodate differences.[23] On the other hand, Fredman's account of substantive equality is expressly designed to deal primarily with status inequality and it is not clear that economic inequality in itself or economic inequality at the upper brackets of the income spectrum (i.e., the ceiling of inequality) are a moral problem for this version of substantive inequality. In practice, however, redistribution from the top down will often be the only available means by which to remedy disadvantage at the bottom, which is the central aim of substantive equality. Fredman has indicated that it may be more appropriate to address socio-economic disadvantage, when it has no relationship with status equality, not through the concept of substantive equality but through other rights or policies, including the right to social security.[24]

*Social equality*,[25] also referred to as relational equality, focuses on societal relationships or structures. As framed by Elizabeth Anderson, the negative aim of social equality is to end oppression, while the positive aim is to create a society

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18 John Rawls, *A Theory of Justice* (Harvard UP 1971) 42-43.

19 Amartya Sen, *Inequality Reexamined* (OUP 1992).

20 See, e.g., James Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (OUP 1986).

21 Richard J. Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical Studies 77.

22 Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 I•CON 712, 727.

23 See Sandra Fredman, 'The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty' (2011) 22 Stellenbosch LR 566.

24 Fredman (n 22) 735.

25 In some versions, social equality would be viewed as a subcategory of substantial equality. For the purposes of this chapter, it is treated separately to illustrate distinctions.

of equals.[26] For Jonathan Wolff, social equality is 'primarily the absence of social inequality (i.e., the absence of asymmetric social relations).'[27] Material distribution is important to these approaches as it translates into asymmetries of power and status. However, material distribution cannot be isolated from other factors leading to exclusions, including discrimination based on race, gender, etc. Economic inequality can, in this context, be viewed as a symptom as well as a cause of 'a deeper problem of what we can understand as domination – the accumulation of unchecked, arbitrary economic or political power over others… the morally-troubling condition of being subject to another's will: even if the other entity treats you well, you remain subservient and therefore unfree.'[28] In this vein, Nancy Fraser conceives social justice as 'parity of participation', which requires various background conditions regarding economic equality, social status and political representation.[29] Fraser's version rejects 'social arrangements that institutionalize deprivation, exploitation, and gross disparities in wealth, income, and leisure time, thereby denying some people the means and opportunities to interact with others as peers'.[30] However, this is not to say 'that everyone must have exactly the same income, but it does require the sort of rough equality that is inconsistent with systemically generated relations of dominance and subordination'.[31]

Anderson frames the distributional requirements of social equality in terms of capabilities, i.e., that people are entitled to those capabilities that allow them to avoid domination by others and function fully as citizens in a democratic states.[32] For Anderson, people should be equal as human beings, referring to physical and mental well-being etc., as workers, and as participants in politics.[33] This emphasis on securing the necessary means for full participation in society has led some to understand theories of social equality as requiring sufficient provision, rather than including a moral requirement of equal distribution.[34] This

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[26] Elizabeth Anderson, 'What is the Point of Equality?' (1999) 109 Ethics 287.

[27] Jonathan Wolff, 'Social Equality and Social Inequality' in Carina Fourie et al. (eds), *Social Equality: On What It Means to be Equals* (OUP 2015).

[28] K. Sabeel Rahman, 'Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?' (2016) 94 Texas LR 1329, 1331.

[29] Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' in Nancy Fraser and Alex Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (Verso 2003).

[30] Ibid., at 36.

[31] Nancy Fraser 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' in Craig Calhoud (ed), *Habermas and the Public Sphere* (MIT Press 1992) 121.

[32] Anderson (n 26) 316. On the capabilities approach more generally see Sen (n 19).

[33] Anderson (n 26) 317-18.

[34] Christian Schemmel, 'Why Relational Egalitarians Should Care About Distributions' (2011) 37 Social Theory and Practice 365; Paula Casal, 'Why Sufficiency is not Enough' (2007) 117 Ethics 296; and Richard Arneson, 'Distributive Justice and Basic Capability Equality—"Good Enough" is not Good Enough' in Alexander Kaufman (ed), *Capabilities Equality—Basic Issues and Problems* (Routledge 2006).

would mean that social equality requires only that everyone has enough, but beyond that it is not concerned with economic inequality. In terms of what counts as 'enough', Sandra Liebenberg, writing about socio-economic rights in South Africa, argues that a social equality conception requires that welfare programs not merely meet basic needs, but facilitate 'the ability of people to participate as equals in society'.[35]

However, Anderson makes a more expansive claim for distributional requirements. In her view social equality requires, first, constraints on economic inequality at the bottom, ensuring a safety net for all. Second, constraints are also needed at the top, as income and wealth translate into political and economic power and thus risks of domination. Third, Anderson argues that egalitarians should support a broad middle class, including by providing social insurance to the middle of the income spectrum, as universal welfare programs reinforce solidarity and avoid stigma. A shrinking middle class, which has proven to be a major risk of neoliberalism, is also a worry for egalitarians as it may lead to reduced social solidarity and increased divisions.[36] Thus, while some versions of social equality would be more worried about poverty than economic inequality, Anderson's version supports reducing inequality across all income brackets.

Finally, we should keep in mind that regardless of all these egalitarian theories, economic inequality, even if not seen as an intrinsically important moral issue, has adverse instrumental effects. These include detrimental effects on health outcomes,[37] on democracy and social cohesion,[38] human rights,[39] and even economic growth.[40] This is a reminder that we might care about reducing economic inequality for purely instrumental reasons.

## 2 Material Distributional Outcomes in Human Rights Adjudication

Writing on South Africa, Geoff Budlender has proposed that equality is potentially very helpful in answering the complicated distributional questions raised by rights adjudication, in that case socio-economic rights:

> [The equality right] offers a simple answer to the question 'how much?' – 'as much as other people receive'. The State may equalise either upward or downward

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35 Leibenberg (n 10) 433.

36 Elizabeth Anderson, 'How Should Egalitarians Cope with Market Risks?' (2008) 9 Theoretical Inquiries in Law 239, 265-68.

37 Kate Pickett and Richard G. Wilkinson, *Why More Equal Societies Almost Always Do Better* (Allen Lane 2009); Göran Therborn, *The Killing Fields of Inequality* (Polity 2013).

38 See, e.g., Piketty (n 3); United Nations Development Programme, *Humanity Divided: Confronting Inequality in Developing Countries* (UNDP 2013).

39 See, e.g., UNHRC Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston (27 May 2015) UN Doc A/HRC/29/31.

40 See, e.g., Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers our Future* (WW Norton 2012).

> (assuming that this is permissible), but it must equalise. When this happens, questions of resource allocation are left to those who have been elected to make those decisions.[41]

Budlender's argument is powerful. However, his answer – 'as much as other people receive' – may not be as clear as it seems. What counts as 'as much' and the mechanism of equalization are deeply disputed topics. Insights from the American legal realists[42] and critical legal studies[43] urge us to examine the indeterminacy of legal concepts in practice, including concepts such as human rights and equality. Rather than focusing on legal determinacy, the distributive effects of law, especially the background rules of property and contract that quietly govern so many interactions between people, are central to critical scholars.[44] In this section I present examples of varying material distributional outcomes – meaning a range of different mechanics whereby legal outcomes affect distribution of wealth or resources – in cases where courts apply principles of equality and non-discrimination. Equality norms are, in this context, a subset of rights and the distributional analysis thus applies more broadly to the application of rights, and some of the examples discussed arise from the application of rights other than equality. I present four categories of distributional outcomes: *regressive*, *de-commodifying*, *pre-distributive*, and *redistributive*. These categories are by no means watertight, and within each one there is quite a bit of variation. However, the categories are designed to highlight different mechanisms of distribution established through rights adjudication.

*a) Regressive:* Regressive distributional effects refer to situations where value is distributed upwards to the already better off. Under certain interpretations, the function of rights may be to dismantle progressive economic policies. The quintessential example is the U.S. Supreme Court's 1905 decision in *Lochner*[45]and the subsequent era of regressive rights adjudication, striking down aspects of the New Deal.[46] In much more recent history, the ECJ's decisions in

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41 Geoff Budlender, '20 Years of Democracy: The State of Human Rights in South Africa' (2014) 3 Stellenbosch LR 440, 443-44.

42 Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia LR 809.

43 Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1943) 96 Harvard LR 561, 570-72 (1983).

44 Duncan Kennedy, 'Law and Economics from the Perspective of Critical Legal Studies' in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Palgrave 1998).

45 *Lochner v New York*, 198 U.S. 45 (1905).

46 For two very different views of the *Lochner* era, see Cass R. Sunstein, 'Lochner's *Legacy*' (1987) 87 Columbia LR 873 and Richard A. Epstein, 'The Mistakes of 1937' (1988) George Mason ULR 1.

*Viking*[47] and *Laval*[48], limiting national trade-union activities, have acquired *Lochner*-type status in Europe as archetypical rights-based neoliberalization by supranational judicial decree. From the European Court of Human Rights (ECtHR), the best-known decisions in this vein are also anti-trade union: *Young, James and Webster v. UK*[49], *Sigurjónsson v. Iceland*[50] and later *Sørensen and Rasmussen v. Denmark*[51] eliminated the closed-shop arrangements favored by trade unions, in spite of the original intention of the member states of the European Convention on Human Rights (ECHR) not to interfere with such arrangements. Examples from domestic courts include the Canadian Supreme Court's decision in *Chaouilli*,[52] creating constitutional protection for private health insurance designed to bypass the public system. While the mentioned cases were not decided on the basis of equality and non-discrimination norms, but other rights provisions, clearly the prevailing conceptions of equality did not prevent these regressive outcomes.

Moving to concrete examples of equality norms leading to regressive outcomes, courts may strike down progressive taxation or special 'solidarity' taxes levied on the rich. Recent examples from Europe include that the Italian Constitutional Court in 2015 struck down a so-called Robin Hood tax levied on the profits of petroleum companies on the basis that the tax was discriminatory.[53] The French *Conseil Constitutionnel* struck down François Hollande's government's 75 per cent top bracket income tax on the basis of a non-discrimination issue with respect to the treatment of different types of households.[54] The Latvian Constitutional Court held that a solidarity tax was unconstitutionally discriminatory as the amount of the tax depended in part on the taxpayer's type of social insurance.[55] As any tax scheme, other than a single flat-tax of the type championed by Milton Friedman,[56] necessarily relies on

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47 Case C-438/05 *International Transport Workers Federation v Viking Line ABP* [2007] ECR I-10779.

48 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

49 *Young, James and Webster v the UK* (1981) ECHR 4.

50 *Sigurjónsson v Iceland* (1993) ECHR 32.

51 *Sørensen and Rasmussen v Denmark* (2006) ECHR 24.

52 *Chaoulli v Quebec (Attorney General)* (2005) 1 SCR 791.

53 Corte Costituzionale [Constitutional Court], Judgment No. 10 of 2015.

54 Conseil Constitutionnel [Constitutional Council] Decision no 2012-662 DC of 29 December 2012. English version available at <https://www.conseil-constitutionnel.fr/en/decision/2012/2012662DC.htm> accessed 24 August 2021.

55 Latvijas Republikas Satversmes Tiesa [Latvian Constitutional Court], Case No. 2016-14-01. And see the Court's press release: 'The tax rates established in Article 6 of the law "On Solidarity Tax" are incompatible with the equality principle enshrined in the Satversme' (10 Oct 2017) <http://www.satv.tiesa.gov.lv/en/press-release/the-tax-rates-established-in-article-6-of-the-law-on-solidarity-tax-are-incompatible-with-the-equality-principle-enshrined-in-the-satversme/> [https://perma.cc/X35J-CZBQ] accessed 24 August 2021.

56 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962).

distinctions between different groups of tax payers, it is easy to see how some conceptions of equality would treat such distinctions as suspect.

A final example might be courts striking down rent-control legislation designed to ensure affordable housing. Of course, opinions will differ as to the effectiveness of rent-control but we might at the very least abstract from the following examples the notion that courts might strike down such schemes with regressive distributional outcomes. In *Bittó*[57] the ECtHR found a Slovakian rent-control scheme to be contrary to the private property provision of the European Convention. While the Court did not examine the case directly under the non-discrimination provision in Article 14 of the Convention, an important element of the decision was a comparison of the rent-controlled apartments owned by the applicants and apartments that did not fall within the scope of the scheme. While the Court agreed with the state that the rent-control scheme served a legitimate purpose, it held that a fair balance had not been respected between the interests of the applicants and the public interest being pursued. Importantly, the Court seemed to be strongly influenced by the considerable difference in rent income allowed under the rent-control scheme and rent on what the Court and the parties referred to as 'free-market'. Thus, market outcomes were treated as the baseline of equal or fair treatment.

*b) De-commodifying*: Rights can be applied to immunize certain goods from economic rationality.[58] In Esping-Andersen's classic work on welfare states, the core of providing a service within the welfare state as a 'right' is the idea of immunity from the market, i.e., to ensure that 'a person can maintain a livelihood without reliance on the market'.[59] As described by Paul O'Connell, understanding rights as decommodification rights means insisting that 'certain things (goods and services) are so fundamental to human flourishing that they should be exempted from market rationality'.[60]

In practice, equality and non-discrimination may have a de-commodifying effect, for example when delivery of certain goods does not depend on the ability to pay (i.e., discrimination based on economic means/socio-economic status). According to the U.N. Committee on Economic, Social and Cultural Rights (CESCR), the right to health includes equal access to health care, and this equality requirement means that states must provide health insurance and services to those lacking the means to pay.[61] We might also characterize as de-commodifying in this way the U.S. Supreme Court's famous judgments in

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57 *Bittó and Others v Slovakia* (2014) ECHR 172. See also *Riedel and Others v Slovakia* (2017) ECHR 7.

58 For an abstract explanation of this function of rights, using the term 'immunity rights' see Roberto Mangabeira Unger, *False Necessity* (Verso 1987) 524-525.

59 Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton UP 1990) 21-22.

60 Paul O'Connell, 'On the Human Rights Question' (2018) 40 Human Rights Q 962, 987.

61 Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (11 August 2000) UN Doc E/C.12/2000/4 para 19.

*Gideon v. Wainwright* (1963),[62] declaring that the right to counsel in criminal proceedings could not be made subject to the defendant's financial means, and *Harper v. Virginia Board of Elections* (1966)[63], striking down a poll tax as it excluded from voting those 'unable to pay a fee'.[64]

The Canadian Supreme Court held in *Eldridge*[65] that the failure of a hospital to provide sign language interpreters without charging a fee amounted to a violation of the equality clause of the country's Charter of Rights and Freedoms. The Court characterized the situation as one of indirect discrimination (adverse effects discrimination) on the basis of disability as there was 'a failure to ensure that deaf persons benefit equality for a service offered to everyone.'[66] The outcome of the case was de-commodifying in that a service (sign language interpretation) previously provided for a fee was made available as a right, i.e., as a part of an essential service.

Welfare systems are the principal tools used by states to de-commodify goods and services. Equality norms may thus have de-commodifying effects when they force welfare systems to be expanded to cover previously excluded groups. The U.N. Human Rights Committee held in *Broeks v. Netherlands*[67] that distinctions between men and women with respect to unemployment benefits amounted to unlawful discrimination in violation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR).[68] Discrimination in welfare systems is frequently alleged before the ECtHR.[69] The South African Constitutional Court's decision in *Khosa*[70] provides another example. Certain non-citizen permanent residents were excluded from social benefits granted to citizens. The Court found the scheme discriminatory and struck down the relevant legislation. The highest state court in Massachusetts reached a similar conclusion in *Finch*[71] finding that the state's exclusion of an immigrant group from the state health care system violated the equal protection clause of the state's constitution, and that state budget considerations alone could not justify the discrimination.

The precise distributional outcomes of de-commodifying approaches to rights may, however, turn out to be complicated. First, de-commodification of some

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62 *Gideon v Wainwright,* 372 U.S. 335 (1963).

63 *Harper v Virginia Board of Elections,* 383 U.S. 668 (1966).

64 We should add that this line of cases did not, as some hoped, lead the U.S. Supreme Court to a broader doctrine treating poverty as a protected class under the equality provision of the Fourteenth Amendment of the U.S. Constitution, see e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

65 *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

66 Ibid., at 629.

67 Communication No. 172/84 *Broeks v Netherlands* (9 April 1987) UN Doc CCPR/C/29/D/172/1984.

68 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

69 See, e.g., *Stec and others v UK* (2006) ECHR 393; and *Bah v UK* (2011) ECHR 1448.

70 *Khosa and Others v Minister of Social Development and Others* [2004] ZACC 11.

71 *Finch v. Commonwealth Health Insurance Connector Authority & others,* 461 Mass. 232 (2012).

minimum threshold of basic subsistence may legitimate broader economic structures. Katharine Young makes this point in her writing on 'minimum core' approaches to socio-economic rights:

> [T]he minimalist focus within the core may well legitimate neoliberalism, especially if the claim for the minimum core is made in order to increase the bundles of commodities or consumption share of the disadvantaged, while failing to challenge the underlying economic institutions which have produced the disadvantage in the first place.[72]

Second, immunization of social goods from market logic through court decisions can have the unintended and counterintuitive consequence of heightened de facto commodification at the individual level. This is the story of Brazil's experience of the right to health as an immunity right/decommodification right.[73] In a simplified version of the story, the Brazilian courts rejected any limitations on the right to health care, meaning that essentially anyone who was able to put their case before the courts received a judgment for provision of claimed medical procedures. A right to publicly-funded health care was expanded and nominally immunized from market-logic. However, the real effect was to amplify the commodification of the right to health as its enforcement became contingent on the financial means of individuals to litigate. Courts became a tool for those with enough means to enforce their rights, while the worse-off did not have realistic access to the courts and may even have suffered in other ways as health care litigation, at least arguably, shifted funds to successful litigants and away from other health care services.

*c) Pre-distributive:* It is a truism that material distribution in capitalist societies mostly takes place on markets. As explained by American legal realists, markets are not really products of *laissez-faire* or non-intervention, but are themselves constructed by the state through law.[74] Legal rules shape the distributional effects of market outcomes and the (malleable) content of these rules is therefore hugely important for economic inequality. If 'redistribution' involves reduction of inequality through tax-and-transfer, efforts to alter market distribution are sometimes referred to as 'pre-distribution'.[75] The importance of pre-distribution is explained by Roberto Unger:

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[72] Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 174. See also a more expansive version of a similar argument in Moyn (n 5)

[73] Octavio L.M. Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil' (2011) 89 S Tex LR 1643; David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 189.

[74] See, e,g., Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470.

[75] Much of the current usage of the term is influenced by the work of political scientist Jacob Hacker, see, e.g., Steven K. Vogel, 'Elizabeth Warren Wants to Stop Inequality Before It Starts' NY Times (3 January 2019) <https://www.nytimes.com/2019/01/03/opinion/elizabeth-warren-economic-policy-democrats.html> [https://perma.cc/LK5W-MH4D] accessed 24 August 2021. Important

> Effective and lasting redistribution would need to result more from a broadening of economic and educational opportunity, achieved through institutional innovation, than from tax policies and transfer programs. The point is to influence the original distribution of wealth and income by reorganizing the market economy, not just to try to correct, after the fact, what the market, as now organized, has done.[76]

How do constitutional norms or human rights norms, such as equality and non-discrimination, impact pre-distribution? In most cases this would involve horizontal effects, i.e., either the direct application of equality norms to a dispute between private parties or, more commonly, indirect effects where human rights influence the interpretation of the background rules of property and contract law and thus influence the outcome of disputes between private parties.[77] Indirect horizontal effects also include holding the state liable for situations where the application of these background rules of the market lead to rights violations in the interaction of private parties. Horizontal effects lead to pre-distribution outcomes as the legal relationships underpinning markets—which determine who has bargaining (and other forms of) power on the market—are amended based on higher order principles of rights. The 'free market'[78] is remade through the application of rights. Pre-distributive outcomes rely on the recognition that law always 'at least partly determines a range of factors from the value of assets to the relative bargaining power of various actors'[79] and, by establishing 'bargaining ground rules' is deeply involved in 'shaping…the distributive results of all bargaining processes'.[80] Labor-market regulations on topics such as minimum wages, minimum hours and collective action (right to strike, etc.) are simple examples of legal interventions shifting bargaining power in markets.

A familiar type of pre-distribution case, perhaps not usually considered as such, involves pay equality. For example, Article 157 of the EU Treaty (TFEU, which we might treat as a quasi-constitutional text for these purposes) states that men and women should receive equal pay for equal work and work of equal value, prohibiting pay discrimination based on sex.[81] The most recent major case before the ECJ involved female employees working as sales assistants at the supermarket chain Tesco, successfully claiming that they were entitled to the

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older work on the subject includes James Meade, *Efficiency, Equality and the Ownership of Property* (Allen & Unwin 1964) and John Rawls, *Justice as Fairness: A Restatement* 137-8 (Harvard UP 2001) (on property owning democracies).

76 Roberto Mangabeira Unger, *The Left Alternative* (Verso 2009) xiv.

77 See Tushnet (n 8).

78 So called 'free market', but no market is correctly described as free since all markets are, at some level, products of legal architecture. The classic explanation of this point is Hale (n 74).

79 Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (Martinus Nijhoff 2002) 134.

80 Karl Klare, 'Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform' (1988) 38 Catholic University LR 1, 17.

81 The principle has also been developed in secondary law, most importantly and recently in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation [2006] OJ L 204/23.

same pay as male employees working in sale departments in different parts of the supermarket group.[82] Tesco argued that while the ECJ had in prior cases held that Article 157 TFEU has direct effect between individuals in cases of pay discrimination for 'equal work', no such direct effect should be recognized in cases of pay discrimination for 'work of equal value', as this criteria would require definition by secondary or national legislation. The ECJ rejected the argument, further opening the door for pay discrimination claims based on a comparison of different jobs. Pay equality cases are in the pre-distribution category as they involve the legal underpinning of the labor market, limiting the extent to which employers can 'freely' set wages.

Housing markets provide clear examples of pre-distributive effects of rights. Human rights bodies have declared 'forced evictions' to be a violation of various rights.[83] This influences housing markets as human rights law seeks to place limits on evictions in relation to, for example, mortgage foreclosures or rent arrears, shifting the balance of power between tenant/homeowner and landlord/creditor. The U.N. Special Rapporteur on adequate housing has stated that:

> [E]victions should only occur as a last resort and after a full exploration of alternative means to resolve outstanding debt, such as through emergency housing benefits, debt rescheduling or, if required, relocation to more affordable housing units meeting adequacy standards[84]

This would, in many legal systems, amount to a departure from a situation where a tenant or homeowner in default has very limited defences in eviction cases, thus significantly altering the bargaining power of the parties involved. Along these lines, the South African Constitutional Court has held that the constitutional right to housing places a limit on the ability of creditors to obtain a forced sale and eviction of a debtor's home due to non-payment of trifling debts. [85] The Court required that in each such case, a judicial body would need to balance the interest of the debtor and the creditor and in some cases, in particular where the debt was a low amount while the debtor, if evicted, would end up homeless, eviction would be barred. The CESCR reached a similar conclusion in an individual complaint arising from the aftermath of the 2008 financial crisis in Spain. The authors of the complaint had failed to pay rent to their (private) landlord. Subsequently their lease ended and the landlord obtained

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82 Case C-624/19 *K and Others v Tesco Stores Ltd* (3 June 2021).

83 Forced evictions are defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection that are compliant with international human rights law. Committee on Economic, Social and Cultural Rights, General Comment No 7, The Right to Adequate Housing (art.11.1 of the Covenant): Forced Evictions (20 May 1997) UN Doc E/1998/22, para. 3.

84 Guidelines for the Implementation of the Right to Adequate Housing Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context (26 December 2019) UN Doc A/HRC/43/43, Guideline no 6.

85 *Jaftha v Schoeman; Van Rooyen v Stoltz* [2004] ZACC 25.

an eviction, leaving the authors homeless. The Committee rejected Spain's argument that the State had nothing to do with this dispute between private individuals and found that the State was required to prevent evictions from causing rights violations. In particular, evictions should not render individuals homeless and the State was responsible for establishing judicial procedures to prevent homelessness.[86] In another case, the Committee held that notice procedures prior to a mortgage foreclosure, even if conducted in line with Spanish law, were inadequate, highlighting the procedural requirements of human rights law.[87] The ECtHR has also applied Article 8 (private and family life) of the ECHR to protect the interest of tenants vis-à-vis landlords. Where the landlord is a public body, the ECtHR requires that a case-by-case proportionality analysis is performed to assess whether an eviction is justified. [88] The Court, however, decided that in the case of private landlords, such case-specific balancing of the competing private rights was not required and it was sufficient that the domestic authorities had performed the balancing through underlying legislation.[89] The Court noted in particular that requiring a court to perform a proportionality assessment any time a temporary tenancy agreement comes to an end would have 'wholly unpredictable and potentially very damaging' effects on the rental market.[90]

The application of equality and non-discrimination norms to housing markets is a clear example of pre-distributive outcomes. In Canada, provincial non-discrimination legislation applies horizontally and includes socio-economic disadvantage as a protected class. Among the most common complaints in that system are that private landlords discriminate against (prospective) tenants based on their economic status.[91] Dixon and Suk worry that when 'landlords are required by law to lease to a lower-income tenant, when an otherwise identical high-income tenant is available, in most market contexts this will lead landlords to pass on the increased costs (or decrease in expected rental returns) via an increase in average rents.'[92] This highlights that pre-distributive outcomes carry risks of unintended consequences. However, Dixon and Suk seem to assume, and this assumption may be true for Canada, that no further regulatory responses are required. Taking non-discrimination based on socio-economic status seriously may, however, require taking a broader view of at least the relevant sector and how markets function. For example, the CESCR has recommended

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86 Communication No 5/2013 *Mohamed Ben Djazia and Naouel Bellili v Spain* (20 June 2017) UN Doc E/C.12/61/D/5/2015.

87 Communication No 2/2014 *IDG v Spain* (17 June 2015) UN Doc E/C.12/55/D/2/2014.

88 For cases involving evictions of tenants from public housing see, e.g., *McCann v UK* (2008) ECHR 385; *Paulic v Croatia* (2009) ECHR 1614; *Kryvitska and Kryvitskyy v Ukraine* (2010) ECHR 1850; and *Bjedov v Croatia* (2012) ECHR 886.

89 *FJM v UK* App 76202/16 (ECtHR 6 November 2018)

90 Ibid., at para 43.

91 Dixon and Suk (n 8) 394-5. See also David Barrett, 'The Importance of Equality Law and Human Rigths in Addressing Socio-Economic Inequality' in Daniel Cuypers and Jogchum Vrienlink (eds), *Equal is Not Enough* (Intersentia 2018).

92 Dixon and Suk (n 8) 395.

imposing regulation of rent prices and important work has been done on a human rights-based approach to the overall structure of housing markets.[93]

*d) Redistributive*: The final category of distributional outcomes is when the application of equality (and other rights norms) has a progressive redistributive effect in the sense of requiring post-market tax-and-transfer. The best examples involve judicial prescription of redistribution through progressive taxation.[94] In a 2003 decision, the Colombian Constitutional Court declared unconstitutional the introduction of a 2% VAT on certain basic necessities. Among other things the Court stated that based on the Constitutional principle of equality, Congress had the duty 'to take into account the differences that in fact exist in society so as not to worsen, with the taxing measure, inequalities already existing'.[95] In the international sphere, the CESCR took a decisive step in 2017 to routinely criticizing states for regressive taxation and urging states to adopt progressive taxation, based on the progressive realization/maximum available resources clause of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.[96]

Redistributive effects can also arise less directly as a part of proportionality analysis, in particular when courts require the authorities to seek less restrictive alternatives In 2018 the German Federal Constitutional Court struck down a fiscal consolidation measure enacted in 2012 in Baden-Württemberg, whereby remuneration to certain civil servants, including judges, was reduced by eight per cent during their first three years of services. [97] The Court found this reduction to be an equality violation as the extra burden placed on this group of civil servants could not be justified. Here the interesting aspect of the decision is that the Court emphasized that the consolidation measure was not accompanied with sufficient details and reasoning by the regional legislature. This included that the legislature did not sufficiently explain why these particular measures were chosen and which alternatives had been reviewed and rejected. We could clearly imagine, although this is not exactly what the German Court did in this case, a court performing proportionality analysis requiring that in order to justify consolidation measures that impact equality or other rights, the state must first have considered or enacted progressive taxation as a less-restrictive alternative for the legitimate purpose of saving government funds. This would be in line

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93 Committee on Economic, Social and Cultural Rights, General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (10 August 2017) UN Doc E/C.12/GC/24, para 19. See also the work of the (past and present) UN Special Rapporteur on the Right to Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context.

94 On the relationship between human rights and progressive taxation generally, see Olivier De Schutter, 'Taxing For The Realization of Economic, Social, and Cultural Rights' in Philip Alston and Nikki Reisch (eds), *Tax, Inequality and Human Rights* (OUP 2019).

95 Corte Constitucional, Decision C-776 of 2003 (per Justice Manuel José Cepeda Espinosa).

96 Ragnarsson (n 7).

97 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], decision of 16 October 2018, 2 BvL 2/17.

with the approach of the CESCR to budget cuts, which, for example, criticized Ireland's post-2008 austerity policies for having been 'disproportionately focused on instituting cuts to public expenditure in the areas of housing, social security, health care and education, without altering its tax regime'.[98]

## 3 The Importance of Judicial Conceptions of Equality

In its first case dealing with the issue of equality, the South African Constitutional Court considered the formulation of equality norms in international law and several national jurisdictions, and then stated:

> This cursory consideration of the international conventions and the foreign jurisprudence … illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.[99]

Indeed, courts reach a variety of material distributional outcomes, as we have seen in section 3, based on different conceptions of what equality requires. Sometimes courts explicitly describe their conception of equality. In its 2011 decision in *Withler*[100] the Supreme Court of Canada stated that the 'animating norm' of the Canadian Charter's equality clause is substantive equality and explicitly found formal equality to be insufficient and overly formalistic. The CESRC stated in its General Comment No. 20 on non-discrimination that 'discrimination must be eliminated both formally and substantially', which may require states to enact special positive measures to redress do facto discrimination.[101] The U.N. Committee on the Rights of Persons with Disabilities has embraced a substantive model of equality, adopting more or less the four dimensions of equality elaborated by Fredman and discussed above.[102] Some constitutions, furthermore, address economic inequality specifically: The Indian constitution of 1948 announces as a directive principle that the state shall strive to 'minimize inequalities in income, status, facilities and opportunities'.[103] In Portugal, the constitution requires that the fiscal system ensures 'a just distribution of income and wealth' and requires that income taxes are progressive

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98 Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Ireland (June 19, 2015) UN Doc E/C.12/IRL/CO/3, para 11(a).

99 *Brink v Kitshoff NO* [1996] ZACC 9, para 39.

100 *Withler v Canada (Attorney General)* [2011] 1 SCR 396.

101 Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (2 July 2009) UN Doc E/C.12/GC/20, paras 8-9.

102 Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on Equality and Non-discrimination (26 April 2011) UN Doc CRPD/C/GC/6, para. 11.

103 Constitution of India (1949, as subsequently amended), art 38.

and 'aim to reduce inequalities'.[104] In other cases, however, courts and human rights bodies do not expound on their general conception of equality and their underlying assumptions about equality remain implicit.

In the preceding sections I have sketched different conceptions of equality (formal, substantive and social) and outlined several different material distributional outcomes of the judicial application of equality norms and related rights norms. But can we tease out a relationship between specific conceptions of equality and specific categories of distributional outcomes?

*Formal equality and distributional outcomes:* A conception of formal equality may accept or require regressive distributive outcomes when such outcomes align with procedural equality and the idea of rules of general application. The Hayekian approach to formal equality, as noted above, rejects efforts to alter distributional outcomes of market processes, rendering progressive economic programs as suspect.

Formal equality may produce de-commodifying effects. The *Khosa*[105] and *Finch*[106] cases discussed above involved the unequal treatment (exclusion) of specific groups in welfare systems. The conclusions in these cases could be reached on the basis that formal equality does not accept such exclusions. The result is an expansion of welfare systems, thus a de-commodifying effect as goods and services are removed from market logic. Formal equality, however, is agnostic as regards whether welfare benefits are provided in the first place,[107] and might therefore be open to leveling down benefits, rather than leveling up previously excluded groups.[108] Other types of de-commodifying outcomes could not be reached through pure formal equality reasoning. *Gideon v. Wainwright*, for example, required the U.S. Supreme Court to look beyond the formal (equal) rules to the unequal outcomes, i.e., to the fact that whether or not a defendant actually received a fair trial depended on her financial means.

Pre-distributive outcomes would in most cases not be required by formal equality. From a formal perspective, market liberalization is viewed as preferable to efforts to bend market-based processes towards more economic equality. A market where everyone is formally allowed to participate, although in fact people may be excluded due to lack of financial means or prejudice towards minority groups, does not appear to be a significant problem to formal equality. Nonetheless, some pre-distributive outcomes do align with formal equality. A market that excludes people based on their race—think the

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[104] Constitution of the Portuguese Republic (1976, as subsequently amended), arts 103 and 104.

[105] *Khosa and Others v Minister of Social Development and Others* [2004] ZACC 11.

[106] *Finch v. Commonwealth Health Insurance Connector Authority & others* 461 Mass. 232 (2012).

[107] See. e.g., Human Rights Committee, Communication No. 172/84 *Broeks v Netherlands* (9 April 1987) UN Doc CCPR/C/29/D/172/1984, para 124. ('[Article 26 of the ICCPR] does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.')

[108] Generally, on the leveling-down objection to equality, see, e.g., Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 229 and Larry Temkin, *Inequality* (OUP 1993) 247–8.

segregation in public accommodation in the United States prior to the federal 1964 Civil Rights Act—fails to accord people equal treatment and proponents of formal equality may require a remedy thereof. This is what Mark Kelman calls 'simple discrimination', a remedy of which does not call for any resource expenditure or shifting of material burdens, but merely the prohibition of exclusion.[109] If pre-distributive outcomes involve, in Kelman's terminology, 'claims to accommodation' i.e., altering the distribution of finite resources between private parties, formal equality would not require, and possibly not accept, such outcomes.

Lastly, redistributive outcomes are highly unlikely under a formal equality conception, almost as a matter of definition, as they require, in Hayekian terms, treating people unequally through the tax system.

*Substantive equality and distributional outcomes:* Substantive equality, as explained above, is concerned with more than equal treatment, and demands some degree of equality in fact. Regressive distributional outcomes would, at least in most cases, be contrary to a substantive equality conception.

De-commodifying outcomes would usually be aligned with substantive equality. Extensive welfare programs are, of course, associated with reduced economic inequality; this was a core element of the creation of post-war welfare states. Those most interested in equal opportunities will advocate for de-commodifying education, health and potentially other basic needs to ensure an equal starting point for everyone. For proponents of equal results, removing the option of the well-off to buy their way to the front will also be welcome. However, we should note again that in some contexts decommodification does not produce increased equality and has regressive distributional effects as in the example of Brazilian health care litigation. In such cases the outcome would not be supported by substantive equality. In fact, Yamin and Lander argue that the, in their view, unfortunate individualization of health care in the Brazilian example should be avoided on equality grounds. Instead, courts should use substantive equality as a guiding principle to expand the context of individual cases on the right to health to address these cases in a systematic context, aiming to remedy system-wide injustices rather than only addressing the situation of the individual that reached the court.[110]

Pre-distributive outcomes would seem aligned with substantive equality, although depending on the specifics. Pre-distributive outcomes that aim to ensure market access align well with ideas of equal opportunities and those outcomes that aim to actively alter the distributive results of market processes match notions of equality of results. The simplest examples of pre-distributive outcomes discussed above involved equal pay for equal work. Gender pay equality can, in fact, be seen as an illustrative example of striving towards substantive equality: it emphasizes difference rather than sameness, as it recognizes the legacy of undervaluing the different jobs historically done by

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[109] Mark Kelman, 'Market Discrimination and Groups' (2001) 53 Stanford LR 833.

[110] Alicia Ely Yamin and Fiona Lander, 'Implementing a Circle of Accountability: A Proposed Framework for Judiciaries and Other Actors in Enforcing Health- Related Rights' (2015) 14 Journal of Human Rights 313, 319-21.

women; imposes a positive obligation on employers to pay women the same as men and is inherently redistributive.[111]

As Fredman explains, substantive equality is concerned with structural changes in order to eliminate disadvantage. It is not as concerned as formal equality with the risks of shifting burdens in Kelman's 'accommodation' scenarios.[112] Recall that for Kelman 'accommodation' involves reallocating finite resources. Substantive equality demands that disadvantage is eradicated and the associated 'costs should be borne by those in a position to bring about change.'[113] Substantive equality highlights that in any event the costs are being incurred as the 'status quo, without legal intervention, requires the out-group to bear the full cost: women bear the cost of child-bearing and childcare; disabled people bear the cost of disability; and ethnic minorities bear the cost of their own cultural or religious commitments.'[114] This corresponds to a legal realist view of markets as legal structures:

> [T]here is no question as to whether public power should be deployed to structure bargaining processes, since that is inevitable. There are only questions of how this should be done, consistent with prevailing ideals and goals of public policy […] Accordingly, the question for public policy is not whether we ought to regulate contracts and markets, but always to determine which regulatory regime will best serve our spiritual and material needs.[115]

Substantive equality in Fredman's version is conceptually open to the type of structural change (being one of Fredman's dimensions of a right to equality) that is the target of pre-distributive outcomes.

Redistributive (post-market) outcomes may be beyond what is required by conceptions of equality of opportunity (except for instrumental reasons, i.e., to fund welfare systems) but would be aligned with equality of results. If our version of substantive equality is concerned with socio-economic inequality as such, requiring post-market redistribution is a good match. Progressive taxation for the purpose of social spending can have a double redistributive effect: 'once when collected and again when spent on inequality-busting public services.'[116] In Rawlsian terms, progressive taxation is a means to reduce inequality at the top to align with the requirements of the difference principle. A conception of substantive equality focusing on economic inequality only or mostly as it relates to status inequality and socio-economic disadvantage in relation to factors such as race and gender (such as Fredman's version) could also justify redistributive

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111 Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 South African Journal on Human Rights 235, 245.

112 Fredman (n 22) 733-34.

113 Ibid.

114 Ibid., at 734.

115 Klare (n 80) 17-18.

116 Oxfam, Working for the Many. Public Services Fight Inequality, 182 Oxfam Briefing Paper (April 3, 2014) 2 <https://www.oxfam.org/sites/www.oxfam.org/files/bp182-public-services-fight-inequality-030414-en.pdf> [https://perma.cc/9ZS6-45DK] accessed 24 August 2021.

outcomes as an effective way to reduce the socio-economic disadvantage of these groups.[117] In that context, the justification for progressive taxes would be more focused on raising the 'floor' of economic inequality than reducing the 'ceiling'[118] and would be tied to the fact that minorities frequently suffer socio-economic disadvantage.

The importance of the precise approach to substantive equality is illustrated by looking to Canada. As noted above, the Canadian Supreme Court has explicitly adopted a notion of substantive equality. However, in answering the ever-present question *equality of what?* the Canadian Court has emphasized dignity. In order to establish a discrimination claim under the Canadian Charter a claimant must establish that the differential treatment harms her dignity.[119] This has, in practice, made it significantly more difficult to bring cases based on distributional reasoning.[120] For our purposes, the lesson is that versions of substantive equality that do not view economic inequality as injustice may be less likely to produce pre-distributive or redistributive outcomes compared to versions that place moral importance on a modicum of economic equality.

*Social equality and distributional outcomes:* Although social equality is more focused on power relations than the precise distribution of resources, regressive outcomes of rights adjudication are unlikely to be acceptable. In other words, social equality is unlikely to require or indeed allow dismantling government programs that strive for a more equal distribution of wealth or income.

De-commodifying outcomes are likely to be highly favored by social egalitarians. Reducing reliance on markets for basic needs such as food, health care and housing aids social equality as it contributes to the fundamental conditions of participating equally in society. Social egalitarians would support de-commodifying resources that go beyond basic needs as full participation in a democratic society requires more than mere survival. Universal welfare programs, to which de-commodifying outcomes often contribute by expanding welfare services, are supported by social equality as they strengthen social solidarity and reduce stigma.

As for pre-distributive outcomes, section 2 above discusses Elizabeth Anderson's arguments that social equality supports constraints on permissible outcomes produced by market processes. She argues for constraints of economic inequality on the bottom, middle and top of the economic spectrum. It directly follows that Anderson's conception of social equality supports pre-distributive outcomes that shape the background rules of markets to reflect these distributional preferences. This applies to redistributive outcomes as well. Other versions of social equality, which may be more exclusively focused on participation for those at the bottom may, accordingly, limit their support for pre-distributive and redistributive outcomes that go beyond ensuring sufficiency. In

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[117] The associated arguments may be similar to the rationale of using progressive taxes to realize socio-economic rights, see De Schutter (n 94).

[118] For an extended argument on the role of human rights with respect to the floor and ceiling of inequality see Moyn (n 5).

[119] *Law v Canada (Minister of Employment and Immigration)* (1999) 1 SCR 497.

[120] Fudge (n 111); Martha Jackman, 'One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin' (2019) 39 National Journal of Constitutional Law 85.

other words, the effects on the middle and top brackets of earners may be less important.

## 4 Conclusion

Distributional analysis of human rights adjudication is not limited to identifying whether the result is regressive (more economic inequality) or progressive (less economic inequality). Rather, we can identify several mechanisms by which adjudication affects material distribution. This chapter sought to categorize these mechanisms. One of the most important distinctions is the relationship between rights, including equality norms, and market processes. Sometimes market distribution is treated as an acceptable baseline for equality and any redistribution should take place through post-market tax-and-transfer. Other examples show how specific goods or services are de-commodified based on the demands of equality, thus removing these from the sphere of markets. In yet other cases, the distributional effects of adjudication target market distribution itself by amending the background rules. A court's view of whether outcomes of the market, as currently constructed, meet the demands of equality is an important factor in establishing which kind of distributional outcomes are deemed acceptable.

I have argued that in that context the prevailing conception of equality shapes the analysis. Which outcomes are required or allowed by equality norms in human rights law depends, at least in part, on what we mean by equality, i.e., equality of what? We have seen that, unsurprisingly, the potential of formal equality to reduce economic inequality is limited. In fact, formal equality may produce regressive outcomes. Thicker conceptions of equality are more promising for those seeking to reduce economic inequality. The idea of social equality, for example, provides a justification for reducing inequality at the bottom, middle and top of the income spectrum.

We also know that many, even most, modern courts and human rights bodies do not limit themselves to formal equality but develop some thicker notion of equality. This is clearly true for status equality—the questions of discrimination based on personal characteristics such as race and gender—which courts frequently address explicitly. However, as with many things relating to economic inequality, we have less clear a picture of the prevailing conception of equality in human rights law. Market arrangements that produce economic inequality are often, and usually implicitly, treated as non-discriminatory as long as they do not exclude people based on personal characteristics. In other words: in relation to material distribution, we limit ourselves to formal equality by accepting the idea of 'free markets' as a neutral baseline of distribution. This chapter sought to explore the potential effects of applying other conceptions of equality to material distribution just like we are accustomed to doing for status equality.

Key lessons from this exploration are, first, the important reminder that high-level principles such as the right to equality are indeterminate in the sense that a variety of material distributional outcomes are possible. These outcomes, however, can be dissected and categorized to understand more fully the mechanics of distribution. Second, in part because of this indeterminacy, we are reminded of the importance of institutions. 'Who decides?' is a central question.

Finally, the conception of equality relied on by the deciding institution matters. A court or human rights body that cares mostly or only about equal treatment is unlikely to apply the range of distributional outcomes possible under equality norms to reduce inequality. By the same token, an institution committed to a conception of equality which places moral importance on placing some limit on economic inequality is more likely to reach progressive outcomes.