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The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law

Anja Seibert-Fohr

THE RISE OF EQUALITY IN INTERNATIONAL LAW AND ITS PITFALLS: LEARNING FROM COMPARATIVE CONSTITUTIONAL LAW

Dr. Anja Seibert-Fohr[*]

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* Head of Minerva Research Group, Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany). The author would like to express her gratitude and thanks to George A. Bermann, Rudolf Bernhard, Russell A. Miller, Alexander Somek, and Rainer Grote for their valuable comments and discussion on this Article. The author would like to additionally thank Dominik Zimmermann for his help with citations, John Dingfelder Stone for proofreading, and the Editorial Board of the *Brooklyn Journal of International Law*.

INTRODUCTION

Since the end of the United States Supreme Court's "*Lochner* era" in 1936, federal and state legislators have had unbridled authority to regulate economic matters in the United States. Having determined that the legislature is the arm of government best-suited to make such regulatory decisions, the Supreme Court announced that constitutionally challenged economic legislation would be subjected to the most deferential standard of judicial review.[1] On the international stage—particularly in the wake of the global financial crisis that began in 2007—one would expect judicial deference toward socioeconomic regulation to be a foregone conclusion. However, the United Nations Human Rights Committee (the "Committee") has actually harked back to a brand of judicial scrutiny reminiscent of the *Lochner* era, having recently condemned certain types of public interest legislation as incompatible with international equal protection.[2]

The Human Rights Committee was established after the entry into force of the International Covenant on Civil and Political Rights ("ICCPR") in 1976 and is now the primary international body charged with monitoring the implementation of this important human rights treaty.[3] Meeting regularly in Geneva and New York, the Committee is comprised of 18 individual experts reviewing formal complaints of international human rights violations and rendering responsive opinions (known as "views") under the Optional Protocol to the ICCPR.[4] Since its inception, the Committee has amassed a substantial body of recommen-

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1. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("[L]egislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless[,] in the light of the facts made known or generally assumed[,] it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

2. *See infra* Part I.A.

3. International Covenant on Civil and Political Rights, *open for signature* Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]. For a comprehensive account of the judgments, see MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (2d rev. ed. 2005); Nisuke Ando, *The Evolution and Problems of the Jurisprudence of the Human Rights Committee's Views Concerning Article 26*, *in* TOWARDS IMPLEMENTING UNIVERSAL HUMAN RIGHTS 205, 205–24 (Nisuke Ando ed., 2004); Tufyal Choudhury, *Interpreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights*, 8 EUR. HUM. RTS. L. REV. 24 (2003); Christian Tomuschat, *The Human Rights Committee's Jurisprudence on Article 26 – A Pyrrhic Victory?*, *in* TOWARDS IMPLEMENTING UNIVERSAL HUMAN RIGHTS 225, 225–43 (Nisuke Ando ed., 2004).

4. *Human Rights—Civil and Political Rights: The Human Rights Committee*, HUMAN RIGHTS FACT SHEET NO. 15 (U.N. Hum. Rts. Committee, New York, N.Y.), May 2005, at 12–14.

dations, and several have dealt with the principle of nondiscrimination.[5] It has been in this context that the Committee's recommendations bear resemblance to *Lochner* era adjudication.

The principle of nondiscrimination prohibits any distinction, exclusion, restriction, or preference that is based on any grounds, such as race, color, or other identifiable individual or group distinctions.[6] Most early cases before the Committee concerned claims of narrowly defined discrimination in the enjoyment of civil and political rights under the ICCPR, but more recently, the Committee has reviewed a broader range of disputes involving social and economic legislation.[7] Recent views have demonstrated the Committee's willingness to expand the meaning of "equal protection" under the ICCPR, and, given the subject matter underlying the disputes in question, there is reason to believe the Committee will find issues of equal protection increasingly relevant to the propriety of certain types of socioeconomic legislative measures in the

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5. *See Karakurt v. Austria* (Communication No. 965/2000), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 304, U.N. Doc. A/57/40 (Jan. 1, 2002) [hereinafter *Karakurt v. Austria*]; *Des Fours Walderode v. Czech Republic* (Communication No. 747/1997), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 88, U.N. Doc. A/57/40 (Jan. 1, 2002) [hereinafter *Des Fours Walderode v. Czech Republic*]; *Vos v. Netherlands* (Communication No. 786/1997), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 271, U.N. Doc. A/54/40 (Jan. 1, 2000) [hereinafter *Vos v. Netherlands*]; *Adam v. Czech Republic* (Communication No. 586/1994), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 165, U.N. Doc. A/51/40 (May 17, 1997) [hereinafter *Adam v. Czech Republic*]; *Simunek v. Czech Republic* (Communication No. 516/1992), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 89, U.N. Doc. A/50/40 (Jan. 22, 1999) [hereinafter *Simunek v. Czech Republic*]; *Pepels v. Netherlands* (Communication No. 484/1991), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 221, U.N. Doc. A/49/40 (Sept. 21, 1994) [hereinafter *Pepels v. Netherlands*]; *Pauger v. Austria* (Communication No. 415/1990), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 325, U.N. Doc. A/47/40 (Oct. 9, 1992) [hereinafter *Pauger v. Austria*]; *Zwaan-de Vries v. Netherlands* (Communication No. 182/1984), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 160, U.N. Doc. A/42/40 (Aug. 28, 1987) [hereinafter *Zwaan-de Vries v. Netherlands*].

6. U.N. Hum. Rts. Comm., *Report of the Human Rights Committee: General Comment No. 18*, ¶ 7, U.N. Doc. A/45/40 (Nov. 11, 1989) [hereinafter *General Comment No. 18*].

7. This development began in 1987 when the Committee dealt with gender discrimination in socio-economic legislation. *See Zwaan-de Vries v. Netherlands*, *supra* note 5.

future.[8] Thus far, the Committee has already applied rigorous scrutiny to such measures.[9]

While the Committee's jurisprudential ideology differs from the laissez-faire capitalism of the *Lochner* Court—it aims instead to protect the interests of disadvantaged citizens—their standard of judicial scrutiny is similarly demanding.[10] As a result, the Committee has deemed a number of laws incompatible with international human rights and the ICCPR.[11] Though the efforts of the Human Rights Committee to enhance equality on the international level are well-intentioned, these efforts may have a chilling effect on the future enactment of important socioeconomic legislation. Socioeconomic legislation is often, by necessity, based on distinctions among groups, as it is designed in pursuit of public interests. If legislation is rejected as discriminatory because the Human Rights Committee is prone to second-guess the legislature's rationale, the legislature may be tempted to avoid enacting such laws in the first place. Thus, it is necessary to work toward developing a more thoughtful approach to international equal protection going forward. International judicial organs should carefully evaluate the implications of their jurisprudence before introducing a sweeping interpretation of equality that does not adequately represent international human rights standards.

Of course, the Committee's approach is only part of a broader trend to extend the scope of the nondiscrimination principle to the international plane.[12] A central problem with the Committee's methodology arises from the concept of international equal protection itself, since the term's precise meaning is still essentially unsettled. The opaqueness of the nondiscrimination provision calls for a clearly enunciated conceptualization and begs the question whether there is a generalized human rights norm to treat all persons equally, or whether international law is only concerned with certain invidious distinctions. Since the case-by-case approach applied by international human rights institutions lacks coherence at present, adjudicative bodies should look to the experience

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8. *See Haraldsson and Sveinsson v. Iceland*, (Communication No. 1306/2004), U.N. Doc. CCPR/C/91/D/1306/2004 [hereinafter *Haraldsson and Sveinsson*].

9. *See id.*

10. *See infra* Part I.A. Another difference is the fact that the *Lochner* Court applied economic due process while the Human Rights Committee applies equal protection analysis. But, in effect, both rationales can be used to invalidate economic legislation.

11. *See, e.g.*, *Haraldsson and Sveinsson*, *supra* note 8.

12. In 2001, the Inter-American Commission of Human Rights interpreted Article 24 of the American Convention on Human Rights as embodying a general principle of nondiscrimination, which would then be applicable to socio-economic cases. Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser./L/V/II.111, doc. 20 rev. ¶ 31 (2001).

gained over time under domestic equal protection jurisprudence in order to refine their approach.

In this Article, I explore the most recent developments in international jurisprudence in order to evaluate the consequences of such developments critically and make suggestions for the future of nondiscrimination analysis. In Part I of this Article, I will explain the expanding role of equal protection in international law, and highlight jurisprudential shortcomings and misconceptions within recent Human Rights Committee views. In Part II, I will examine equal protection interpretation under various domestic constitutional regimes and argue that such comparative analysis should guide international equal protection application. Finally, in Part III, I will propose a coherent doctrinal framework for the future of international equal protection jurisprudence.

I. THE SPREAD OF INTERNATIONAL EQUAL PROTECTION

The principles of nondiscrimination and equal protection have been on the dockets of international human rights institutions for decades, and various conventions and treaty mechanisms have been established in order to deal with specific types of discrimination.[13] Still, while the concept of "equal protection" is embedded in the existing comprehensive human rights instruments, the exact meaning of the term as used in various clauses requires clarification.

Whereas the International Convention on the Elimination of All Forms of Racial Discrimination[14] and the International Convention on the Elimination of All Forms of Discrimination against Women[15] are tailored to specific distinctions, the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[16] both prohibit general discriminatory application of domestic laws based on distinctions provided within the covenants themselves.[17] Such prohibited grounds of dis-

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13. *See* International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. Treaty Doc. 95-18, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Economic, Social and Cultural Rights, *adopted and opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

14. International Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 13.

15. Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 13.

16. ICESCR, *supra* note 13.

17. For a comparison of the nondiscrimination provisions under the different human rights treaties, see Aileen McColgan, *Principles of Equality and Protection From*

crimination include: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."[18] Article 1 of the American Convention on Human Rights[19] and Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibit discrimination on identical grounds.[20]

While these provisions spell out an accessory right, providing only for the equal enjoyment of *conventional* rights, Article 26 of the ICCPR goes

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Discrimination in International Human Rights Law, 2003 EUR. HUM. RTS. L. REV. 157, 157–75 (2003). Further examples of Conventions pertaining to the prevention of discrimination are the following: International Convention on the Suppression and Punishment of the Crime of Apartheid, *open for signature* Nov. 30, 1973, 1015 U.N.T.S. 243; International Convention against Apartheid in Sports, *adopted* Dec. 10, 1985, 1500 U.N.T.S. 161; International Labor Organization, Convention concerning discrimination in respect of employment and occupation, *adopted* June 25, 1958, 362 U.N.T.S. 31; Convention against Discrimination in Education, *adopted* Dec. 14, 1960, 429 U.N.T.S. 93; International Labor Organization, Convention concerning equal remuneration for men and women workers for work of equal value, *adopted* June 29, 1951, 165 U.N.T.S. 303. *See also*, CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL NON-DISCRIMINATION LAW (Dagmar Schiek et. al. eds., 2007).

18. The ICCPR reads:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

ICCPR, *supra* note 3, art. 2, ¶ 1. *See also*, ICESCR, *supra* note 13, art. 2, ¶ 2. For the guarantee of equal enjoyment of the Covenant rights to men and women, see ICCPR, *supra* note 3, art. 3.

19. Article 1, paragraph 1 reads:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

American Convention on Human Rights "Pact of San José, Costa Rica", *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123, art. 1(1) [hereinafter ACHR].

20. Art. 14 of the Convention states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, art. 14.

even further[21] by referring to equal protection "before the law" as a matter of formal equality and equal protection "of the law" as a matter of substantive equality, and by neglecting to limit the Article's application to the rights enumerated in the Covenant.[22] The American Convention on Human Rights also provides for a comprehensive right to equal protection.[23] No such general provision is found in the European Convention. However, Protocol No. 12 to the European Convention, promulgated in 2005, extends the nondiscrimination principle beyond the scope of conventional rights[24] by providing for a general prohibition of discrimination, which applies to any right set forth by law.[25]

Though the nondiscrimination principle has generally been recognized in various treaties, the search continues for a more fleshed out interpretation. As the body called upon to apply and interpret the ICCPR, the Human Rights Committee has dealt extensively with the meaning of "equal protection of the law."[26] As compared to Article 2(1), the broad

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21. Article 26 states:

> 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.

ICCPR, *supra* note 3, art. 26.

22. Torkel Opsahl, *Equality in Human Rights Law: With Particular Reference to Article 26 of the International Covenant on Civil and Political Rights*, *in* FORTSCHRITT IM BEWUSSTSEIN DER GRUNDUND MENSCHENRECHTE [PROGRESS IN THE SPIRIT OF HUMAN RIGHTS] 51 (Manfred Nowak et al. eds., 1988); *see* Syméon Karagiannis, *Considérations sur l'article 26 du Pacte des Nations Unies relatif aux droits civils et politiques*, *in* LES DROITS DE L'HOMME AU SEUIL DU TROISIÈME MILLÉNAIRE: MÉLANGES EN HOMMAGE À PIERRE LAMBERT 467–97 (Pierre Lambert ed., 2000).

23. The Convention notes that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." ACHR, *supra* note 19, art. 24.

24. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 2000, Europ. T.S. No. 177 [hereinafter Protocol No. 12].

25. Article 1, paragraph 1 of the Protocol states:

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol No. 12, *supra* note 24, at 2, art. 1, ¶ 1.

26. *See* cases cited *supra* note 5.

wording of Article 26 has led the Committee to deal with a considerable number of discrimination cases that, upon first glance, would not appear to fall within the realm of civil and political rights.[27] By 1987, the Committee had already determined that Article 26 prohibits discrimination in law or in practice in any area regulated and protected by public authorities, including unemployment benefits.[28]

This line of jurisprudence is of particular relevance to cases implicating a variety of socioeconomic interests. Since the ICESCR does not yet provide for an individual complaint procedure, the complaint mechanism under the ICCPR seems to be an attractive alternative for complainants to pursue their claims before the Committee. This is all the more true since the Committee has recently taken an even broader interpretation of its mandate, and has, in the process, opened new grounds for challenging allegedly discriminatory practices and laws. While the Committee originally only dealt with clear-cut cases of gender discrimination in socioeconomic matters, it has now indicated that it is willing to apply Article 26 to other types of discriminatory distinctions. This change of course will likely prompt complainants to use the equal protection clause as a vehicle to enforce social and economic rights more generally, as evinced by recent disputes to come before the Committee.

A. Application to Economic Issues

A recent dispute reviewed by the Committee, *Haraldsson and Sveinsson v. Iceland*,[29] illustrates the new areas of application of the universal nondiscrimination clause of ICCPR Article 26. In *Haraldsson*, the Committee dealt with the Fisheries Management System in Iceland and the question of whether giving preferential treatment to existing fishing licenses violated new license applicants' equal protection rights.[30] In response to overfishing, Iceland adopted an Act in 1985 requiring a fishing permit for several species of fish.[31] The Act gave preferential treatment to those vessels that had received permits in the previous three years: only those ships were entitled to fishing quotas on the basis of their catch

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27. *See* Tufyal Choudhury, *The Drafting of Article 26 of the International Covenant on Civil and Political Rights*, 2002 EUR. HUM. RTS. L. REV. 591 (2002). For the early discussion in the Committee regarding these matters, see Bertrand G. Ramcharan, *Equality and Nondiscrimination*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 246, 246–69 (Louis Henkin ed., 1981).

28. *Zwaan-de Vries v. Netherlands*, *supra* note 5, at 168, para. 12.3.

29. *Haraldsson and Sveinsson*, supra note 8.

30. *Id.*

31. *Id.* at 4.

performance during the reference period.[32] A new permit was only to be granted if a vessel already in the fleet was decommissioned. However, because the quota share of a vessel was transferrable, accession to the regulated fishing market, at least in practice, depended on the purchase or lease of such a quota on the free market.[33]

Market prices for quotas rose considerably and the complainants in this case, having purchased a ship without an attached quota, faced bankruptcy from the entitlement leasing expense.[34] They denounced the system and started fishing without catch entitlements in order to challenge the Act's validity.[35] As a result, the complainants were fined, and this sentence was confirmed by the Supreme Court of Iceland.[36] Shortly thereafter the complainants declared bankruptcy and faced considerable financial hardship in the subsequent months.[37]

The authors of the communication claimed that the quota discriminated against new fishers, who had to pay money in order to take part in the fishing of regulated species, and further denied the fishers the opportunity to pursue the occupation of their choice in accordance with "the principles of freedom of employment and equality . . . ."[38] Iceland contested these claims, pointing out that freedom of employment is not protected by the ICCPR.[39] According to Iceland, there was also no impermissible discrimination in violation of Article 26, because the fisheries management system sought to prevent over-fishing and to protect the vital public interest of the State.[40]

One might assume that this case, which was effectively concerned with economic matters, would be dealt with under the "freedom of work" doctrine.[41] In jurisdictions that provide this right via their constitution, this is

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32. Lög um stjórn fiskveiða 1986–1987 [Act 97/1985] (Stjórnartíðindi A-Deild, 1985, 323–27) (Ice.).

33. *Haraldsson and Sveinsson*, supra note 8, at 6, para. 2.8. The Act, however, stated that the fishing banks around Iceland were the common property of the nation and that the quotas to the ships would not give rise to rights of private ownership. *Id.*

34. *Id*. at 6, para. 3.1.

35. *Id.* at 6–7, paras. 3.2–3.3.

36. *Id.* at 7, para. 3.4.

37. *Id.* at 7, para. 3.5.

38. *Id.* at 7, para. 4.1.

39. *Id.* at 9, para. 5.6.

40. *Id.* at 9, para. 5.7.

41. *See* David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP CT. REV. 333, 347, n. 110 (1989), *reprinted in* 9 GERMAN L.J. 2179, 2194, n. 110 (2008) (describing the basis of the doctrine in German law to be the belief that one's vocation "is the foundation of a person's

primarily a matter of access to, and the practice of, a profession.[42] However, in the absence of a complaint procedure under the ICESCR, the challenge was brought under the Optional Protocol of the ICCPR.[43]

B. The Sweeping Interpretation of the Nondiscrimination Grounds

The Committee, in its analysis under Article 26, reiterated its prior interpretation that discrimination does not only apply to exclusions and restrictions, but also to preferences.[44] The differentiation between fishers in business during the statutory reference period and fishers who had to purchase or lease quota shares from the first group was considered to be a distinction which "is based on grounds equivalent to those of property."[45] In order to satisfy Article 26, such a distinction must be objective and reasonable according to the standing jurisprudence of the Committee.[46] Though the aim of protecting fish stocks was considered legitimate, the measure of granting quotas on a permanent basis was not deemed reasonable by the majority of the Committee.[47] They preferred a system in which quotas no longer in use would revert to the State for allocation to new holders in accordance with standards of fairness and equity.[48]

Though the Icelandic statutory regime raises questions about its inherent fairness, it is more questionable whether it qualifies as an unlawful discriminatory State action. The Committee's line of reasoning, however, is based on a broad scope of nondiscrimination protection and establishes a high level of justification under Article 26. In short, the Committee considerably extended the grounds of nondiscrimination. At issue was the distinction between those taking part in fishing during the reference period and new fishers. The Committee asserted that this statutory distinction was *equivalent* to a distinction based on property,[49] but, in effect, the distinction was not based on property, or anything of the sort. Properly understood, the distinction turns on the extent of fishing

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existence through which that person simultaneously contributes to the total social product.").

42. *See*, *e.g.,* Grundgesetz fur die Bundesrepublik Deutschland [GG] (Basic Law) May 23, 1949, Bundesgesetzblatt, Teil I (BGBI. I), as amended, § 2034, art. 12.

43. *Id.* at 3. Since there is no right to freedom of work in the Civil and Political Covenant, the case could only be dealt with under Article 26.

44. *General Comment No. 18*, *supra* note 6, ¶ 7.

45. *Haraldsson and Sveinsson*, *supra* note 8, para. 10.3.

46. *See*, *e.g.*, *Zwaan-de Vries v. Netherlands*, *supra* note 5, at 167–69 paras. 12–15.

47. *Haraldsson and Sveinsson*, *supra* note 8, para. 10.4.

48. *Id.*

49. According to Yuji Iwasawa, in his dissenting opinion in the Haraldsson matter, the case involved none of the explicitly-listed grounds of prohibited discrimination. *Id.* at 25–26.

conducted in a given reference period. This is a purely factual distinction relating to actions taken. It is true that the statute allowed established fishers to accrue an economic asset (the right to partake in fishing), but this was merely a side effect of the regulation, not the result of any discriminatory distinction. By the time the complainants entered the market, most of their competitors had already purchased their quotas as well. The real problem in this case is not the distinction among competitors but the permanent distribution of quotas. This is not a matter of discrimination on the basis of property (or anything equivalent) but a matter of access to the profession. Such a dispute should be dealt with under Article 6 of the ICESCR. It seems that the Committee circumvented the ICCPR's lack of such a provision by resorting to the nondiscrimination clause.

There is another argument that cautions against such an extensive reading of Article 26. If discrimination on the basis of property is interpreted to prohibit *de facto* discrimination on the basis of economic assets, there may hardly be any socioeconomic regulation immune to challenge. Such loose interpretation goes far beyond that which appeared in earlier Committee recommendations. For instance, in *Zwaan de Fries v. the Netherlands*[50] and *Broeks v. the Netherlands*,[51] the Committee discussed the prohibition of gender discrimination in unemployment law, and explained that Article 26 went beyond Article 2, in that it was also applicable to rights not guaranteed by the ICCPR.[52] However, these were cases involving *de jure* instances of gender discrimination. Once it was determined that Article 26 was applicable, it was undeniable that there had been an impermissible discrimination on the grounds of sex, because the laws themselves were based on gender stereotypes.

In *Haraldsson and Sveinsson v. Iceland*, on the other hand, the Committee substantially broadened the scope of challengeable discriminatory distinctions in ruling for the complainants. After all, it is one thing to use an expansive reading of the covenant to forbid racial and gender discrimination in areas of life that are not explicitly protected,[53] but it is quite another to read the grounds for discrimination so broadly as to equate

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50. *Zwaan-de Vries v. Netherlands*, *supra* note 5.

51. *Broeks v. Netherlands* (Communication No. 172/1984), U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 139, U.N. Doc. A/42/40 (Jan. 1, 1987) [hereinafter *Broeks v. Netherlands*].

52. *Zwaan-de Vries v. Netherlands*, *supra* note 5, at 149, para. 12.3; *Broeks v. Netherlands*, *supra* note 51, at 149, para. 12.3.

53. This was the view taken by the Committee in *Broeks* and *Zwaan-de Vries*. *Zwaan-de Vries v. Netherlands*, *supra* note 5; *Broeks v. Netherlands*, *supra* note 51. *See also General Comment No. 18*, *supra* note 6, ¶ 12.

almost all imaginable distinctions with those listed explicitly in Article 26. Therein lies the crucial difference between *Zwaan de Fries* and *Haraldsson*. Whereas *Zwaan de Fries* only scrutinized those socioeconomic regulations that discriminated between men and women,[54] *Haraldsson* essentially opened the door to challenges for a much wider array of socioeconomic regulations—whenever a potential complainant can claim membership to some sort of identifiable group—and this is problematic.[55]

The trouble with the Committee's interpretation is not the application of the nondiscrimination principle to non-Conventional rights, but, rather, the seemingly unlimited extension of impermissible grounds.[56] Properly viewed, however, the Committee's interpretation was part of a broader jurisprudential development established in earlier cases, which indicated a gradual extension of the scope of nondiscrimination. Those prior decisions resorted to the term "other status," and thereby extended the grounds of nondiscrimination under Article 26 beyond those explicitly mentioned in the Convention.[57] In *Gueye et al. v. France*,[58] the Committee held that differentiation by reference to "nationality acquired upon independence" falls within the parameters of "other status."[59] The Committee has also dealt with discrimination based on marital status, which it considered a protected class similar to those enumerated in Article 26.[60]

However, the instances in which the Committee considered such distinctions unreasonable were limited.[61] Distinctions such as those between

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54. *Zwaan-de Vries v. Netherlands*, *supra* note 5, at 160, para. 2.1.

55. After all, socioeconomic legislation is necessarily based on distinctions when it seeks to address social costs or benefits affecting specific groups. *See* Gianluigi Palombella, *The Abuse of Rights and the Rule of Law, in* ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS 5, 12 (András Sajó ed., 2006). Thus, if Article 26 were to apply to virtually all distinctions arising under the law, then there would hardly be any area of law that could avoid a test for reasonableness.

56. *But see* Ando, *supra* note 3; Tomuschat, *supra* note 3.

57. *See* cases cited *supra* note 6.

58. *Gueye v. France* (Communication No. 196/1985), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 189, U.N. Doc. A/44/40 (Sept. 29, 1989).

59. *Id.* at ¶ 9.4. In *Guyel*, the Committee considered the different treatment of Senegalese as compared to French citizens with respect to military pensions. *Id.* This, however, cannot be read as a general mandate to treat aliens and nationals equally in the context of social-security. Distinctions between citizens and aliens are permissible if based on reasonable and objective criteria. U.N. Hum. Rts. Comm., *Report of the Human Rights Committee: General Comment No. 15*, ¶ 17, U.N. Doc. A/41/40 (Apr. 11, 1986).

60. *See* NOWAK, *supra* note 3, at 625.

61. *See e.g.*, *Danning v. Netherlands* (Communication No. 180/1984), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 151, para. 14, U.N. Doc. A/42/40 (Jan. 1, 1987) [hereinafter *Danning v. Netherlands*]; *Sprenger v. Nether-*

employed and unemployed persons, between graduates and others, between persons sharing a household with their parents and others, as well as between police officers and volunteer firemen, were found to be reasonable and objective.[62] The significance of this jurisprudence was rather limited, not only because these cases involved unique fact patterns, but also because of the lenient level of scrutiny applied, which regularly upheld legislative distinctions. The interpretation of equal protection in *Haraldsson and Sveinsson v. Iceland*, on the other hand, was quite novel. There, the Committee demanded a high level of justification and extended the scope of Article 26 to discrimination based on economic circumstances, thereby clearing the way for a far more inclusive economic equal protection analysis. Such an extension of the nondiscrimination grounds moves Article 26 in the direction of a general principle of equality, which requires equal treatment in all contexts and on all grounds. This is a dubious undertaking that seemingly has no basis in the text of the Article itself. Though Article 26 provides for equal protection of the law, it explicitly notes that such protection shall be "without any discrimination."[63] What is meant by "discrimination" is then specified in the second sentence, which lists "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[64] Even though reference is made to "other status," which opens the concept of nondiscrimination to new grounds of exclusion, the enumeration of impermissible grounds, such as race, sex, and social origin, suggests that it must be comparable to the grounds specified.

It is dubious at best to claim that engagement in fishing during a certain period of time can be compared to such personal characteristics as race, gender, and religion. In effect, extending the grounds of nondiscrimination to such a vague, almost random, criteria of distinction, which relates to entirely fact-specific situations and personal behavior, devalues the other grounds of discrimination. As a consequence, almost all imaginable groups and activities will fall within the scope of Article 26, and, thus, any form of statutory distinction could be scrutinized by the Committee. When it comes to international human rights protection, such

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lands (Communication No. 395/1990), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 311, U.N. Doc. A/47/40 (Jan. 1, 1987) [hereinafter *Sprenger v. Netherlands*].

62. *See* NOWAK, *supra* note 3, at 626–27. It is, however, doubtful whether such distinctions fall within the scope of "other status" in the first place.

63. ICCPR, *supra* note 3, art. 26.

64. ICCPR, *supra* note 3, art. 26. For a contextual reading of the two sentences, see NOWAK, *supra* note 3, at 609.

a generalized concept of equality goes too far.[65] Even when appearing unreasonable, some distinctions simply cannot be deemed unlawfully discriminatory.[66]

C. The Level of Scrutiny

Such a broad interpretation of the nondiscrimination principle is particularly problematic when combined with a high level of scrutiny for the justification of distinctions. In *Haraldsson and Sveinsson v. Iceland*, the Committee held that the State party had not shown that the particular quota system met the requirements of reasonableness.[67] The State argued that the quota system was necessary to protect sustainable fishing in Iceland.[68] Though the protection of fish stocks was acknowledged as a legitimate aim, the existence of permanent entitlements rendered the law unreasonable.[69] The application of the reasonableness test in *Haraldsson and Sveinsson v. Iceland* shows that the standard for justification is more demanding than a basic "rational basis" review.[70] The Committee engaged in a searching analysis of proportionality in which it asked what means would be least intrusive while still effective.[71] Yet, by favoring a revertible quota, the majority of members substituted their preferences for the Icelandic legislature's and effectively applied a necessity test.

It is startling that the Committee, in just a few sentences, concluded that the quota fishing system of Iceland was unreasonable. The case involved a complicated matter of economic and environmental regulation with competing and conflicting public and private interests.[72] The legis-

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65. *See* Michael Stolleis, *Historische und ideengeschichtliche Entwicklung des Gleichheitssatzes*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 7-22 (Rüdiger Wolfrum ed., 2003).

66. *See* Alexander Somek, *Equality as Reasonableness. Constitutional Normativity in Demise*, *in* ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS 191–215 (András Sajó ed., 2006).

67. *Haraldsson and Sveinsson*, *supra* note 8, para. 10.4.

68. *Id.*

69. *Id.*

70. The United States Supreme Court, in economic matters not involving suspect or quasi suspect classifications, has applied the arbitrary and capricious test, a low standard of reasonableness. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

71. *Haraldsson and Sveinsson*, *supra* note 8, para. 10.4.

72. Public interest demanded restrictions on commercial fishing in order to prevent over-fishing. *Id*. at para. 5.7. The government enacting the legislation tried to reconcile the interest in the environment with the interest in a prosperous fishing industry. *Id*. at para. 5.8. The goal of the quota system was to manage fisheries in the most sustainable and efficient manner in order to guarantee profitable and economically efficient utilization of the fish stocks. *Id*. at para 5.7–8. But with the distribution of quotas, new fishers'

lature considered not only the public interest in conservation of their natural environment, but also the interest in a vital and sustainable fishing industry.[73] The rights of those taking part in the fishing economy, as well as those trying to enter the business, also had to be taken into account.[74] The divergence of these interests did not render the solution an easy one. It involved value judgments and prospective decisions. The State party must have concluded that a different model would jeopardize operating vessels' investments (i.e., previously purchased quotas) and would consequently endanger the fishing industry in the future. The Committee, in open disagreement with the Supreme Court of Iceland, did not accept this rationale.[75]

The lack of deference to the careful evaluation of the matter by State organs is striking. The Icelandic statutory framework had been revised several times in response to judgments by the Supreme Court of Iceland in order to accommodate individual rights.[76] Finally, the highest court of Iceland had held the restriction on commercial fishing by the quota system to be compatible with the equal protection clause of the Constitution.[77] The court, in explaining its finding, noted that permanent catch entitlements had made it possible for operators to plan their activities for the long term.[78] It is difficult to see why such a responsible analysis and revision by the State party should not be considered reasonable. Taking

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interests in access to the fishing industry conflicted with the interests of those existing fishers who had already acquired quotas. Meanwhile the government merely tried to facilitate long-term planning, *id*. at para. 5.8, and to create stability for those who had invested in fishery operations. *Id*. at para 5.3. The government acknowledged that existing fishers had become dependent on this sector for their livelihoods. *Id*. at para 5.7. With the permanent quotas, the government sought to protect those individuals who had direct interests in the protection of extensive investment in vessel operations, *id*. at para 5.7, and, at the same time, the government took action for the sake of the general public interest. *Id*. at para 2.7.

73. *Id*. at para. 10.4.

74. *See id.*

75. *Id.* at para. 10.4.

76. *See id.* at 4, para. 2.1.

77. *Id.* at 6, para. 2.6. According to Iceland's Constitution:

> All shall be equal before the law and enjoy human rights without regard to sex, religion, opinion, national origin, race, color, financial status, parentage and other status. . . . Men and women shall enjoy equal rights in every respect.

CONSTITUTION OF THE REPUBLIC OF ICELAND, art. 65, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 29 (Gisbert H. Flanz ed., Ágúst Árnason trans., 1999).

78. *Haraldsson and Sveinsson*, *supra* note 8, para. 2.6.

into account that the case involved purely economic matters[79] without any kind of invidious discrimination (such as a distinction on the basis of race or gender), it would have been adequate to defer to the parliament's evaluation and to limit judicial review to an arbitrariness standard.[80] The Committee's mere perception that a statutory regulation was unjust or inequitable should have been insufficient to render it in violation of the ICCPR.

D. The Role and Capacities of the Committee

It is not clear whether the consequences of this new kind of equal protection analysis have been fully considered. If Article 26 is continually interpreted and applied in this fashion, the Committee will soon be confronted with a veritable onslaught of disputes encompassing a vast array of fact patterns. Such disputes will demand a high degree of competence in order to be properly evaluated and the Committee will be required to balance competing concerns to determine whether the high threshold of reasonableness advocated in *Haraldsson and Sveinsson v. Iceland* has been met. Not only will professional and technical competence be necessary, the Committee will also need a deeper understanding of complicated areas of economic and social regulation.[81] Such an undertaking creates an unnecessary and distracting burden on an international human rights body.

It is true that in the late 1980s the interpretation of Article 26 as a nonaccessory right in *Zwaan de Fries* attracted similar criticism,[82] but that interpretive leap was clearly justified. The current trend of extending the meaning of this provision further by moving the nondiscrimination rule in the direction of a less deferential, general equal protection principle has a new quality. Previously, the Committee limited its analysis to the grounds spelled out in Article 26, and, thus, the judicial analysis was restrained by the text of the Convention.[83] In *Zwaan de Fries v. the Nether-*

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79. Arguably, Article 26 was never implicated here, because the statute at issue did not concern any of the nondiscrimination grounds.

80. *See e.g.*, *Des Fours Walderode v. Czech Republic, supra* note 5, at 94; *Brok and Brokova v. Czech Republic* (Communication No. 774/1997), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee,* at 110, U.N. Doc. A/57/40 (Jan. 1, 2002) [hereinafter *Brok and Brokova v. Czech Republic*].

81. Opsahl in 1988 already questioned whether the Committee is competent to become an effective Ombudsman for Equality in every area covered by legislation. Opsahl, *supra* note 22, at 64.

82. *See*, *e.g.*, Tomuschat, *supra* note 3, at 227.

83. In *P.P.C. v. the Netherlands* the Committee explained that art. 26 "does not extend to differences of results in the application of common rules in the allocation of benefits." *P.P.C. v. the Netherlands* (Communication No. 212/1986), *reprinted in*, U.N.

lands, it was clear that the gender discrimination at issue was based on stereotypes and therefore unreasonable.[84] But if a dispute is purely economic (i.e., if it concerns an area of purely socioeconomic issues), and if the distinction is based on economic facts (e.g, fishing during the reference period in the case of *Haraldsson and Sveinsson*), the analysis of the regulation's reasonableness will involve an assessment of factors that lie beyond the sphere of human rights standards. There is then a risk that claimants will use the individual complaint procedure to have a broad range of legislation reviewed by the Committee on the basis of equal protection. This will lead to an unmanageable load of cases and a reduction in judicial effectiveness. Furthermore, it is doubtful whether such a course of action would further the interests in economic, social, and cultural rights. The ICESCR is much better equipped with the expertise to resolve such issues and will be competent to consider individual communications once the Optional Protocol to the ICESCR enters into force.[85]

Fortunately, several members of the Committee took nuanced positions in dissent. Sir Nigel Rodley, for instance, having acknowledged the difficulties a nonexpert international body faces in attempting to master the issues at stake, called for greater deference to the State party's determination.[86] Yuki Iwasawa also advocated a wider scope of legislative discretion in economic regulation.[87] Ruth Wedgwood concurred with Iwasawa, arguing that the ICCPR is not a "manifesto for economic deregulation" and that the Committee should remain true to the limits of its legal and practical competence in order to protect the important rights covered by the Covenant.[88] Elisabeth Palm, Ivan Shearer, and Iulia Antoanella Motoc, in their dissenting opinions, did not require such deference.[89] Instead, they required distinctions to be "based on objective ground" and "proportionate to the legitimate aim pursued."[90] They concluded, however, that Iceland had carried out a "careful balance" and

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Hum. Rts. Comm., *Report of the Human Rights Committee*, at 244, ¶ 6.2, U.N. Doc. A/43/40 (Sept. 28, 1988).

84. The Netherlands, by changing the law retroactively, seemed to acknowledge that the differentiation involved gender discrimination. *See Zwaan-de Vries v. Netherlands*, *supra* note 5, at 162, para. 4.5.

85. Hum. Rts. Comm., *Report of the Human Rights Committee,* at 4, U.N. Doc. A/63/435 (Nov. 28, 2008).

86. *Haraldsson and Sveinsson*, *supra* note 8, at 24.

87. *Id.* at 25–26.

88. *Id.* at 27.

89. *Id.* at 22.

90. *Id.* The Committee, however, used the terms "objective" and "reasonable" in describing the standard they would adhere to. *Id.* at 19–20, ¶ 10.2.

met this test.[91] This lack of unanimity among the members may indicate that the Committee will reevaluate and refine its approach to equal protection analysis in the future.

II. LEARNING FROM CONSTITUTIONAL EQUAL PROTECTION

The following section will make some suggestions for the future conceptualization of international equal protection. In order to develop a solid and constructive approach, it is necessary to evaluate the underlying rationales of the equal protection doctrine. With that end in mind, consideration of the evolution of the equal protection principle in the context of domestic law and its interpretation over time is instructive.[92]

A. The Focus on Grounds of Nondiscrimination

The equal protection principle, a fundamental feature of modern constitutional law, has many facets and has evolved substantially over the past two centuries. Equal protection "before the law" was first emphasized as early as the French Revolution.[93] It required equal application of the law and thus became particularly relevant to the administration of law.[94] Later, the Civil War Amendments to the United States Constitution introduced the principle of equal protection "of the law," which binds the legislature, as well as the judiciary and the executive.[95] The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[96] The earliest interpretation of this edict was limited to the prohibition of slavery.[97] In the nineteenth century, the concept of comprehensive, substantive equal protection was not yet developed.[98] It was an advent of the twentieth century that

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91. *Id.* at 22.

92. For the relationship between comparative law and international law, see George A. Bermann, *Le droit comparé et le droit international: allis ou ennemis?*, 2003 REVUE INTERNATIONALE DE DROIT COMPARÉ 519 (2003).

93. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789, art. 6.

94. *See* NOWAK, *supra* note 3, at 598.

95. *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV. In Germany, the idea of equal protection of the law was first expressed in the text of the Constitution of the Weimar Republic. *See* Weimarer Reichsverfassung [Constitution] art. 109 [F.R.G.], *reprinted in* CONSTITUTIONS THAT MADE HISTORY 379 (Albert P. Blaustein & Jay A. Sigler eds., 1988).

96. U.S. CONST. amend. XIV.

97. *See* Slaughter-House Cases, 83 U.S. 36, 81 (1873).

98. For the historical development of the nondiscrimination doctrine, see, Stolleis, *supra* note 65, at 7–122. *See also* Opsahl, *supra* note 22; Karl Josef Partsch, *Fundamental Principles of Human Rights: Self-Determination, Equality and Nondiscrimination*, *in* 1

domestic and international law went beyond procedural protection and focused on the more specific prohibition of discrimination on the basis of certain individual characteristics.[99]

Beginning with the *Slaughter-House Cases* in 1873, the U.S. Supreme Court interpreted the Equal Protection Clause of the Fourteenth Amendment to prohibit racial discrimination.[100] Though this was the first official enunciation of the equality principle, the Court refused to apply the clause beyond the context of discrimination based on race and alienage until the 1960s.[101] Then, the Court gradually tabulated a list of quasi-suspect classifications covering such grounds as gender and illegitimacy.[102] More recently, the Court has refused to expand the list further, reasoning that the Equal Protection Clause could then be used to expand constitutional rights beyond those explicitly recognized in the Constitution.[103] As Justice Powell explained, "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[104] In sum, despite its seemingly broad wording, the Equal Protection Clause of the U.S. Constitution has never been interpreted by the Supreme Court as providing for general equality. The pursuit of such broader goals has instead been left to the legislature.[105]

The insight that equal protection is best expressed by identifying specific grounds of nondiscrimination was also manifested in several other post-World War II constitutions.[106] These examples usually differ from the open-ended text of the French and U.S. Constitutions.[107] Though they

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THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS, 61, 72 (Karel Vasak & Philip Alston eds., 1982).

99. Partsch, *supra* note 98, at 73.

100. Slaughter-House Cases, 83 U.S. at 81.

101. Reynolds v. Sims, 377 U.S. 533, 590 (1964). In *Toyosaburo Korematsu v. United States*, the Supreme Court explained that discrimination on the basis of race and alienage is immediately suspect. Toyosaburo Korematsu v. United States, 323 U.S. 214, 216 (1944).

102. Trimble v. Gordon, 430 U.S. 762, 767 (1977); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

103. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

104. *Id.*

105. *See*, *e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000 (1966); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1966); Fair Housing Act, 42 U.S.C. § 3601 (1970).

106. Edward J. Eberle, *German Equal Protection: Substantive Review of Economic Measures*, 9 GERMAN L.J. 2095, 2099 (2008).

107. For ready access to constitutional law worldwide, see CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: A SERIES OF UPDATED TEXTS, CONSTITUTIONAL CHRONOLOGIES AND ANNOTATED BIBLIOGRAPHIES (Albert P. Blaustein & Gisbert H.

also provide for equal protection of the law, they tend to include nondiscrimination clauses that define equal protection by spelling out impermissible grounds of nondiscrimination.[108] The Canadian Charter of Rights and Freedoms, for example, mentions race, national or ethnic origin, color, religion, sex, age, and mental or physical disability.[109] The South African Constitution contains a more elaborate catalog.[110] Apart from the traditional nondiscrimination grounds, such as race, color, ethnicity, alienage, and gender, it outlaws discrimination on the basis of wealth, age, disability, religion, conscience, belief, culture, language, birth, sexual orientation, pregnancy, marital status, and social origin.[111] In both jurisdictions, constitutional equal protection review is not a matter of general equality but of invidious discrimination.[112] According to the Supreme Court of Canada, "[E]quality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good

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Flanz eds., 1971). *See also*, Andreas Kellerhals & Dirk Trüten, *Equality under Swiss Law*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 37, 37–53 (1999).

108. The United Kingdom's Canadian Act, for example, provides for equal protection before and under the law, as well as for equal protection and benefit of the law without discrimination, while also spelling out specific grounds of nondiscrimination. Canada Act, 1982, c.11, § 15.1, sched. B (Eng.). For other examples of constitutional protection of equal protection with specific prohibitions, see The Instrument of Government [Constitution] arts. 15 and 16 (Swed.), *reprinted in* 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 7 (Rüdiger Wolfrum et al. eds., 2005); Constitution of the Republic of Finland, § 6, *reprinted in,* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 2 (Rüdiger Wolfrum et al. eds., 2006); Constitution of the Russian Federation, art. 19, *reprinted in,* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 4 (Gisbert H. Flanz ed., 2002); Constitution of the Italian Republic, art. 3, *reprinted in,* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (Rüdiger Wolfrum et al. eds., 2006); Constitution of the Kingdom of Spain, art. 14, *reprinted in,* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 12 (Gisbert H. Flanz ed., 2004).

109. Canda Act, 1982, c.11, § 15.1, sched. B (Eng.). According to the Supreme Court of Canada these categories are neither exclusive or exhaustive, but merely representative. *Egan v. Canada*, [1995] S.C.R. 513 (Can.).The Court, therefore, extended protection to same-sex partners.

110. Constitution of the Republic of South Africa, ch. 2, § 9, *reprinted in,* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 12 (Gisbert H. Flanz & Patricie H. Ward eds., 2004).

111. *Id*. For an overview of constitutional equal protection in South Africa, see Lourens W.H. Ackermann, *Equality under the 1996 South African Constitution*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 105–17 (Rüdiger Wolfrum ed., 2003).

112. *See, e.g., Law v. Canada*, [1999] 1 S.C.R. 497 (Can.); *Prinsloo v. van der Linde* 1997 (6) BCLR 759 (CC) at paras. 31–33 (S. Afr.).

reason, or that otherwise offend fundamental human dignity."[113] The South African Constitutional Court also gives special attention to specific grounds of nondiscrimination and has interpreted the general equal protection clause narrowly.[114]

B. Equality as a Measure to Probe Legislation?

There have been efforts in a few jurisdictions to go beyond textual nondiscrimination distinctions and test legislation under general principles of equality, but those efforts have been challenged.[115] One example comes from the German constitution, the German Basic Law, which provides both a general principle of equality clause in Article 3(1) and a nondiscrimination clause in Article 3(3).[116] In practice, the latter plays a less significant role due to the fact that constitutional adjudicators are mainly concerned with the general equality principle.[117] In that sense, equal protection has become a structural principle for the organization of government, and is utilized primarily to limit the government's discretionary power.[118] With this emphasis, German equal protection analysis differs from that of many other jurisdictions that focus on specified grounds of discrimination.[119] Nonetheless, it should be noted that German courts do not apply a uniform standard of review for all inequalities.[120] The level of scrutiny varies depending on the subject matter concerned and the distinction upon which unequal treatment is based.[121] The German

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113. *Egan v. Canada*, [1995] S.C.R. 513, at ¶ 36.

114. The South African Constitutional Court only requires a rational connection to a legitimate government purpose for differentiations under section 9(1). *Prinsloo v. van der Linde* 1997 (6) BCLR 759 (CC) at paras. 31–33; *Harksen v. Lane* 1997 (11) BCLR 1489 (CC) (S. Afr.).

115. *See*, *e.g.,* Lindsey v. Normet, 405 U.S. 56 (1972); Christian Starck, Commentary on Article 3, in 1 DAS BONNER GRUNDGESETZ 310 (Hermann von Mangoldt, et al. eds., 1999); *see also* Wojciech Sadurski, *Perspectives on Equal Protection* (pt. 1), 1998 ST.LOUIS-WARSAW TRANSATLANTIC L.J. 63, 71 (noting that the prospect of treating everyone equally is "an impossible and unattractive ideal").

116. Grundgesetz fur die Bundesrepublik Deutschland [GG] (Basic Law) May 23, 1949, Bundesgesetzblatt, Teil I (BGBI.I), as amended, § 2034, art 3. *See generally* Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 277–279 (1999); Michael Sachs, *The Equality Rule Before the German Federal Constitutional Court*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 139.

117. Baer, *supra* note 116, at 251.

118. Sachs, *supra* note 116, at 148.

119. Baer, *supra* note 116, at 260.

120. Sachs, *supra* note 116, at 139.

121. Baer, *supra* note 116, at 258; Sachs, *supra* note 116, at 141.

Federal Constitutional Court applies a high level of scrutiny only with respect to distinctions implicating fundamental rights and distinctions based on grounds sufficiently similar to those specified in Article 3(3), such as race, sex, gender, language, national origin, disability, faith, religion, and political opinion.[122] Other types of distinctions are evaluated for arbitrariness.[123] Though German jurisprudence does not formally distinguish between different classifications, such as suspect classification and quasi-suspect classification, the courts' analyses vary depending on the nature of the distinction involved and its potential implications.[124] Compared to the United States' jurisprudence, the analysis of the German Constitutional Court is generally more probing, but the standard of review applied in individual cases depends nonetheless on the distinction made.[125] In this sense there are parallels between these jurisdictions, as will be further addressed below.[126]

Suffice it to say that the concept of equal protection has not remained fixed throughout its history. Equal protection of the law, as a matter of substantive equality, has raised many difficulties, as the principle of equality itself is intrinsically vague and therefore requires specification.[127] Most courts have tried to give meaning to this general principle by focusing on the concept of nondiscrimination, and this is true even in jurisdictions where the text of the constitutional equal protection clause

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122. Over a period of 30 years, Article 3 has been interpreted as a prohibition of arbitrariness in legislation, a rather lenient standard of judicial review. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 14 (52) (F.R.G.). The so-called "new formula," a more demanding standard of review, is a more recent jurisprudential development, which is still highly controversial. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 7, 1980, 55 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 72 (88) (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 4, 2001, 103 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 310 (318) (F.R.G.). *See also* Hans Meyer, *Gleichheit und Nichtdiskriminierung — die deutsche Debatte*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 79–93 (Rüdiger Wolfrum ed., 2003). For the interpretation of equal protection by the French Conseil Constitutionnel, see Olivier Jouanjan, *Gleichheitssatz und Nicht-Diskriminierung in Frankreich*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 59–78 (Rüdiger Wolfrum ed., 2003).

123. The German test of arbitrariness is more demanding than basic rationality review in the United States. *See*, Eberle, *supra* note 106, at 2100 (2008).

124. Sachs, *supra* note 116, at 153.

125. Eberle, *supra* note 106, at 2100.

126. *See infra* Part III.C.2.

127. Sadurski, *supra* note 115, at 71–72.

is open-ended, such as the United States.[128] The interpretation of such general clauses reveals a focus on specific types of distinctions, requiring higher standards of justification.[129] A general equal protection analysis going beyond these nondiscrimination grounds is rather exceptional in constitutional review.[130] It is very controversial; thus, it is far from representing a universal consensus.[131] If exercised at all, such an approach usually applies different standards of review depending on the nature of the discrimination at issue.[132]

C. The Transfer to International Equal Protection

Given the historical development of equal protection norms in domestic law, it should come as no surprise that the equality principle has also been codified as a nondiscrimination principle on the international level.[133] The ICCPR, for instance, incorporated both the principle of equality "before the law" and equality "of the law."[134] However, language within the ICCPR indicates that its drafters never meant to provide for general quality with respect to all socioeconomic legislation—the ICCPR explicitly states that equal protection "of the law" merely protects against discrimination on specified grounds.[135] In this sense, Article 26 of the ICCPR exhibits several parallels to modern equal protection provisions, and the grounds listed in Article 26 seem to reflect an international consensus with respect to impermissible grounds for discrimination.[136]

Consistent with this wording, the early jurisprudence on Article 26 focused on the nondiscrimination clause as a clarification of equal protection.[137] However, by extending its application in later reports, the Committee has moved it in the direction of a general equality principle.[138] The nondiscrimination principle, which was introduced in order

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128. *See* sources cited *supra* note 107.

129. Partsch, *supra* note 98, at 73.

130. *Id.* at 69.

131. *Id.*

132. *Id.* at 73.

133. *See* WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW (1983).

134. *But see* Tomuschat, *supra* note 3, at 227 (suggesting that Article 26 merely applies to enacted laws).

135. The first sentence of Article 26 explicitly refers to the right to equal protection of the law "without any discrimination." ICCPR, *supra* note 3, art. 26. The second sentence identifies specific grounds of discrimination which are impermissible. *Id*.

136. *See* NOWAK, *supra* note 3, at 598; *see also* Part II.A.

137. *See* cases cited *supra* note 6.

138. *See* analysis of *Haraldsson* Case at *supra* Part I.B.

to clarify the equal protection principle, thereby stands to lose its essential contours and meaning. Given the historical trajectory from equality "before the law," to equality "of the law," to the nondiscrimination principle, this shift toward an open-ended notion of equality seems almost anachronistic. At the very least, it is unparalleled in the world of constitutional law due to its generality and breadth.

It is important to remember that the ICCPR is an international human rights instrument concerned with the protection of fundamental rights.[139] It sets universal standards that its Member States are required to guarantee at a very minimum.[140] In the interpretation of these standards, the Committee should not lose sight of comparative constitutional law. The legal practice of several democratic states has also guided the European Court of Human Rights in its analysis of the nondiscrimination principle of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[141] This is not to advocate a least common denominator approach to international law, but to encourage the consideration of the profound legal discourse that has occurred regarding similar matters of domestic law. At least in the area of equal protection, it is not the prerogative of the Human Rights Committee or the regional courts of human rights to expand their interpretations beyond the views shared within comparative constitutional law without a firm legal basis.[142]

Yet another argument cautioning against such a sweeping interpretation is that the rise of equal protection of the law has far-reaching structural implications with respect to nation-state governments and separation of powers. The dialogue surrounding constitutional equal protection has long been preoccupied with the tension between democracy and constitutionalism.[143] However, with judicial review moving in the direction of a general principle, equality of the law is evolving into more of a tool for the judiciary, rather than a matter for democratically-elected legislatures. In short, legislative determinations are increasingly subjected to judicial scrutiny in order to ascertain whether they adequately provide for

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139. ICCPR, *supra* note 3, art. 5.

140. ICCPR, *supra* note 3, preamble.

141. *See*, *e.g.*, Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*"* v. Belgium (No. 2), 6 Eur. Ct. H.R. (Ser. A) at 30–31 (1968).

142. For a comprehensive overview of equal protection in domestic and international law, see GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ (Rüdiger Wolfrum ed., 2003).

143. *See*, *e.g*,. MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 60–61 (1991); Stephen M. Griffi, *Judicial Supremacy and Equal Protection In a Democracy of Rights*, 4 U. PA. J. CONST. L. 281.

substantive equality. This adjudicatory second-guessing could cause a chilling effect on socioeconomic legislation, which would be counter-productive to the societal goals of enhancing social and economic wealth. This approach is already questionable on the domestic level, and it is definitely not embraced by all states.[144]

Furthermore, international institutions, such as the European Court of Human Rights and the Human Rights Committee, are not in a competent position to comprehensively reassess democratic decisions regarding economic and social issues.[145] It is one thing to evaluate a law as to whether it constitutes racial, sexual, or otherwise suspect discrimination, but it is quite another thing to demand that all distinctions arising from legislation meet vague standards of general equality and pass the substantial hurdles of review in accordance with reasonable and objective criteria. The question of what is reasonable and fair is context-specific; thus, it is unlikely that the standard of fairness is homogenous enough to qualify as a universal principle, and it is even less likely that it could qualify as a human rights principle. In other words, to clothe purely economic inequalities as an issue of human rights raises serious concerns over the dilution of the human rights ideal. Therefore, international judicial bodies should be confident in exercising more judicial self-restraint, not only in the face of their already overwhelming case loads, but also as a matter of democracy. International human rights bodies should not blithely interfere with, or substitute their analyses of socioeconomic legislation for, that of democratically elected legislators and competent constitutional adjudicators, particularly in disputes that have been carefully scrutinized by responsible domestic institutions.

III. SUGGESTIONS FOR FUTURE INTERNATIONAL EQUAL PROTECTION ANALYSIS

As the foregoing discussion has shown, the Committee's current reading of the equal protection clause of the ICCPR does not reflect broad consensus, and a focus on nondiscrimination would be preferable. The analysis of the Committee's interpretation demonstrates that the basic problems arise with the proper reading of the grounds of discrimination and in the definition of reasonableness. These elements, therefore, are the focus of the following discussion. Drawing on domestic jurisprudence, I will make suggestions for a future conceptualization of international

144. Partsch, *supra* note 98, at 69.

145. *See Haraldsson and Sveinsson*, *supra* note 8, at 25–26.

equal protection, and I will consider ways to integrate early Committee recommendations into a coherent equal protection doctrine.

A. Focus on Nondiscrimination Analysis

One step to adequately deal with nondiscrimination cases in the future would be to focus on the grounds of discrimination explicitly delineated[146] and to develop a differentiated doctrinal framework along these lines. According to settled Human Rights Committee doctrine, Article 26 of the ICCPR is applicable to any field regulated and protected by public authorities; however, this does not mean that it provides for a principle of general equality.[147] Equality "of the law," pursuant to Article 26, merely prohibits discrimination on the bases listed in the second clause.[148]

It is therefore incumbent upon the Committee to further specify the grounds of nondiscrimination that will be entertained as potential violations of Article 26. If an excessively broad interpretation of those grounds is not avoided, nearly any distinction could be characterized as discrimination, and this would result in comprehensive scrutiny of a plethora of legislation for reasonableness.

One example is discrimination based on property. As the *Haraldsson* case demonstrates, with a broad reading of the term "property," almost every piece of economic regulation could be considered discriminatory on the basis that some controlling distinction is equivalent to a distinction based on property.[149] If "property" were interpreted to include "all forms of economic assets," the Committee would soon have to contend with the reasonableness of tax laws, which regularly provide for different levels of regulation depending on an individual's income and assets. Subsidies and public procurement laws could also become the subject of the Committee's scrutiny. This would be similarly questionable. Of course, to advocate a stricter reading of Article 26 is not to remove

146. This approach was already advocated by Partsch. Partsch, *supra* note 98, at 69. *But see* Georg Nolte, *Gleichheit und Nichtdiskriminierung*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 235, 237 (Rüdiger Wolfrum ed., 2003).

147. *See., e.g., Zwaan-de Vries v. Netherlands*, *supra* note 5, at 168.

148. This is also the approach taken by the Inter-American Court of Human Rights. The Court of Human Rights has interpreted Article 24 of the American Convention on Human Rights as referring to the grounds of nondiscrimination in Article 1, paragraph 1. Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am Ct HR (ser A) No. 11 (Aug. 10, 1990), para. 22.

149. *Haraldsson and Sveinsson*, *supra* note 8.

"property" from lists of explicit discriminatory distinctions, but it would be sensible for the Committee to focus on such cases in which voting rights, for example, are afforded discriminately on the basis of property. Evaluating economic and social regulations comprehensively but without greater doctrinal focus is beyond the scope of Article 26.

B. The Meaning of "Other Status"

Though the list in Article 26 is not exhaustive, one should be careful in extending it to remote bases of impermissible discrimination. The reference to discrimination on the basis of "other status" renders the concept flexible over time, but there is an implicit caveat that overreaching should be avoided. The term "other status" should not be interpreted so expansively that it becomes the primary measure of the reasonableness of legislative acts.[150] Instead, this term should be interpreted contextually, in light of the other grounds explicitly listed.

There is consensus that discrimination based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, and birth" is unacceptable.[151] Further, the grounds listed in Article 26 refer to identifiably distinct categories.[152] They are personal characteristics that should not be the principal determinants of an individual's rights or privileges. Some are immutable, such as race, colour, sex, origin, and birth, reflecting the idea that individuals are born equal.[153] Others follow from an exercise of universally accepted fundamental rights, such as freedom of religion, the right to own property, and free-

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150. *See* Tomuschat, *supra* note 3, at 242; *Kavanagh v. Ireland* (Communication No. 819/1998), *reprinted in* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 122, paras. 10.2–10.3, U.N. Doc. A/56/4 (Oct. 1, 2001). *But see*, NOWAK, *supra* note 3, at 627 (endorsing the Committee's broad interpretation of "other status" in *Kavanah v. Ireland* as "justified").

151. Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955); Mabo v. Queensland (1988) 166 C.L.R. 186 (Austl.); Lavoie v. Canada, [2002] 1 S.C.R. 769 (Can.); Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2002 I.C.J. 219 (July 10).

152. *B.d.B. et al. v. Netherlands* (Communication No. 273/1988, adopted 1989), *reprinted in* U.N. Hum. Rts.Comm., *Report of the Human Rights Committee*, at 286, para. 6.7, U.N. Doc. A/44/40 (Sept. 29, 1989).

153. Tomuschat, *supra* note 3, at 232 (referring to these characteristics as "stable characteristics"). However, Sadurski argues that "immutability" is not an adequate or appropriate touchstone for determining the existence of impermissible classifications. Sadurski, *supra* note 115, at 78–84. Instead, he advocates focusing on the wrongful motives of prejudice and hostility in discerning whether legislative enactments are discriminatory. *Id.* at 93–102.

dom of expression (political or otherwise). Distinctions based on these traits are intolerable because they seriously jeopardize the fundamental concept of human rights[154]—the conviction that individuals are born equal with inalienable rights.[155] This conviction is called into question when a governmental body distinguishes citizens on one of these bases. This understanding of nondiscrimination is reflected in the jurisprudence of several constitutional courts. As the South African Constitutional Court in *Prinsloo v. Van der Linde*[156] explained, unfair discrimination means essentially "treating persons differently in a way which impairs their fundamental dignity as human beings."[157] A similar approach was adopted by the Supreme Court of Canada in the matter of *Law v. Canada*.[158] There, the Court explained that the purpose of the equality rights provision of the Canadian Charter is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."[159]

It is not only the area of application that triggers equal protection analysis, but also the particular nature of the distinction and the criteria used in the implementation thereof. In other words, fundamental rights are not only implicated where there is unequal treatment with respect to the specified areas protected by the Covenant, but also if there is discrimination in other fields of law on the basis of, for example, race, religion, opinion, or sex. Therefore, a high standard of scrutiny should be exercised in reviewing the following types of legislation: (1) legislation under which distinguishable groups do not enjoy the same fundamental rights (e.g., voting rights); and (2) legislation under which a specific type of discrimination, such as racial discrimination, is so invidious that it cannot be tolerated regardless of the exact context in which the distinction is made. For instance, where public benefits are distributed on the basis of race, the basic human right of equal dignity before the law is subverted. A high burden of justification ought to be demanded from any legislature willing to pass such a measure.

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154. Choudhury, *supra* note 3, at 41.

155. *See* VA. CONST. of 1776, § 1, *reprinted in,* 7 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 382 (Francis N. Thorpe ed., 1909) ("That all men are by nature equally free and independent, and have certain inherent rights."); DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789, art. 1, ("Les hommes naissent et demeurent libres et égaux en droits." [Men are born and remain free and equal in rights.]).

156. *Prinsloo v. van der Linde* 1997 (6) BCLR 759 (CC) (S. Afr.).

157. *Id.* at para. 33.

158. Law v. Canada, [1999] 1 S.C.R. 497.

159. *Id.* at 516.

The distinctions listed in Article 26 make up significant elements of personal identity;[160] however, other grounds of discrimination, such as sexual orientation,[161] age,[162] and disability,[163] should be similarly protected as immutable personal characteristics.[164] Still, it is unclear whether additional characteristics, particularly those linked to personal decisions of free will, should be included in this list.[165] One example is marital status. That married couples enjoy preferential treatment such as tax benefits is unlikely to be deemed a human rights issue. Marital status is not an invidious distinction because there are a number of legitimate reasons for legislatures to afford certain types of benefits to married couples but not to single individuals. These reasons include the State's interest in family welfare, as well as the lack of impact on unmarried individuals' fundamental rights (provided they do not wish to marry).

C. Refining the Standard of Reasonableness

If a legislature wishes to cast distinctions on the basis of any of the explicitly enumerated grounds or on a sufficiently analogous basis, the distinction must then be justified. As the Committee has explained repeatedly, there is no absolute prohibition on legislation that treats certain groups differently from others.[166] Rather, it is only those distinctions that

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160. In other words, it is not only immutability or prejudice and hostility which might explain the classifications listed in Article 26. *See* Sadurski, *supra* note 115, at 78–84 (critiquing the use of "immutability" alone as a measure of discrimination).

161. The Committee has found that discrimination on the basis of sexual orientation is a form of sexual discrimination, and thus contrary to articles 2, paragraph 1, and 26 of the Covenant. *Toonen v. Australia*, (Communication No. 488/1992), *reprinted in* Hum. Rts. Comm., *Report of the Human Rights Committee*, at 235, U.N. Doc. A/49/40 (Sept. 21, 1994). *But see*, NOWAK, *supra* note 3, at 623 (favoring the inclusion of sexual orientation with the definition of "other status"). Another good reason to consider sexual orientation as an "other status" is that it goes to the heart of the right to privacy.

162. *Love v. Australia* (Communication No. 983/2001) at 14, ¶ 8.2, U.N. Doc. CCPR/C/77/D/983/2001 (Apr. 28, 2003) (noting that age discrimination is generally impermissible; however, it may be justified if "based on reasonable and objective criteria").

163. *C v. Australia* (Communication No. 832/1998), *reprinted in,* U.N. Hum. Rts. Comm., *Report of the Human Rights Committee*, at 260, U.N. Doc. No. A/56/40 (Jan. 10, 2001).

164. The South African Constitutional Court refers to "fundamental dignity" of human beings in its equal protection analysis. *Prinsloo v. van der Linde* 1997 (6) BCLR 759 (CC) at para. 31 (S. Afr.); *see also* Ackermann, *supra* note 111, at 112.

165. *But see*, *Danning v. Netherlands*, *supra* note 61 at 151, para. 14; *Sprenger v. the Netherlands*, *supra* note 64, at 308.

166. *Zwaan-de Vries v. Netherlands*, *supra* note 5, at 168, para. 13; *Broeks v. Netherlands*, *supra* note 51, at 150, para. 13.

are neither objective nor reasonable that are to be deemed impermissible.[167] Still, the standard of reasonableness is inherently vague and neither the Human Rights Committee's General Comment on Nondiscrimination nor the relevant case law defines the term "reasonable."[168] Given the recently expanded scope of application of the principle of nondiscrimination in the Committee's jurisprudence, it is necessary to specify what is meant by "reasonableness." Of course, crafting a definition of the term may be easier said than done, and the substantial number of dissenting opinions in recent cases indicates that there is a controversy among the Committee with respect to the meaning of—and the standards for determining—reasonableness.[169]

1. Different Levels of Scrutiny

The "reasonable and objective" criterion is also to be found in domestic constitutional equal protection jurisprudence[170] and in the case law of the European Court of Human Rights.[171] Generally speaking, what is "reasonable" can only be determined by comparing the competing interests at stake in a given dispute. This involves a balancing inquiry; the adjudicator evaluates the legislative aim in relation to its consequences with the goal of striking a certain degree of proportionality between the two. In the *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,"*[172] the European Court of Human Rights explained that "[t]he existence of . . . a justification must be assessed in relation to the aim and effects of the measure under consideration."[173] Therefore, the Court requires a legitimate aim and a "reasona-

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167. *Zwaan-de Vries v. Netherlands*, *supra* note 5, at 168, para. 13; *Broeks v. Netherlands*, *supra* note 51, at 150, para. 13.

168. *General Comment No. 18*, supra note 6, ¶ 13.

169. *See, e.g.*, *Brok and Brokova v. Czech Republic*, *supra* note 80 at 110; *Diergaardt v. Namibia* (Communication No. 760/1997), *reprinted in* U.N. Hum. Rts. Comm. *Report of the Human Rights Committee*, at 140, U.N. Doc. No. A/55/40 (Feb. 1, 2001). *See also* Ando, *supra* note 3, at 220.

170. The proportionality analysis is found, for example, in Germany, France, and Poland. *See* Guy Carcassonne, *The Principle of Equality in France*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 159, 159–72; Leszek Lech Garlicki, *The Principle of Equality and the Prohibition of Discrimination in the Jurisprudence of the Constitutional Tribunal of Poland*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 7 (1999); Jouanjan, *supra* note 127, at 59–78.

171. *See* CC decision no. 2000-437DC, Dec. 19, 2000, http://www.conseil-constitutionnel.fr.

172. Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*"* v. Belgium (No. 2), 6 Eur. Ct. H.R. (Ser. A) at 31 (1968).

173. *Id.*

ble relationship of proportionality between the means employed and the aim sought to be realised."[174] Even though the Human Rights Committee does not regularly refer to the term "proportionality," its earlier method of dispute analysis clearly reflected a balancing of the competing interests.[175] Thus, it was unsurprising that Committee members Elisabeth Palm, Ivan Shearer, and Iulia Antoanella Motoc used the phrase "proportionate to the legitimate aim" in their dissenting opinions in the *Haraldsson* case.[176]

So, ultimately, "reasonable" means "proportionate to a legitimate aim." But the answers to the questions, "what will be found to be a legitimate aim?" and, "what consequences will be found to be proportionate to that aim?" still depend on the distinction at issue. An examination of comparative jurisprudence reveals that the level of scrutiny varies depending on the nature of discrimination. For example, adjudicators require governmental bodies to provide much more compelling justifications if drawing distinctions on the basis of race as compared to gender.[177] But a more compelling justification is required for gender distinctions than for those based on property.[178] It is impossible to conceive of any justification for *de jure* discrimination on the basis of race, but the idea of common but differentiated responsibility under socioeconomic legislation may very well justify distinctions based on property. In other words, the exact standard of justification should depend on the specific ground of discrimination at issue. The more a distinction jeopardizes the recognition of fundamental rights, the more demanding the scrutiny of its "reasonableness." As explained, this is a common theme in constitutional jurisprudence.[179] For instance, the use of the term "suspect classification" in U.S. equal protection analysis reflects the understanding that certain distinctions, such as race, are not acceptable and, therefore, presumptively

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174. *Id.*; *see also* Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser./L/V/II.111, doc. 20 rev. ¶ 31 (2001). For a discussion of the African system, see U. O. Umozurike, *Equality and Non-Discrimiantion under the African Charter*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 171–83 (Rüdiger Wolfrum ed., 2003).

175. *See* cases cited *supra* note 6.

176. *Haraldsson and Sveinsson*, *supra* note 8, at 22; *see also id.* at 25 (in his dissenting opinion, Committee member Yuji Iwasawa concluded that the disadvantages of the regulation were not disproportionate to the advantages).

177. Choudhury, *supra* note 3, at 43; Janneke H. Gerards, *Intensity of Judicial Review in Equal Treatment Cases*, 51 NETHERLANDS INT'L L. REV. 135, 164–66 (2004).

178. Choudhury, *supra* note 3, at 27; Gerards, *supra* note 177, at 172.

179. *See, e.g.*, Garlicki, *supra* note 170, at 9.

invalid.[180] A high threshold of justification and a particularly careful analysis is required in such cases.[181]

This balancing approach can also be recognized in international case law. According to the European Court of Human Rights, discrimination on the basis of race or ethnicity is particularly invidious, and, therefore, no difference in treatment will be justified if it is based exclusively on those immutable traits.[182]

A heightened level of justification is also usually sought with respect to gender discrimination. The Human Rights Committee explained in *Müller and Engelhard v. Namibia*[183] that differential treatment based on gender "places a heavy burden on the State party to explain the reason for the differentiation."[184] The European Court of Human Rights asks for "very weighty reasons" as well when it comes to gender discrimination.[185]

However, in cases involving distinctions based on property—i.e., purely economic distinctions—the Committee's analysis should be more deferential.[186] The Committee should follow Yuji Iwasawa's approach—explained in Iwasawa's dissenting opinion in the *Haraldsson* case—and state actors should be afforded wide latitude in devising economic regulatory policies.[187] Such government action should not be found imper-

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180. For a critical evaluation of the "per se" test and the "color blindness" theory, see Sadurski, *supra* note 115, at 74–84.

181. Loving v. Virginia, 388 U.S. 1 (1967); *see also Haraldsson and Sveinsson, supra* note 8, at 25–26.

182. D.H. v. Czech Republic, App. Co. 57325/00, (2006), http://www.echr.coe.int/echr/Homepage_EN.

183. *Müller and Engelhard v. Namibia* (Communication No. 919/2000), *reprinted in* Hum. Rts. Comm., *Report of the Human Rights Committee*, at 243, U.N. Doc. No. A/57/40 (Jan. 1, 2002).

184. *Id. at*. 243, para. 6.7.

185. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (Ser. A) at 31–32 (1985). This high standard of review is also applied to treatment based exclusively on the ground of nationality. *See* Gaygusuz v. Austria, 1996-IV Eur. Ct. H.R. 1129.

186. For example, in the case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" *v. Belgium,* the European Court of Human Rights applied a low standard of review by requiring a "reasonable relationship of proportionality." Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*"* v. Belgium (No. 2), 6 Eur. Ct. H.R. (Ser. A) at 31 (1968); *see also Swedish Engine Drivers' Union*, 20 Eur. Ct. H.R. (Ser. A) at 14 (1976) (noting that differential treatment may be justified by a legitimate aim). *See generally*, J.H. GERARDS, JUDICIAL REVIEW IN EQUAL TREATMENT CASES (2005).

187. Committee member Iwasawa explained that, "[s]tates should be allowed wider discretion in devising regulatory policies in economic areas. . . . The Committee should be mindful of its own expertise in reviewing economic policies that had been formed

missible under Article 26 under the rubric of unfairness. This was also the position of Committee member Sir Nigel Rodley, who recognized the insufficient capacity of an international body to master the issues at stake in economic regulations and, therefore, conceded deference to the State party's arguments.[188] It is telling that, even under the most stringent domestic law standard of review, deference is still given to the legislature when it comes to purely economic matters.[189] As mentioned above, under the "new formula" of the German Federal Constitutional Court, a more lenient standard of review is exercised in these matters.[190] Distinctions neither based on discriminatory grounds nor deemed to affect a fundamental right are tested only for manifest inappropriateness.[191] In this respect, German jurisprudence is similar to that of many other jurisdictions. A comparison of domestic constitutional jurisprudence reveals that distinctions involving purely economic matters are usually upheld.[192]

It is difficult to understand why international human rights protection should go further in developing overly stringent standards of equal protection scrutiny. Presumably, this is due to a misunderstanding of the term "reasonable," which is inherently vague. The Human Rights Committee should therefore enhance its doctrinal understanding of Article 26 with a focus on refining the term "reasonable" as used in nondiscrimination analysis, in order to ultimately differentiate its analytical approach according to the intensity with which unequal treatment affects fundamental rights.[193]

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carefully through the democratic process." *Haraldsson and Sveinsson*, *supra* note 8, at 25–26.

188. *Id.* at 24; *see also*, Sadurski, *supra* note 115, at 72 (stating that "the ideal of equality in the law is narrower and more specific than an ideal of overall justness.").

189. *See*, *e.g.*, Carolene Products Co. v. United States, 344 U.S. 144 (1944).

190. Eberle, *supra* note 106, at 2100.

191. The "new formula" only provides for a more stringent standard of review if basic rights are affected and if discrimination is based on grounds similar to those listed in Article 3, paragraph 3 of the Constitution. Apart from this, an arbitrariness test is applied. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 7, 1980, 55 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 72 (89) (F.R.G.). The regulation at issue in *Haraldsson and Sveinsson v. Iceland* would not be invalidated on the basis of equal protection. For the jurisprudence under the "new formula" in general, see Sachs, *supra* note 120, at 152–53.

192. Baer, *supra* note 116, at 257.

193. This does not duplicate the fundamental rights analysis. Equal protection becomes relevant if the analysis reveals that there has not been a violation. This is particularly relevant in cases in which a State party goes beyond the standards of the Covenant and makes distinctions between different groups of people.

2. Standards of Review or a Sliding Scale?

By standardizing the review according to the severity of the discrimination—an approach comparable to that of the U.S. Supreme Court, which distinguishes between suspect, quasi-suspect, and other classifications[194]—the Committee could generate a more coherent equal protection doctrine. The respective standards would each specify permissible aims, as well as the proper means-to-ends relationship. The U.S. standard of review ranges from "strict scrutiny" to deferential "rational basis" review: strict scrutiny review applies to suspect classifications and infringements of fundamental rights;[195] intermediate scrutiny applies to quasi-suspect classifications;[196] and rational basis review applies to nonsuspect classifications.[197] Under strict scrutiny review, statutory distinctions based on race and alienage can only pass muster if they serve a compelling state interest and are narrowly tailored to achieve that designated interest.[198] The intermediate standard of review—applied, for example, to classifications based on gender and illegitimacy—requires a substantial connection between the classification and an important government objective.[199] And rational basis review—the least rigorous standard, which applies to nonsuspect distinctions such as economic status—requires merely that the given statutory means be rationally related to the achievement of a legitimate legislative aim.[200]

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194. This approach has not gone unchallenged in the United States. For example, Justice Thurgood Marshall advocated a "sliding scale" methodology, which entails that the intensity of judicial review should vary depending on the value of the particular interest or individual right affected and the importance of the legislative goal. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).

195. The fundamental rights analysis is applied to cases involving the right to family relations, procreation, vote and travel. *See* Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Va. Bd. Of Elections, 383 U.S. 663 (1966).

196. *See*, *e.g.*, Craig v. Boren, 429 U.S. 190 (1976). The Court has also indicated that a less lenient standard of rationality review might be applied for instances of discrimination based on sexual orientation, illegitimacy, and mental illness. Romer v. Evans, 517 U.S. 620 (1996); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Trimble v. Gordon, 430 U.S. 762, 767 (1977).

197. *See*, *e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); *Mass. Bd. of Ret.*, 427 U.S. at 307; Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Ry. Express Agency v. New York, 336 U.S. 106 (1949).

198. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

199. 'Important' means that a purpose needs to be less than compelling but more than legitimate, where as 'substantial' means that the classification must be more than reasonable but less than the almost perfect fit between ends and means, which is required for suspect classifications. *See*, *e.g.*, Craig v. Boren, 429 U.S. at 190.

200. *See* Carolene Products Co. v. United States, 344 U.S. 144, 152, n.4 (1944).

The advantage of this approach—as compared to proportionality analysis or the sliding scale method pursued by Continental European courts and the European Court of Human Rights[201]—is standardization. It arguably renders judicial outcomes more predictable and perhaps even more rational.[202] The flexible standards and the case-by-case approach found in the German Federal Constitutional Court and the European Court of Human Rights case law have been criticized as lacking doctrinal coherence and predictability and leaving too much room for judicial value judgments.[203] On the other hand, a certain degree of subjectivity will always exist with any method of nondiscrimination analysis.[204] Even in the United States, the questions of whether a classification is suspect or quasi-suspect, and whether a classification serves an important objective, both require judgments of value.[205] Further, what may seem to be a standardized level of scrutiny may vary in its application to individual cases.[206] In practice and implementation, the difference between the European sliding scale approach and the U.S. standard of review approach is almost insignificant. Even though the European approach lacks formally standardized levels of scrutiny, the jurisprudence of these Courts effectively reflects varying degrees of scrutiny depending on the nature of the discrimination and its implications. The outcomes of equal protection cases in European domestic courts shows that distinctions which impinge on the exercise of fundamental rights have a much harder

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201. *See* Christian Walter, *Gleichheit und Rationalität*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 253, 258–62 (Rüdiger Wolfrum ed., 2003).

202. *See* Partsch, *supra* note 98, at 69.

203. See, Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284 (1998) (comparing the German Constitutional Court's analysis with the U.S. Supreme Court's).

204. According to Dupuy, the determination as to whether a statute is reasonable requires an evaluation of socio-cultural elements, traditions, and mentalities. Pierre-Marie Dupuy, *Equality under the 1966 Covenants and in the 1948 Declaration*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 149, 154 (Rüdiger Wolfrum ed., 2003).

205. Donal P. Kommers & Stephanie E. Niehaus, *An Introduction to American Equal Protection Law*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 25, 38–39 (Rüdiger Wolfrum ed., 2003).

206. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006); *see also,* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481 (2002).

time surviving judicial scrutiny than discrimination based on purely economic categories.[207]

The difference between the two approaches should not be overstated. If European scrutiny is more demanding in some areas, it is not due to a difference of method. Rather, the variance is more appropriately attributable to different value judgments with respect to the invidiousness of a classification. German jurisprudence, for example, is concerned with the protection of vulnerable groups more generally and tends to exhibit a different understanding of the role of the judiciary in shielding those groups from what it perceives as harmful.[208]

What is important is that domestic and international courts realize that the degree of their review must correspond to the invidiousness of the discriminatory classification. As such, regardless of whether the Committee adopts a variable proportionality analysis or a standardized test, it will need to fine-tune its analysis. In practice, the Committee has already applied the "reasonable" test with varying intensity.[209] A close look at the Committee's reasoning in particular cases shows that the standards of justification have indeed varied.[210] While a more lenient approach originally dominated judicial review of socioeconomic legislation, such that a number of regulatory distinctions were upheld, more recent cases trend toward increasing demands for justification, even when no fundamental rights are at stake.[211] The Committee should re-evaluate this trend and take note of the varying standards it has applied in earlier cases. In order to develop a balanced and consistent approach, it is high time to acknowledge the underlying rationale of equal protection and to structure equal protection analysis accordingly.

Even if the Committee is not willing to develop a standardized test for different categories of discrimination, the Committee must define the contours of the "reasonableness" test, and, in doing so, must acknowledge that it is in fact utilizing a proportionality review in order to determine what is reasonable. As a matter of transparency, the Committee should specify what aims are permissible, clarify the means-to-ends relationship, and note that the standards will vary depending on the na-

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207. Baer, *supra* note 116, at 260.

208. *Id.* at 256. Judicial self-restraint is not a common theme of European constitutionalism.

209. *See* cases cited *supra* note 6.

210. The Committee usually engaged in an intermediate standard of review, standing somewhere between basic rationality and strict scrutiny. *See* cases cited *supra* note 6.

211. *See* Ando, *supra* note 3, at 213–22 (detailing accounts of relevant cases).

ture of the discriminatory distinctions at issue.[212] After all, the more a distinction or its implications affect a fundamental human right, the more rigorous the justification requirements for permissible state interests and for the means-to-ends relationship. Finally, with respect to economic matters, a deferential approach should be applied across the board.

CONCLUSION

Article 26 of the ICCPR comprises two elements of equality: equality before the law (i.e., formal equality); and the principle of nondiscrimination (i.e., substantive equality *of* the law).[213] In order to inject real meaning into the concept of equal protection, it is necessary to focus on the enumerated grounds of impermissible discrimination as set forth therein. The nondiscrimination rule renders the abstract notion of equality more concrete because it indicates the criteria by which equality should be granted; however, Article 26 does not provide for a principle of general equality that supersedes the nondiscrimination grounds. The emphasis on nondiscrimination is also the predominant approach in domestic constitutional law across a number of jurisdictions. The structural parallels of equal protection rules in international human rights instruments and national constitutions imply that comparative constitutional analysis is a valuable tool for evaluating the meaning of the international nondiscrimination principle. After all, equal protection rules are based in the same historical preoccupation with harnessing the control of State power in the interest of protecting human rights.[214] International equal protection is thus yet another field in which comparative constitutional law can play a significant role, and a shift toward such analysis offers mutual benefit for all involved.

Thus far, the discussion in the United States has centered on the question of whether comparative constitutional analysis is a permissible tool in the interpretation of national constitutional law.[215] However, it is not only domestic constitutional jurisprudence that stands to benefit from a

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212. This appears to be implicit in the Committee's evaluation of whether a regulation is reasonable.

213. Unfortunately, *General Comment No. 18* already seems to depart from the assumption that Article 26 comprises three elements: equality before the law, equal protection of the law, and nondiscrimination. *See General Comment No. 18*, *supra* note 6, ¶ 12. However, the discrimination principle is essentially a negative formulation of equal protection of the law. *See* NOWAK, *supra* note 3, at 607–608.

214. *See* NOWAK, *supra* note 3, at 598.

215. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003). *But see*, *id.* at 598 (Scalia, J., dissenting).

consideration of the reflections of foreign and international institutions. International jurisprudence can also take advantage of domestic constitutional interpretation, including the long standing experience of the U.S. Supreme Court and other constitutional courts worldwide. This is particularly true with respect to equal protection analysis, given that it is a relatively new area of international law. Current trends in the interpretation of the universal nondiscrimination principle seem, unfortunately, to lose track of the theoretical underpinnings of equal protection analysis. There is an urgent need for re-conceptualization, but this requires an effort by all those working in this field of law.

Instead of continuing to criticize the Committee for applying Article 26 to non-Conventional rights, international law scholars and practitioners should join in the development of a sound jurisprudential approach. Drawing from a comparative analysis, this Article has attempted to provide suggestions for the future realization of an international equal protection framework. The Human Rights Committee should heed these suggestions and, rather than extend the grounds of nondiscrimination further, should instead allow a wider margin of deference to State parties where less serious distinctions are being made. The Committee should be confident that it is not its responsibility to venture into notions of general equality. To interpret Article 26 as a principle of general equality, requiring sound and persuasive grounds for any kind of distinction, is not in the interest of international human rights. The purpose of human rights norms is to set basic standards for the enjoyment of fundamental rights and freedoms, not to unduly limit legislative discretionary power by providing a judicially prescribed model for legislation.[216]

Whether legislation is generally reasonable largely depends on value judgments that vary from nation to nation. What may be considered unreasonable in western societies may have a reasonable explanation in other settings. If equal protection on the international level is to be regarded as a general measure in assessing the reasonableness of legislation, it would most certainly run into the trap of cultural imperialism. In order to avoid such criticism, it is necessary to concentrate on universal values. Fortunately, the grounds of nondiscrimination spelled out in Article 26 stand for a universal consensus that discrimination based on certain classifications cannot be tolerated.[217] A stronger focus on the specified grounds of nondiscrimination would guide equal protection

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216. This is why it is not appropriate to apply the German equal protection model as a structural element of constitutional law at the international level.

217. *Compare* ICCPR, *supra* note 3, art. 26, *with* discussion *supra* Part II.A.

analysis along these well tread lines and help to reemphasize the validity of Article 26 as a truly *international* human rights instrument.

The suggestions presented herein are not only relevant for the interpretation of Article 26 of the ICCPR, but also for the future of international equal protection more generally. For example, interpretation of the parallel provisions in the American Convention on Human Rights[218] and the African Charter on Human and Peoples' Rights may well benefit from this discussion.[219] With Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms having entered into force in 2005, the European Court of Human Rights is also about to deal with similar questions.[220] The trials and errors of its counterparts can help the Court develop a thoughtful and reasoned approach to this issue.[221] If only one lesson is to be passed on, let it be that the principle of equal protection should not be misunderstood as a principle of general equality. Rather, the principle of equal protection should be afforded a narrow nuanced interpretation, such that it may be rendered a truly universal principle.

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218. The Inter-American Court has only dealt with nondiscrimination in two advisory opinions. *See* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. C.H.R. (ser A) No. 4, (Jan. 19, 1984), paras. 53–59; Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. Ct HR (ser A) No. 11 (Aug. 10, 1990), para. 22. For the Inter-American Commission of Human Rights' interpretation of Article 24, see Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser./L/V/II.111, doc. 20 rev. ¶ 31 (2001); *see also* Thomas Buergenthal, *Nondiscrimination and Equal Protection in the Inter-American System*, *in* GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ 161, 161–70 (Rüdiger Wolfrum ed., 2003) (providing an overview of the nondiscrimination and equal protection doctrines under article 1, parargraph 1 and article 24 of the American Convention).

219. The African Charter provides for a broad principle of equality before the law without specifying the forbidden grounds of discrimination. African Charter on Human and Peoples' Rights, *concluded* June 27, 1981, 1520 U.N.T.S. 217, art. 3; *see also* Umozurike, *supra* note 174, at 175–82 (discussing the African Commission's application of the equality and non-discrimination principles).

220. *See generally* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 20 (dealing with the issue of values that can be considered international human rights standards across all nations, without infringing upon national law-making sovereignty).

221. Fortunately, article 1, paragraph 1 of Protocol No. 12, *supra* note 24, does not provide for equality, but is limited to the rule of nondiscrimination.