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**Discrimination and the foundation of justice: hate
speech, affirmative action, institutional opinions**
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Preface

At the beginning of his history of the Peloponnesian war, Thucydides tells his readers that he wrote this work “not as an essay which is to win the applause of the moment, but as a possession for all time.”¹ It was to be such a possession not merely because of the importance of the war reported therein, however momentous that conflict may have been, but because of what these events and their causes could tell us about the broader human condition.² The present work may also initially appear to concern merely the obligations and limitations of liberal states when addressing discriminatory assumptions and their consequences in the relationship between citizens. Notwithstanding the gravity of that subject, though, these pages likewise encompass insights into the broader human condition. Regarding the vulnerability of human beings and the fears they ought to harbor, for instance. But above all, insights into pathways towards a world in which everybody is guaranteed a sufficient quality of life during their existence on earth, and the possible role(s) for fundamental rights when we try to realize that guarantee. This would be a world where, in the very first place, discrimination is eradicated or at least finally properly addressed.

Thus I dread for this work to also be a timeless possession in another sense of the word. Because, within these pages I have gathered the results of a research project that concerned discrimination, a matter which itself exhibits a regretful longevity. And I fear that long after the lifespans of myself and those who come after me, even in some future society that we can barely comprehend at present, the matter of discrimination and thus the cautions collected in this work will still appear contemporary. In the most optimistic scenario – then and now – I aspire for this work to contribute to a more sophisticated approach to the opposition to discrimination. An approach that is conscious of the obligations liberal states have

¹ Robert Strassler, *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York: Free Press, 1996), 16; Richard Buxton, *Imaginary Greece: The Contexts of Mythology* (Cambridge: Cambridge University Press, 1994), 46.

² Erich Gruen, “Thucydides, His Critics and Interpreters,” *The Journal of Interdisciplinary History* 1, no. 2 (1971): 327.

acquired regarding our rights in these matters, in addition to the limitations they should respect. An approach which acknowledges that both state action and state restraint are needed to achieve the aforesaid sufficient quality of life for all. But primarily an approach that definitively separates the possibility to fully enjoy our fundamental rights from the prejudices that exist with respect to a varying roster of personal characteristics and circumstances, which depend on the time and place where we happen to live.

As this work is predicated on a confined research question, its contributions in this regard are correspondingly limited. My ambition nonetheless remains the aforementioned contribution to a more sophisticated approach to the opposition to discrimination within liberal states and, consequently, to a world without discrimination. In a more pessimistic scenario – and only if I have utterly failed that what I set out to achieve – the cautions in this work could be used by pundits to resist attempts to address discrimination altogether. However, if someone reads this work carefully, or even less than carefully, one will find that it does not intend such a use and ardently argues against it. In that regard, it is written in a spirit of hope. Hope that the longevity of discrimination is perhaps not as robust as it seems. That any and all harmful prejudices might vanish. And that my work will not retain the relevance that Thucydides' writings still possess.

READING GUIDE

When I first started compiling this report, I aimed that after a general part, what eventually became the first four chapters, the latter three chapters on a ditto number of case studies could be read separately. Alas, when the tale grew in the telling and the confines of a PhD-thesis became more pressing, I had to abandon this initial plan. As such, to completely understand the last two case studies, one also has to read the one or two preceding chapters. To facilitate at least some measure of independent inquiry of the latter three chapters, I fairly regularly refer back to what was written earlier in the book. To this end, I have divided this work in 43 continuously numbered sections. In addition, it is important to note that the substantive treatment of the subjects discussed within these pages was concluded in

Preface

May 2022, apart from some incidental changes. Up until that point, I have tried to keep the text entirely up to date with all relevant legal matters and recent events. In any case, I am convinced that the value of this work lies in the fundamental theoretical considerations that are relayed throughout. These considerations will arguably remain relevant, regardless of most imaginable changes with respect to the statutes under examination. Unless they are fundamentally altered, that is. These remarks point me to the last observation I intend to make for this brief Reading Guide. Through its premises, research questions, and elaborations, this work says something about the very foundations of justice, injustice, discrimination, criminal and private law, and state neutrality. But this foundational approach comes at a price, as I ended up writing a work that is probably too theoretical for jurists and too juridical for theorists. I nevertheless expect that both these groups, in addition to the general public, find something of added value in the following chapters. And for good reason, as there is much to find for all of them. Because, while I was answering my research questions, I slowly but surely created a veritable treasure trove of legal theory. Any reader can learn a lot about many of the phrases they hear and use in everyday life, but have never given much thought. It is partly for this reason that I provided elaborate annotations, so that those who find their appetites whetted can easily access more info. The erudition necessary for such an undertaking is naturally not entirely my own – I am indebted to a lot of people.

ACKNOWLEDGEMENTS

As is tradition, I want to thank my supervisors first. Some would view the appointment of a physically impaired person as a university lecturer and to a PhD-position – or to any job, for that matter – as an unnecessary risk that could better be avoided. My supervisors did not only take that ‘risk’, but they also followed through when I was confronted with severe and unexpected setbacks. I especially appreciate the professional kindness they showed me when the COVID-19 pandemic upended my entire existence. I am also grateful for the diligent comments, considerations, and recommendations of my supervisors and the PhD-assessment committee. Less

formal, but not less valuable, was the support I received from my convivial colleagues at Leiden University. The first 18 months of my tenure there have proven to be the most fruitful and rewarding period of my life so far.

It takes a village to raise a child, as some would say, but it arguably takes a bona fide town that is filled with family, friends, and acquaintances to keep a PhD-student sane.³ My gratitude first and foremost goes to those close to me who, with substantial risks to their own sanity, have proofread the entire manuscript that would become this work, that being my fiancée Emma de Jong, and my friends Sven Zoeteman and Milan van Esveld.

There were also the people who supported me but rightly avoided reading the entire thing. My parents and brother, Fred, Marianne, and Wouter, endured my ramblings on deadlines, legal theory, and the trappings of academic life with patience. Beyond these blood ties, there were many others who aided me in some way or another. So thank you Mathijs Smith, Daniel Schaap, Jip Stam, Arie-Jan Kwak, Michael Klos, Femke Hokwerda, Jiska Ogier, Iris Bakx, Lida Tsvetkova, Marike van Dam, Eveline van der Veen, Willem van Schendel, Lark van Leeuwen, Tycho Laan, Inge Zoetemelk, Francine Maessen, Kim Olsthoorn, Iris Moorhoff, Naor Scheinowitz, Emmy Stevens, Lucia Langerak, and Sanne Meier. It is done.

Besides my family and these old and new associates, I would be amiss to neglect those academics beyond my own department who counseled me during my research. The advice of Paul van Trigt (Leiden University) was always welcome, whether it was in Leiden, Lund, or at the Institute for Human Rights. The insights and reading groups of Nadia Sonneveld (Leiden University) gave depth to my inquiries and she taught me much about academic life. Finally, Lukas van den Berge (Utrecht University) shepherded me through the publication of my most important article so far and helped me to keep my love of classical studies alive.

Lastly, I want to thank my erstwhile master thesis supervisor, Gelijk Molier. He helped me discover Martha Nussbaum and my penchant for academic writing. And when I would have rather abandoned this project halfway through, it was his encouragement that kept me pushing on.

³ For the origins and genealogy of this proverb, see: Wolfgang Mieder, "It Takes a Village to Change the World: Proverbial Politics and the Ethics of Place," *The Journal of American Folklore* 124, no. 492 (2011): 7–8.

Abbreviations

A number of international human rights documents and the common designations for some international courts are abbreviated in this work.

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

