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Part One

The Foundation of Justice

Liberalism, Power, and the Individual – The Modern Human Rights Discourse – A Liberalism of Fear – Discrimination and the *Rechtsstaat*

Chapter I

Liberalism, Power, and the Individual

Liberalism and Humanism – Liberalism as a Political Program – Four Liberal Concerns – Liberalism and Democracy – Liberalism and Human Rights

6.

Liberalism and Humanism

In the present day and age, there is perhaps no more influential concept of the role of the state than liberalism. This influence pertains to both the duties and the limitations of states.¹ As there has never been universal agreement on the contents of this concept, there exist many conceptions and practical implementations. These interpretations all have different takes on the liberal repertoire.² As with the group-based approaches to the protection against discrimination, that I discuss in the second part of this work, I do not aim to give a full exegesis of all the different rooms that have been furnished under the venerable liberal roof. I merely offer a brief reconnaissance of those aspects of liberalism which are relevant to my endeavor: unearthing the role of the individual in the modern human rights discourse, and evaluating current group-based attempts to safeguard one fundamental right, the right to be protected against discrimination.

Hence, in this chapter, I chiefly focus on two aspects of liberalism: its mistrust of power and the expedient societal position of the individual, which follows from that mistrust. In the present section, I will show the

¹ Michael Freeden, *Liberalism: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 7; Edmund Fawcett, *Liberalism: The Life of an Idea* (Princeton: Princeton University Press, 2018), xi, 11.

² Introduction, section 4; Conclusion, section 42; Freeden, *Liberalism*, 2–3.

historical exception liberalism presents in its humanism. Thereafter, I shall explore the nature of liberalism as a political program, before delving into the arguable core of the liberal ideas. Following these surveys, I scrutinize the tempestuous liaison between liberalism and democracy, as well as the chilly rapport between liberalism and human rights.³ These relationships will prove relevant when I propose my own interpretation of the requirements of the modern human rights discourse regarding the opposition to discrimination in liberal states, a liberalism of fear, in Chapter III.

HUMANISM

As a fellow child of the Enlightenment, humanism is an important precursor to liberalism and the position of the individual therein.⁴ Humanism is sometimes called a *faux ami*: its meaning fluctuates throughout and within languages.⁵ For my immediate purpose, to survey humanism as a forerunner of and catalyst for liberalism and the modern human rights discourse, I define humanism as the positioning of the human individual – with their capacities and the connections they are able to make – as the central vector of thought.⁶ More precisely, I would summarize humanism with four assumptions concerning the human condition: all humans are autonomous beings; they can take responsibility for their own life; as such, their condition is not a given but can be bettered; and as autonomous, responsible beings they are capable of devising political structures through which the latter can occur.⁷ Liberalism can, to a certain extent, be viewed as the political translation of these foundational assumptions of humanism. This translation was an arduous process. It started with the germs of the idea of liberalism during the Enlightenment and it took until the establishment

³ Adam Gopnik, *A Thousand Small Sanities: The Moral Adventure of Liberalism* (London: Riverrun, 2019), 110; Judith Shklar, “The Liberalism of Fear,” in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge: Harvard University Press, 1989), 22.

⁴ Gopnik, *A Thousand Small Sanities*, 18–19; Fawcett, *Liberalism*, 1–2.

⁵ Vito Giustiniani, “Homo, Humanus, and the Meanings of ‘Humanism’,” *Journal of the History of Ideas* 46, no. 2 (1985): 167.

⁶ Gopnik, *A Thousand Small Sanities*, 71; Steven Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (New York: Viking, 2018), 410–11.

⁷ Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence: Legality, Legitimacy and the Foundations of the Law* (New York: Routledge, 2019), 59–60.

of the Common Constitutional Pattern in our current era.⁸ The Common Constitutional Pattern, as will be explored in more detail in the next section, is the constitutional model presently followed in most liberal states.

There is, however, another link between humanism and liberalism, which is perhaps as interesting for this work. The assumptions of humanism, as high-minded as they might sound, can trace their origins to blood and dirt, fear and violence, intolerance and oppression. These grubby beginnings not only engendered the previously elaborated view of the human condition, but eventually led to the insight that any and all human individuals – regardless of world view, gender, skin color, sexual orientation, impairments, and so forth – are endowed with these same qualities.⁹ This humanist instinct on its own has been a pervasive influence on the modern human rights discourse.¹⁰ Nevertheless, it was the liberal movement which incorporated this edifice for all individuals in a globally successful campaign.¹¹ In the long run, that is. More on that shortly, when I discuss liberalism more extensively.¹² For now, let us take a closer look at the role played by past atrocities in the origins of both humanism and liberalism.

HISTORICAL HORRORS

The long and winding road from some of the worst historical horrors, which are the delivery room of humanism as well as liberalism, to the view that all humans are as deserving of liberty, equality, and dignity, is the first stepping stone in my exploration of the individual as the foremost concern

⁸ Ibid., 61–62; Robert Gahringer, “Liberalism and Humanism,” *Ethics* 66, no. 1 (1955): 40; Zargham Yousefi, Alireza Yousefy, and Narges Keshtiaray, “Liberal Humanism and Its Effect on the Various Contemporary Educational Approaches,” *International Education Studies* 8, no. 3 (2015): 104–5. Political philosopher John Rawls has disputed the connection between Enlightenment liberalism and present-day variants of political liberalism, see: John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), xxxviii. But Rawls’ claims have proven to be controversial, see: Jeremy Fortier, “Can Liberalism Lose the Enlightenment?,” *The Journal of Politics* 72, no. 4 (2010): 1004, 1008–9.

⁹ Richard Norman, *On Humanism* (London: Routledge, 2004), 14, 24–25, 100–101.

¹⁰ Kamila Stullerova, “Rethinking Human Rights,” *International Politics* 50, no. 5 (2013): 688.

¹¹ Gahringer, “Liberalism and Humanism,” 47.

¹² David Held, *Models of Democracy* (Oxford: Wiley, 2006), 59.

of the currently prevailing foundation of justice. It is advantageous to start this brief foray into the connection that humanism and liberalism have with human misery, by looking at the views of the 17th century philosopher John Locke.¹³ It was particularly religious violence which inspired, as morbid as that verb may sound in this context, Locke's famous writings on toleration.¹⁴ His views on toleration are a far cry from our modern sensibilities and initially they do not appear to show much affinity with the many-branched tree of liberalism or the modern human rights discourse.¹⁵ Locke's idea of toleration concerned Christian denominations and it did not extend, among many others, to non-believers. However, his *Letter Concerning Toleration*, written during his exile in the Netherlands, contains two important observations which still inform liberal ideas on the relationship between the individual and collectives.¹⁶ The first observation is that true faith can only exist through the free choice of an individual.¹⁷ The second observation is that churches themselves are to be understood as voluntary associations.¹⁸ This second observation also entails constraints on the manner and extent to which the state can be involved with such associations.¹⁹ These observations already contain the kernel of the argument that I intend to make, regarding the opposition to discrimination: individuals should be able to fashion their own life, free from the pressure of associations and other collectives, whether these are private or public in nature.²⁰

Surpassing Locke, later Enlightenment thinkers expanded the

¹³ John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Belknap Press of Harvard University Press, 2001), 1–2; Romy Hasan, *Modern Europe and the Enlightenment* (Eastborne: Sussex Academic Press, 2021), 14–15.

¹⁴ Inigo Bocken, "Voorwoord," in *John Locke: Een Brief over Tolerantie*, ed. Inigo Bocken (Budel: Damon, 2004), 8.

¹⁵ Robert Loudon, *The World We Want: How and Why the Ideals of the Enlightenment Still Elude Us* (Oxford: Oxford University Press, 2007), 23.

¹⁶ Inigo Bocken, "Inleiding," in *John Locke: Een Brief over Tolerantie*, ed. Inigo Bocken (Budel: Damon, 2004), 13–14; Maurice Cranston, *John Locke: A Biography* (New York: MacMillan, 1957), 259–60; Loudon, *The World We Want*, 23.

¹⁷ John Locke, "A Letter Concerning Toleration," in *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (New Haven: Yale University Press, 2003), 215, 219.

¹⁸ *Ibid.*, 220.

¹⁹ *Ibid.*, 224.

²⁰ Freedon, *Liberalism*, 20–22.

circle of the possible benefactors of toleration.²¹ Pierre Bayle included all those who sincerely search for truth and act on their acquired beliefs.²² Voltaire opened the proverbial gates for those who are wrong.²³ And in the works of Immanuel Kant, humans *an sich* became the only end.²⁴ Humanism would continue to evolve and eventually developed into a bona fide alternative to religious world views.²⁵ But it is safe to say that its original concern was the peace between the different denominations of Christianity. Above all, it was the underlying abhorrence of religious violence and group-based oppression – be it through the state or through private associations – which informed the earliest humanist thinkers as well as, in time, the liberal movement. The subsequent observed need to protect individuals belonging to religious minorities, is sadly still relevant so many years later. Even if the contemporary strive for more religious toleration also includes different religious minorities, and non-believers besides.²⁶

THE CONNECTION WITH LIBERALISM

The relationship between humanism and liberalism is a complicated affair. Humanism on its own retains a substantial influence in the world apart from liberalism, for instance.²⁷ And there are branches of that large and lofty liberal tree which sideline some prominent humanist concerns. Many of these have not been discussed here, as they fall outside the scope of this work. Some prominent examples of these concerns include: the role of rationality – which is crucial to many conceptions of humanism – the imperative for individual self-control, and a focus on arguments from na-

²¹ Loudon, *The World We Want*, 23–25.

²² Paul Bayle, “On Superstition and Tolerance,” in *The Portable Enlightenment Reader*, ed. Isaac Kramnick (London: Penguin Books, 1995), 79–80.

²³ Loudon, *The World We Want*, 24; Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton: Princeton University Press, 2003), 294.

²⁴ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Harvard University Press, 2006), 50.

²⁵ Stephen Law, *Humanism: A Very Short Introduction* (Oxford: Oxford University Press, 2011), 108–41.

²⁶ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 375–76.

²⁷ Karl Popper, *The Open Society and Its Enemies* (London: Routledge, 2011), 460.

ture.²⁸ But the hitherto established humanist views on the human condition, and the respect allotted to every human being therein, did acquire global influence through the manner in which the central tenets of liberalism and the modern human rights discourse incorporated the four previously enumerated concerns. The acute awareness of violence and oppression, reinvigorated by the crimes against humanity, principally – but not exclusively – committed during the Second World War, informed the commonly shared ambitions within the contemporary liberal movement, as well as the interpretation which will be directive in this work: a liberalism of fear.²⁹ Let us now examine the general foundation of that liberal movement, and determine how it differs from the humanist world view.

7.

Liberalism as a Political Program

In the foregoing, I have on multiple occasions compared liberalism to a tree. And the movement has indeed sprouted many branches, since its arguable origins in the 18th century.³⁰ One may yet distill an influential and well-known core, though, which represents liberalism – more or less – in the popular consciousness and constitutes the point of departure for both the modern human rights discourse and the constitutional model followed in most liberal states today.³¹ Before I embark on my analysis of this shared foundation – the stem, so you will, of the liberal tree – I first need to define what liberalism *is* and how it differs from humanism. This difference will turn out to be the distinction between a world view and a political program. In this section, I will explain that divergence and elucidate what I mean with the observation that liberalism is a political program. These explanations and elucidations will lay the groundwork for

²⁸ Giustiniani, “Homo, Humanus, and the Meanings of ‘Humanism,’” 180–81; Nussbaum, *Frontiers of Justice*, 127–40; Pinker, *Enlightenment Now*, 410.

²⁹ Shklar, “The Liberalism of Fear,” 23.

³⁰ Held, *Models of Democracy*, 59; Ronald Dworkin, “Liberalism,” in *Public and Private Morality*, ed. Stuart Hampshire (Cambridge: Cambridge University Press, 1978), 115, 120.

³¹ Held, *Models of Democracy*, 57.

my exploration of liberalism proper, by means of the four underlying liberal ideas as they are identified by Edmund Fawcett, in the next section.

WORLD VIEWS AND POLITICAL PROGRAMS

Due to their close relationship, the liberal tree is sometimes difficult to untangle from the humanist ivy. Many thinkers whose observations were instrumental for humanism, including some of those that we encountered above, derive their fame first and foremost from their legacy as the founding fathers and mothers of (proto-)liberalism. At the same time, there are humanists whose contributions to the Common Constitutional Pattern, the aforesaid constitutional model followed in most liberal states, are indispensable.³² Despite this entanglement, there is – at least in our current era – a clear difference between humanism and liberalism. It is the aforementioned distinction between a world view and a political program.³³

From its humble origins in a tentative trend towards religious toleration, as told above, humanism became an all-encompassing world view, a veritable substitute for religion.³⁴ And in this regard it might as well have as many different denominations. Liberalism, although it shares its origins and many of its attachments with influential trends within humanism and even though the liberal movement also influences other areas of life, such as economics, is a political program first and foremost.³⁵ Any coherent political program, in the definition of Ronald Dworkin, contains two elements: a. constitutive political positions; and b. derivative political positions, which serve as the means to achieve the constitutive positions.³⁶ As even the most cursory student of history knows, there is always a chance that political programs accommodate or – in due course – become all-en-

³² Giustiniani, “Homo, Humanus, and the Meanings of ‘Humanism,’” 180–81; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 57–58, 61–62.

³³ Ad Verbrugge, Govert Buijs, and Jelle van Baardewijk, *Het Goede Leven en de Vrije Markt: Een Cultuurfilosofische Analyse* (Rotterdam: Lemniscaat, 2018), 118; Dworkin, “Liberalism,” 116–17.

³⁴ Verbrugge, Buijs, and van Baardewijk, *Het Goede Leven en de Vrije Markt*, 313.

³⁵ Freedon, *Liberalism*, 12–16; Colin Bird, *The Myth of Liberal Individualism* (Cambridge: Cambridge University Press, 1999), 6.

³⁶ Dworkin, “Liberalism,” 116.

compassing world views.³⁷ Political philosopher Hannah Arendt famously established the circumstances under which this could happen. Specifically when political programs do not allow alternatives to their creed and thus leave no room for pluralism vis-à-vis the good.³⁸ Their constitutive political positions and chosen means becoming an unquestioned good to which even history is envisioned to be subservient.³⁹ Under such circumstances a political program can be characterized as totalitarian. Most versions of liberalism manage to avoid these pitfalls through the structure of their program, which allocates ample room for pluralism and guards this fiercely.

THE RIGHT AND THE GOOD

This structural advantage can be summarized as follows: liberals distinguish the right from the good.⁴⁰ The first is the province of the political program of liberalism, the latter is the domain of the individual. Initially, this distinction may appear a sheer word game; a paper tiger hiding at the roots of the liberal tree. But it is this separation of the right and the good that constitutes the indispensable safeguard liberalism offers against the ever-present danger of totalitarianism.⁴¹ The right, in this regard, first and foremost denotes the basic political structure – which legitimizes and constrains the use of state power – and a set of principles which trestles this structure, starting with our old friend toleration.⁴² These principles are deemed non-negotiable, at least to a certain extent. They do not constitute an unalterable or irreducible limit on the state – calamities unfortunately happen and can sometimes demand extraordinary measures – but liberalism does require that every public policy should be considered with them

³⁷ Hannah Arendt, “Introduction into Politics,” in *The Promise of Politics*, ed. Jerome Kohn (New York: Schocken Books, 2005), 95.

³⁸ Hannah Arendt, *The Origins of Totalitarianism* (London: Penguin Books, 2017), 207.

³⁹ Hannah Arendt, “The Concept of History: Ancient and Modern,” in *Between Past and Future*, ed. Jerome Kohn (London: Penguin Books, 2006), 79.

⁴⁰ Rawls, *Political Liberalism*, 135; Marlies Galenkamp, *Individualism versus Collectivism: The Concept of Collective Rights* (Rotterdam: RFS, 1993), 69.

⁴¹ Shklar, “The Liberalism of Fear,” 24.

⁴² *Ibid.*, 24–25; Rawls, *Political Liberalism*, 136–37; Connor O’Mahony, “There Is No Such Thing as a Right to Dignity,” *International Journal of Constitutional Law* 10, no. 2 (2012): 572.

in mind.⁴³ The right thus concerns the “groundwork of our existence”, as the younger Mill would have it.⁴⁴ This basic political structure and the adjacent principles are that part of the liberal program which Dworkin calls the constitutive political positions. They more or less coalesce over all liberal conceptions, and a general version will be treated momentarily.⁴⁵

The means to establish and protect this structure and these principles – the derivative positions – are more debated and belong to the realm of politics.⁴⁶ But such debates focus mostly on their elaboration, as these means themselves are still shaped and confined by the constitutive positions, and their naked existence is often considered a component of the right. To take fundamental rights as an example: the existence (of certain categories) of such rights or similar institutions might be called a constitutive position, whereas the particular rights which are declared and eventually enforced are arguably part of the derivative positions.⁴⁷ This distinction gives us clarity regarding the matter of the many branches of the liberal tree. The fact that many cherished liberal ideas disappeared or mutated over time can be attributed to their nature as the means to achieve more fundamental goals. These goals are at the heart of the liberal constitutive positions.⁴⁸ Beyond these constitutive and derivative positions lies the pleasure garden where a myriad conceptions of the good and a good life can blossom.⁴⁹ As said, this is the domain of the individual. But this garden solely exists within the borders drawn up by the political structure as provided by liberalism. The commonalities shared by the various practical implementations of this structure – the constitutive and derivative political positions of liberalism that can be found in the constitutional arrangements present throughout most liberal states – are the elements that make up the

⁴³ Shklar, “The Liberalism of Fear,” 24.

⁴⁴ John Stuart Mill, “Utilitarianism,” in *On Liberty, Utilitarianism and Other Essays*, ed. Mark Philp and Frederick Rosen (Oxford: Oxford University Press, 2015), 167.

⁴⁵ Dworkin, “Liberalism,” 120.

⁴⁶ Marie-Luisa Frick, *Human Rights and Relative Universalism* (London: Palgrave MacMillan, 2019), 16; Dworkin, “Liberalism,” 121–22; Dworkin, *Justice for Hedgehogs*, 331–36, 338.

⁴⁷ Dworkin, “Liberalism,” 134.

⁴⁸ *Ibid.*, 119–20.

⁴⁹ Rawls, *Political Liberalism*, 135–37; Chapter VII, section 36.

previously defined Common Constitutional Pattern.⁵⁰ I revisit this constitutional model during my investigation of the possibilities and limitations when opposing discrimination within the Dutch *Rechtsstaat* in Chapter IV.

8.

Four Liberal Concerns

By this point the nature of liberalism may seem rather underwhelming, as it is ‘just’ a political program. This opinion is not uncommon. Liberalism has often been called empty or groundless.⁵¹ And indeed, liberalism is open about the relatively modest role it wants to play in society and acknowledges that it can only achieve so much – it leaves utopia to Thomas More and company.⁵² Because liberalism recognizes the burdens and responsibilities of power, as well as its dangers and its impotence.⁵³ However, abandoning the lure of an all-encompassing world view for ‘merely’ a view of the right, through which everybody can explore their own idea of the good and a good life, is one of the most bold and exciting ideas in human history.⁵⁴ And it has cost many lives to achieve a semblance of this idea in the world.⁵⁵ Liberalism’s constitutive positions are in that respect as ambitious and hard-won as those of any political program – or, for that matter, any movement – that works towards improving the world.

In the latter regard, the liberal movement has been widely successful and to the betterment of the lives of billions.⁵⁶ The ambitions of liberalism have long since eclipsed Locke’s desire for an end to bloodshed and

⁵⁰ Cliteur and Ellian, *A New Introduction to Jurisprudence*, 57–59.

⁵¹ Roberto Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (New York: The Free Press, 1976), 170.

⁵² Shklar, “The Liberalism of Fear,” 26; Gopnik, *A Thousand Small Sanities*, 143; Thomas More, “Utopia,” in *Three Early Modern Utopias: Utopia, New Atlantis, The Isle of Pines*, ed. Susan Bruce (Oxford: Oxford University Press, 1999), 1–148.

⁵³ Fawcett, *Liberalism*, 2–3, 9–12, 23; John Bunzel, “Liberal Ideology and the Problem of Power,” *The Western Political Quarterly* 13, no. 2 (1960): 384–88.

⁵⁴ Gopnik, *A Thousand Small Sanities*, 102, 137.

⁵⁵ Fawcett, *Liberalism*, 297.

⁵⁶ Jack Donnelly, “The Relative Universality of Human Rights,” *Human Rights Quarterly* 29, no. 2 (2007): 306.

oppression.⁵⁷ In our modern age, mere peace is not enough to legitimize the conduct of the state; even though it is still the origin and starting point of any liberal conception.⁵⁸ Liberal theorists and liberal states are on an ongoing basis faced with the dilemma of “finding a balance between might and right, power and law, duties and rights.”⁵⁹ What are then those lauded constitutive positions, which shape these ambitions and preoccupations? As can be expected by now, the precise definition and formulation of these positions varies. As for this work, and being the subject of this section, I will take the definition of Edmund Fawcett as my guideline.⁶⁰ His analysis is not entirely undisputed. For instance, he traces the roots of liberalism to the 19th instead of the 18th century.⁶¹ Moreover, he bases his intricate argument on a rather broad synthesis of liberal thinkers, who disagreed often and on pivotal points.⁶² Notwithstanding these two reservations, I think that Fawcett’s analysis is a good resource for the endeavor documented in this work as he specifically prioritizes power and the individual.⁶³ This emphasis allows me to put the dilemmas with group-based approaches to fundamental rights in sharp focus in the following chapters. I cannot do his full account justice here, but Fawcett and many of the thinkers he discusses will reappear when I treat the possibilities to address discrimination within liberal states, as well as when I explore and evaluate the selected Dutch group-based approaches to anti-discrimination measures.

THE CONSTITUTIVE POLITICAL POSITIONS OF LIBERALISM

Fawcett’s four constitutive political positions – or the four underlying ideas of liberalism, as he calls them – show a close kinship with the aforementioned four assumptions of humanism. A summary will make the

⁵⁷ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2012), 23; Fawcett, *Liberalism*, 320; Shklar, “The Liberalism of Fear,” 23.

⁵⁸ Unger, *Law in Modern Society*, 167.

⁵⁹ Held, *Models of Democracy*, 59.

⁶⁰ Fawcett, *Liberalism*.

⁶¹ *Ibid.*, xii.

⁶² Freedon, *Liberalism*, 39.

⁶³ Fawcett, *Liberalism*, 125–35.

latter point clear. The four main ideas underlying this concept of liberalism are as follows: moral and material conflicts are inevitable in a human society, but can be contained by institutions such as the law; there is a need to oppose unchecked power within society, whether this power is exercised by institutions or private individuals and groups; as a result, law-backed respect from the state and societal institutions for the autonomy of the individual and their life's plan is essential; and, lastly, there is the faith that, by way of institutionalizing conflict, opposing unchecked power through the accountability of those institutions, and respecting the individual, society's ills can be ameliorated and the human condition can be bettered.⁶⁴ The humanist notions are all reflected here: human autonomy gives rise to the conflicts that need to be contained; depending on the extent to which humans take responsibility for this autonomy, there is the danger of power grabs; however, humans are still capable of devising a political structure to counter such dangers; as such, humanism and liberalism aptly share their faith in the possibility of progress. In this way, the assumptions of humanism are taken up by liberalism and, as we shall see, these humanist notions and liberal concerns in turn inform the modern human rights discourse.⁶⁵

These four constitutive positions, as put forth by Fawcett, are still rather abstract. But abstractness does not call for the aforementioned allegations of emptiness or groundlessness.⁶⁶ Quite the opposite! The liberal movement, as represented above, propagates a set of constitutive political positions which is – with the caveats discussed above – more or less non-negotiable, entails a check on power, and takes the individual and their life as a starting point.⁶⁷ From these foundations we can derive guidelines on the desirable conduct of the state and other societal institutions.

If we return to the matter of discrimination for a moment, it is evident that the state has a duty regarding the possibility of discrimination occurring in the relationship between citizens, as this would be a conflict stemming from an abuse of power which needs to be addressed through institutions. And it is clear that such a duty, in the first place, concerns the

⁶⁴ Ibid., 2–3.

⁶⁵ Donnelly, “The Relative Universality of Human Rights,” 303; Freedman, *Liberalism*, 39.

⁶⁶ Dworkin, “Liberalism,” 142.

⁶⁷ Gopnik, *A Thousand Small Sanities*, 102, 137.

individual.⁶⁸ We will see that this applies, even if those individuals are targeted as an assumed member of a group or by a group, and irrespective of whether they belong to such groups.⁶⁹ As the preference for institutional routes already indicated, liberalism chooses reform over revolution as the mechanism to oppose discrimination.⁷⁰ One of the reasons that revolutions are disdained, is again the liberal commitment to the individual and the confinement of power. Revolutions affect individuals with less power disproportionately.⁷¹ The liberal mind cannot abide this, as it views every individual as unique and irreplaceable.⁷² From this view follows liberalism's attachment to pluralism, which I examine below. To facilitate pluralism, involves addressing all kinds of power differences, not only those that are at play with discrimination.⁷³ The opposition to discrimination is therefore very important, but it does not sanction all means. Especially not those means that would subtract from the position of the individual.

All this does not signify that liberalism practices negligence regarding the plight of any marginalized group.⁷⁴ I would argue that liberalism's deliberate aversion towards revolutions – when avoiding revolution is a viable option with regard to remedying injustice – and thoughtfulness with respect to the means to protect individuals against discrimination, ultimately benefits those who face oppression and exclusion.⁷⁵ Because persons who belong to a marginalized group, or are otherwise disadvantaged, seldom fare well in revolutions or under the intolerant regimes that often follow such attempts at utopia – and these persons are arguably also the most at risk when well-intentioned anti-discrimination measures go awry.⁷⁶

⁶⁸ Fawcett, *Liberalism*, 11, 285; Gopnik, *A Thousand Small Sanities*, 192.

⁶⁹ *Ibid.*, 122; Fawcett, *Liberalism*, 10–11.

⁷⁰ Gopnik, *A Thousand Small Sanities*, 88, 202; Popper, *The Open Society and Its Enemies*, 120.

⁷¹ Gopnik, *A Thousand Small Sanities*, 59–60.

⁷² Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 177–78.

⁷³ Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2016), 526–27; Chapter VII, section 36.

⁷⁴ Caroline Criado-Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (London: Penguin Books, 2019), 22–23.

⁷⁵ Gopnik, *A Thousand Small Sanities*, 44.

⁷⁶ *Ibid.*, 88; Popper, *The Open Society and Its Enemies*, 149.

LIBERALISM IN PRACTICE

But how should the duty of liberal states to oppose discrimination *actually* be carried out and, perhaps as important, what are the boundaries to state action in this regard? The proper means are reform not revolution, and pertain to the individual and not to groups – this much is clear. Though uncertainty remains about the practical extent to which a liberal state has to combat discrimination in the relationship between citizens in their day-to-day life. The open-ended and rather vague assertions from the previous paragraphs do not solve this query relating to the murky and drab everyday experience of living in a society which has not yet adequately addressed discrimination. We still do not know what we should be able to expect.

Both the obligations and the limitations stemming from the constitutive positions of liberalism can, in the end, only be determined and demarcated by the chosen means. For contemporary liberal states, these means prominently include fundamental rights. The modern human rights discourse, though, is but a temporary stop *en route* to the answer to our questions regarding the right to be protected against discrimination. As it happens, and will be further explored in Chapter II, these fundamental rights also require interpretation: the political rights in rights declarations and covenants need to be translated, so to say, into legal rights. But this translation only solves part of the often cited conundrum, that we regularly have rights on paper which we cannot meaningfully enjoy.⁷⁷ Because even our legal rights are routinely in need of additional explication.⁷⁸ In Chapter III, I will therefore circle back to one of the branches of the liberal tree in order to find an interpretation which can function as a theoretical framework that can concretize what we should be able to expect from our rights, both regarding state action and state restraint, and with which I might then evaluate the three selected Dutch group-based approaches to the right to be protected against discrimination. But before I can proceed to the genesis of the modern human rights discourse, the current catalogues of fun-

⁷⁷ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 54; Brian Barry, *Why Social Justice Matters* (Malden: Polity Press, 2005), 19–20.

⁷⁸ Dworkin, *Justice for Hedgehogs*, 331.

damental rights, and their connections with liberalism and the individual, I first have to spare a few words for two famously complicated relationships: the tumultuous marriage between liberalism and democracy, and the surprisingly casual friendship between liberalism and human rights.

9.

Liberalism and Democracy

In order to introduce the tumultuous marriage between liberalism and democracy, I return for a moment to our cursory student of history, who previously noticed that political programs can derail into totalitarian dystopias. They might likewise have noted that some of the most murderous regimes in recent history came into power, or were (partly) legitimized, through using and abusing the means of democracy, or at least its disfigured cousin.⁷⁹ But also in less dramatic circumstances is it safe to say that democracy on its own does not guarantee liberalism. Sometimes democracy can even be detrimental to its constitutive positions.⁸⁰ Before I continue, it is necessary to first define my fairly technical use of the broadly familiar terminology in this matter, as democracy is often envisioned to already incorporate liberalism and fundamental rights.⁸¹ For the moment, I will distinguish this compound-idea of ‘liberal democracy’ from ‘formal democracy’.⁸² The latter can be defined as a political system where “the citizens have a significant influence on the contents of the legislation.”⁸³ One can imagine that, if we employ this more restrictive definition

⁷⁹ Pierre Rosanvallon, *Good Government: Democracy beyond Elections*, trans. Malcolm DeBevoise (Cambridge: Harvard University Press, 2018), 10.

⁸⁰ Marc Plattner, “Illiberal Democracy and the Struggle on the Right,” *Journal of Democracy* 30, no. 1 (2019): 7; Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton & Company, 2003), 248; Freedman, *Liberalism*, 6, 53–54, 121; Fawcett, *Liberalism*, 56. This does not have to surprise us, as the coupling of liberalism and democracy is both more recent and less ardent than is often assumed, see: *Ibid.*, 3; Hasan, *Modern Europe and the Enlightenment*, 107.

⁸¹ Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Cambridge: Harvard University Press, 2019), 48.

⁸² Jasper Doomen, *Freedom and Equality in a Liberal Democratic State* (Brussels: Bruylant, 2014), 20.

⁸³ *Ibid.*, 235.

of democracy, then there is a very real possibility for the existence of political systems that are democratic but do not adhere to, or even contest, the constitutive positions of liberalism.⁸⁴ The relationship between liberalism and democracy now emerges as rather Byzantine. On the one hand, democracy is often viewed as an essential companion to liberalism.⁸⁵ But on the other hand, as we just established, a formal democracy might prevent or even dismantle a liberal political structure. In order to better understand this conundrum, let us now explore these two aspects of the tumultuous marriage between liberalism and democracy in more detail.

DEMOCRACY AS A COMPANION TO LIBERALISM

Formal democracy is usually viewed as part of those derivative positions which are generally thought to be necessary to ensure the constitutive positions of liberalism. And indeed, voting is a mighty tool against accumulated or unchecked power. Besides, it is a tool which under the conditions of universal suffrage will be available to almost every individual.⁸⁶ As such, democracy is unsurprisingly one of the most common means to ensure the central tenets of liberalism. But – and this is a big but – within our definition of formal democracy, universal suffrage is not a given. Furthermore, democracy can direct its energy against liberal norms.⁸⁷ In the latter case, the democratic process can be utilized to abolish the existing liberal political structure of a society. With regard to discrimination, we can imagine a majority of voters – or at least enough voters to obtain a parliamentary majority within the local electoral system – turning against minorities, through curbing their rights or disrupting the institutions that safeguard their societal position.⁸⁸ Because in a formal democracy the majority

⁸⁴ Mounk, *The People vs. Democracy*, 48.

⁸⁵ *Ibid.*, 97; Hasan, *Modern Europe and the Enlightenment*, 15.

⁸⁶ Erwin Dijkstra, “Laat Ouderen over de Toekomst Stemmen,” *Nederlands Juristenblad* 95, no. 16 (2020): 1152–54.

⁸⁷ Mounk, *The People vs. Democracy*, 48.

⁸⁸ Jasper Doomen, “Het Antidemocratische Karakter van ‘Militante Democratie,’” in *De Strijd om de Democratie: Essays over Democratische Zelfverdediging*, ed. Afshin Ellian, Geliijn Molier, and Bastiaan Rijpkema (The Hague: Boom Uitgevers, 2018), 140–142; Doomen, *Freedom and Equality in a Liberal Democratic State*, 39.

decides which fundamental rights exist – if at all – and to whom they apply.⁸⁹ While compiling this work as the report of my research project, the bulk of which happened during the early twenties of the 21st century, some eastern European members of the European Union were said to be drifting in this direction.⁹⁰ In Hungary, for instance, voting continued, but with increasing (legal) pressure on the press, opposition parties, and freedom of expression, and accompanied by rhetoric from public officials against Jewish persons and other minorities.⁹¹ The Hungarian example shows how a formal democracy is capable of abolishing the position of the individual, which is so essential to the liberal constitutive positions. The inclusion of a democratic element may be an indispensable asset of a liberal state, but it carries within it the danger of the emergence of an illiberal democracy.⁹²

ILLIBERAL DEMOCRACY

The second chapter of Yascha Mounk’s book *The People vs. Democracy* is therefore quite aptly titled ‘Democracy Without Rights’.⁹³ In this chapter he discusses two proponents of illiberal democracy: autocrats and populist leaders. Not coincidentally, these more or less coincide with the sources from which we already saw pressure on the universal and individual characterization of fundamental rights emanate.⁹⁴ The conduct of autocrats and populist leaders illuminates the continuous and persistent dangers which present themselves when the apparatus of the state or other societal institutions is employed to serve only the interests of some group(s). Both autocrats and populists are known to blend the right and the good, especially with their frequent claims to represent the wishes of some sort of moral majority. Through their intolerant definitions of the good and a good life, they subsequently marginalize individuals within their environ-

⁸⁹ Doomen, “Het Antidemocratische Karakter van ‘Militante Democratie,’” 146–47.

⁹⁰ Pippa Norris and Ronald Inglehart, *Backlash: Trump, Brexit, and Authoritarian Populism* (Cambridge: Cambridge University Press, 2019), 154.

⁹¹ Chapter VII, section 37; Robert Antonio, “Reactionary Tribalism Redux: Right-Wing Populism and De-Democratization,” *The Sociological Quarterly* 60, no. 2 (2019): 203.

⁹² Fawcett, *Liberalism*, xiii; Hasan, *Modern Europe and the Enlightenment*, 80–81.

⁹³ Mounk, *The People vs. Democracy*, iii.

⁹⁴ Introduction, section 1.

ed *demos*, in addition to further disadvantaging those groups that could already be described as marginalized.⁹⁵ One can remember the Hungarian example for such a use of democratic means to achieve illiberal goals. As a practical implication of this marginalization and as a necessary condition to make such demeanor possible, autocrats and populists show a pattern of attacking institutions, whether they are in power or not.⁹⁶ One of the most important institutions which suffers such attacks is the modern human rights discourse and the position of the individual therein, as enshrined in declarations, treaties, and constitutions.⁹⁷ As some of these fundamental rights – especially universal suffrage – are the guarantee for the democratic caliber of a democracy, one is left to wonder if an illiberal democracy, or a formal democracy *an sich*, can stay a democracy for very long.⁹⁸

This work is about the legitimacy of using group-based approaches to address discrimination when it occurs in the relationship between citizens, within the boundaries of the modern human rights discourse and the political structure of liberal states. As such, I focus on desirable and less desirable interpretations of our fundamental rights and not on democracy in and of itself. That said, the link between the foregoing and group-based approaches to the protection against discrimination is unmistakable. Democracy is an indispensable asset for the realization of the constitutive positions of liberalism. But democratic majorities can also make illiberal decisions. One of the most potent bulwarks against such decisions is the modern human rights discourse, which incorporated the liberal concerns with the individual. If liberal states make democratic decisions relating to a measure that realizes a fundamental right, such as anti-discrimination measures, which would merely apply to certain, politically determined groups, then there could be reason for concern.⁹⁹ In the tumultuous marriage between democracy and liberalism, fundamental rights thus appear to be a safety net. However, the friendship between liberalism and human

⁹⁵ Mounk, *The People vs. Democracy*, 42–43; Cas Mudde and Cristóbal Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017), 91, 95–96.

⁹⁶ Fawcett, *Liberalism*, 392.

⁹⁷ Mudde and Kaltwasser, *Populism*, 81.

⁹⁸ Mounk, *The People vs. Democracy*, 51.

⁹⁹ Frick, *Human Rights and Relative Universalism*, 24.

rights is likewise far more recent and less close than is often thought.

10.

Liberalism and Human Rights

If the modern human rights discourse presented the apparent triumph of the central tenets of liberalism, one might wonder how this partnership can be any less cozy than is often presumed.¹⁰⁰ As with many fragile friendships, we can find clues in the past. Because, before that great work of humanitarian concern got underway from 1948 onwards, the trajectory of human rights was hardly liberal in the sense of our preceding definition. And there is still every possibility that human rights resume their “walk on the dark side”, as Ratna Kapur so eloquently states.¹⁰¹ As with the previous discussion regarding the affinity between liberalism and democracy, or the lack thereof, I will treat this vexed relationship through two aspects. That being the exclusionary potential of human rights as a concept, on the one hand, and the expanding role of so-called technocratic organizations, that are often tasked with the increasingly complex job of overseeing the implementation of our fundamental rights, on the other.

The exclusionary potential of human rights as a concept is an important subject for this work and comes up again in the next chapter. For the sake of bringing this introduction on liberalism and its relationship with both democracy and human rights to a satisfying conclusion, I will give this matter nonetheless a brief introduction. Following Marie-Luisa Frick, we can roughly divide the exclusion of persons from the enjoyment of their fundamental rights in two categories.¹⁰² In the first place, one can be excluded as a distinct person. This happens when persons are not seen as human or are considered morally irrelevant.¹⁰³ In a practical sense, one can imagine this category of exclusion as the extreme consequence of racism, misogyny, and the like. Fundamental rights in such a context would

¹⁰⁰ Galenkamp, *Individualism versus Collectivism*, 71.

¹⁰¹ Ratna Kapur, “Human Rights in the 21st Century: Take a Walk on the Dark Side,” *The Sydney Law Review* 28, no. 4 (2006): 665–87.

¹⁰² Frick, *Human Rights and Relative Universalism*, 24–27.

¹⁰³ *Ibid.*, 24.

be merely group rights. Within liberal states, this kind of exclusion is seldom as blatant anymore – if we ignore the predicament of undocumented non-citizens, that is.¹⁰⁴ Secondly, there is the possibility for the restriction, entirely or partially, of certain fundamental rights, which is not based on distinct personal characteristics but occurs “for the sake of other, predominantly collective goods and interests.”¹⁰⁵ These kinds of restrictions can also affect the universal and individual characterization of fundamental rights when they are employed with a collective orientation. With regard to discrimination, we can observe that the right to be protected against this societal ill often tends to be translated in legal claims only for persons who belong to a number of delineated groups and merely when certain types of wrongful differential treatment are involved.¹⁰⁶ I explore examples of this dynamic with the Dutch hate speech ban and affirmative action measures, in Chapters V and VI. These omissions can be remedied, as one might inspire lawmakers – which I try in these chapters – to address such exclusions in the existing laws or reconsider the design of these measures altogether. This kind of exclusion becomes particularly pressing when the state and other societal institutions attempt to realize fundamental rights without a proper judicial framework, like we shall encounter with institutional opinions as an anti-discrimination measure in Chapter VII. There it will be established that several Dutch institutions have publicly disseminated opinions to address the marginalized societal position of some groups, but not others. However, many of the individuals who make up those forgotten collectives, or do not belong to any group at all, arguably experience similar conditions to those of the selected groups. As there is no judicial framework, the claims of these overlooked victims of discrimination have nowhere to go; they are silent, to borrow a phrase from Luigi Corrias. In other words, there is a need for legal protection that is not accommodated by the architecture of the existing legal structure.¹⁰⁷ In summation, the central tenets of liberalism, especially the position of individuals,

¹⁰⁴ Stephanie DeGooyer et al., *The Right to Have Rights* (New York: Verso, 2018), 2.

¹⁰⁵ Frick, *Human Rights and Relative Universalism*, 25.

¹⁰⁶ *Ibid.*, 24, 43.

¹⁰⁷ Luigi Corrias, “Het Recht als Bescherming van Bepaalde Partijen: Een Rechtsfilosofische Verkenning,” *Ars Aequi* 69, no. 1 (2020): 94.

can suffer through the exclusionary potential of human rights as a concept.

The second aspect of the chilly rapport between liberalism and human rights, the role of technocratic organizations, can be treated as cursory. It is necessary to do so, though, as the debates surrounding these organizations relate to the first aspect of human rights overreach, one of the subjects of the next chapter, and because we shall come across some of them along the way. Anticipating these elaborations, I will confine myself for now to the matter of liberalism's concerns with power. The modern human rights discourse is perhaps the pre-eminent instrument, or derivative position, to address these concerns.¹⁰⁸ For instance, through fundamental rights judges can protect vulnerable minorities as well as neutralize power grabs.¹⁰⁹ But when something becomes a human rights matter, it is – to a certain extent – subtracted from the sphere of politics and, as a consequence, from the influence of many of the power checks in liberal states.¹¹⁰ Even so, and as said above, human rights still require interpretation and adjacent political discussions on several levels, before fundamental rights can be meaningfully realized. In part due to this complexity and in some measure adding to it, more and more human rights matters are at least partly entrusted to organizations with the essential technical expertise.¹¹¹ For instance, one can think of (inter)national human rights bodies, such as the UN-Committee on the Elimination of Discrimination against Women and the Netherlands Institute for Human Rights.¹¹² And this is perhaps necessary when the implementation of fundamental rights, as they are codified on a national and international level, has progressively become

¹⁰⁸ Marlies Galenkamp argues that group-oriented fundamental rights can also address liberal concerns with state power, see: Galenkamp, *Individualism versus Collectivism*, 39; Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 147–49. However, such a deviation from the modern human rights discourse would neglect the issue of the power of groups, see: *Ibid.*, 118.

¹⁰⁹ Roger Kelemen, "Judicialisation, Democracy and European Integration," *Journal of Representative Democracy* 49, no. 3 (2013): 297; Mounk, *The People vs. Democracy*, 73.

¹¹⁰ Wolin, *Politics and Vision*, 521; Rosanvallon, *Good Government*, 114–24. It is argued that the matter merely leaves the sphere of 'political politics', but is still subject to judicial oversight, which some would characterize as 'judicial politics', see: Christine Landfried, "Introduction," in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. Christine Landfried (Cambridge: Cambridge University Press, 2019), 2–3, 10–11.

¹¹¹ Fawcett, *Liberalism*, 291; Mounk, *The People vs. Democracy*, 59–60, 74.

¹¹² Chapter VI, section 32. For the Dutch municipal level, see: *Staatsblad* 2009, 373.

more intricate.¹¹³ Furthermore, through these organizations individuals are able to remind their own states, or other relevant authorities, of their human rights obligations.¹¹⁴ One can imagine at least two conceivable risks, though, with this course of action. In the first place, one might put forth that human rights matters could appear increasingly insulated from normal political life.¹¹⁵ All the while, and despite their intricacy, these matters still relate to genuine political issues.¹¹⁶ At the same time, and this is the second possible risk, the actions such technocratic organizations undertake, and the arrangements they design or recommend, might be seen as to be too far removed from the legitimization offered by the ordinary means of politics.¹¹⁷ As a result of these two risks, there is the very real chance for an accountability gap. Such a gap does not go well with the constitutive positions of liberalism – especially those concerning unrestricted power.¹¹⁸

The two not-so-harmonious relationships in the foregoing – the tumultuous marriage between liberalism and democracy, and the rather casual friendship between liberalism and human rights – handily illustrate the enduring importance of the individual within any desirable political program, at least from a liberal point of view. As such, a close connection between liberalism and democracy, and liberalism and human rights remains prudent. The latter objective is the subject of the following chapter.

¹¹³ David Kennedy, “The International Human Rights Movement: Part of the Problem?” *European Human Rights Law Review* 6, no. 3 (2001): 250–66; Held, *Models of Democracy*, 139–40, 152–57; Fawcett, *Liberalism*, 284.

¹¹⁴ Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 58–61.

¹¹⁵ Mudde and Kaltwasser, *Populism: A Very Short Introduction*, 117.

¹¹⁶ Mounk, *The People vs. Democracy*, 92–93.

¹¹⁷ Rosanvallon, *Good Government*, 60–61; Held, *Models of Democracy*, 139.

¹¹⁸ *Ibid.*; Mounk, *The People vs. Democracy*, 77. This accountability gap is all the more pressing if one considers the doctrine of coercive human rights with regard to criminal law, see: Natasa Mavronicola and Laurens Lavrysen, “Coercive Human Rights: Introducing the Sharp Edge of the European Convention on Human Rights,” in *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, ed. Laurens Lavrysen and Natasa Mavronicola (London: Bloomsbury, 2020), 3–4. Most relevant for this work is the possibility that the doctrine of coercive human rights might be capable of obscuring authoritarian political programs behind the veil of human rights obligations, see: Chapter V, Section 26; Mattia Pinto, “Awakening the Leviathan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law,” *Utrecht Journal of International and European Law* 34, no. 2 (2018): 183.