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

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Chapter II

The Modern Human Rights Discourse

An Exclusionary Heritage – Whose Rights? What Universality? – Three Generations of Rights – Human Rights Overreach – Politics of Contestation

11.
An Exclusionary Heritage

The modern human rights discourse has become the pre-eminent ground on which oppression and violence by and within states are condemned and – through supervision and advice, as well as humanitarian interventions – sometimes addressed.[1] As was already indicated through the surprisingly chilly report between liberalism and human rights, an elevated position for the individual – present within both humanism and liberalism – has only recently become part of the prevailing human rights framework.[2] In this section, I explain this exclusionary heritage of human rights as a concept in more detail. In the subsequent two sections, I will discuss the trajectory of the modern human rights discourse since the Second World War. By way of this discussion I show that the constitutive positions of the liberal political program – specifically those concerning power and the individual – are reflected in the fundamental rights within the relevant rights catalogues, and in what manner. As such, the practical extent to which the modern human rights discourse can be considered a derivative position or means to achieve liberal goals, is illustrated.

[1] Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side," *The Sydney Law Review* 28, no. 4 (2006): 665, 682.
[2] Chapter I, section 10; Martti Koskenniemi, *The Politics of International Law* (Portland: Hart Publishing, 2011), 153–54, 162–64.

In the last two sections, I consider the argument that the modern human rights discourse has been overextended.[3] Three related developments, which can be encapsulated with the phrase human rights overreach, are relevant for this work: governments increasingly present their human rights obligations as an apolitical imposition; the expansion of rights catalogues is accompanied by the tendency that not all fundamental rights are warranted equally; and a growing number of international covenants seemingly focusses on the rights plight of some groups, but not others.[4] Adjacent to this, proposals for (tentative) group rights have re-entered the picture. As a result of these developments, there is currently no clear indication which fundamental rights should be safeguarded when and for whom. This can cause these rights to lose their distinctive purpose.[5] Especially the protection of every individual against the worst humanity has to offer, has the potential to be compromised.[6] Therefore, a return to some branch of the liberal tree is perhaps necessary in order to determine which of the existing fundamental rights should – at least at a minimum – be enforced and under what circumstances, as well as to firmly re-establish the universal and individual characterization of these rights. In the next chapter, I propose a liberalism of fear as an expedient candidate for such a branch.

OPPRESSION AND THINKING IN GROUPS

Like humanism and liberalism, as we previously defined them, the modern human rights discourse in its present form can be said to be a historical

[3] Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge: Cambridge University Press, 2019), 4; Marlies Galenkamp, *Individualism versus Collectivism: The Concept of Collective Rights* (Rotterdam: RFS, 1993), 56. This phenomenon is also known as the proliferation of human rights, see: Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence: Legality, Legitimacy and the Foundations of the Law* (New York: Routledge, 2019), 47, n. 30.

[4] Ruti Teitel, "Human Rights Genealogy," *Fordham Law Review* 66, no. 2 (1997): 307, 317; Cas Mudde and Cristóbal Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017), 83; Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge: Harvard University Press, 1989), 34; Pankaj Mishra, *Age of Anger: A History of the Present* (London: Penguin Books, 2017), 12–13.

[5] Galenkamp, *Individualism versus Collectivism*, 56.

[6] Hannum, *Rescuing Human Rights*, 3–4.

anomaly.[7] If I can be excused for returning to the cruelties of the past once more, it is vital to point out that throughout the preceding centuries – and especially since modernity – many of the entities that we would now call states and societal institutions, judged people on the disadvantaged societal position and assumed lack of merits of the group(s) to which they supposedly belonged.[8] And these prejudices were not confined to those public associations, but reflected influential undercurrents in these societies.[9] As I mentioned in the Introduction to this work, several prominent Enlightenment thinkers likewise held views in this vein.[10] Some of the most horrible crimes imaginable have their roots in this way of thinking and were justified through it. Two examples from history will probably suffice: the European colonial powers and Nazi Germany. In both cases, terrible conduct was rationalized with the belief that some groups are superior and deserve domination.[11] An example of the abhorrent rationales that were used, is the notion of the 'white man's burden'.[12] Simply put, this entails the idea that persons could be categorized in 'peoples' or 'races' which exhibit a clear hierarchy between them. The 'white' or 'Western' peoples were imagined to occupy the top of this pyramid and, as such, conquest and bloodshed in the rest of the world was their birthright.[13] Other groups, correspondingly envisioned as inferior, were thought to deserve the harsh

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[7] Adam Gopnik, *A Thousand Small Sanities: The Moral Adventure of Liberalism* (London: Riverrun, 2019), 201; Anthony Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights That Made the Modern West* (London: Bloomsbury, 2014), 246, 248. But see also: Koskenniemi, *The Politics of International Law*, 153–55.

[8] Nawal Mustafa and Anya Topolski, "Race in Relation to Law and Politics," in *Diversiteit: Een Multidisciplinaire Terreinverkenning*, ed. Claartje Bulten et al. (Deventer: Wolters Kluwer, 2020), 324–25; Ali Rattansi, *Racism: A Very Short Introduction* (Oxford: Oxford University Press, 2020), 11, 75.

[9] Martha Nussbaum, *The Monarchy of Fear: A Philosopher Looks at Our Political Crisis* (Oxford: Oxford University Press, 2018), 97, 108–16.

[10] Introduction, section 1.

[11] Rattansi, *Racism*, 51.

[12] Upendra Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," in *The Future of International Human Rights*, ed. Burns Weston and Stephen Marks (New York: Transnational, 1999), 131; Rattansi, *Racism*, 27, 47.

[13] Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly* 20, no. 2 (1998): 229; Florian Coulmas, *Identity: A Very Short Introduction* (Oxford: Oxford University Press, 2019), 28; Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007), 193.

treatment that was subsequently meted out by their oppressors.[14]

This thinking in groups transcended oppression on the basis of skin color, ethnicity, and descent, and included, amongst other categories, gender, sexual orientation, religion, and impairment.[15] We already encountered the most horrific consequence of this line of thinking in the second section of the Introduction: the industrial genocides committed by the Nazis.[16] The myths which sustained the colonial attitudes and the Nazi ideology have long since been thoroughly discredited.[17] However, one should never underestimate how deep these prejudices ran: some groups, according to many in those times, could even be considered less then human.[18] We shall see that (slightly) watered down variants of this line of thinking, in some form or the other, have stifled and derailed the trajectory of human rights since its inception. And even today, rights language and human rights frameworks are at times still employed by some as a proverbial fig leaf, while condemning persons to hierarchical situated groups.[19]

MARRED BEGINNINGS

However self-evident hierarchical situated groups may have appeared to many, throughout this sad history there always remained resistance against the oppression which was engendered by this line of reasoning – a light that shone even in the darkest of times.[20] With the French Revolution this

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[14] Zygmunt Bauman, *Wasted Lives: Modernity and Its Outcasts* (Cambridge: Polity, 2004), 5–6.

[15] Introduction, section 2; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002), 347; Rattansi, *Racism*, 27; Coulmas, *Identity*, 31, 36, 38–40, 43–44, 61–62, 69; Erwin Dijkstra, "Een Gemankeerde Wereld: Theorieën over (On)Toegankelijkheid," *Recht der Werkelijkheid* 42, no. 3 (2021): 69.

[16] Peter Wade, *Race: An Introduction* (Cambridge: Cambridge University Press, 2015), 87.

[17] Mishra, *Age of Anger*, 236–37; Rattansi, *Racism*, 113, 118, 120. For a more comprehensive overview, see: Robert Sternberg and Karin Sternberg, *The Nature of Hate* (New York: Cambridge University Press, 2008); Shashi Tharoor, *Inglorious Empire: What the British Did to India* (London: Hurst & co., 2017); Mike Davis, *Late Victorian Holocausts: El Niño Famines and the Making of the Third World* (New York: Verso, 2001).

[18] Mustafa and Topolski, "Race in Relation to Law and Politics," 325.

[19] Kapur, "Human Rights in the 21st Century," 669, 671–74, 679–82, 685.

[20] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Boston: Beacon Press, 2015), 73, 83–84; Norman Davies, *Europe: A History,* (London: The

contrarian way of thinking gained momentum. Founded on the three revolutionary values of liberty, equality, and fraternity – which were supposed to pertain to every person – a catalogue of universal and individual rights was formulated.[21] This declaration and its successors "accorded [rights] to the individual, and [these were] thus universally valid through their connection to personhood."[22] However, the specter of exclusion still haunted this famous *Déclaration Universelle des Droits de l'Homme* of 1787. Because the rights that it declared were – for a shorter or longer period, totally or partially – mostly denied to persons of color, women, and other marginalized groups.[23] As such, it is defensible to postulate that the emergence of rights that are universal and individual in more than name, is actually much more recent than the late 18th century.[24] And even though the number of rights bearing groups under the French *Déclaration* was expanded until Napoleonic times, the tendency to see humankind as a collection of groups, which are positioned in a hierarchical relationship to each other, never really abated until after the atrocities of the first half of the 20th century.[25] One especially morbidly ironic example may elucidate the latter point. The Haitian Revolution – which was galvanized by the aforementioned values of the French Revolution and led to the local abolishment of slavery, as well as the dislodging of the French colonial rulers – could not be comprehended in the Old World, stuck as it was in its ideas of racist hierarchies. Accordingly, the Europeans – including the French – stubbornly persisted in trivializing its results, even when the independence of Haiti was a *fait accompli*.[26]

Bodley Head, 2014), 1018.

[21] Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy* (Princeton: Princeton University Press, 2009), vii–ix.

[22] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 66.

[23] Hunt, *Inventing Human Rights*, 149–75, 180; Caroline Criado-Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (London: Penguin Books, 2019), 13.

[24] Marie-Luisa Frick, *Human Rights and Relative Universalism* (London: Palgrave MacMillan, 2019), 41, 46–47; Teitel, "Human Rights Genealogy," 311.

[25] Hunt, *Inventing Human Rights*, 149–50, 187, 192–93; Frick, *Human Rights and Relative Universalism*, 46–47.

[26] Trouillot, *Silencing the Past*, 94–95; Charles Mann, *1493: How Europe's Discovery of the Americas Revolutionized Trade, Ecology and Life on Earth* (London: Granta, 2011), 425, 465–69.

If anything, the earliest trajectory of human rights, only reinforces the importance of the liberal concerns with power and the individual. These concerns, in addition to the values undergirding the French Revolution, inspired the modern human rights discourse with its universal and individual rights, that got its real start after the Second World War.[27] But while the modern human rights discourse did present the victory of the central tenets of liberalism, this triumph was not uncontested.[28] Furthermore, the question of the ultimate importance of the universal and individual characterization of our fundamental rights was never given a unanimously accepted answer. Though this characterization continues to be emphasized by human rights bodies and other appropriate authorities, it is still a real point of contention. The matter of the inviolability of its universal and individual characterization has therefore haunted the modern human rights discourse for the better part of the last eight decades.[29]

Within this context, the debate on the feasibility of group rights has been especially pertinent. Therein the legitimate but neglected interests of certain groups are often poised against the possibility of the exclusion of other groups and individuals from the reach of our human rights framework.[30] Disagreement about (the desirability of) the universal and individual characterization of fundamental rights is also one of the underlying grievances perceptible within the three high-profile attacks on the modern human rights discourse, that we encountered above.[31] So, while I now continue with the more recent trajectory of the modern human rights discourse and the fundamental rights provided therein, the promise or threat of group rights will never be far away. Going forward, I will therefore remain mindful of the abiding effects of the exclusionary heritage of human rights and the enduring potential of the (re-)emergence of group thinking.

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[27] Edmund Fawcett, *Liberalism: The Life of an Idea* (Princeton: Princeton University Press, 2018), 287.

[28] Ibid., 290, 298; Susan Darraj, *The Universal Declaration of Human Rights* (New York: Chelsea House, 2010), 99.

[29] Frick, *Human Rights and Relative Universalism*, 1–2, 26, 57–58.

[30] Julia Stapleton, "Introduction," in *Group Rights: Perspectives Since 1900*, ed. Julia Stapleton (Bristol: Thoemmes Press, 1995), xxxv; Vernon van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought," *The Journal of Politics* 44, no. 1 (1982): 21–22, 26–31.

[31] Introduction, section 1; Chapter I, section 9.

12.
Whose Rights? What Universality?

Despite all the lofty words and values, the ultimate genesis of the contemporary idea of human rights appears to be quite messy. Liberty, indeed, but only for some groups. Equality for all, but not for everybody. And fraternity, but many humans are not considered our siblings. However, the barbarities of the Second World War gave these values a new lease on life.[32] In atonement for those darkest years of inhumanity, the international community broke the vicious cycle of group thinking and achieved something even the early liberals had seldom dared to suggest: commonly shared, enforceable rights.[33] The resulting rights catalogues had more tangible effects than any of the previous efforts, including the *Déclaration*.[34] Due to these fundamental rights, people are gradually living more and more under political structures which to an ever greater extent conform to the liberal view of the right, while they can chase their own ideas of a good life.[35] These structures are capable of channeling societal conflicts, including power imbalances, through institutions that are compelled to facilitate the life of every individual. Moreover, the latter entails an end to state-sanctioned privileges and disadvantages, as well as the obligation to address discrimination in the relationship between citizens.[36]

The bedrock of this success was the universal and individual characterization of the established human rights framework. This is arguable a unique occurrence in human history. A short excursion through the early story of the modern human rights discourse will show that this edification of all humans – everywhere and always, irrespective of any personal characteristics – was far from self-evident.[37] This excursion further serves as

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[32] Fawcett, *Liberalism*, 290.
[33] Ibid., 292.
[34] Ibid., 293–94.
[35] Sophia Moreau, "What Is Discrimination?," *Philosophy & Public Affairs* 38, no. 2 (2010): 147.
[36] Fawcett, *Liberalism*, 285; Mishra, *Age of Anger*, 12–13. For an overview of the role of the non-discrimination principle in the modern human rights discourse and the relevant documents of international law, see: Introduction, section 1, note 12.
[37] Frick, *Human Rights and Relative Universalism*, 2.

an introduction to the analysis of the enforceable rights treaties that follows in the next section, where the ever-present temptation of a return to some form of group rights looms increasingly large. As I focus merely on the role of the liberal notion of the individual in the modern human rights discourse, I will – for the moment – forego the many discussions of such notions within more general theories of justice, such as natural rights, Rawlsian justice as fairness, Dworkinian equal concern and respect, and cultural relativism.[38] Suffice it to state that these more extensive interpretations never (completely) abandon the central interest of the protection of the individual against inhumanity through enforceable fundamental rights, even those theories which seem to prioritize group interests.[39]

THE TEMPLE OF CASSIN

The story of the modern human rights discourse customarily begins with the monumental achievement of the Universal Declaration of Human Rights, which was proclaimed by the General Assembly of the United Nations in 1948.[40] One of the drafters, René Cassin, conceived this new human rights discourse as a classical temple façade.[41] The façade would consist of four pillars, symbolizing the values of liberty, equality, dignity, and fraternity, which in turn support the codified rights, envisaged as the temple's pediment. These four values can currently be found in article 1 of the 1948 Declaration.[42] And indeed, despite the ostensible and relative obscurity of fraternity, the liberty, equality, and dignity of every human being have since then substantiated all the enforceable rights treaties, which followed the non-binding Declaration. And these values are still instrumental in the interpretation of those treaties.[43] However, if we look passed the

[38] Shestack, "The Philosophic Foundations of Human Rights," 214–34.
[39] Mishra, *Age of Anger*, 12; Stapleton, "Introduction," xxxv.
[40] For a critical note, see: Frick, *Human Rights and Relative Universalism*, 32–33, note 21.
[41] Fawcett, *Liberalism*, 288; Micheline Ishay, "What Are Human Rights? Six Historical Controversies," *Journal of Human Rights* 3, no. 3 (2004): 359.
[42] Article 1 Universal Declaration of Human Rights.
[43] Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 140; Shestack, "The Philosophic Foundations of Human Rights," 229–30; Hunt, *Inventing Human Rights*, 17, 19, 202–4; Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 312, 318–19; Christopher McCrudden,

pillars and the pediment of Cassin's temple, we notice that the entire building in addition rests on a double foundation: the universal and individual nature of these rights. This characterization precedes any tangible and enforceable fundamental rights. The influence of liberalism is visible in many parts of this temple. For instance, both the foundation and the subsequent rights are, for a large and important part, engendered through an interpretation of the demands of the values of liberty, equality, and dignity that fits the previously established core of liberal constitutive positions to a tee.[44]

To really appreciate these foundations, their importance, and their relationship with definite rights – like the freedom of expression and the right to be protected against discrimination – I have to get a bit technical for a moment. In her illuminating account of the universal and individual nature of fundamental rights, legal and political scholar Marie-Luisa Frick distinguishes two levels of claim entitlements.[45] The first level concerns the claim all individuals have on fundamental rights. The actual rights this entails are codified and allocated on the second level. The rights that are acknowledged on this second level are not predetermined, in a strict sense, by the first level of entitlements.[46] In other words, the universal and individual nature of rights does not tell us which rights are to be written down in declarations, covenants, and national laws. Though, as one can imagine, the first level does make certain requirements of the rights that are codified at the second level.[47] These requirements involve both prohibitions and commandments. An instance of the former, is the impossibility of group rights or other exclusionary rights. An example of the latter, is that every right on the second level has to be important enough to be relevant to all humans – as the rights which are elected on this level, by definition, become a collective guarantee to all of us.[48] Frick's stratification recalls the

"Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no. 4 (2008): 660, 662–63.

[44] Frick, *Human Rights and Relative Universalism*, 23, 58; Clapham, *Human Rights*, 28, 140; Connor O'Mahony, "There Is No Such Thing as a Right to Dignity," *International Journal of Constitutional Law* 10, no. 2 (2012): 572.

[45] Frick, *Human Rights and Relative Universalism*, 5.

[46] Ibid., 7.

[47] Ibid., 6.

[48] Clapham, *Human Rights*, 28.

distinction between constitutive and derivative positions, which we came across while examining the liberal political program, and illustrates yet again the affiliation between liberalism and the modern human rights discourse.[49] We will now turn to the entitlements of the first level: why should every individual have a claim to universal rights? A greater understanding of this first level of rights will enable us to better appreciate the trajectory that the actually enforceable rights catalogues followed since the doctrine of the modern human rights discourse was initially laid down in 1948, and whether this trajectory continues to adhere to these foundations or not.

Perhaps inevitably, Frick distinguishes two ideas within the first level of claim entitlements: universalism and individualism – the twofold foundation of the temple we constructed above.[50] Universalism entails that everybody is entitled to fundamental rights. This idea corresponds with what Frick denotes as the equality dimension of rights. That everybody is entitled to fundamental rights does not tell us the kind of rights they are eligible for, though. We could all be solely entitled to group rights, if there was just the equality dimension. That is where the counterpart of universalism comes in: individualism or the liberty dimension of rights. This dimension is closely connected to the assumption that fundamental rights first and foremost are individual allotments and ultimately aim to emancipate the individual.[51] The modern human rights discourse prioritizes these two characteristics of fundamental rights over the existence of any specific rights. Taken together these two foundational ideas are also known as relative or weak universalism.[52] The qualification 'relative' or 'weak' refers to the fact that the universal and individual foundation of the modern human rights discourse merely relates to the beneficiaries of rights and not to certain delineated rights.[53] It is all about what Hannah Arendt called – in a

[49] Frick, *Human Rights and Relative Universalism*, 58; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 2009), 17.
[50] Frick, *Human Rights and Relative Universalism*, 8.
[51] Ibid., 57; Galenkamp, *Individualism versus Collectivism*, 68.
[52] Frick, *Human Rights and Relative Universalism*, 8; Jack Donnelly, "Human Rights and Asian Values: A Defense of 'Western' Universalism," in *The East Asian Challenge for Human Rights*, ed. Joanne Bauer and Daniel Bell (Cambridge: Cambridge University Press, 1999), 83; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), 98.
[53] Frick, *Human Rights and Relative Universalism*, 43.

more confined context – the right to have rights.[54] Not only does the double foundation of the modern human rights discourse not exhaustively prescribe the actual rights that should be codified, but it also leaves a (local and temporal) margin of appreciation concerning the implementation and interpretation of the rights obligations which are shaped on the second level.[55] This margin, amongst other provisions, constitutes a mitigating factor in the possible conflicts between democracy and human rights, without compromising the latter – at least in theory.[56] However weak or relative, we can derive some essential recommendations from the twofold foundation or first level of the modern human rights discourse. For our current endeavor we may note that, all things considered, the choice for these foundational ideas prohibits all rights discrimination and probably blocks the road to group rights.

CHOICES AND CONSEQUENCES

Indeed a choice. Because, it is crucial to realize that this foundation of the modern human rights discourse is not neutral or inevitable, but was selected from among many options.[57] There are other foundations possible than the equality and the liberty dimension – such as nature, religion, and social cohesion – and these are in fact continuously suggested, up to the present day.[58] As with all decisions in life, this choice can come with potential drawbacks. Two of the most frequently uttered grievances, which principally target the liberty dimension of rights, are that this approach creates atomized and egotistical individuals, and that important social and collective interests get compromised in favor of the privileged individual. A brief consideration of these objections will further clarify the projected advantages and possible shortcomings of the universal and individual

[54] Hannah Arendt, *The Origins of Totalitarianism* (London: Penguin Books, 2017), 386–90.
[55] Frick, *Human Rights and Relative Universalism*, 9; Clapham, *Human Rights*, 53.
[56] Andreas Follesdal, "Appreciating the Margin of Appreciation," in *Human Rights: Moral Or Political?*, ed. Adam Etinson (Oxford: Oxford University Press, 2018), 270.
[57] Frick, *Human Rights and Relative Universalism*, 15; Galenkamp, *Individualism versus Collectivism*, 66, 72.
[58] Frick, *Human Rights and Relative Universalism*, 65–68; Galenkamp, *Individualism versus Collectivism*, 73.

foundation that defines the modern human rights discourse.

The first grievance is easily refutable. Fundamental rights are the minimum of protection for the individual and their life plan, to which we are all entitled.[59] The fact that we are all entitled to these rights, means that we are, at the same time, confined by the rights of others, which prohibits all too careless egotism.[60] Furthermore, with almost all fundamental rights we are free to forego invoking them in service of a social or group goal, if we desire such.[61] Thus, the structure of the modern human rights discourse does not necessarily compel us to become atomized individuals.

The second grievance is more poignant, as it is undeniably true that the modern human rights discourse has the potential to trump and thus hamper some social and group interests.[62] However, liberalism, and in its footsteps the modern human rights discourse, have deemed group rights more dangerous than the individual alternative.[63] The age-old fears of oppression and violence by associations – whether they are public or private in nature – which spurred both humanism and the liberal movement, resurface here.[64] Suffering caused by and within private groups, even though they are – for the most part – not as unavoidable and powerful as the state and other societal institutions, should arguably not escape the attention of any human rights framework. And because of these observations, defenders of the modern human rights discourse are "unapologetic about the fact that the idea of human rights is biased in favor of individuals."[65] This does not mean that social or group goals have become impossible to realize, nor that individuals are privileged relatively to groups. It

[59] Gopnik, *A Thousand Small Sanities*, 122.
[60] Frick, *Human Rights and Relative Universalism*, 68–69.
[61] Ibid., 71; Galenkamp, *Individualism versus Collectivism*, 72; Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 121. Naturally, this is different for rights which are conceived as absolute constraints, primarily on the state, such as the prohibition of torture, see: Clapham, *Human Rights*, 83.
[62] Galenkamp, *Individualism versus Collectivism*, 60.
[63] Karl Popper, *The Open Society and Its Enemies* (London: Routledge, 2011), 95–101; Frick, *Human Rights and Relative Universalism*, 69.
[64] Peter Jones, "Human Rights, Group Rights, and Peoples' Rights," *Human Rights Quarterly* 21, no. 1 (1999): 81–82.
[65] Frick, *Human Rights and Relative Universalism*, 70; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2003), 67.

merely entails that the modern human rights discourse, following the lead of its liberal underpinnings, aims to keep individual membership of such associations, and the effort these members put in towards the goals of those associations, voluntarily.[66] Furthermore, as we will discover when we discuss the possibilities – and responsibility! – to oppose discrimination within liberal states in Chapter IV, from the claim entitlement "that individuals must not be instrumentalized for collective interests, it does follow not that their interests can never be restricted by supposedly higher goals."[67] Thus, through the preceding analysis, the bonds between humans appear to be important to the modern human rights discourse – as they were to humanism and liberalism.[68] And it is at least partly in service of these bonds that the fundamental rights on the second level of claim entitlements are founded as an individual possession, despite the potential drawbacks of this approach for many, but not all, social or group goals.

In the end, however many words we dedicate to this subject, in 1948 the drafters of the Universal Declaration of Human Rights made the decision to adhere to the central tenets of liberalism regarding the expedient position of the individual.[69] This choice did not only show compassion with all humans but also self-assurance, as the subsequent rights were to be created by humans themselves, rather than conferred by some variant of a higher authority.[70] The modern human rights discourse exists as a historical reality regardless of all too earnest searches for a foundational creed.[71] All enforceable fundamental rights in the conventions that were adopted from 1948 onwards, and the national laws that followed suit, built

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[66] Frick, *Human Rights and Relative Universalism*, 70; Barry, *Culture & Equality*, 195. Galenkamp notes that making group membership a voluntary choice, irrevocably changes traditional group dynamics, see: Galenkamp, *Individualism versus Collectivism*, 166–68. But she also notes the advantages of this course of action, see: Ibid., 72–73.
[67] Frick, *Human Rights and Relative Universalism*, 60; Colin Bird, *The Myth of Liberal Individualism* (Cambridge: Cambridge University Press, 1999), 65.
[68] Barry, *Culture & Equality*, 123.
[69] Wim Voermans, *Het Verhaal van de Grondwet: Zoeken Naar Wij* (Amsterdam: Prometheus, 2019), 39; Fawcett, *Liberalism*, 290.
[70] Frick, *Human Rights and Relative Universalism*, 15; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 159.
[71] Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *Truth and Progress: Philosophical Papers* (Cambridge: Cambridge University Press, 1998), 170.

on this original decision.[72] The drafters and their successors were not without a compass in this undertaking. They were led by the values of liberty, equality, dignity, and – erstwhile – fraternity. It is the persistence of the adherence to the liberal interpretation of these values that I will now try to establish throughout the trajectory of the subsequent rights catalogues. As the first level of claim entitlements does not specify which rights should be codified and allocated, there is much room for debate and arguable missteps during the down and dirty work of drafting rights documents. Additionally, there is no hard limit on the fundamental rights that can be crafted. As a result, there is now an ever-expanding body of rights treaties. A turn of events which, at least in some measure, instigated the developments associated with human rights overreach, as outlined above.[73] These developments and their implications for the universal and individual characterization of fundamental rights, will follow the coming discussion of the evolution of the first two – and proposed third – generations of rights.

13.
Three Generations of Rights

As we have examined the foundation of the temple of Cassin, as well as the pillars which hold up the pediment where the Universal Declaration of Human rights is inscribed, let us now turn to the fundamental rights that were codified in the actually enforceable rights catalogues that followed. We are at present on Frick's second level, the rights which are derived from the demands of liberty, equality, and dignity.

For the purpose of tracing the position of the individual through the expansion of our temple, it is advantageous to follow the customary division in three successive generations of rights: from strictly individual civil and political rights, through the seemingly more general economic, social, and cultural rights, towards the push for a third generation of group rights. This division is not without its detractors. As all realized rights catalogues are housed in the previously elaborated temple of Cassin and show

[72] Ibid., 172.

[73] Fawcett, *Liberalism*, 294. See more comprehensively below: Chapter II, section 14.

a remarkable theoretical consistency, this kind of divisions, and especially the distinction between the first two generations of rights, have been dismissed as a relic from the Cold War.[74] Despite their undeniable similarities in conception and intellectual underpinnings, it can still be productive to study the differences between the first two generations of rights in addition to the reasons for the reinvigorated campaigning for a new generation of group rights. These differences and that reasoning constitute the backdrop for the ever-recurring discussion on the desirability for some (tentative) group rights. As such, we need to take notice of this backdrop if we aim to determine the possibilities and limitations for liberal states to address discrimination without simultaneously forsaking the individual. It will also serve our evaluation of the Dutch group-based approaches to the protection against discrimination in the last three chapters of this work.

THE FIRST GENERATION OF RIGHTS

In the foregoing, I established the Second World War as the moment where the trajectory of human rights confronted its exclusionary heritage and began to morph into the modern human rights discourse. This starting point also provides the background for the first generation of rights.[75] The first generation of civil and political rights can be described as the most immediate reaction to the then recent atrocities of the previous years, that were mainly conducted through state power. These fundamental rights therefore constituted primarily a check on the power of states.[76] States thus made the political decision to commit themselves to the most essential civil and political rights, by adopting rights catalogues such as the ICCPR and the ICERD.[77] These fundamental rights constrained the state in two ways. They required both restraint from certain actions – such as torture

[74] Teitel, "Human Rights Genealogy," 311; David Beetham, "What Future for Economic and Social Rights?," *Political Studies* 43, no. 1 (1995): 50; Joy Gordon, "The Concept of Human Rights: The History and Meaning of Its Politicization," *Brooklyn Journal of International Law* 23, no. 3 (1998): 695.
[75] Gordon, "The Concept of Human Rights," 698, 702.
[76] Ibid., 692; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 40–41.
[77] Teitel, "Human Rights Genealogy," 314; Gordon, "The Concept of Human Rights," 707, 750.

and unequal treatment – and action – such as facilitating political participation and opposing discrimination.[78] Consequently, individuals could directly compel governments to refrain from torturing them, as well ensure their capability to participate in the political process.[79] As such, the duties engendered by the first generation of rights where threefold: to refrain, to protect, and to fulfill.[80] On first glance, these rights perhaps most closely resemble the liberal concerns with power and the individual, that we encountered previously.[81] Apart from their contents, we see that – through their universal and individual characterization – these rights curtail the power of the state and necessitate the state to consider any and all individuals.[82] To give you an idea: political participation is primarily an individual right, as the state cannot hinder someone's political participation when the societal salient groups under which this person can be counted are already satisfactorily enfranchised – group membership is just not relevant when considering the obligations and limitations of the state in this regard.[83] However, some rights superficially seem to hint towards group rights.[84] For example, can one assemble alone?[85] And what about the right to self-determination, which opens the ICCPR?[86] In order to properly address these further considerations, I need to give a few of the rights which comprise this first generation of rights, some more and closer attention.

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[78] Beetham, "What Future for Economic and Social Rights?," 51; Gordon, "The Concept of Human Rights," 712; Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge: Cambridge University Press, 2020), 175, 693; Erwin Dijkstra, "Het Stand Still-Beginsel en de Uitvoering van het VN-Verdrag Handicap," *Handicap & Recht* 6, no. 1 (2021): 22.

[79] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 52; Dijkstra, "Het Stand Still-Beginsel en de Uitvoering van het VN-Verdrag Handicap," 22.

[80] Aernout Nieuwenhuis, Maarten Den Heijer, and Wouter Hins, *Hoofdstukken Grondrechten* (Nijmegen: Ars Aequi Libri, 2017), 151.

[81] Fawcett, *Liberalism*, 2. Mudde & Kaltwasser are critical of the abilities of the modern human rights discourse in this regard, see: Mudde and Kaltwasser, *Populism*, 117.

[82] Frick, *Human Rights and Relative Universalism*, 43, 59; Martha Minow, *Not Only for Myself: Identity, Politics, and the Law* (New York: New Press, 1997), 9.

[83] Taylor, *A Commentary on the International Covenant on Civil and Political Rights*, 693.

[84] Frick, *Human Rights and Relative Universalism*, 57–58.

[85] Ibid. This is most pertinent when a protest is staged, cf.: Articles 19 & 21 ICCPR.

[86] Article 1 ICCPR. Article 1 of the principle covenant of the second generation of rights, the ICESCR, and article 3 of the non-binding UNDRIP also enshrine this right.

COLLECTIVE RIGHTS OR GROUP RIGHTS?

In this regard, one should make a further distinction within the body of rights realized at the second level, which is separate from the division in three generations of rights: the distinction between mere collective rights and full-blown group rights.[87] Group rights, in the definition of Peter Jones, pertain to groups and can only be effectuated by groups as a group.[88] This differs, according to Jones' account, from rights jointly held by a group of individuals.[89] Therefore, in order to be considered a collective rather than a group right, "it must be a right possessed by everyone, so that one set of individuals cannot prevail over another because the former has collective human rights while the latter does not. Collective human rights also must be consistent with whatever other rights we ascribe to human beings."[90] This further distinction explains why the right to peacefully assemble – to stage a protest, for example – is still an individual right which fits with Frick's liberty dimension and the foundation of the modern human rights discourse. Every protesting individual can *for themselves* compel the state through their right. The collective right to peacefully assemble is also consistent with other rights we possess. It is therefore no surprise, as both Vernon van Dyke and Marlies Galenkamp are wont to point out, that every right in the ICCPR which hints at a group entitlement is carefully formulated to reflect that they are emphatically not group rights.[91] We can therefore agree with Patrick Thornberry, who postulates that international law is traditionally hesitant to accord rights to groups, at most seeking to attribute rights to the individuals who make up a group.[92]

There is an odd duck out there, though, and this is the right to self-determination.[93] Through using one's imagination, it might be possible to

[87] Frick, *Human Rights and Relative Universalism*, 26.
[88] Jones, "Human Rights, Group Rights, and Peoples' Rights," 82.
[89] Ibid., 94.
[90] Ibid., 93.
[91] Dyke, "Collective Entities and Moral Rights," 24–25; Galenkamp, *Individualism versus Collectivism*, 43–45.
[92] Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), 385; Galenkamp, *Individualism versus Collectivism*, 45.
[93] Dyke, "Collective Entities and Moral Rights:," 25–26. Other possible candidates, like article 27 ICCPR and correspondingly article 30 CRC, are – in my opinion – formulated

reduce this right to another collective right by stressing the 'self' in the right in self-determination.[94] However, this right is generally deemed a right of peoples and the UN-Committee on Human Rights has declined to consider individual complaints under the possibilities for appeal in the first protocol to the ICCPR.[95] Nonetheless, there remain contra-indications, which point to an individual aspect of the right to self-determination. For instance, in one UN fact-sheet concerning human rights, it was suggested that the right to self-determination would at a minimum entail that all members of a people enjoy the other fundamental rights codified in the ICCPR.[96] And the UN-Committee on Economic, Social and Cultural Rights has indicated that it might be more lenient with similar claims under the ICESCR.[97] All in all, we can view the right to self-determination, for the time being, as the first group right which is codified in enforceable rights catalogues. Therefore, one can consider the right to self-determination a forerunner of the proposals for a third generation of group rights.[98] In actual state practice, this right is hardly relevant with regard to the subject of this work, discrimination in the relationship between citizens, as it mostly concerns the plight of (formerly) colonized peoples against mistreatment by the state.[99] However, this right does present a departure from the double foundation of the modern human rights discourse, and thus from the liberal attachments which that foundation can be said to reflect. I shall treat the dilemmas which come with such departures, existent and suggested, when I discuss the proposed third generation of rights below.

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as individual rights. Though one could argue, as Jeremy Waldron does, that such rights do share a similar, communitarian world view, see: Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," *University of Michigan Journal of Law Reform* 25, no. 3 (1992): 758, 780. See also: Galenkamp, *Individualism versus Collectivism*, 43.

[94] Dov Ronen, *The Quest for Self-Determination* (New Haven: Yale University Press, 1979), 8, 53, 59.

[95] James Summers, "The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right," *New England Journal of Public Policy* 31, no. 2 (2019): 1.

[96] Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 15 (Rev. 1), Civil and Political Rights: The Human Rights Committee*, May 2005, 4, 7.

[97] Chapter II, section 13, note 86; Summers, "The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right," 3, 6.

[98] Frick, *Human Rights and Relative Universalism*, 78, note 19.

[99] Galenkamp, *Individualism versus Collectivism*, 46–47.

THE SECOND GENERATION OF RIGHTS

For now, this short detour to determine the difference between collective rights and group rights, allows us to appreciate the currently existing enforceable rights catalogues as being almost solely comprised of strictly universal and individual fundamental rights – even if some of these rights do pertain to collective affairs. Thus we arrive at the second generation of rights. As a result of the similar theoretical underpinnings of all enforceable rights catalogues, it is frankly a rather difficult task to try and distinguish between the two generations of rights within the treaties themselves. The second generation encompasses, as said, economic, social, and cultural rights. However, the aforementioned ICERD – which is mostly seen as a first generation treaty – also concerns economic, social, and cultural matters.[100] The text of the ICCPR, in addition, shows us the "natural interdependency" of both generations of rights, "offering independent protections for some fundamental economic, social, and cultural rights such as the right to join trade unions."[101] Let us therefore first examine the similarities between the second generation of rights and the preceding generation, before we move on to the differences.

In the footsteps of the first generation of rights, these fundamental rights are also closely connected to the concerns of liberalism.[102] The second generation of rights likewise obligates states to facilitate the individual and their life plan, in addition to protecting them against abuses of power. With the second generation this protection predominantly concerns the power of fellow citizens, including groups and other private associations. However, the first generation of rights can, as we saw, also be said to play a role in this regard. Such observations on the two generations of rights,

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[100] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2018), 364–91.
[101] Martha Fineman, "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality," *Boston University Law Review* 92, no. 6 (2012): 1745.
[102] Fawcett, *Liberalism*, 28–29; Ishay, "What Are Human Rights?," 360, 363–66. Social, economic, and cultural concerns are especially prioritized within the New Liberalism-movement, see: Brian Barry, "How Not to Defend Liberal Institutions," *British Journal of Political Science* 20, no. 1 (1990): 3; Michael Freeden, *The New Liberalism: An Ideology of Social Reform* (Oxford: Oxford University Press, 1986); Fawcett, *Liberalism*, 186.

the treaties shared between them, and their comparable theoretical underpinnings, led Henry Shue to argue that many of the fundamental rights belonging to the second generation should be viewed in the same vein as the first generation. They also compel the state parties to refrain, to protect, and to fulfill.[103] In 2000, Shue's view was – to a degree – confirmed in General Comment no. 14 of the UN-Committee on Economic, Social, and Cultural Rights.[104] Following the line of thinking of Shue and the UN-Committee, the distinction between the two generations of rights might appear merely gradual. Treaties like the ICESCR just relate to a relatively larger degree to economic, social, and cultural rights, instead of civil and political rights. Having said that, in practice there do emerge two important differences between the codified civil and political rights, on one side, and the enshrined economic, social, and cultural rights, on the other.

These two differences mainly concern the phrasing and enforceability of the second generation of rights. In contrast to the first generation of rights, the second generation is formulated and interpretated more generally. As such, the second generation of rights is often considered to be more akin to a promise or a policy goal. Furthermore, these rights often lack "requirements for immediate compliance by all states, as well as mechanisms for enforcement."[105] Just as the commitment to the first generation of rights was a political choice, this secondary position of economic, social, and cultural rights – maintained in spite of UN-documents, such as the aforementioned General Comment – is thoroughly political.[106]

THE PROPOSED THIRD GENERATION OF RIGHTS

Notwithstanding these two key differences, the similarities between the first two generations amount to one big difference with the proposed third

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[103] Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1980), 5–9, 158–59; Nieuwenhuis, Den Heijer, and Hins, *Hoofdstukken Grondrechten*, 26, 146.
[104] ICESCR General Comment no. 14 (2000) on article 12 (The Right to the Highest Attainable Standard of Health), par. 33.
[105] Gordon, "The Concept of Human Rights," 696, 709–10.
[106] Beetham, "What Future for Economic and Social Rights?," 41; Gordon, "The Concept of Human Rights," 693, 717; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press, 2018), xi–xii.

generation of rights.[107] Both the first and the second generations of rights fit in the template of Cassin's temple. These rights are universal as well as individual in nature, and therefore fit a conceivable liberal interpretation of the demands of liberty, equality, and dignity. The individual is the principal subject and they are protected against unchecked power, whether this power is wielded by public associations, such as the state and societal institutions; other individuals; or groups and assorted private associations.[108] The phrasing and common interpretation of the second generation of rights may therefore deviate on the whole from the strictly enforceable entitlements within the first generation, and gravitate more towards policy goals for the general population; but these rights arguably still adhere, at least in theory, to the individual as the subject of fundamental rights.[109]

The proposed third generation of rights, that being group or solidarity rights, presents a more radical departure from the heretofore accepted rights discourse.[110] With my discussion of Jones' distinction between collective and group rights, I showed that the first and second generation rights are perfectly capable of tackling both individual and collective matters without resorting to group rights.[111] In addition to peaceful assemblies, we can think of the protection against being subjected to discrimination as part of a group. This still constitutes a right which individuals can compel states to upheld.[112] The third generation, as we saw with the right to self-determination, applies to groups as groups.[113] In this way,

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[107] Philip Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?," *Netherlands International Law Review* 29, no. 3 (1982): 307.

[108] Jones, "Human Rights, Group Rights, and Peoples' Rights," 81–82; Fawcett, *Liberalism*, 399; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002), 210.

[109] Nieuwenhuis, Den Heijer, and Hins, *Hoofdstukken Grondrechten*, 35.

[110] Carl Wellman, "Solidarity, the Individual, and Human Rights," *Human Rights Quarterly* 22, no. 3 (2000): 639; Jones, "Human Rights, Group Rights, and Peoples' Rights," 95. One could argue that with this third generation of rights, the value of fraternity remerges from its aforementioned relative obscurity, see: Galenkamp, *Individualism versus Collectivism*, 31–32.

[111] Jones, "Human Rights, Group Rights, and Peoples' Rights," 82.

[112] Galenkamp, *Individualism versus Collectivism*, 68. For an in-depth treatment of this matter, see: Jones, "Human Rights, Group Rights, and Peoples' Rights," 90–93.

[113] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 72–73.

theorists who promote these solidarity rights, aim to solve a perceived deficit in the modern human rights discourse: the importance of community and communal challenges for a worthwhile human life.[114] As such, the third generation of rights would not primarily concern states and individuals, but a varying roster of groups and their obligations.[115] Common examples are the right to peace and the care duties that should be imposed on people alive today on behalf of those who are yet to come.[116] These rights are group rights in the sense that they are not "reducible to the several rights of the individual members of these groups."[117] In this regard they differ from the aforesaid rights to peacefully assemble and to be protected against discrimination.[118] Despite this divergence, the proposals for a third generation of rights could, at first glance, be appraised as to befit the evolution of the modern human rights discourse in practice – as some have perceived it, that is. To reiterate, that this discourse went from strictly delineated individually enforceable rights, through seemingly more general policy goals – which lacked such clear aim and enforceability – towards (tentative) group rights without individual claimants or bearers of duties.[119]

Thus I can conclude my discussion of the three generations of rights, also known as Frick's second level of claim entitlements, in a nutshell. What does the aforesaid tell us with regard to my central inquiry into discrimination, the individual, and the foundation of justice? The first two generations of rights still adhere to the individual and universal foundation of the temple of Cassin, even though their contents are not necessarily engendered by this foundation. However, these contents do correspond with a liberal interpretation of the demands of the three values of liberty,

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[114] Karel Vašák, "Pour une Troisieme Génération des Droits de l'Homme," in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Cristophe Swinarski (The Hague: Martinus Nijhoff, 1984), 838; Galenkamp, *Individualism versus Collectivism*, 33–37, 72.

[115] Wellman, "Solidarity, the Individual, and Human Rights," 644; Galenkamp, *Individualism versus Collectivism*, 39.

[116] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 72.

[117] Wellman, "Solidarity, the Individual, and Human Rights," 644; Vašák, "Pour une Troisieme Génération des Droits de l'Homme," 838; Jones, "Human Rights, Group Rights, and Peoples' Rights," 82.

[118] Nieuwenhuis, Den Heijer, and Hins, *Hoofdstukken Grondrechten*, 39.

[119] Jones, "Human Rights, Group Rights, and Peoples' Rights," 86–88.

equality, and dignity, including – but not limited to – liberalism's concerns with the individual and power.[120] Fundamental rights, such as the right to be protected against discrimination, deliver us from the power of both public and private associations, while simultaneously protecting us against oppression as a professed or assumed member of the latter collectives.[121] The haphazard institutional attention to the second generation of rights, however, brings up the question whether these rights are actually available to all.[122] The proposed third generation of rights, by extension, jeopardizes the foundation of the modern human rights discourse itself, as group rights do not fit the universal and individual characterization that defines the fundamental rights within this human rights framework.[123] These issues fit in with broader and widely discussed developments associated with the modern human rights discourse, both in theory and in practice. The three developments that I previously subsumed under the header human rights overreach are arguably the most relevant to this work.

14.
Human Rights Overreach

The current popularity of rights language and the accompanying *disputationes* have had the effect that "if one is to believe the current political rhetoric, almost all beings seem to have rights to nearly everything."[124] And the hitherto described trajectory of the modern human rights discourse does seem to lead to some more nuanced version of this conclusion. Whereas the modern human rights discourse first started out

[120] Loughlin, *Foundations of Public Law*, 312, 318–19; Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge: Harvard University Press, 2015), 37, 55, 119; McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," 660, 662–63.
[121] Gopnik, *A Thousand Small Sanities*, 186; Jones, "Human Rights, Group Rights, and Peoples' Rights," 81–82.
[122] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 406.
[123] Frick, *Human Rights and Relative Universalism*, 25–26.
[124] Galenkamp, *Individualism versus Collectivism*, 56; Koskenniemi, *The Politics of International Law*, 156.

as a humble temple, through the previously elaborated first two generations of rights it has increasingly become a bona fide maze of halls, lodges, and chambers, some grand and widely accessible, others dusty and tucked away. During this expansion, the previously elaborated troubled relationships between liberalism and democracy, as well as between the liberal inspirations of the modern human rights discourse and the enforcement of the codified fundamental rights, took the practical shape they have today. Those of the ensuing developments that are of our concern have already been encapsulated with the phrase human rights overreach. As said above, these developments conceivably play an important part in the indeterminacy of the duties and the limitations that liberal states have relating to safeguarding our fundamental rights in general, and opposing discrimination in particular.[125] A confrontation with these issues is therefore needed, before I move on – in the next chapter – to the branch of the liberal tree, that will be the bedrock of the theoretical framework with which I will evaluate the three selected Dutch group-based approaches to the protection against discrimination in the second part of this work.

THREE ASPECTS OF HUMAN RIGHTS OVERREACH

To reiterate, my definition of human rights overreach comprises three aspects, corresponding with three developments. These can be summarized as follows: the obfuscation of the political nature of the modern human rights discourse; the partial warranting of the existing rights catalogues; and the seemingly excessive attention to the particular rights plight of some groups. With regard to the first development, it has been observed, by Hurst Hannum amongst many others, that after the inception of the most important rights catalogues, safeguarding the fundamental political qualities of these rights became less of a priority.[126] Political choices regarding the expanding reach of human rights were subsequently obscured by prevalent assumptions regarding the neutrality of the resulting rights catalogues.[127] National politicians could view such issues as to be regret-

[125] Chapter I, section 1; Koskenniemi, *The Politics of International Law*, 157–58.
[126] Hannum, *Rescuing Human Rights*, xvii–xviii.
[127] Beetham, "What Future for Economic and Social Rights?," 48–49.

fully out of their hands, it is a human rights matter after all.[128] This apparent option, to present human rights obligations as an apolitical imposition, has partly been facilitated by the emergence of technocratic organizations charged with overseeing the implementation of these obligations, as we saw earlier.[129] During this process of apoliticization, human rights became less a constraint on the political realm and more a kind of 'moral trump' in policy considerations.[130] Under these circumstances, political questions could be postponed or abandoned by marking them as a human rights obligation. A strange occurrence indeed, as state parties themselves had made the political decision to agree to these obligations in the first place.[131] This had the remarkable effect that, on the one hand, governments presented their human rights obligations as an apolitical imposition, but, on the other hand, they made further and very political decisions regarding these rights. These decisions included the choice to not equally warrant all fundamental rights that could be found in the existing rights catalogues.[132]

The latter choice brings me to the second aspect of human rights overreach. One can discern a tendency to pass over the more general, less monitored, and difficult to compel economic, social, and cultural rights for civil and political rights, contrary to the previously elaborated intention of some UN-documents.[133] This is not a necessity but a political, and thus avoidable, preference.[134] A preference which indicates that the interests of the status quo outrank the economic, social, and cultural betterment of those that are worst off in society, as is envisioned by covenants like the ICESCR.[135] Unsurprisingly, some suggest that this asymmetrical attention

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128 Koskenniemi, *The Politics of International Law*, 133, 149–50.
129 Chapter I, section 10.
130 Gordon, "The Concept of Human Rights," 696; Dworkin, *Justice for Hedgehogs*, 329.
131 Teitel, "Human Rights Genealogy," 314.
132 Ibid., 307; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 72–73; Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 111.
133 John Pratt and Michelle Miao, "From Protecting Individual Rights to Protecting the Public," in *Populism and the Crisis of Democracy – Volume 2: Politics, Social Movements and Extremism*, ed. Gregor Fitzi, Jürgen Mackert, and Bryan Turner (New York: Routledge, 2019), 49–51; Wellman, "Solidarity, the Individual, and Human Rights," 641.
134 Beetham, "What Future for Economic and Social Rights?," 48–49.
135 Pratt and Miao, "From Protecting Individual Rights to Protecting the Public," 47, 60–61.

for the two generations of rights has contributed to current societal rifts.[136] As such, it is not inconceivable that the lack of appreciation for the second generation of rights has added to the disadvantages experienced by those individuals and groups that are commonly denoted as marginalized.

In light of such bleak circumstances, the intentions behind the specialized covenants that address the plight of certain marginalized groups, our third aspect of human rights overreach, are entirely understandable. However, seeing the limited reach of these covenants, it is hard not to hear a faint echo of the allegations – already previewed in the Introduction to this work – that the prevailing human rights framework translates into an antagonistic zero-sum game between societal salient groups, where the interests and plight of some groups irrevocably lose out to others.[137] But can such accusations, that implicitly reference group privileges and ditto rights, survive scrutiny? As this inquiry directly relates to the research project reported in this work, whether group rights can be allotted a place within the modern human rights discourse, it merits some further attention.

THE CASE OF THE SPECIALIZED COVENANTS

In order to decide on this matter, we need to answer two preliminary questions: *Primo*, are the specialized covenants concerning the fundamental rights of certain groups unequivocally group rights – like the proposed third generation of rights? *Segundo*, do these covenants indeed privilege certain groups? I will now treat these two questions in the presented order.

To answer the first question, we have to ascertain the nature of the obligations in the specialized covenants. The obligations in these covenants are often considered to be a reaction to the continuing legacy of the exclusionary tendencies of human rights.[138] Because, after the implementation of the general rights catalogues, it was noticed that under the usual

[136] Beetham, "What Future for Economic and Social Rights?," 58.
[137] Introduction, section 1; Mishra, *Age of Anger*, 12–14, 19, 76; Patrick Deneen, *Why Liberalism Failed* (New Haven: Yale University Press, 2019), 3; Robert Antonio, "Reactionary Tribalism Redux: Right-Wing Populism and De-Democratization," *The Sociological Quarterly* 60, no. 2 (2019): 203–6; Mudde and Kaltwasser, *Populism*, 82.
[138] Chapter I, section 10; Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 109–12; Teitel, "Human Rights Genealogy," 309.

interpretation of these rights, certain groups – whose members can be described as marginalized – lacked the full enjoyment thereof.[139] We already saw that the benefits of fundamental rights are unequally distributed: the politically induced neglect of second generation rights, for instance, can be said to notably affect persons who belong to marginalized groups.[140] A more specific example might be provided by the marginalization of women, which stems from the myriad of formal and informal ways society disadvantages them, and how this shapes their own life plans in spite of their fundamental rights.[141] As a result of these and similar observations, the current plurality of our circumstances became relevant for the universally shared, full and equal enjoyment of our fundamental rights.[142] The international community reacted with an ongoing series of specialized covenants for certain groups. This was not unprecedented, as the aforementioned ICCPR already included article 3, which emphasizes the right of men and women to equally enjoy the rights in that treaty.[143] The specialized covenants do not contain new rights *per se*, but obligate states to interpret the existing rights catalogues in a way which allows the group in question to fully enjoy their rights alongside their fellow citizens.[144] In this way, the covenants re-examine a number of important fundamental rights and make them meaningful to individuals within marginalized collectives. The result of these more specialized obligations for state parties is thus, I would argue, merely the extension of the benefits of already existing and enforceable fundamental rights, such as the right to political participation or protection against discrimination, to those who up until then – due to the

139 Gordon, "The Concept of Human Rights," 724; Mudde and Kaltwasser, *Populism*, 80–81.
140 Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 108–9.
141 Chapter VI; Frick, *Human Rights and Relative Universalism*, 192–207; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 111–66, 252, 282; Shklar, "The Liberalism of Fear," 34.
142 Frick, *Human Rights and Relative Universalism*, 202.
143 Taylor, *A Commentary on the International Covenant on Civil and Political Rights*, 87.
144 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 46; Erwin Dijkstra, "De Coronacrisis Noopt tot Meer Expliciete Aandacht van de Nederlandse Staat voor het VN-Verdrag Handicap," *NTM/NJCM-Bulletin* 45, no. 3 (2020): 377–78.

conventional interpretation of the rights duties of the state and other societal institutions – lacked the full enjoyment thereof. As such, in the end the subject of these fundamental rights undoubtedly remains us all.

I will offer two examples in support for the preceding argument: the fundamental right to political participation for impaired persons and the opposition to the discrimination of women. Most impaired individuals can currently reference the interpretation of the right to political participation, as formulated by the CRPD. This interpretation, among other stipulations, emphasizes that voting booths are to be fully accessible to persons with mental and/or physical impairments – as they should have been accessible to every citizen in the first place.[145] My second example is somewhat more elaborate, as well as better applicable to my focal point in this work, the duties and boundaries of liberal states relating to the opposition to discrimination in the relationship between citizens. With this example, I continue the previously painted picture of the discrimination of women. As we saw above, discrimination has since long been prohibited in general human rights covenants like the ICCPR.[146] However, the duties that were derived from such treaties under the usual interpretation, did not, it was observed, address the discrimination of women satisfactorily.[147] Due to the special challenges women continued to face, even after the implementation of these general covenants, the CEDAW was conceived. This covenant obligates states, for instance, to employ a specific interpretation of the right to be protected against discrimination, to ameliorate those challenges. To summarize these examples: the rights that are covered in specialized covenants still adhere to the universal and individual foundation of the modern human rights discourse, whether they address ableism, sexism, or the plight of other groups whose enjoyment of the selected fundamental rights needs further specifying. Because these rights pertain merely to existent rights obligations that were already codified, and prescribe only a different interpretation of these obligations, in order to provide their full

[145] Dijkstra, "De Coronacrisis Noopt tot Meer Expliciete Aandacht van de Nederlandse Staat voor het VN-Verdrag Handicap," 378–79; Dijkstra, "Het Stand Still-Beginsel en de Uitvoering van het VN-Verdrag Handicap," 23.
[146] Introduction, section 1, note 12.
[147] Frick, *Human Rights and Relative Universalism*, 192–207.

enjoyment to those who earlier lacked this. In essence, these specialized covenants do not comprise new or extra rights for some groups but extend the duties engendered by already existing fundamental rights to everyone.

It is this observation, that the obligations in covenants like the CRPD and the CEDAW are a mere interpretation of the fundamental rights in already effective rights catalogues, which explains why the recipient groups are not privileged – the second question on these specialized covenants, that I set out to answer. Writing on the topic, Marie-Luisa Frick states that "[t]he idea of human rights is not incompatible with rights that are equally granted, yet (sometimes) shaped distinctly for different people."[148] Thus, contrary to the aforementioned claims that there is an apolitical imposition of rights and that certain groups are privileged through the currently prevailing human rights framework, these covenants in fact affirm and reinforce the earlier political choice for the individual characterization and universal applicability of the fundamental rights within the modern human rights discourse.[149] These covenants are part of a necessary politics of difference, which aims to provide the full enjoyment of our fundamental rights to persons who lacked such enjoyment due to institutional and societal marginalization.[150] The charge of human rights as a privilege for some groups can therefore be countered. Because these covenants just present a more thorough commitment to the rights of the individual.[151]

CAUSES FOR CONCERN

My refutation of the charge of group privileges through these specialized covenants notwithstanding, the three aspects of human rights overreach remain a cause for concern. And all three arguably have a disproportionate effect on those persons who just now come into a semblance of the full enjoyment of their rights. The presentation of human rights obligations as

148 Ibid., 45; Barry, *Culture & Equality*, 112.
149 Karima Bennoune, "In Defense of Human Rights," *Vanderbilt Journal of Transnational Law* 52, no. 5 (2019): 1212.
150 Kymlicka, *Contemporary Political Philosophy*, 265, 300; Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2011), 3.
151 Ian Shapiro and Will Kymlicka, "Introduction," in *Ethnicity and Group Rights*, ed. Ian Shapiro and Will Kymlicka (New York: New York University Press, 2000), 6–7.

an apolitical imposition mistakes the political nature of fundamental rights and this can contribute to the loss of public support for important emancipation projects.[152] And partially safeguarding fundamental rights – accompanied by the notion that some rights, particularly second generation rights, are 'soft' rights – is likewise a political choice. A choice that corrodes the function of fundamental rights as our protection against inhumanity. A protection which we previously denoted as especially important for marginalized groups.[153] Even the third development, attention through specialized covenants for groups whose members lack the full enjoyment of their rights, has a darker side. As this attention is not systematically implemented, it seems to be only groups with a modicum of influence and political clout, whose representatives are adept at navigating the labyrinths of national and international bureaucracies, who might obtain this form of justice.[154] Worse still, the emancipation of some groups in this haphazard manner might come at the price of neglecting questions of intersectionality – which pertain to the heterogeneity within and outside groups – or may even further the marginalization of other groups who lack the full enjoyment of their rights.[155] I already referred to the neglected plight of persons who identify on the spectrum of LGBTI+, as their international legal emancipation has yet to come to full fruition.[156] At this place, it is fitting to give a more detailed illustration. An example which can, I think, illustrate the dark side of the partial attention to the plight of marginalized groups, is the still perilous position of trans rights. It wasn't until mid-2019 that the UN World Health Organization got rid of their identification of trans persons as having a 'mental disorder'.[157] Furthermore, the emanci-

[152] Bennoune, "In Defense of Human Rights," 1210–11.
[153] Ibid., 1211; Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 118; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 72–73.
[154] Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 111, 116, 123; Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016), 44, 139.
[155] Baxi, "Voices of Suffering, Fragmented Universality, and the Future of Human Rights," 108, 118–19; Minow, *Not Only for Myself*, 19, 39, 82; Alison Phipps, *Me, Not You: The Trouble with Mainstream Feminism* (Manchester: Manchester University Press, 2020), 152.
[156] Introduction, section 3.
[157] Manuel Rodríguez, Maria Granda, and Villaverde González, "Gender Incongruence

pation of trans persons has been presented as endangering another important, as well as historically and recently often overlooked emancipatory project: women's safety.[158] This example and the preceding observations corroborate my earlier statement that the current, less than systematic emancipation of marginalized groups through a group-based approach to fundamental rights in rights covenants and national laws, is thoroughly political and runs the risk that toleration precedes legal emancipation.

To summarize the previous points: the obfuscation of the political nature of our fundamental rights, the partial effectuation of existent rights catalogues, and the haphazard nature of the attempts to furnish marginalized groups with the full enjoyment of their rights, all hurt the defense of the universal and individual characterization of those rights. And this characterization is – as we have previously seen through our examination of their liberal roots – an indispensable safeguard for all the downtrodden.[159]

15.
Politics of Contestation

And this brings us to the need for a return to the source, a branch of the tree of liberalism. Because, even if we refute the attacks on the modern human rights discourse, the three aspects of human rights overreach still give the augurs in Cassin's temple a lot of leeway to interpret the temple's foundations and the values that sustain it. As a result, we do not possess undisputed criteria to select all the political rights that should, at the very minimum, be translated into legal rights in enforce-

Is No Longer a Mental Disorder," *Journal of Mental Health & Clinical Psychology* 2, no. 5 (2018): 8.

158 Phipps, *Me, Not You*, 30. Evidence from several countries shows that there is no empirical basis for the widely publicized fear of more violence in women-only spaces through the emancipation of trans persons, see: Ibid., 149. Furthermore, we should not ignore the current societal tendency to hold individuals, who are assumed to belong to a marginalized group, responsible for the conduct of other members of these groups, solely because they are ascribed certain shared personal characteristics. This observation is important with regard to trans persons, but that tendency also affects women who were assigned this gender at birth, see: Chapter IV, section 25; Chapter VI, section 33.

159 Kymlicka, *Contemporary Political Philosophy*, 251–52; Cliteur and Ellian, *A New Introduction to Jurisprudence*, 72; Heinze, *Hate Speech and Democratic Citizenship*, 44, 139.

able rights covenants, constitutions, and national laws, or to determine the manner in which this should happen. Nor is there consensus on the standard of enforcement to which the state and other societal institutions can subsequently be held to in practice.[160] What is at stake here will become more clear if we return to the subject of this work and ask ourselves whether the hitherto established foundation of justice, that being fundamental rights, allows for a group-based approach to discrimination. Surprisingly, neither humanism nor the general understanding of liberalism and the modern human rights discourse, are conclusive. Despite the sheer uncontested elevated position of the individual as the preferred rights subject, there already exists a codified group right, the right to self-determination. And group-based approaches to the right to be protected against discrimination are neither prohibited nor controversial in most liberal states. In other words, there is still ample room for the politics of contestation.[161]

The causes for this lack of clarity have all been discussed in the foregoing. First among them the observation that the three aspects of human rights overreach have, to some extent, obscured the foundations of the modern human rights discourse. The liberal attachments and the genesis of the modern human rights discourse do suggest, though, that some fundamental rights are inevitable – arguably the classic civil and political rights, and the more basic economic, social, and cultural rights – and that these should be enjoyed by us all. At a minimum, the universal and individual implementation and enforcement of some sort of a core of fundamental rights is therefore indispensable.[162] And such a selection, at least as a temporary necessity, is not inconceivable. As the phenomenon of colliding rights showed: the realization of human rights is not an exact science.[163]

But to do this without proper guidelines, runs the aforementioned risk to haphazardly advantage the rights plights of some and correspondingly neglect others. As economic, social, and cultural rights already get the short end of the stick, their position would likely be even more precari-

[160] Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 2017), 331–33.
[161] Frick, *Human Rights and Relative Universalism*, 16–17.
[162] Ibid., 3–6.
[163] Introduction, section 3; Frick, *Human Rights and Relative Universalism*, 7.

ous. And with their position, the societal position of those who need them the most likewise worsens. In addition, the fundamental rights that are in practice often realized as group entitlements, like the protection against discrimination, would probably remain so. Consequently, to select a minimum of obligations relating to fundamental rights for liberal states without a solid theoretical substantiation, might present a return to state-sanctioned privileges and disadvantages, as well as some sort of group rights.[164]

Thus, a haphazard approach regarding the selection of those rights obligations that liberal states should at least be attentive to for all individuals, does also not guarantee the commonly shared full enjoyment of our most pertinent fundamental rights, including a comprehensive protection against discrimination. Ultimately, we could end up in the same boat as revolutionary France, where this chapter began; with a nominally universal and individual human rights framework, which is nonetheless exclusionary. Therefore, I will now present a liberalism of fear as a guideline for the criteria for a tentative core of fundamental rights that should be codified and enforced – for everyone and to at least a standardized minimum.

[164] Ibid., 42.