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

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Chapter IV

Discrimination and the *Rechtsstaat*

The *Rechtsstaat* – Five Characteristics – A Dynamic-Cultural Approach – Two Relationships, Three Spheres – What is Discrimination?

21.
The *Rechtsstaat*

In the foregoing, I established that the foundation of the modern human rights discourse is universal and individual in nature, and that this is in part due to the incorporation of the central tenets of liberalism. As such, there is a twofold foundation that carries this human rights framework, universalism and individualism, in addition to the three values that inspired it, that being liberty, equality, and dignity. However, both liberalism and the modern human rights discourse have been interpretated in ways that (partly) forego these observations. We saw, for instance, that most liberal states do not warrant all fundamental rights equally or even for everyone. As a remedy, I proposed that our universally shared vulnerability could be the *telos* on which to found an interpretation of liberalism that would ensure the enjoyment of (a core of) our fundamental rights to *at least* a sufficient minimum for every individual. The practical elaboration of this idea, to secure such a lower limit of rights protection for all of us, was anchored in the guarantee of a dignified life and took shape through the capabilities approach. The branch of the liberal tree that emerged through the amalgamation of these building blocks, a liberalism of fear, is the framework that I will employ in my case studies of the three selected Dutch group-based approaches to discrimination in the coming chapters.

In this chapter I aim to pave the way for these case studies through a discussion of the Dutch *Rechtsstaat*, including its assurances concerning

the central tenets of liberalism and the foundation of the modern human rights discourse. I shall first sketch the general history of the *Rechtsstaat*, where it differs from the Rule of Law, and its relationship with (group) privileges and disadvantages. Subsequently, I survey the five characteristics of the Common Constitutional Pattern and the manner in which they are implemented within the Dutch *Rechtsstaat*. These characteristics indicate, to an extent, the adoption in the Netherlands of the central tenets of liberalism and the obligations of the modern human rights discourse. Though such characteristics in and of themselves do not offer a solution to the previously described tendency in most liberal states, such as the Netherlands, to selectively warrant fundamental rights or safeguard them only for some. Because these five characteristics, as well as the fundamental rights that are protected through this structure, still require interpretation. As such, a liberalism of fear remains useful. Closing out this chapter, I look at one of these rights in relation to the Dutch *Rechtsstaat*: the right to be protected against discrimination. These last considerations will constitute our transition to the second part of this work and the case studies.

THE RECHTSSTAAT *AND THE RULE OF LAW*

The *Rechtsstaat* already made an appearance when I explained the currently prevalent liberal approaches to state action in general and to the protection against discrimination in particular. Notwithstanding the commitment of liberal states to either the *Rechtsstaat* or the Rule of Law, the anatomy of these approaches appeared to present flaws. Including, but not limited to, a propensity for group-based approaches to state tasks.[1] But there is more to the story of the *Rechtsstaat* and the position of the individual therein than these previous observations allowed for. The *Rechtsstaat* does *par excellence* embody the liberal concerns with the individual and power, at least in principle. It therefore has the potential to provide liberal states with a basis for constitutional models that fit well with the foundation of the modern human rights discourse. As such, there are reasons to be critical if the Dutch *Rechtsstaat* employs some sort of group-based approach, as I

[1] Chapter III, section 16.

am in the next chapters. The substantiation of these comments requires me to return to the differences between the Rule of Law and the *Rechtsstaat*. A brief look at the Rule of Law provides an astute introduction into the more advantageous position of the individual within the *Rechtsstaat*.[2]

The *Rechtsstaat* and the Rule of Law may be the two main implementations of liberalism in contemporary liberal states, but the *Rechtsstaat* cannot be considered a direct equivalent of the Rule of Law.[3] This disparity goes beyond the adherence to mere liberal institutions as opposed to a larger amount of state tasks, which I discussed in the foregoing. The Rule of Law and the *Rechtsstaat* arguably emerged in different constitutional traditions and their political histories are not entirely similar.[4] The Rule of Law, in the classic formulation of Albert Dicey, has three central features: regular law trumps arbitrary power; citizens are equal before the law; and a constitution, which enshrines the rule of law, is the unavoidable answer to the demands which stem from the rights of individuals.[5] As a contested concept, the Rule of Law has acquired many understandings, both before and after these theoretical observations by Dicey. And all too often this phrase has been misused.[6] However, the constraints of this work force me to generalize, as I merely aim to illustrate the contrast with the history and current iterations of the *Rechtsstaat*. Therefore, I continue with a stripped down but nonetheless very influential understanding of the Rule of Law.[7]

Two differences between the *Rechtsstaat* and this understanding of the Rule of Law are relevant for this chapter. These pertain to the law and the role of fundamental rights. The usual elaboration of the Rule of Law

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[2] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 92.

[3] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 314; Erik Jurgens, "Het Verschil tussen Rechtsstaat en Rule of Law," *Nederlands Tijdschrift voor de Mensenrechten/NJCM-Bulletin* 36, no. 8 (2011): 867–72.

[4] Loughlin, *Foundations of Public Law*, 312–13. For a succinct overview of the different trajectories of the Rule of Law and the *Rechtsstaat*, see: Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford: Oxford University Press, 2016), 70–81.

[5] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1915), 198–99, 402, 406; Grimm, *Constitutionalism*, 72.

[6] Judith Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology*, ed. Allan Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), 1.

[7] Tamanaha, *On the Rule of Law*, 92.

emphasizes a more thin and formal idea of the law, while the *Rechtsstaat* has more substantial requirements. In addition, *Rechtsstaten* generally envision a more integral role for fundamental rights and the adjacent obligations than many interpretations of the Rule of Law allow. Such extensive state responsibilities, besides the restraints engendered by these rights, are perceived as essential to the contemporary *Rechtsstaat*-tradition. Meanwhile, rights can by and large be said to play a more modest role, both in content and scope, within most liberal states that adhere to the Rule of Law.[8] This is not to say that the Rule of Law does not aim to further the interests embodied by these rights. It evidently does, but more hands off.[9] These divergent characterizations of the Rule of Law and the *Rechtsstaat* may be rough generalizations, but they are broadly accepted in legal-theoretical circles and have been tentatively acknowledged by authorities like the Council of Europe.[10] But what do these differences entail in practice?

For the amount of state tasks, the preceding two characterizations translate in the earlier introduced distinction between liberal states that primarily focus on the existence of institutions and those that envision a larger package of state responsibilities.[11] They also account for a disparity in the manner in which the position of individuals versus groups is guaranteed. Because, the more stringent demands of laws and more elaborate role for fundamental rights within the *Rechtsstaat*, as shown below, offer extra protection to individuals. This happens through the expanded obligations of the state, as well as the greater restriction of the power of groups and associations with regard to their members, both actual and assumed.[12]

One last note on the Rule of Law is imperative before I move on

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[8] Joseph Raz, *The Authority of Law: Lessons in Law and Morality* (Oxford: Oxford University Press, 1979), 211, 221; Caroline Raat, "Stories and Ideals," in *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics*, ed. Wibren van der Burg and Sanne Taekema (Brussels: P.I.E.-Peter Lang, 2004), 98, n. 2; Loughlin, *Foundations of Public Law*, 332–41, 356.

[9] Tamanaha, *On the Rule of Law*, 92, 113.

[10] Jurgens, "Het Verschil tussen Rechtsstaat en Rule of Law," 871.

[11] Chapter III, section 16.

[12] Grimm, *Constitutionalism*, 52, 84–87; Loughlin, *Foundations of Public Law*, 431; Joan Tronto, *Caring Democracy: Markets, Equality, and Justice* (New York: New York University Press, 2013), 72–76; Nicholas Barber, "The Rechtsstaat and the Rule of Law," *The University of Toronto Law Journal* 53, no. 4 (2003): 444.

to the extra guarantees in this area within most iterations of the *Rechtsstaat*. As the Rule of Law is a house with many rooms, it should not be surprising that some of the proposed interpretations of this concept come a lot closer to the *Rechtsstaat* than our stripped down understanding.[13] The following would therefore also be applicable if such interpretations would ever become more influential in the liberal states that adhere to the Rule of Law.

A BRIEF HISTORY OF THE RECHTSSTAAT

Surveying the development of the *Rechtsstaat* will show why this implementation of liberalism gives contemporary liberal states more opportunities to ensure that individuals can fully enjoy their fundamental rights, as well as receive protection against groups and associations that could inhibit this enjoyment. The latter is partly achieved through the former. Because an individual who can explore certain capabilities of their own accord is more resilient against the pressure of the groups to which they believe to belong or among which they are counted by others.[14] But the fact *that* states can do more also makes the state an arguable greater threat to the individual.

This tension is a common thread throughout the development of the *Rechtsstaat*. Conceived at the end of the 18th century and gaining currency in the following decades, the idea of the *Rechtsstaat* concerned the limitation of the power of the state through fundamental rights guaranteed by those states.[15] Within the context of the German states, which lacked the revolutionary backdrop of France, America, or even Cromwell's Britain, the idea of the early *Rechtsstaat* could be characterized as "an attempt to reconcile modern claims of liberty with traditional authoritarian gover-

[13] Shklar, "Political Theory and the Rule of Law," 9.
[14] Chapter III, section 20; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 86, 90.
[15] Luc Heuschling, *État de Droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002), 29; Paul Tiedemann, "The Rechtsstaat-Principle in Germany: The Development from the Beginning Until Now," in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, ed. James Silkenat, James Hickey, and Peter Barenboim (Cham: Springer, 2014), 172; Ernst-Wolfgang Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law,* trans. Jim Underwood (New York: Berg, 1991), 49–50; Grimm, *Constitutionalism*, 79.

ning arrangements."[16] During the 18th and 19th century the latter arrangements appeared to have the last laugh, though. Despite undeniable progress with regard to the rights of some, many groups saw these rights withheld. On account of their descent, for instance.[17] As another exponent of the exclusionary early trajectory of human rights, the rights allotted by early *Rechtsstaten* thus included some societal salient groups and not others. Be that as it may, the idea of the *Rechtsstaat* did theoretically put the individual center stage from its inception. Because it envisioned the limitation of the state to mean a definitive end to state-sanctioned privileges, be it of individuals or groups.[18] To illustrate this point, we can look to Robert von Mohl, an important 19th century proponent of the *Rechtsstaat*. Von Mohl contended that the *Rechtsstaat* comprised three elements: governmental order was the property of free, equal, and rational individuals; the aims of this order should encompass the protection of these individuals, especially their security and property; and the state embodying this order had to be rationally organized, which included government through the law and the protection of basic civil liberties.[19] These elements already contain the kernel of both the attention to individuals and the common view on the necessity of constraining the state in contemporary *Rechtsstaten*. Additionally, the French distinction between *l'État Légal* and *l'État de Droit*, roughly the Rule of Law and the *Rechtsstaat*, found its way into the debates concerning the concept of law and the duties of the state within the *Rechtsstaat*.[20] Through this cross-fertilization, the position of the individual and their flourishing became even more pronounced. Consequently, the trappings of the *Rechtsstaat*, at least in theory, were simultaneously intended to limit the state and to impose a series of duties on it. These duties mostly aimed at ensuring the enjoyment by each and every individual of their rights.[21]

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[16] Loughlin, *Foundations of Public Law*, 318; Grimm, *Constitutionalism*, 70.
[17] Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007), 183–85.
[18] Grimm, *Constitutionalism*, 71, 81. For the influence of this vision, see: Pankaj Mishra, *Age of Anger: A History of the Present* (London: Penguin Books, 2017), 12–13.
[19] Böckenförde, *State, Society and Liberty,* 49–50.
[20] Loughlin, *Foundations of Public Law*, 322; Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no. 4 (2008): 660–61.
[21] Loughlin, *Foundations of Public Law*, 431; Grimm, *Constitutionalism*, 52, 84–87.

After the horrors of the Second World War, it was this vision for fundamental rights – a guarantee for human flourishing as provided by the state and other societal institutions – that became the blueprint for political structures within the contemporary *Rechtsstaat*-tradition; especially in continental western Europe.[22] Through the subsequent constitutional models and the fundamental rights provided therein, a certain amount of freedom was assured: freedom from abuses of power, both by institutions and private actors, such as groups and associations.[23] As said, such assurances also enable individuals who pursue their goals through these groups and associations.[24] However, flourishing requires more than constraining those forces that would thwart it. This insight has prompted liberal states within the contemporary *Rechtsstaat*-tradition to support their citizens as much as protecting them. In their view, fundamental rights surpass constraints and also entail obligations. But there is more to the *Rechtsstaat* than rights.

MORE THAN RIGHTS

In the last two paragraphs, I made the effort to carefully distinguish the confinement of the state from the tasks states have relating to our fundamental rights. I did this because the current section presents a relative break with the preceding chapters. It diverts from the focus on fundamental rights that characterized our trajectory until now. We already saw that the central tenets of liberalism cover more than just rights.[25] And this is also evident in the reception of the *Rechtsstaat*. Liberal states in the contemporary *Rechtsstaat*-tradition, as Robert von Mohl erstwhile advocated, confine the state beyond just rights. Because, if a constitutional model aims to provide *effective* fundamental rights, it also has to put limits on the

[22] Hunt, *Inventing Human Rights*, 176–77, 183; Grimm, *Constitutionalism*, 84–85; Michael Freeden, *Liberalism: A Very Short Introduction* (Oxford: Oxford University Press, 2015), 2; Marie-Luisa Frick, *Human Rights and Relative Universalism* (London: Palgrave MacMillan, 2019), 8; David Beetham, "What Future for Economic and Social Rights?," *Political Studies* 43, no. 1 (1995): 51.
[23] Peter Jones, "Human Rights, Group Rights, and Peoples' Rights," *Human Rights Quarterly* 21, no. 1 (1999): 81–82.
[24] Chapter II, section 15; Frick, *Human Rights and Relative Universalism*, 26, 56–74.
[25] Chapter I.

state, organize oversight, and regulate the conduct of the state with respect to guaranteeing those rights. And this should be no surprise. In the foregoing we saw time and again that the mere existence of fundamental rights does not guarantee their realization, nor their universal and individual characterization. Even though state duties, limits on state action, and fundamental rights protection continue to be intrinsically linked, the constitutional models that are mostly followed by liberal states in the *Rechtsstaat*-tradition can therefore be said to encompass several characteristics that compel the state but which do not *strictly* concern our fundamental rights.

These characteristics are denoted by some with the already familiar phrase Common Constitutional Pattern.[26] This model can also be applied to the Anglosphere, where it is often titled Constitutionalism and roughly consists of the expansion of the local, stripped down conception of the Rule of Law with some of the additional concerns of the *Rechtsstaat*. In this work, though, I apply the characteristics of the Common Constitutional Pattern solely to the *Rechtsstaat*. As this is the implementation of choice in the Netherlands, where the group-based approaches to discrimination that I discuss in the next chapters are employed.[27] In the following section, I will explain the five characteristics of the Common Constitutional Pattern. We shall see that these characteristics, though they seek to guarantee the central tenets of liberalism and the twofold foundation of the modern human rights discourse, leave ample room for (legal) interpretation and thus group-based approaches to state tasks. This room is especially acute with the prevalent perception of the obligations that fundamental rights entail and for whom, when considering the protection against discrimination. In this regard, a liberalism of fear remains necessary as the lower limit which local interpretations of the characteristics of the Common Constitutional Pattern should clear. Such a lower limit, as I will relate more fully below, can serve the purpose of the *Rechtsstaat* as more than a legal framework. That being a dynamic-cultural phenomenon and an ideal to strive for.[28]

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[26] Chapter I, section 7-8; Paul Cliteur and Afshin Ellian, *A New Introduction to Jurisprudence: Legality, Legitimacy and the Foundations of the Law* (New York: Routledge, 2019), 57–59.

[27] Paul Cliteur and Afshin Ellian, *Inleiding Recht* (Deventer: Wolters Kluwer, 2017), 113.

[28] Raat, "Stories and Ideals," 100–101. The same approach can be deployed with the

22.
Five Characteristics

The five characteristics of the Common Constitutional Pattern are one influential way in which liberal states within the *Rechtsstaat*-tradition can guarantee individuals their fundamental rights effectively while protecting them against institutional abuse.[29] These characteristics shall not surprise the attentive reader, as they relate to the concerns of humanism and liberalism.[30] What are these characteristics? They are comprised of: a. the principle of legality; b. the obligation of the state to respect certain fundamental rights; c. the acknowledgement of these rights as higher law and preferably codified as such, for instance in a constitution; d. the entrenchment of such a constitution; and e. the existence of independent oversight with respect to these characteristics.[31] I will now treat these characteristics in more detail, but with an emphasis on the first two. Because legality and rights are crucial for my discussion of the opposition to discrimination within the *Rechtsstaat* in the last section of this chapter.

Let me first address the principle of legality. This principle entails that the state commits itself to the exercise of power solely through the law. Legal rules in this sense "protect citizens from an arbitrary restriction on their behavioral alternatives by the government" in addition to making the government predictable.[32] Within the *Rechtsstaat*-tradition, the principle of legality is often interpreted more expansively. Because its basic formulation does not tell us which kind of rules would qualify as a law.[33] That is to say: the presented notion of legality is regularly expanded with the goal of preventing perfectly legal atrocities. Some of these additional require-

Rule of Law, see: Trevor Allen, "Freedom, Equality, Legality," in *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, ed. James Silkenat, James Hickey, and Peter Barenboim (Cham: Springer, 2014), 155.

[29] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 44–45.

[30] Ibid., 61–62.

[31] Ibid., 44–45.

[32] Ibid., 46; Tamanaha, *On the Rule of Law*, 66; Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law," *Law and Philosophy* 24, no. 3 (2005): 242; Loughlin, *Foundations of Public Law*, 229.

[33] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 46–47.

ments of proper laws have been agreed upon by influential legal thinkers as diverse as Friedrich von Hayek, Frederick Pollock, and Lon Fuller. They concern safeguards for the equality of citizens before the law and – subsequently – before the state. These requirements are primarily the generality and legibility of legal rules.[34] When rules are generally applicable, the order constituted by the law focusses not on one person or some group(s) but on a potentially unlimited class of people.[35] Privileges and other inequalities in the relationship between state and citizen can thus be prevented. The maxim of the legibility of the law, which is frequently called the principle of *lex certa*, means there is only so much room to interpret a rule. As such, it cannot be differentially applied in order to privilege or disadvantage certain citizens, groups, or associations.[36] This is therefore a necessary requirement from a liberal point of view. As it is easy to see how vague or ill-defined rules would still mean unrestricted state power and, as a consequence, the continuing possibility of a privileged position for some and disadvantages for others.[37] These requirements will be treated in more detail shortly, as I discuss where and when a liberal state in the *Rechtsstaat*-tradition can address discrimination in the relationship between citizens.

The second characteristic of the Common Constitutional Pattern entails that the state respects particular fundamental rights. These rights can only be restricted to a certain extent and for compelling reasons, even if there is an appropriate legal basis in place.[38] As such, we have encountered yet another way in which the principle of legality is supplemented. Laws cannot establish any and all policies when rights are involved. Two further aspects of this second characteristic will prove pivotal when I look at the possibilities to oppose discrimination within the *Rechtsstaat*, that being the rights subjects and the difference between rights and help. Due to

[34] Friedrich Von Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 2011), 215–16; Friedrich Von Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt, 1955), 34; Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 39, 46–90; Frederick Pollock, *A First Book of Jurisprudence* (London: MacMillan, 1929), 37.

[35] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 44–47.

[36] Joost Nan, *Het Lex Certa-Beginsel* (The Hague: SDU Uitgevers, 2011), 15–16.

[37] Wolfgang Naucke, *Über Generalklauseln und Rechtsanwendung im Strafrecht* (Tübingen: Mohr, 1973), 14.

[38] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 48–49.

my verbosity in the previous chapters, I can be succinct on the first aspect. Fundamental rights, that we now recognize as the realized entitlements on Frick's second level of rights, should strictly pertain to the individual.[39] As alluded to above, the state cannot, for example, deny a person the freedom of expression or the right to housing because the societal salient group(s) to which they are assumed to belong is/are generally provided.[40] The second aspect that I want to discuss, the difference between rights and help, will be further elaborated below. For the moment, it will suffice to state that rights in the sense of this characteristic are envisioned to be formal and neutral.[41] The possibility to invoke a right *viz.* the state depends on circumstances that are legally defined as relevant and which apply to every citizen.[42] Any person can invoke any right if they fulfill the relevant criteria as determined in the ditto statutes, even if it is of no use to them or goes against their overall interests.[43] Thus, assistance on the basis of a right differs from aid of help in an ordinary sense. Such aid, for example between friends, lovers, or parents, is often wholly or predominantly dependent on circumstances that are irrelevant to the *Rechtsstaat*. In the *Rechtsstaat*-tradition, fundamental rights compel others without "considerations of benevolence and charity."[44] Through this lens, we can understand the difference between rights and privileges.[45] Note that the phrase 'rights', as we saw in Chapter II, is regularly used by scholars and lay persons alike in ways which are alien to the *Rechtsstaat* and the definition utilized in this work. The phrase has at times even been invoked to describe legal relationships that *do* grant privileges and correspondingly disadvantage others.[46]

The last three characteristics will be discussed at a more brisk pace,

[39] Chapter II, section 12.
[40] Chapter II, section 13; Grimm, *Constitutionalism*, 66.
[41] Jerome Shestack, "The Philosophic Foundations of Human Rights," *Human Rights Quarterly* 20, no. 2 (1998): 203; Frick, *Human Rights and Relative Universalism*, 42.
[42] Ibid., 43, 46; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015), 6, 12, 65. More elaborately discussed in Chapter II, section 14.
[43] Joseph Raz, "On the Nature of Rights," *Mind* 93, no. 370 (1984): 208, 213.
[44] Marlies Galenkamp, *Individualism versus Collectivism: The Concept of Collective Rights* (Rotterdam: RFS, 1993), 59.
[45] David Brink, "Mill on Justice and Rights," in *A Companion to Mill*, ed. Cristopher MacLeod and Dale Miller (Chichester: John Wiley & Sons, 2017), 386.
[46] Shestack, "The Philosophic Foundations of Human Rights," 203.

as they are only marginally relevant to the argument presented in this chapter. The third characteristic of the Common Constitutional Pattern, one recalls, requires that the aforementioned fundamental rights are acknowledged as higher law and preferably documented in a constitution. As such, these rights are, fourthly, entrenched. They are usually more difficult to amend or abolish – if at all – even by the democratically appointed legislator.[47] This guarantees, to an extent, the aforesaid second characteristic. Lastly, there should be independent oversight concerning the violation of these constitutionally entrenched fundamental rights and the other confinements of the state, such as the legality principle. In liberal states this oversight has predominantly been entrusted to the judiciary.[48] But there is also a role for national and international technocratic organizations.[49] I will discuss one of these, the Netherlands Institute for Human Rights, below.[50]

The preceding list is of course an approximation. There are many moving parts within a functional *Rechtsstaat* and the label itself has been employed with an impressive versatility.[51] Though one can observe an array of fundamental principles and characteristics which coalesce throughout most definitions of the *Rechtsstaat*.[52] I will give an example to illustrate the latter remark. During my research project, the Dutch Bar Association (*Nederlandse Orde van Advocaten*) published a report on the *Rechtsstatelijkheid* of the programs of political parties for the general election of March 2021. This report applied a mere three main questions. But these questions did arguably cover all five characteristics from the previous paragraphs.[53] In conclusion, the preceding list can be assumed to adequately illustrate why and how the *Rechtsstaat* guarantees the prerequisites of liberalism and the modern human rights discourse, even though other lists are possible.[54]

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47 Cliteur and Ellian, *A New Introduction to Jurisprudence*, 51–55.
48 Ibid., 55–57.
49 Chapter I, section 10; Chapter II, section 14.
50 Chapter VI, section 32.
51 Wim Voermans et al., *Juridische Betekenis en Reikwijdte van het Begrip 'Rechtsstaat' in de Legisprudentie & Jurisprudentie van de Raad van State* (The Hague: Raad van State, 2011), 25.
52 Ibid., 15–17.
53 Willem van Schendel et al., *De Rechtsstaat, een Quick Scan: De Partijprogramma's voor de Verkiezingen van 2021 Rechtsstatelijk?* (The Hague: Nederlandse Orde van Advocaten, 2021), 6.
54 For another example, see: Raat, "Stories and Ideals," 101–2. Caroline Raat employs a

23.
A Dynamic-Cultural Approach

As comprehensive as the preceding list may appear, it nevertheless seems to be wanting. Because these characteristics still require interpretation. Both in general and with regard to specific fundamental rights, statutes, and cases. For example, the degree to which a state is constrained through the principle of legality, depends on what rules are considered legible. And what citizens can expect regarding state support to ensure the full enjoyment of their fundamental rights will, in turn, depend on the perception of these rights. Furthermore, a lot of historically public tasks have been privatized. As a result, many private organizations exercise powers that used to be public, but such organizations do not have to be as strictly deferent to the constraints and requirements of the *Rechtsstaat*.[55] These observations explain the apparent paradox of my endeavor: how can I use the *Rechtsstaat* to evaluate legal practices that have evidently been allowed in many a *Rechtsstaat*, including the Dutch variant? And especially through such an idiosyncratic framework as a liberalism of fear? There has been no international condemnation of the Dutch group-based approach to hate speech. Nor could I find widespread protests by the judiciary and other authorities with regard to past and present affirmative action measures or institutional opinions. These group-based approaches have barely elicited resistance based on the foundational concerns which I hitherto considered inherent to the *Rechtsstaat*. This is arguably because such group-based approaches fit the currently prevalent understanding of the *Rechtsstaat* in the Netherlands. But such a perception can be criticized.

This is why I want to employ the *Rechtsstaat* through what Caroline Raat calls a dynamic-cultural approach.[56] The *Rechtsstaat*-tradition since the Second World War, its contemporary iterations, and the five previously described characteristics of the Common Constitutional Pattern, develop-

mere two, broadly formulated, features. And even these arguably align with the previously elaborated five characteristics.

[55] Ibid., 97, 99. See also: Chapter VII, section 37.

[56] Raat, "Stories and Ideals," 100–101.

ed in connection with the modern human rights discourse. As such, the *Rechtsstaat* is more than a strictly legal concept which allows some state conduct, including the Dutch group-based approaches to discrimination, and disavows other behaviors. It is also a social, historical, and ethical concept.[57] And in this regard, the *Rechtsstaat* is arguably underpinned by much of the same values and concerns as humanism, liberalism, and the modern human rights discourse. It is these values, as incorporated within a liberalism of fear, with which I intend to evaluate the three group-based approaches to discrimination in the Netherlands in the following chapters. The Dutch interpretation of the *Rechtsstaat* on which these group-based approaches are founded is legally viable, there is little doubt about that. But they can be said to clash with the tenets of humanism, liberalism, and the modern human rights discourse. In other words: these group-based approaches collide with the values behind the *Rechtsstaat*. Therefore, if the individual as the subject of our fundamental rights and the universal nature of these rights are to be our axioms, for the reasons elaborated in the preceding chapters, than it is possible to evaluate statutes that employ group-based approaches on their legitimacy.[58] Of course, I cannot evaluate all relevant Dutch statutes, so in the following I will adhere even stricter to my focus on the opposition to discrimination within the Dutch *Rechtsstaat.*

24.
Two Relationships, Three Spheres

In the preceding chapters, I first unearthed the prevailing foundation of justice in liberal states at the most general level. Simply put, this foundation consists of fundamental rights that can be characterized as universal and individual. However, the interpretation of these rights and the subsequent approaches to the protection against discrimination in many liberal states presented problems. In order to address these problems I

[57] Ibid., 98.
[58] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 1; Anthony Quinton, "Introduction," in *Political Philosophy*, ed. Anthony Quinton (London: Oxford University Press, 1967), 9.

presented a new branch of the liberal tree. This liberalism of fear holds that the *minimum* of the responsibilities of liberal states relating to our fundamental rights, as well as of the relevant constraints, pertains to fostering commonly shared resilience against injustice. In practice, this would entail a certain threshold of state support with respect to the full enjoyment of our fundamental rights by everyone, including the right to be protected against discrimination, while still limiting capacity of the state to cause injustice itself. In this chapter, I have hitherto examined the position of the individual within the *Rechtsstaat*. I shall now consider the relevant aspects of the relationship between the state and its citizens, when the former aims to address discrimination in the relationship between the latter themselves. These considerations give me the chance to discuss the earlier introduced matter of the areas of life where liberal states can legitimately interfere to address discrimination. Naturally, this matter relates to the liberal distinction between a public and a private sphere. One query remains, though. Because, we still need to be able to ascertain what behavior constitutes wrongful differential treatment in the appropriate spheres of life. I treat this last question on discrimination and the *Rechtsstaat* in the next section.

STATE AND CITIZEN

Within any implementation of liberalism it is the combination of state restraint and state action, which aims to secure for every individual the full enjoyment of their fundamental rights, that legitimizes state power.[59] As discrimination prohibits the enjoyment of such rights, it is a required task of liberal states to oppose it.[60] It is therefore no surprise that the protection against discrimination has also become a right in itself. While examining

[59] Frick, *Human Rights and Relative Universalism*, 1; Philippe Defarges, *La Gouvernance* (Paris: Presses Universitaires, 2015), 13–16.
[60] Ronald Dworkin, "Liberalism," in *Public and Private Morality*, ed. Stuart Hampshire (Cambridge: Cambridge University Press, 1978), 122; Henry Sackers, "The Curious History of Group Discrimination in the Netherlands," in *Freedom of Speech under Attack*, ed. Afshin Ellian and Gelijn Molier (The Hague: Eleven International Publishing, 2015), 17; Brian Barry, *Culture & Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 5; Khaitan, *A Theory of Discrimination Law*, 3–4.

the scope of this duty, it is important to distinguish two kinds of relationships: the dealings between the state and its citizens, and the relations between the citizens themselves.[61] It is the relation between citizens where discrimination, such as hate speech and bigotry in the workplace, occurs. But it is the relationship between the state and its citizens that determines the manner in which the state can interfere and to what extent.[62]

By looking at the relationship between the state and its citizens, we can acquire a more general picture of the duties and limitations of liberal states while ensuring individuals the full enjoyment of their fundamental rights in their affiliations with others.[63] Through our exploration of the theoretical underpinnings of a liberalism of fear, we already encountered the comprehensive position of the contemporary state. The state is an *Allgemeinverbindlichkeit*, a coercive structure that one cannot avoid or circumvent.[64] Therefore, the liberal movement and the modern human rights discourse aimed to curtail the power of the state and other societal institutions. That ambition was subsequently incorporated in the *Rechtsstaat*-tradition.[65] Central to this ambition is the rights-mandated respect of the state for each and every individual as an individual.[66] This respect also includes, as we have seen, the elimination of privileges and the corresponding disadvantages for groups and individuals. Privileges and disadvantages, in this sense, pertain to those which used to be conferred by the state and other societal institutions outright, as well as to those that were allowed to continue to exist in practice through inaction and negligence.[67] As a result, the

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[61] Rikki Holtmaat, *Grenzen aan Gelijkheid* (The Hague: Boom Juridische Uitgevers, 2004), 2; Michael Foran, "Discrimination as an Individual Wrong," *Oxford Journal of Legal Studies* 39, no. 3 (2019): 901–5, 927; Khaitan, *A Theory of Discrimination Law*, 63.

[62] Dworkin, "Liberalism," 126.

[63] Barry, *Culture & Equality*, 131; Matt Cavanagh, *Against Equality of Opportunity* (Oxford: Oxford University Press, 2002), 157.

[64] Aernout Nieuwenhuis, *Over de Grens van de Vrijheid van Meningsuiting* (Nijmegen: Ars Aequi Libri, 2015), 36.

[65] Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England & Wales* (Cambridge: Intersentia, 2011), 22.

[66] Edmund Fawcett, *Liberalism: The Life of an Idea* (Princeton: Princeton University Press, 2018), xii, 3.

[67] Grimm, *Constitutionalism*, 71, 81; Martha Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20, no. 1

relationship between the state and its citizens is generally assumed to be governed by a strict equality, sometimes also denoted as civil equality.[68]

This strict equality also determines when liberal states are allowed to ameliorate discrimination in the relationship between citizens. The capacity of the state to act in this regard is both founded on and limited by the capacity of the individual to fully enjoy their fundamental rights.[69] These rights, as we saw above, prominently include the protection against discrimination, an entitlement that is enshrined in international rights catalogues and most local jurisdictions.[70] The right to be protected against discrimination safeguards, as I explain more fully below, the enjoyment of other rights without certain interferences from others. As a right, the protection against discrimination in this legal sense, as anticipated in section 22, differs therefore from help or aid.[71] Such aid, in the ordinary sense, would depend on the personal, extra-juridical circumstances of the citizen. Circumstances which muddy the waters of the aforementioned strictly equal treatment of every citizen by the state. Accordingly, a citizen is only discriminated against in a legal sense when their situation concurs with the relevant conditions in the law. And these ought to apply to every citizen equally. It is only under these conditions that a liberal state can act to oppose discrimination, and most of the time has an obligation to do so.

That the protection against discrimination is a duty of liberal states and has to be legally defined, does not guarantee the strict equality that governs the dealings between the state and its citizens, though. I return here to the first two of the five characteristics of Common Constitutional Pattern: the principle of legality and the respect of the state for the fundamental rights of the individual. As we have seen above, the requirement of general and legible rules, derived from the principle of legality, ensures

(2008): 5–8; Judith Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 3, 56, 74.

[68] Loughlin, *Foundations of Public Law*, 229–30; Noorloos, *Hate Speech Revisited*, 23; Dworkin, "Liberalism," 126; Sybe Schaap, "Van Burger tot Mens: De Kanteling van Rechtsbeginselen," in *De Vitale Rechtsstaat: Grondslag, Kwetsbaarheid, Weerbaarheid*, ed. Frank van den Heuvel and Patrick Overeem (Nijmegen: Valkhof Pers, 2019), 28, 31.

[69] Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016), 50; Holtmaat, *Grenzen aan Gelijkheid*, 21; Barry, *Culture & Equality*, 131.

[70] These (inter)national obligations are summarized in the Introduction to this work.

[71] Holtmaat, *Grenzen aan Gelijkheid*, 21.

the equality in the relationship between the state and its citizens. Because, through this requirement the law must not only apply to all of us, but there is, in addition, only so much room to interpret laws. As such, rules cannot be tweaked to privilege or disadvantage certain individuals or groups.

The respect for the fundamental rights of the individual, the second characteristic of the *Rechtsstaat*, entails both restraint and action.[72] Up until now, I have primarily focused on the imperative duty of the state to oppose discrimination. However, in order to constrain state power, that other indispensable condition for the full enjoyment of fundamental rights by all of us, the state cannot have a *carte blanche* when it comes to ameliorating discrimination.[73] Therefore, only some differential treatment should qualify as discrimination. The question what behavior towards others in which areas of life is suited for state interference and why, brings us to the relationship between citizens themselves and the different spheres of life.

THREE SPHERES

Where the relationship between the state and its citizens is characterized by strict equality, the relationship between citizens themselves forms a strong contrast.[74] This may come as a surprise to some. The strict prohibition of unequal treatment by the state has often been conflated with the opposition to discrimination, in a legal sense, in the relationship between citizens.[75] In practice, however, it is clear that few people agree on what constitutes reproachable differential treatment between citizens, much less what legal consequences should apply in which situation.[76] Two questions need to be answered in this regard. First, in which sphere(s) of life can the state intervene to ameliorate discrimination? And secondly, when is a sit-

[72] Cliteur and Ellian, *A New Introduction to Jurisprudence*, 48–49.
[73] Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2005), xxii; Isaiah Berlin, "Two Concepts of Liberty," in *Liberty*, ed. Henry Hardy (Oxford: Oxford University Press, 2002), 173.
[74] Schaap, "Van Burger tot Mens," 28.
[75] Holtmaat, *Grenzen aan Gelijkheid*, 5, 11–12; Cavanagh, *Against Equality of Opportunity*, 23.
[76] Esther Janssen, *Faith in Public Debate: On Freedom of Expression, Hate Speech, and Religion in France & the Netherlands* (Cambridge: Intersentia, 2015), 415; Cavanagh, *Against Equality of Opportunity*, 153–54.

uation severe enough to allow such an intervention? Or in other words: what differential treatment is wrongful and should legally qualify as discrimination?[77] As said, the first question will be the subject of the remainder of this section, while the second question will be treated subsequently.

With the first query, which parts of daily life can be singled out for protection against discrimination, I return to the idea of dividing life into separate spheres for the purpose of determining the responsibilities and limitations of the state. A strict distinction between a public and a private sphere was the third aspect of the prevalent approach to discrimination in liberal states. However, similar distinctions are also present in many prolific alternatives to the political arrangements engendered by that specific elaboration of the requirements of liberalism.[78] Following Hannah Arendt, I forego the usual dichotomy between a public and a private sphere for a threefold distinction between a public, a social, and a private sphere.[79] Through this distinction we can better identify the areas of life which are to be singled out for protection by the state and other societal institutions against being discriminated in one's relationships with other citizens.[80]

The public sphere covers the relationships between societal institutions, such as the state, and citizens. It constitutes the area of statecraft.[81]

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[77] In order to be effective, though, this definition should not stray too far from the general perception of discrimination, see: Shklar, *The Faces of Injustice*, 8.

[78] Khaitan, *A Theory of Discrimination Law*, 65; Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993).

[79] Hannah Arendt, "Reflections on Little Rock," in *The Portable Hannah Arendt*, ed. Peter Baehr (New York: Penguin Books, 2000), 236–40. As befits a work on discrimination, I reference here some of the valid and important criticisms of the biases and inaccuracies in Arendt's treatment of institutional and private discrimination in the cited essay, see: Franco Palazzi, "'Reflections on Little Rock' and Reflexive Judgement," *Philosophical Papers* 46, no. 3 (2017): 393, 395–96; Patricia Owens, "Racism in the Theory Canon: Hannah Arendt and 'The One Great Crime in Which America Was Never Involved'," *Millennium* 45, no. 3 (2017): 407, 419. Arendt's distinction between three spheres of life, however, can still be useful for my analysis. Especially as she herself influenced the contemporary ideas on the use of such distinctions with this and other works, see: Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998), 24, 31–32, 40–41; Palazzi, "'Reflections on Little Rock' and Reflexive Judgement," 397–98, 434.

[80] Richard Arneson, "What Is Wrongful Discrimination?," *San Diego Law Review* 43, no. 4 (2006): 778.

[81] Peter Baehr, "Editor's Introduction," in *The Portable Hannah Arendt*, ed. Peter Baehr (New York: Penguin Books, 2000), xxxiii–xxxvi.

The private sphere, on the other end of the spectrum, is where we, the citizens, meet as intimates. We are friends, lovers, or family members, but emphatically not equals and do not have to treat each other as such.[82] The private sphere is therefore characterized by exclusivity. As such, the state is severely limited regarding possible interferences in this sphere. But it would also be absurd to assume that the choices we make therein – to accept or decline friendships and to take or discard a lover – could be unjust. Both in the ordinary or legal sense of discrimination.[83]

This leaves us with the social sphere, which is neither characterized by the strict equality of the public sphere nor the exclusivity of the private sphere.[84] The better part of our daily lives is spend here. Earning our living, following our vocations, and realizing our goals.[85] The social realm is governed by "like attracts like" and many of the same exclusionary mechanisms of the private sphere. However, because of the importance of this sphere and the lack of the exclusionary context of the private sphere, this is the area of life which lends itself to anti-discrimination measures by the state. This answer to the question where the state can interfere to oppose discriminatory assumptions and their consequences suits a liberalism of fear. Because a simple and strict distinction between a public and a private sphere would leave too many manifested vulnerabilities – which, if left unaddressed, would constitute an injustice – outside of our collective responsibility. But this brings us back to the matter of which of those manifested vulnerabilities constitute an injustice. Or, in other words, what conduct in the social sphere should be legally classified as discrimination?

[82] Ibid., xxxiv; Arneson, "What Is Wrongful Discrimination?," 791.
[83] Cavanagh, *Against Equality of Opportunity*, 164; Sophia Moreau, "What Is Discrimination?," *Philosophy & Public Affairs* 38, no. 2 (2010): 160.
[84] Khaitan, *A Theory of Discrimination Law*, 2.
[85] Arendt, "Reflections on Little Rock," 237.

25.
What is Discrimination?

Much of the common sense and self-evident assumptions which govern life in a contemporary liberal state, have been dissected in the last four chapters. I exposed the grim origins of liberalism, explained why these led to a political program instead of an all-encompassing world-view, and relayed the basic constitutive political positions of this program. Subsequently, we saw these positions reflected in the story of the modern human rights discourse. But the liberal tree turned out to have sprouted some inadvisable branches and the modern human rights discourse arguably overextended itself. I therefore proposed a liberalism of fear as the minimum of the effort and the constraint that we should be able to expect from a liberal state. This minimum is achievable within the *Rechtsstaat*-tradition, which includes the Netherlands, but this only became apparent with a dynamic-cultural approach. Through such an approach, the *Rechtsstaat* could serve as the ideal with which I can evaluate the legitimacy of group-based approaches to state action beyond their legality. Finally, in the previous section, I established *where* a liberal state in the *Rechtsstaat*-tradition can oppose wrongful differential treatment, but not *what* differential treatment is wrongful. I will now fill in that last lacuna.

THREE DIMENSIONS OF DISCRIMINATION LAW

In the previous section I established that differential treatment does not constitute a liberal concern in all areas of life. With regard to discrimination in the relationship between citizens, the social sphere appeared to be the relevant area of life. If we contend that, within the social sphere, the state is held to ameliorate or even prevent a certain level of discrimination in the relationship between citizens, we are left with our second question: what treatment constitutes discrimination?[86] Evidently not all differential treatment in this sphere, be it through acts or neglect, is reason for state

[86] Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 305; Noorloos, *Hate Speech Revisited*, 11.

action or even disgruntlement.[87] Some differentiation, at least to a certain extent, is inevitable and perhaps even desirable.[88] In the contact between teachers and students, for instance, or the affiliations between employers and employees.[89] Many of us can readily recall practices that should definitely be legally classified as discrimination and those that definitely should not.[90] But just as with the distinction between a right and aid, there is often a disparity between the lay understanding of discrimination and the legal definition.[91] To quote Tarunabh Khaitan: "[…] the law treats a much wider range of conduct as discriminatory than does ordinary language, although its regulation of such conduct is restricted to a limited range of contexts."[92] These, admittedly coarse, archetypes lead us to the three elements of discrimination law and the criteria which usually dictate what differential treatment is wrongful and should be legally classified as discrimination.

Discrimination laws can generally be said to comprise three elements: the normative foundation of the statute; the rights granted or, in other words, who can press a claim; and the corresponding duties these rights bestow on certain actors.[93] These elements determine which differential treatment in the relationship between citizens legitimizes, and in many cases necessitates, state action.[94] These three dimensions in themselves do not prevent group-based approaches. On the contrary, it is such a pervasive practice that an (exhaustive) list of protected groups is often viewed as yet another element of discrimination law, even though such a

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87 Cavanagh, *Against Equality of Opportunity*, 156; Khaitan, *A Theory of Discrimination Law*, 65.

88 Martha Fineman, "Vulnerability and Inevitable Inequality," *Oslo Law Review* 4, no. 3 (2017): 139, 143.

89 Raz, "On the Nature of Rights," 196–97; Iris Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 2011), 216; Shklar, *The Faces of Injustice*, 8.

90 Lippert-Rasmussen, *Born Free and Equal?*, 13; Khaitan, *A Theory of Discrimination Law*, 4.

91 Arneson, "What Is Wrongful Discrimination?," 777; Khaitan, *A Theory of Discrimination Law*, 2, 12.

92 Ibid., 2.

93 Ibid., 10–11. As with the *Rechtsstaat*, most definitions contain roughly the same elements. This distinction can also be found in Galenkamp's analysis of the structure of claim-rights in general, if one interprets the object-aspect as the interest to be protected against discrimination, see: Galenkamp, *Individualism versus Collectivism*, 61–64.

94 Chapter IV, section 24, note 60; Holtmaat, *Grenzen aan Gelijkheid*, 12–13.

list is not strictly necessary.[95] Notwithstanding the widespread acceptance of the universal and individual characterization of our fundamental rights, national lawmakers can perhaps be forgiven if they take the same approach that is, at first glance, employed in the specialized covenants for specific groups or follow the ditto examples in more general rights treaties, such as article 3 ICCPR, when confronted with the overwhelming reality of the tragedies caused by discrimination.[96] Consequently, if the normative foundation allows for it, discrimination laws in liberal states can and often do grant rights solely to certain groups, especially societal salient groups.[97] The duties engendered through these laws will then also solely pertain to the members of these groups. Wrongful differential treatment would in such cases only be discrimination, in a legal sense, when it relates to these persons. As we saw with the prevalent liberal approaches to the protection against discrimination, the selection of such groups is not without its reasons. We will survey some of the criteria that are used to determine who is protected through such statutes – all relevant individuals or only certain groups – along with a few of the underlying reasons and the subsequent theoretical and practical dilemmas, when I investigate the three selected Dutch group-based approaches to the protection against discrimination in the following chapters. In this chapter we are interested in a more preliminary concern: when can we speak of wrongful differential treatment? This question concerning what actually *is* discrimination, is important with respect to all discrimination laws, irrespective of whether the answer only pertains to merely some groups, or not. To answer this question we have to examine the possible normative foundations of discrimination laws.

In essence, there are three possible normative foundations for a discrimination law. As can be expected by now, these coincide with the

[95] For example, see: Khaitan, *A Theory of Discrimination Law*, 45, 49; Lippert-Rasmussen, *Born Free and Equal?*, 26.

[96] Aranka Kellermann, "Begrippen en Definities," in *Met Recht Discriminatie Bestrijden*, ed. Carolina de Fey, Aranka Kellermann, and Jacky Nieuwboer (The Hague: Boom Juridische uitgevers, 2004), 19; Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2018), 3; 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), 87–89.

[97] Khaitan, *A Theory of Discrimination Law*, 49, 154–55.

values of liberty, equality, and dignity.[98] Depending on the chosen foundation, discrimination laws can be characterized as libertarian, egalitarian or dignitarian. In practice, however, we almost always encounter a mixture.[99] It is this mixture which, in turn, determines the distribution of the rights and duties.[100] In the end, it is therefore the normative foundation of discrimination laws, in combination with the rights and duties provided in line with that foundation, which regulates whether or not differential treatment, in a general sense, is wrongful and can constitute discrimination.

Most discrimination laws are not conceived or formulated this abstractly, though. They usually present more mundane characterizations of the types of wrongful differential treatment that these statutes would consider to constitute discrimination. I would describe these characterizations as further specifications of the underlying normative foundation, as most can ultimately be reduced to the aforementioned mixture of the values of liberty, equality, and dignity. Discrimination scholars distinguish between a number of paradigmatic forms or *Idealtypen* of discrimination that can be found in such specific discrimination laws. Some influential variants are mental state-based accounts, objective-meaning accounts, well-being accounts, and statistics-based accounts.[101] More *Idealtypen* of wrongful discrimination are considered when I discuss the ever-evolving reasoning behind the three selected Dutch group-based approaches to the protection against discrimination in the next chapters. As we have encountered another tangled forest of available options, a liberalism of fear once again proves its usefulness. This branch of the liberal tree aims to adhere to perhaps the most influential *Idealtype* of wrongful discrimination: harm.[102]

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[98] Ibid., 6–7. One other candidate, now often discredited, is rationality, see: Donal Nolan, "A Right to Meritorious Treatment," in *Understanding Human Rights*, ed. Conor Gearty and Adam Tomkins (New York: Mansell, 1996), 239–65.
[99] Khaitan, *A Theory of Discrimination Law*, 7.
[100] Ibid., 25, 27–29, 42.
[101] Lippert-Rasmussen, *Born Free and Equal?*, 79–99, 103–4, 129–30; Khaitan, *A Theory of Discrimination Law*, 115–16.
[102] Joel Feinberg, *The Moral Limits of the Criminal Law – Volume 1: Harm to Others* (New York: Oxford University Press, 1984), 12–13; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002), 260; Carolyn Evans, "Religious Speech That Undermines Gender Equality," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 364.

HARM

Within a liberalism of fear the boundary between permissible differential treatment in the relationship between citizens and discrimination can be found through one criterion, harm.[103] As my interpretation of liberalism focusses on the injustice of the consequences of suffering for a person's dignity, it is no stretch to apply such a grim indicator to determine when the state should at a minimum intervene to address discrimination. But are we now not merely burdened with a new question? For what is harm? For my current purpose and fitting a rights-based liberal program, harm can be defined as a setback of one's fundamental rights which is wrong.[104] Because our dignity demands the full enjoyment of those rights. As such, the underlying normative foundation is primarily dignitarian in nature, though positive liberty and substantive equality are, as we saw above, also tied to a liberalism of fear. They latter two are arguably necessary to address harm.

If we consider discrimination, the work of Sophia Moreau might serve to make this criterion less abstract. Personal characteristics, according to her account, should not pervasively shape one's deliberations and choices with regard to the social sphere. At least not in a way that differs from those other persons who do not share that characteristic and can therefore enjoy their rights more fully, relatively to the persons that are disadvantaged.[105] That is to say, such characteristics should not incur social costs that others do not also face.[106] This is especially true for cognate groups. These groups are counterparts within categories that house more than one class of people, such as gender, sexual orientation, and health.[107]

The preceding observations will become more clear with an example. If we follow the insights of Moreau, then one can select a teacher bas-

[103] Judith Shklar, "The Liberalism of Fear," in *Liberalism and the Moral Life*, ed. Nancy Rosenblum (Cambridge: Harvard University Press, 1989), 29–30. Note that Shklar uses other terms, such as cruelty, and interprets harm slightly differently then I do below.
[104] Noorloos, *Hate Speech Revisited*, 30; Feinberg, *The Moral Limits of the Criminal Law – Volume 1*, 47–49; Donald Brown, "The Harm Principle," in *A Companion to Mill*, ed. Cristopher MacLeod and Dale Miller (Chichester: John Wiley & Sons, 2017), 413; Holtmaat, *Grenzen aan Gelijkheid*, 9.
[105] Moreau, "What Is Discrimination?," 147.
[106] Ibid., 148–50.
[107] Khaitan, *A Theory of Discrimination Law*, 30–38.

ed on their acumen, but not on the notion that society in general fancies men better teachers than women. As such, I may be hired to teach law and not physics, based on my law degree and lack of a physics education. Because the social cost of a law or a physics degree is faced by everyone.[108] The preference for one class of people within the category gender, however, relatively disadvantages persons who are assumed to not belong to that class. Because individual women would then be held responsible for the assumed lack of teaching skills within their group as a whole.[109] While men, on the other hand, evade such scrutiny and do not have to deliberate on it. Therefore, women face an additional consideration with respect to their choices. This does not mean that these kinds of characteristics should become meaningless within individuals' deliberations.[110] One's Christian beliefs, for example, can still dictate what one undertakes on a Sunday. It is the disparate social costs, as well as the pervasive nature of the described practices, which impede the full enjoyment of our fundamental rights and the adjacent capabilities, that constitute the harm.[111] Such costs inhibit a life that can be called dignified in the sense of a liberalism of fear.[112] To create such costs or to allow them to persist, would thus be an injustice.

Now that we have defined under which circumstances the relative disadvantages faced on account of personal characteristics are cause for concern, we also want to know when such a relative disadvantage, at a minimum, presents a setback in one's rights. The underlying goal of the CRPD gives us a tangible idea of the relevant conditions: impaired persons should be able to partake in society on equal footing with relatively healthy people and make their own life decisions in that same vein.[113] Therefore,

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[108] One must keep in mind, of course, that the possibilities to obtain such degrees are often inhibited by discrimination, see: Chapter V, section 26; Chapter VI, section: 37.
[109] Lippert-Rasmussen, *Born Free and Equal*, 182.
[110] Moreau, "What Is Discrimination?," 150, 152.
[111] Cavanagh, *Against Equality of Opportunity*, 205.
[112] On harm, dignity, and fundamental rights, see in general: Rikki Holtmaat and Guido Terpstra, "Leve de Pluriformiteit bij de Discriminatiebestrijding: Een Kritiek op het Ideaal van een Uniforme Aanpak van Verschillende Discriminatiegronden," *Nederlands Tijdschrift voor de Mensenrechten/NJCM-Bulletin* 36, no. 2 (2011): 164–70.
[113] Erwin Dijkstra, "Addressing Problems Instead of Diagnoses: Reimagining Liberalism Regarding Disability and Public Health," *Netherlands Journal of Legal Philosophy* 50, no. 1 (2021): 26.

if these capabilities are pervasively thwarted on account of another personal characteristic, and thus factor in on our life plans and decisions, we can also reasonably speak of a setback of one's rights and thus harm. These are such very basic capacities, that they present an appropriate minimum to determine when an individual faces discrimination and should therefore be supported by the state and other societal institutions. Because, these disadvantages on the basis of personal characteristics cause people to lose out on the lower limit of capabilities as defined in the previous chapter.[114]

It is this definition of harm which marks, for instance, the current difference between an employer rejecting potential employees on the basis of being born in a leap year as opposed to skin color, impairment, and gender.[115] The former can be classified as a personal quirk by a certain employer, which the candidate is unlikely to be aware of or encounter elsewhere. One's capabilities to live without a certain level of discrimination and to compete on the labor market on an equal footing, are arguably not impeded. One can participate in society and make one's life choices without considering such a remarkable birth date. However, if such treatment would become widespread, it could conceivably constitute a setback of one's rights and thus harm. In this sense, our idea of harm is very personal. Discrimination is primarily wrong because of its pervasive impact on persons and the full enjoyment of their fundamental rights, as encapsulated by the aforementioned lower limit of capabilities. Not because it impacts a certain group, threatens public order, or is historically conspicuous.[116]

This definition is intentionally broad. The harm principle offers no proverbial silver bullet.[117] For instance, if one takes harm as the criterion for protection against discrimination, one should be vigilant that public attention and resources go to those persons that are indeed experiencing a setback with regard to their fundamental rights, which bars their exploration of the applicable lower limit of capabilities, instead of those that have the most political sway.[118] Nevertheless, through taking the proposed

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[114] Chapter III, section 20.
[115] Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1993), 22.
[116] Moreau, "What Is Discrimination?," 168.
[117] Brown, "The Harm Principle," 419.
[118] Kerry Whiteside, "Justice Uncertain: Judith Shklar on Liberalism, Skepticism, and

definition of harm as a guideline, states can provide more resilience against discrimination as a manifested vulnerability, with enough regard for the differing soci(et)al circumstances of individuals. Furthermore, this idea of harm can also serve as a necessary limit on state action with respect to the amelioration of differential treatment in the affiliations between citizens.[119] As harm dictates when the state has to act and when it should back down.

These notions and their necessity, merely sketched here, will be discussed in more depth when I treat the foundations of criminal law, private law, and state neutrality in the following chapters. There harm, for a liberalism of fear the prime candidate to demarcate the duties and constraints of liberal states with regard to pursuing a dignified life at a sufficient minimum for everyone, will be made more concrete as well as meet its current competitors. As mentioned, the reasons to select certain groups for protection against discrimination in the Netherlands vary and have a proclivity to change over time. Harm to individuals *an sich* may be the least imperfect candidate according to a liberalism of fear, but it has many rivals. This variety and the tendency to single out certain personal characteristics for protection but not others, arguably follows from the architecture of (many of) the Dutch discrimination laws. This architecture often exhibits the characteristics of the logic behind the anatomy of the prevalent liberal approaches to discrimination: the anti-discrimination angle and notion of desert are regularly present, and a strict distinction between the public and the private sphere is often maintained.

PLURIFORMITY & UNIFORMITY

Naturally, I do not want to imply that Dutch lawmakers do not hold harm reduction in high regard. It is invoked regularly in parliamentary debates, especially when criminal law is considered.[120] But for an array of reasons, that I discuss in the following chapters, some harms are eventually deemed worse or more pressing than others, and thus many anti-discrimination

Equality," *Polity* 31, no. 3 (1999): 522.

[119] Brown, "The Harm Principle," 415.

[120] Sjarai Lestrade, *De Strafbaarstelling van Arbeidsuitbuiting in Nederland* (Deventer: Wolters Kluwer, 2018), 134.

measures employ a group-based approach to the resulting rights and duties. As a result, the Dutch have ended up with the aforementioned article 1 of their Constitution, that prohibits any and all discrimination, as well as more specific statutes that protect merely certain groups under particular circumstances.[121] As such, the constitutional right to be protected against discrimination is universal and individual in nature, while many of the statutes that citizens can actually invoke, and which are dependent on a majoritarian process, protect only some in practice.[122] How can we explain this discrepancy? Dutch lawmakers still work within the parameters of the modern human rights discourse and liberalism, as these are the main progenitors of the Dutch *Rechtsstaat*. But the three aspects of human rights overreach seem to have obscured the double foundation of the temple of Cassin, that being the universal and individual characterization of our fundamental rights. To warrant a few rights for some groups, including merely protecting particular individuals against certain forms of discrimination, has come to be perceived as natural and a-political, at least to an extent. The tendency to protect a changing roster of groups in a ditto set of circumstances through anti-discrimination measures, thus presents a remarkable unity in its pluriformity. These laws consistently forego the individual as the primary rights bearer. The general dilemmas with this haphazard method of protecting only some delineated groups have already been presented in the Introduction. These dilemmas will be further examined and specified with regard to different areas of law in the following chapters.[123]

This way of protecting the population of a liberal state against discrimination is not illegal nor entirely without its merits.[124] And if this is the only course of action that can salvage some protection against discrimination for some people from the Dutch political arena, then there is nothing

[121] Jan-Peter Loof, "Toekomstige Uitdagingen voor het Gelijkebehandelingsrecht," *Nederlands Tijdschrift voor de Mensenrechten/NJCM-Bulletin* 45, no. 2 (2020): 271–72; Erwin Dijkstra, "Het Versmade Strafrecht? Een Breder Perspectief op het Toevoegen van Geslachtskenmerken, Genderidentiteit en Genderexpressie aan de AWGB," *Nederlands Juristenblad* 94, no. 17 (2019): 1243.

[122] Martha Fineman, "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality," *Boston University Law Review* 92, no. 6 (2012): 1737.

[123] Introduction, section 3; Chapter II, section 14; Chapter V; Chapter VI; Chapter VII.

[124] Galenkamp, *Individualism versus Collectivism*, 25.

in this work that will change that. However, from a liberal and a modern human rights perspective, to protect some and not others against discrimination can be said to counteract the universal and individual characterization of the fundamental rights that every individual ought to enjoy since the darkest days of the twentieth century. Rights that can be considered the bedrock of the Dutch *Rechtsstaat* itself. Thus, if one wants to deviate from a universal and individual interpretation of the second of the five characteristics of the Common Constitutional Pattern, it should be explicitly considered and properly justified. At least more explicitly and proper than at present seems to be the case with the policies that are the subject of the following three case studies. As protecting only some human beings against certain manifested vulnerabilities that impede their rights – which can, depending on time and place, affect us all – is a stark deviation from the inspirations and foundation of the modern human rights discourse. Furthermore, it is an arguable senseless deviation. Because, by means of the protection of all individuals against discrimination on account of their personal characteristics, the present and future marginalization of the groups amongst whom they count themselves or are assumed to belong to, is also addressed, be it indirectly.[125] These observations cannot and should not be neglected, especially not while crafting discrimination laws.

[125] Foran, "Discrimination as an Individual Wrong," 902.