

Geachte Rector Magnificus, geachte decaan, beste studenten en collega's, lieve familie en vrienden,

Is it a human right to have periodic paid holidays?¹ Do trains without a toilet constitute a violation of human rights?² Is the obligatory wearing of facemasks during a pandemic a violation of the right to privacy and bodily integrity?³ Social movements and civil society organisations (CSOs) around the world are increasingly framing issues and demands in relation to human rights. Human rights have become part of our daily vocabulary, as also evidenced by the insistence on rights during the COVID-19 pandemic.⁴ There has also been a rights turn in relation to the environment and climate change, as illustrated by cases such as *Urgenda*, *Milieudefensie/Shell* and *Verein*

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- 1 Griffin referred to the inclusion of this right in Article 24 of the Universal Declaration of Human Rights (right to rest and leisure) as a 'blunder' and being 'widely rejected'. Griffin, *On human rights* (OUP, 2008), 14. See, however, the right to 'an annual period of paid leave' in Article 31(2) of the EU Charter of Fundamental Rights as well as the extensive case law of the CJEU. E.g. Case C-569/16, *Bauer and Broßonn*, EU:C:2018:871.
- 2 'Trein zonder toilet schendt mensenrechten' (7 May 2019), <https://supportmagazine.nl/trein-zonder-toilet-schendt-mensenrechten>.
- 3 E.g. 'Standpunt Privacy First inzake mondkapjesplicht' (24 Nov. 2020), <https://privacyfirst.nl/artikelen/standpunt-privacy-first-inzake-mondkapjesplicht/>; ECtHR, *Makovetskyy v. Ukraine*, Appl. No. 50824/21; CE:ECHR:2022:0519DEC005082421.
- 4 Uzman, 'De wereld staat in brand – Mensenrechten in tijden van COVID-19', 45 *Nederlands Tijdschrift voor de Mensenrechten* (2020), 143-147.

KlimaSeniorinnen Schweiz.⁵ Since the Dutch parliamentary elections in November 2023, constitutional and fundamental rights⁶ and the rule of law (*rechtsstaat*)⁷ have been on everybody's lips.⁸

Simultaneously, human rights have become subject to increasing criticism over recent years. This critique has originated from various factions, including not only politicians, the public and

5 Dutch Supreme Court 20 Dec. 2019, NL:HR:2019:2006; District Court The Hague 26 May 2021, NL:RBDHA:2021:5337; ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. No. 53600/20, CE:ECHR:2024:0409JUD005360020; Krommendijk, 'Beyond *Urgenda*: The role of the ECHR and judgments of the ECtHR in Dutch environmental and climate litigation', 31 *RECIEL* (2021), 1-15.

6 Throughout this lecture I will mostly use the term 'human rights' even though 'fundamental rights' (*fundamentele rechten*) are often used in relation to the EU system while *grondrechten* (constitutional rights) are frequently used in (Dutch) constitutional law.

7 I adopt a broad (or 'thick') definition of the rule of law as not only consisting of rule by law, legal certainty, (formal) legality and the prohibition of arbitrariness, but also (substantive) human rights. This coincides with the 'Materieller Rechtsstaatsbegriff' of the Venice Commission. The close relationship between the rule of law and human rights has also been recognised by the ECtHR and the CJEU. Moller and Skaanin, 'Systematizing thin and thick conceptions of the rule of law', 33 *Justice System Journal* (2012), 136-153; Case C-156/21, *Hungary v. European Parliament*, EU:C:2022:97, paras 156-157; Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', 27 *ELJ* (2021), 211-227.

8 E.g. the 'Common baseline for safeguarding the Constitution, fundamental rights and the democratic rule of law' as agreed upon by the four political parties PVV, VVD, NSC and BBB. 'Aanbiedingsbrief en eindverslag informateur Plasterk' (12 Feb. 2024), www.kabinetsformatie2023.nl/documenten/verslagen/2024/02/12/aanbiedingsbrief-en-eindverslag-informateur-plasterk, 2-4.

the judiciary but also academics and CSOs. Let us commence by considering politicians and the public. Alston wrote in strong terms regarding the populist challenge to human rights, describing it as a ‘nationalistic, xenophobic, misogynistic and explicitly anti-human rights agenda’.⁹ There is apparently a notion among the population that human rights are not for ‘them’, but only for criminals, asylum seekers and terrorists.¹⁰ Former UN High Commissioner for Human Rights Ra’ad Al Hussein held that human rights are ‘an easy target’ for politicians who manipulate people’s concerns as fig leaves for human rights violations.¹¹ What is more, national courts challenge international courts and defer to domestic political pressures and local values and traditions.¹² Former European Court of Human Rights (ECtHR) Judge Pinto de Albuquerque observed that the ‘resentment against the Court has reached a new, alarming pitch, stoking sectarian rage against the Convention system’.¹³ Supreme and constitutional courts in established liberal democracies such as Germany, Italy, Slovenia and the UK have explicitly ruled that they are not bound to follow every

9 Alston, ‘The populist challenge to human rights’, 9 *Journal of Human Rights Practice* (2017), 1-15. See also Ragnarsson, ‘Humanising not transformative? The UN Committee on Economic, Social and Cultural Rights and economic inequality in OECD countries 2008-19’, 8 *London Review of International Law* (2020), 261-286.

10 Alston 2017, 6.

11 Al Hussein, ‘Is international human rights law under threat?’ (26 June 2017), via www.ohchr.org/en/statements/2017/06/international-human-rights-law-under-threat-grotius-lecture-law-society-london.

12 Posner, ‘Liberal nationalism and the populist backlash’, *Arizona State Law Journal* (2017), 795-819.

13 Partly concurring, partly dissenting opinion of judge Pinto de Albuquerque in ECtHR, *G.I.E.M. S.r.l. and Others v. Italy*, Appl. Nos. 1828/06, 34163/07 and 19029/11, para 58.

decision of the ECtHR.¹⁴ There also been a ‘flagrant disregard’ of UN human rights treaty bodies.¹⁵ These phenomena have been described as backlash, democratic decline or rule of law backsliding. This critique has coincided with more general and growing criticism of multilateral cooperation and international organisations.¹⁶

Interestingly, this worsening political environment coincides with more and more criticism from academics, especially over the last 15 years.¹⁷ Hopgood proclaimed the ‘end times of human rights’, while others referred to a ‘post-human rights era’ or the ‘twilight of human rights’.¹⁸ Moyn criticised the human rights movement for its failure to address socio-economic inequality

14 Breuer, *Principled resistance to ECtHR judgments - A new paradigm?* (Springer, 2019). See more generally about the implementation of ECtHR judgments Jaraczewski et al., ‘Justice delayed and justice denied: Non-implementation of European courts judgments and the rule of law’ (Re:constitution, 2023).

15 Jelić and Mührel, ‘The Human Rights Committee – Challenges and prospects for enhanced effectiveness and integration’, 14 *Journal of Human Rights Practice* (2022), 17-43.

16 Voeten, ‘Populism and backlashes against international courts’, 18 *Perspectives on Politics* (2020), 407-422.

17 For a concise overview of both practical critiques (practice fails to live up to theory) and conceptual (the concept is fundamentally flawed), see Dembour, ‘Critiques’ in Moeckli et al. (Eds.), *International human rights law*, 4th ed. (OUP, 2022), 43-62.

18 Hopgood referred to human rights as ‘a globally unowned and unknowable claim of human moral’ and ‘a by-product of American power’. Hopgood, *The endtimes of human rights* (Cornell University Press, 2013), xii, 14-15, 22; Wuerth, ‘International law in the age of Trump: A post-human rights agenda’, (14 Nov. 2016) *Lawfare*; Posner, *The twilight of human rights law* (OUP, 2014); Posner, ‘Have human rights treaties failed? Human rights law is too ambitious and ambiguous’, (28 Dec. 2014) *New York Times*.

and its root causes.¹⁹ There is now a vast literature describing how human rights have ‘underpropped’ capitalism or humanised, legitimised or deepened neoliberalism.²⁰ Academics have also directed criticism at the human rights movement, criticizing its ‘bubble think’ or ‘intellectual autism’.²¹ International human rights NGOs have been accused of disempowering local advocates with their top-down, overly formal and distant approaches.²² Some of these NGOs have been accused of providing a cover for Western imperialism.²³ These sentiments have affected NGO officials and human rights advocates. Allegedly, several advocates have lost hope as well.²⁴

19 Moyn, ‘A powerless companion: human rights in the age of neoliberalism’, 77 *Law and contemporary problems* (2014), 147-169; Moyn, *The last utopia* (Harvard University Press, 2010); Moyn, *Not enough: Human rights in an unequal world* (Belknap Press, 2018); cf. Marks, ‘Human rights and root causes’, 74 *Modern Law Review* (2011), 57-78.

20 Salomon, ‘Emancipating human rights: Capitalism and the common good’, 36 *LJIL* (2023), 857-877; Young, ‘The minimum core of economic and social rights: A concept in search of content’, 33 *Yale Journal of International Law* (2008), 113-175.

21 Hoffmann, ‘Quite enough (still). Human rights in (times of) crisis’ in Bhuta et al. (Eds.), *The struggle for human rights* (OUP, 2021), 392-411, 394; Koskeniemi, ‘Rocking the human rights boat. Reflections by a fellow passenger’, in Bhuta et al. (Eds.), *The struggle for human rights* (OUP, 2021), 51-61.

22 Knuckey and Satterthwaite, ‘Should human rights practice be rights based?’ in Bhuta et al. (Eds.), *The struggle for human rights* (OUP, 2021), 369-391, 369; Merry, ‘The state of human rights consciousness: Not yet endtimes’ in Bhuta et al. (Eds.), *The struggle for human rights* (OUP, 2021), 62-69, 62.

23 Mutua, *Human rights: A political and cultural critique* (University of Pennsylvania Press, 2002).

24 Sikkink, *Evidence for hope. Making human rights work in the 21st century* (Princeton University Press, 2017), 6.