

THE CROWBAR TO UNIVERSALITY: IMPLICATIONS OF ‘EQUAL IN RIGHTS’

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Introduction

In May 2003, at Mofid University in Iran’s holy city of Qom, an institution for the academic education of Islamic clerics, I had the pleasure of listening to Titia Loenen’s presentation of her paper for a Conference Workshop on “Human Rights: Universality versus Cultural Diversity.” It was very well attended, particularly by young women from all over Iran, wearing—like Titia herself—their obligatory, yet joyous headscarves. What Professor Loenen addressed was *Human Rights, Universality and Gender Bias*.² Bypassing secondary issues such as the legally mandated female attire, her critique was on the international human rights framework, questioning the true universality of its nature. Her point was that the Universal Declaration of Human Rights (1948), the Charter-Based declarations, and the Treaty-Based instruments that followed reflect an inherent assumption that the human being is male. Since the entire post-WWII venture is founded upon the non-discrimination principle, women ought to be protected by these rights no less than men. Yet, how have these rights actually been defined? With a central focus on the risks people face in the public sphere, which men are generally concerned about, Loenen concluded. Now attention is to be drawn to the private sphere, the domain where women tend to face substantial risks. Naturally, she referred here to domestic violence, pointing to “the invisibility of human rights violations in the private sphere.” Domestic violence, that “regretfully universal phenomenon,” is absent from the International Bill of Human Rights, and, one may add, even from the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).³ The prevalence of domestic violence must be truly seen as one of the major components in the “global human rights deficit.”⁴

Loenen directed a similar critique concerning the universality of human rights with regard to the right to work, again a domain in which “the implicit standard of reference often [is] male life experiences and models of living rather than female ones.”⁵ Thus, in the crucial UN documents there is just work and leisure -- completely neglecting

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² M.L.P. (Titia) Loenen, *Human Rights, Universality and Gender Bias*, in *Theoretical Foundations of Human Rights (Collected Papers of the Second International Conference on Human Rights 17-18 May 2003)*, Qom: Mofid University 2005, pp. 587-595.

³ Meanwhile, the CEDAW committee has included this under discrimination. See below fn. 9.

⁴ De Gaay Fortman, B., *Political Economy of Human Rights: Rights, Realities and Realization*, (Routledge, Abingdon, Oxon, 2011).

⁵ *Supra*, fn. 2, p. 593.

any “right to (give) care”⁶ -- while work has been rather obviously connected to a male head of the household responsible for feeding *his* family.

This is a strong critique, further elaborated in a highly instructive article by Ivana Radačić entitled “Human rights of women and the public/private divide in international human rights law.”⁷ Yet, rather than joining feminist rejections of “male chauvinist” human rights *per se*, Loenen emphasized the dynamic potential of international human rights law: “...the provisions in the human rights conventions are formulated open enough to allow for a dynamic interpretation.”⁸ Indeed, the “human rights system has turned out to be a rather flexible system, which provides space for dynamic development and interpretation.”⁹ Thus, in 1993, the UN General Assembly added to CEDAW the Declaration on the Elimination of Violence against Women (DEVAV).¹⁰ Moreover, through a general comment identifying domestic violence against women as a discriminatory practice the CEDAW Committee has incorporated this human rights violation in its mandate.¹¹ Loenen concluded:

...I would say we should use the dynamics of the human rights system to do away with gender bias and to make it truly universal. The image is one of restructuring and adding, of incorporating and extending the human rights building, not of demolishing and building anew from scratch.¹²

I concur. All too often well-founded criticism of the global human rights venture culminates in proposals for new paradigms. What is neglected there is both the positive reception of human rights within the international community and the flexibility of the international venture to protect everyone’s basic human dignity by law. Following Loenen’s advice, this chapter will take the dynamic nature of international human rights in general, the Universal Declaration in particular, and more specifically the First Article, as a starting point to a political economy approach towards the significance and implications of that crucial phrase *equal in rights*. This is a clause on which there is hardly any literature, let alone jurisprudence.¹³ However, it

⁶ *Id.*, p. 589.

⁷ Ivana Radačić, “Human rights of women and the public/private divide in international human rights law,” *Croatian Yearbook of European Law and Policy*, 3: 2007, pp. 443-468.

⁸ *Supra*, fn. 2, p. 591.

⁹ *Id.*

¹⁰ UN General Assembly, “Declaration on the Elimination of Violence against Women,” A/RES/48/104, 20 December 1993, available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

¹¹ CEDAW, “Violence against women,” General Recommendation No. 12 (eighth session, 1989) and General Recommendation No. 19 (11th session, 1992), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

¹² *Supra*, fn. 2, p. 594.

¹³ Several treaty-based committees have recognized the necessity of equality, but the result of all these expressions of equality in the Committees’ Comments has been extensive rhetorical output with essentially no implemented outcomes. The ESCR Committee asserts that women have an equal right to the enjoyment of rights stating, “these may include the adoption of temporary special measures to accelerate women’s equal enjoyment of their rights, gender audits, and gender-specific allocation of resources.” (CESCR, General comment No. 16, “The equal right of men and women to the enjoyment

is essential to examine if in efforts to enhance true universality of human rights -- without bias -- there might be potential for a methodological approach.

Notably, we abstain from philosophical inquiries into distinct meanings of equality, and instead start from existing human rights law in the light of concrete implications of inequality in actual struggles to protect human dignity. First, our focus will be on universality as represented by the word “all.” Second, we will examine the general meaning and implications of Article 1. Third, we shall look into the general meaning of equal in rights as a normative statement, connecting the idea of human rights to both formal and substantive equality. Finally, the “equal in rights” principle will be applied to the challenges of overcoming the global human rights deficit as apparent in the public/private divide, the impunity of state-related perpetrators of gross and systemic violations, abuse of the rights of oppressed collectivities, and structural non-implementation of the rights of the poor.

The Struggle for True Universality

In assertions of an entirely “Western” history of human rights, it is usually assumed that these are to be seen as inalienable rights to protect citizens against their own sovereign, *viz.* the state. Crucial here is the notion of rights, regarded as (primarily individual) interests protected by law.¹⁴ Human rights, then, are fundamental interests, *viz.* fundamental freedoms and basic human entitlements, protected by law. It is crucial that these are truly inalienable, which means sacrosanct in confrontations with any state. Since to a large extent the formation of modern nation states began in “the West,” so did the struggle for the inalienability of rights. Indeed, if rights pertaining to freedoms and entitlements derived from people’s basic human dignity could be simply

of all economic, social and cultural rights,” (2005)). Apparently, it is considered not enough that women are equal in rights, so the Committee renders this principle hollow by claiming that women are also entitled to “equal enjoyment of rights.” If women are already equal in rights, then why must they also have an equal right to the enjoyment of them? Parsing out equality to such an extent has the opposite effect of promoting equality – but creates a false division that sanctions difference – thereby justifying inequality and perpetuating the status quo. Similarly, the CEDAW Committee affirmed “the equality of human rights for women and men in society and in the family,” and that variations in laws may have the impact of “restricting [women’s] rights to equal status and responsibility within marriage.” (CEDAW, General Recommendation No. 21, “Equality in marriage and family relations, (1994)). The CAT Committee emphasized that “...equal weight to the testimony of women and girls” should be afforded during judicial proceedings and that vulnerable groups, including LGBT “...people, must be treated fairly and equally...” (CAT, General comment No. 3, “Implementation of article 14 by States parties,” (2012)). The CRC Committee expressed concern “...about the difficulties faced by particular categories of children in relation to enjoyment and conditions of equality of the rights defined in article 31, especially girls, poor children, children with disabilities, indigenous children, children belonging to minorities, among others.” (CRC, General comment No. 17, “The right of the child to rest, leisure, play, recreational activities, cultural life and the arts,” (2013)), The CMW Committee acknowledged the right of migrants to “...enjoy equal treatment to that of nationals in respect of remuneration, other conditions of work and terms of employment.” They further explained that “[t]he equal treatment principle also covers any other matter that, according to national law and practice, is considered a working condition or term of employment, such as maternity protection.” (CMW, General comment No. 2, “The rights of migrant workers in an irregular situation and members of their families,” (2013)). The CRPD even redundantly recognized previous comments, stating “[t]he Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities each specify that the right to equal recognition before the law is operative “everywhere.” (CRPD General comment No.1, “Article 12: Equal recognition before the law,” (2014)).

¹⁴ Cf. Rudolph Von Ihering, *Law as a Means to an End*, (New York: Macmillan, 1913), pp. 49-50.

taken away based upon “*raisons d’état*,” they would lose all meaning. Thus, the history of the human rights endeavour became a struggle for the rule of law; in the sense that a state is itself subject to established legality, too, and committed to respect the rights of its citizens including their *human* rights.

Actually, however, this is just the account of a struggle to realise one particular category of fundamental rights, called civil and political rights, intended to protect fundamental freedoms primarily against state power. In terms of realising peoples’ basic human dignity in a confrontational context, the struggles to implement a second category called economic, social and cultural rights, meant to ensure peoples’ basic entitlements, are no less crucial, and that applies to the whole world including “the West.” Illustrative in this respect is the “right to work” (UDHR art. 23), a “universally declared” right that is devoid of legal significance in any kind of jurisdiction in the sense of grounding concrete claims to employment. Additionally, the “right to work” appears to be practically absent from day-to-day politics in whatever situation of gross and systemic unemployment.¹⁵

Moreover, while first restricted to citizens’ rights, international efforts have extended the endeavour to realise fundamental freedoms protecting people against abuse of power and to ensure basic entitlements to sustain daily livelihoods, to *all human beings*. Naturally, this happens to be a mega struggle too, a meta-Western one for that matter, and not only a battle *against* “the West,” as in the case of the slave trade, slavery, and of colonialism in all its manifestations of oppression of “the others” (the natives). Notably, the struggle against such a systemic denial of universal human rights has been full of contradictions. Thus, in the Declaration of Independence, 1776, the United States plainly declared:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed...

Unbelievably, however, normative notions such as “equal,” “liberty,” and “consent of the governed” excluded indigenous peoples, slaves, women,¹⁶ and the like. Indeed, the

¹⁵ Typically, in the United States the “Right to Work principle”, a guiding concept of the National Right to Work Legal Defense Foundation, affirms the right of every American to work for a living without being compelled to belong to a union. Thus, “Right to Work laws”, as have been enacted in 24 states, in line with section 14 (b) of the Taft-Heartly Act rather than guaranteeing employment just guarantee that “no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to a labor union”.

¹⁶ In 1848, women and men (Frederick Douglass, for one, attended) who were working on abolition also held a conference regarding women’s issues, which resulted in “The Declaration of Sentiments, Seneca Falls Conference, 1848” where they re-wrote the Declaration of Independence to include women as follows:

“We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed.” *Modern History Sourcebook*, Fordham University, available at:

laws of slave states called the slave “a chattel personal.” Yet, it is precisely her reflection on universal morality that induced Angelina Grimké, the daughter of a slaveholder, to become an active abolitionist. In a letter written in 1838 she acknowledged “the rights of the slave” arguing:

The investigation of the rights of the slave has led me to a better understanding of my own. I have found the Anti-slavery clause to be the high school of morals in our land – the school in which morals are more fully investigated and better understood and taught, than in any other. Here a great fundamental principle is uplifted and illuminated, and from this central light rays innumerable stream all around. Human beings have *rights*, because they are moral beings: the rights of all men grown out of their moral nature; they have essentially the same rights.¹⁷

The “Anti-slavery clause” refers to Thomas Jefferson’s draft of the Declaration of Independence. Much of that draft was ultimately adopted by Congress, but only after removing his clause on British culpability in promoting the slave trade in America and on encouraging slaves to rise up in insurrection against their slaveholders. Later John Adams wondered if the failure to publish that draft had been due to its “vehement philippic against Negro slavery.”¹⁸ Strikingly, it is that erased clause which convinced Angelina Grimké that all fundamental freedoms grow out of our moral nature and that as moral beings essentially we all have the same rights or, in other words, we are all “equal in rights.” Consequently, this is a normative statement, apparently derived from a struggle for true universality. As a foundational value it has found its place in the Universal Declaration of Human Rights of 1948 (UDHR).

Article 1 of the Universal Declaration of Human Rights¹⁹

Although designed as a credo, the first article of the Universal Declaration (UDHR) is not well known. This applies to both the general public and the international community itself. Indeed, there is relatively little literature on that text, which stipulates:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.²⁰

<http://www.fordham.edu/halsall/mod/senecafalls.asp>.

¹⁷ Angelina, Grimké. 1838, Letter XII “Human Rights Not Founded On Sex”, in *Letters to Catherine Beecher*, Boston: Isaac Knapp, p. 10.

¹⁸ Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, (New York: M.E. Sharpe, 2001), p. 140.

¹⁹ This section benefits from my recent inquiry entitled “Article 1 UDHR: from Credo to Realisation,” in Yves Haeck et alia, *The Realisation of Human Rights: When Theory Meets Practice. Studies in Honour of Leo Zwaak*, (Antwerp: Intersentia, 2014), p. 41-53.

²⁰ On the origin and inclusion of Art. 1 UDHR see, notably, Morsink, Johannes, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, (Philadelphia: University of Pennsylvania Press, 1999); Facing History and Ourselves National Foundation, “Fundamental Freedoms: Eleanor Roosevelt and the Universal Declaration of Human Rights – Part III: The Universal Declaration of Human Rights,” available at: www.facinghistory.org/sites/facinghistory.org/files/PartIII_essay_and_documents_0.pdf, last accessed 27 January 2013; Lindholm, T. “Article One,” in Eide, A. et al. (eds.), *The Universal Declaration of*

Notably, every word in the UDHR is important, even seemingly small words such as “equal” and “all,” since the drafting of the UDHR was one in which, “...delegates ‘thrashed out’ their differences and poured over the draft text ‘line by line’ and ‘word by word.’”²¹ This scrutiny is to be understood in the light of that global endeavour to find a moral-political basis for universal recognition and equal protection of the dignity of each and every human being, which the international community was determined to get enacted as its main goal after the moral-political catastrophe of Nazism and the ensuing World War.

Although nearly every other article in the UDHR has been codified into a treaty and served as the basis for jurisprudence,²² there is hardly any jurisprudence on Article 1 UDHR (Article 1), however.²³ In the scarce literature on this foundational text, two major issues are addressed: origin and inclusion, and basic values. A primary focus,

Human Rights: A Commentary, (Scandinavian University Press/Oxford University Press, Oslo/Oxford, 1992), p. 31-56; Morsink’s book review of that volume, Morsink, J., “The Universal Declaration of Human Rights: A Commentary,” *Human Rights Quarterly*, Vol. 17, No. 2, 1995, pp. 398-402; Waltz, S., “Reclaiming and rebuilding the history of the Universal Declaration of Human Rights,” *Third World Quarterly*, Vol. 23, No. 3, 2002, pp 437–448; Bailey, P., “The Creation of the Universal Declaration of Human Rights,” available at: www.universalrights.net/main/creation.htm; Danchin, P., “Article 1 UDHR, drafting history,” available at: ccnmtl.columbia.edu/projects/mmt/udhr/article_1/drafting_history.html.

²¹ Paul Gordon Lauren, *Visions Seen: The Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 1998), p. 234.

²² National courts throughout the world have looked to the UDHR as a source of law. For example, in *Tayazuddin and another v. Bangladesh*, the Bangladesh Supreme Court used Article 3 of the UDHR as well as the Bangladesh Constitution to hold that the government was responsible for protecting victim rights, and not just the rights of the accused, in criminal trials in order to have free and fair trials. As one scholar describes, “Through the reference to Article 3 of the UDHR, the court explained that the right to life, liberty and security of a person applies as much to the victim as to the accused, so that the court could weigh the liberty of the accused against the sense of security of the victim. Considering the gravity of the crime alleged, the court held that the right of victims to security and freedom from fear would prevail over that of the accused.” (Md. Mostafa Hosain, “Application of UDHR by Supreme Court of Bangladesh: Analysis of Judgments,” January 13, 2013, available at <http://www.clcbd.org/journal/13.html>). In South Africa, in a case regarding housing for the homeless, Judge Yacoob declared, “The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom.” (as quoted by De Gaay Fortman, B., *Political Economy of Human Rights: Rights, Realities and Realization*, (Routledge, Abingdon, Oxon, 2011), p. 159). Even in the United States, where incorporating international human rights domestically has encountered resistance, courts have used the UDHR in decisions, including the Supreme Courts of California, Connecticut, Oregon, and West Virginia. The UDHR has been cited regarding rights to education, a minimum standard of living, protecting prisoners, privacy, freedom of movement, and freedom from discrimination as well as cruel and unusual punishment. (*Pauley v. Kelly*, 162 W. Va. 672, 679, 255 S.E.2d 859, 864 (1979); *Moore v. Ganim*, 233 Conn. 557, 637, 660 A.2d 742, 781 (1995); *Sterling v. Cupp*, 290 Or. 611, 620, 625 P.2d 123, 130 (1981); *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130, 610 P.2d 436, 440 (1980); *Am. Nat’l Ins. Co. v. Fair Employment & Hous. Com.*, 32 Cal. 3d 603, 608, 651 P.2d 1151, 1154 (1982); *In re White*, 97 Cal. App. 3d 141, 148, 158 Cal. Rptr. 562, 567 (Ct. App. 1979)).

²³ It is primarily “human dignity” that plays its part in judicial decision-making, but only in cases in which national and/or regional sources also refer to this foundational value.

then, is on the drafting process.²⁴ The adoption of Article 1 “reflects the inspirational nature of the project,” as one author put it.²⁵ It was included, he writes, “only after much controversy about whether it was just stating the obvious, or whether it should be included in the preamble rather than the main text [...] The reason for including it in the main text, then, is to state firmly the basis of all human rights, the rationality of human persons and their *obligation* to deal fairly with everyone else, regardless of race, sex, wealth and so on.”²⁶ As Eleanor Roosevelt acknowledged, during the drafting of the UDHR, “[s]he believed in an international community that respected the value and variety of all human life where no nation or individual person could be truly free as long as others were not. Consequently, as she expressed herself in thought and action it became clear that her commitment to human rights embraced presidents and ambassadors as well as the “everyday people” of the world, and extended from the large citadels of government power to tiny hamlets and villages.”²⁷ According to her, it was designed “...as a common standard valid ‘for all people and all nations.’”²⁸

Actually, the middle part of the text—on the human endowment with reason and conscience, and the subsequent duty to treat others as fellows—was added somewhat later at the drafting stage after there had been an argument as to its factual basis. Deliberately, then, the article is voiced as a matter of faith rather than fact. In the General Assembly, the term “by nature”—in respect of the endowing force—was deleted as the gist of the Declaration was to keep disputed (“metaphysical”)²⁹ beliefs out of a *universal* declaration. (In a similar vein, the General Assembly rejected the Dutch delegate Leo Beaufort’s amendment to the preamble, referring to “man’s divine origin and immortal destiny.”³⁰) Finally, the statement of duty—“should act towards one another in a spirit of brotherhood”—was intentionally placed at the end. A proposed phrase referring to “duties to the community” was shifted to Article 29.³¹

²⁴ On the origin and inclusion of Art. 1 UDHR see, notably, Morsink, (supra fn. 14); Facing History and Ourselves National Foundation, “Fundamental Freedoms: Eleanor Roosevelt and the Universal Declaration of Human Rights – Part III: The Universal Declaration of Human Rights,” available at: www.facinghistory.org/sites/facinghistory.org/files/PartIII_essay_and_documents_0.pdf, last accessed 27 January 2013; Lindholm, T. “Article One,” in Eide, A. et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, (Scandinavian University Press/Oxford University Press, Oslo/Oxford, 1992), p. 31-56; Morsink’s book review of that volume, Morsink, J., “The Universal Declaration of Human Rights: A Commentary,” *Human Rights Quarterly*, Vol. 17, No. 2, 1995, pp. 398-402; Waltz, S., “Reclaiming and rebuilding the history of the Universal Declaration of Human Rights,” *Third World Quarterly*, Vol. 23, No. 3, 2002, pp 437–448; Bailey, P., “The Creation of the Universal Declaration of Human Rights,” supra; Danchin, P., “Article 1 UDHR, drafting history,” supra 17.

²⁵ Bailey, “The Creation of the Universal Declaration of Human Rights,” supra 17.

²⁶ Bailey, “The Creation of the Universal Declaration of Human Rights,” supra 17. Emphasis added.

²⁷ Lauren, *Visions Seen*, p. 218.

²⁸ Lauren, *Visions Seen*, p. 234.

²⁹ Lindholm, T. “Article One,” in Eide, A. et al. (eds.), *The Universal Declaration of Human Rights: A Commentary*, (Scandinavian University Press/Oxford University Press, Oslo/Oxford, 1992), p. 31-56.

³⁰ Johannes Morsink, *The Universal Declaration of Human Rights. The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, (Philadelphia: University of Pennsylvania Press, 1999), p. 288.

³¹ Lindholm, “Article One,” p. 40.

Obviously then, Article 1 was framed as opening articles of statutes and constitutions commonly are, in both public and private settings, namely as *jus divinum* in the metaphorical sense of a fundamental statement of faith and mission—a statement of principles—as opposed to *jus positivum*, implying concrete norms and rules enacted to be observed and if necessary enforced.³² Indeed, the first article of the Declaration is to be regarded as an expression of that reaffirmed *faith* in fundamental human rights expressed in the preambles to both the Charter and the Declaration. Thus, human rights are based upon universal faith in certain crucial values. It is primarily as a normative basis for both law-making and judicial interpretation that these values are to play their part.

On the normative proclamation that human beings are all equal in rights, the United Nations does not provide much instructive comment. Indeed, an educational explanation on the UN digital programme *Cyber schoolbus* is not particularly enlightening: “**Equal** does not mean that we are all the same. Each of us is different in our own special way. But we also have the common qualities that make us all humans. So each of us should be treated with respect and dignity and treat others in the same way.”³³ The point is, of course, that Article 1 does not declare all human beings to be generally equal but rather specifically equal *in dignity and rights*. The educational statement then proceeds to a positive interpretation of “equal in dignity,” leaving “equal in rights” aside.

Equal in dignity does, indeed, refer to the inherent worth of each and every human being, simply as an innate consequence of human existence whether or not an individual person is convinced of it.³⁴ Inherent is, indeed, the adjective used in the Preamble to the Universal Declaration of Human Rights, meaning that human dignity is a matter of being rather than having, and hence implying that it cannot be taken away.³⁵ But what about “equal in rights?” Actually, this might be seen as the most difficult normative assertion in the whole Declaration. However, before tracing its meaning and implications in practice, it should first be noted that Article 1 must be read as one text, connecting *liberty* (all human beings born free), *equality* (born equal in dignity and rights) and fellowship or *solidarity* (should act towards one another in a spirit of “brotherhood”) in one triangle displaying human dignity in three manifestations:

Figure 1

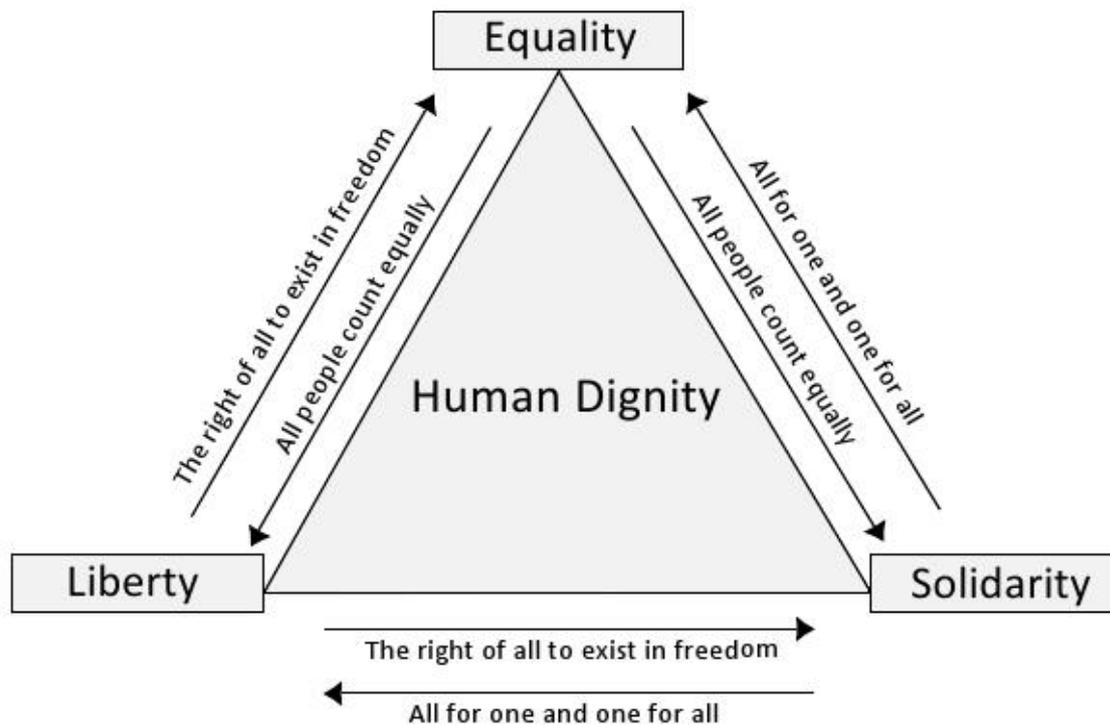
³² In canon law, an amazing distinction is made between *jus divinum positivum* and *jus divinum naturale*. Notably, the term *jus divinum* is used here in a purely metaphorical sense, referring to a statement of faith.

³³ United Nations, “Cyber School Bus,” available at <http://www.un.org/cyberschoolbus/humanrights/declaration/1.asp>, last accessed 29 July 2014.

³⁴ Matthijs De Blois, “Self-Determination or Human Dignity: The Core Principle of Human Rights,” in A. Hendriks and J. Smith (eds), *To Baehr in Our Minds: Essays on Human Rights from the Heart of the Netherlands*, (Utrecht: Netherlands Institute of Human Rights, 1998) p. 531.

³⁵ See Bas de Gaay Fortman, “Equal dignity in international human rights,” in Marcus Duewell et alia, *The Cambridge Handbook of Human Dignity*, (Cambridge: Cambridge University Press, 2014), p. 355-362.

The “Golden” Triangle of Human Dignity Manifestation



Source: de Gaay Fortman, *Political Economy of Human Rights: Rights, Realities and Realization*, London/NY: Routledge, paperback reprinting 2012, note 12, at p. 8.

Markedly, human dignity qualifies the three major human rights principles with the adjective *all*, while also connecting them as branches from the same tree. This crucial link between liberty, equality and solidarity implies that there cannot be a hierarchy of fundamental rights and their underlying values; a balancing exercise between different interests behind claims in the light of all relevant (competing) rights and core values is, indeed, vital. As was noted in a joint dissenting opinion in a European Court of Human Rights (ECtHR) case, “the Court must decide whether a fair balance has been struck between competing interests. It is not, therefore, a question of deciding which interest must, in a given case take absolute precedence over others [...] It must perform a “balancing of interests” test and examine whether in the present case the French system [the legal system at issue], struck a reasonable balance between the competing rights and interests.”³⁶

Thus, in actual practice the three basic values also qualify one another, each with its own core perspective. Indeed, Ronald Dworkin calls here for “solutions to *simultaneous equations*.”³⁷ It is important, in other words, not to play one value out against another (liberty versus equality, for example) but to aim at simultaneous realisation.

³⁶ ECtHR, *Odièvre v. France*, 13 February 2003 (Appl.no. 42326/98), joint dissenting opinion of judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

³⁷ Ronald Dworkin, *Justice for Hedgehogs*, (Cambridge: The Belknap Press of Harvard UP, 2011), p. 3. Emphasis added.

The Equal Rights of All: (1) Formal Equality

Perusing international human rights law and the comments and observations of its distinct supervisory bodies, one is struck by a primary interpretation that relates the equality principle to the subjects of human rights, in particular “the equal rights of men and women.” Actually, it is already in the preamble to the UN Charter that the “Peoples of the United Nations” reaffirm their faith in... “the equal rights of men and women.” This expression is repeated in the preamble to the UDHR whilst human rights treaties themselves use phrases like “the equal right of men and women to the enjoyment of all rights set forth in the present Covenant.”³⁸

A first issue in this respect is the meaning of equal enjoyment. In its General Comment No. 16 (2005) the Committee on the International Covenant on Economic, Social and Cultural Rights (CESCR) has provided a conceptual framework for this purpose. Its primary distinction is between formal (*de jure*) and substantive (*de facto*) equality. The former requires equal status before the law in the sense of equal treatment of equal cases. Often quoted in this connection is Aristotle’s characterization of formal justice where “...equals are to be treated equally and unequals unequally.”³⁹ In other words, a principle of consistency.⁴⁰ However, since antiquity accepted slavery, one thus has to be careful. To regard a fellow human being as an “unequal” due to certain circumstances requires legitimation in the light of that fundamental principle based upon the birth of *all* as human beings “equal in rights.”

Naturally, then, in adjudication and law enforcement, women ought to be treated as equals in the sense that they should not be the objects of discrimination. But there is more. The Canadian Charter of Rights and Freedoms of 1982, Article 15(1) reads: “Every individual is equal *before and under the law* and has the *right to the equal protection* and equal benefit of the law *without discrimination*...”⁴¹ Thus, apart from the prohibition of discrimination there is also the requisite of “equal protection of the law.” The latter may well call for special measures, for example to protect women from violence under cover of privacy. The point is that the law ought to protect men and women alike in all aspects of their human dignity, including bodily integrity. This responsibility may well entail different (unequal) approaches in unequal cases in order to equally protect both men and women. This is precisely Loenen’s argument as recalled at the outset of this chapter.

A strategic issue in this regard is whether the categorization of rights entailing special measures to fight gender discrimination and to provide legal protection in case of gendered vulnerability might be conducive to the struggle as such. My view is that in light of both the systemic nature of human rights violations -- specifically directed against women and the need for a global moral platform the slogan “Women’s Rights

³⁸ It is a bit odd to grant people rights to enjoy rights. Perhaps typical of the soft nature of the international human rights venture.

³⁹ As quoted by Louis P. Pojman & Robert Westmoreland (eds.), *Equality: Selected Readings*, (New York: Oxford University Press, 1997), p. 2.

⁴⁰ *Id.* at p. 3.

⁴¹ Quoted by Wojciech Sadurski, *Equality and Legitimacy*, (Oxford: Oxford University Press, 2008), p. 95. His emphasis.

are Human Rights” has been fully understandable.⁴² Probably, it has worked too. The term *women’s rights* may well have exerted substantial positive affect on the struggle against such practices as sex discrimination in law, sexual violence, female genital mutilation (FGM), and trafficking.

Currently, however, two downsides manifest themselves. First, the slogan emphasizes difference -- where the challenge is to convince society of (gender) equality in principle. Consequently, a motto like “Equality Now” is more in conformity with the fight for universality and against exclusion.⁴³ Second, the categorization of rights according to specific characteristics of legal subjects has become disturbingly widespread. Thus, we formerly had LGBT rights: Lesbian, Gay, Bisexual and Transsexual, which meanwhile has been extended to abbreviations as odd as LGBTQIA (adding Questioning, or Queer, Intersex and Asexual). This specification and categorization has become not only bizarre but also counterproductive. Human rights are all encompassing. Thus, it is unnecessary to speak of “a right to be human,” a “right to be a woman,” or “a right to be gay” – all of which sounds absurd, since the term human rights is intended to be comprehensive. Moreover, it confuses the argument and mobilizes counterforces against people with non-mainstream sexual orientations. The point is that *all* people are *equal in rights* and hence shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex, sexual orientation, or on any other grounds whatsoever shall not be permitted.⁴⁴

The Equal Rights of All: (2) Substantive Equality

Nationally, equal protection tends to be constitutionally embedded as, for example, in the Fourteenth Amendment to the US constitution. Of course, this is not enough to realise genuine equality in rights. On the contrary, David Cole, a US constitutional law scholar, argues that although the US “...criminal justice [system] is explicitly based on the premise and promise of equality before the law, the administration of criminal law...is in fact predicated on the exploitation of inequality.”⁴⁵ Based on an empirical analysis of *Race and Class in the American Criminal Justice System*, he concludes

...our criminal justice system affirmatively depends on inequality. Absent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass

⁴² In preparation for the Second International Conference on Human Rights (Vienna 1993) this slogan was coined by the women’s lobby. Hillary Clinton used it in her speech, “Remarks by the First Lady Hillary Rodham Clinton to the United Nations Fourth World Conference on Women Plenary Session,” September 5, 1995, available at <http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt>.

⁴³ Actually, this is the name of a global women’s movement founded in 1992: <http://www.equalitynow.org/ourwork>.

⁴⁴ Notably, the last two sentences constitute an English translation of Article 1 of the Dutch Constitution. Strategically, the term “or on any grounds whatsoever” should suffice.

⁴⁵ David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, (New York: The New Press, 1999), p. 5.

incarceration that we have pursued over the past two decades.⁴⁶

Race and class disparities manifest themselves in collective prejudice and consequential discrimination on the part of law enforcement officers as well as juries and judges. Exemplary in the struggle for *equal in rights* in this respect is the Innocence Project in the US, a non-profit national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice. Not surprisingly, all their clients are “poor, forgotten, and have used up all legal avenues for relief.”⁴⁷

With regard to civil litigation, Marc Galanter completed an extensive legal-anthropological inquiry into structural disparities among parties in cases involving claims presented to insurance companies. The article carries the striking title *Why the Haves Come Out Ahead*.⁴⁸ The companies happen to be “repeat players” while individual claimants are “one-shotters.” As parties in litigation, the large and professionally organised repeat players specialise in legal services, and appear to enjoy substantial advantages, extending even to favourable rules and due process barriers.⁴⁹

Notably then, procedural equality is not enough. Merely settling for formal rights, Freeman has argued,

...one is locked into the subtle constraints of the equal opportunity game, including a pressure to legitimize its results (the “qualified” get ahead) and a resistance to deviation from its premises ... If equality of opportunity does not work, then rights acquisition by itself cannot deliver on its substantive promise.⁵⁰

Indeed, formal rights acquisition may even result in some negative effect on public opinion when it comes to substantive equality. Thus, once the American civil rights movement had achieved equal citizenship, its claims regarding substantive equality were seen as less urgent.⁵¹ Similarly, after meaningfully achieving formal equality goals the women’s rights movement faced growing opposition against its demands for affirmative remedial measures.⁵²

⁴⁶ *Id.*

⁴⁷ “Innocence Project,” available at <http://www.innocenceproject.org/news/>.

⁴⁸ Marc Galanter, “Why the ‘haves’ come out ahead: speculations on the limits of legal change,” in *Law and Society*, Fall (1974), pp. 95-160.

⁴⁹ *Id.*, Figure 3 at p. 125.

⁵⁰ Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv. C.R.-C.L. L. Rev. 295, (1998), p. 335-36.

⁵¹ William N. Eskridge Jr, “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 *Mich. L. Rev.* (2002) 2062, 2098.

⁵² *Id.* at 2114.

What, then, are possible elements of a struggle to achieve substantive equality? Notably, there is a crucial distinction between the demands for formal and substantive equality, especially in terms of the recognition and protection of equality. Refugees, for example, are either granted a right to seek asylum or not. Since rights discourse also uses absolutes, it supports judicial action. To achieve substantive equality, however, requires relative approaches of a political rather than judicial nature. Thus, levelling down socio-economic inequalities is a common objective in political struggles for social justice. Yet, from a judicial perspective substantive equality entails some conclusive implications, too.

First, obviously the “equal in rights” principle also pertains to economic, social and cultural rights. This applies to articles 22-26 of the UDHR as well as to the ICESCR treaty. Indeed, it is the ESCR Committee that pays consistent attention to issues concerning equal opportunities in respect of entitlements protected by these rights such as education, work and health care. What is at stake here is *resource equality*. As Dworkin holds, “we cannot guarantee people well-being, let alone equal well-being, but we can offer them equal resources and make sure that they are compensated for brute bad luck and do not profit from brute bad luck.”⁵³ Specific implications of resource equality may be identified in equal opportunities of acquirement such as equal availability and equal accessibility. In an article entitled “Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health,” Yamin and Norheim have analyzed such implications in respect of health care.⁵⁴ In such a methodology, “equal in rights” is translated into “human rights criteria,” as they call certain specified principles, applied to priority setting in systems of health care. It is an approach based not so much on human rights legality but on criteria derived from human rights-based principles of legitimacy, including formal and substantial equality.⁵⁵

Second, in the same vein “...individuals have a right to *equal concern* and respect in the design and administration of the political institutions that govern them.”⁵⁶ This, again, may be seen as a precept of substantive equality derived from the “equal in rights” principle. It entails human rights criteria to be applied to administrative budgeting at all levels of government. Not surprisingly, then, an international non-governmental organization called *Equalinrights* used to focus particularly on “budgeting rights.”⁵⁷ Several other INGOs as well as UN treaty bodies have paid

⁵³ As characterized by Louis P. Pojman & Robert Westmoreland (eds.), *Equality: Selected Readings*, (New York: Oxford University Press, 1997), p. 11.

⁵⁴ A.E. Yamin, & Norheim, O.F., “Taking Equality Seriously: Applying Human Rights Frameworks to Priority Setting in Health,” in *Human Rights Quarterly*, Vol. 36, No. 2, May 2014, pp. 296-324.

⁵⁵ Behind each distinct human right is a principle connected to basic human dignity. Examples following from the UDHR are the value of human life per se, bodily integrity and the trinity of Article 1: liberty, equality and solidarity. Such principles underline the legitimacy of any use of power that affects people’s lives and living conditions.

⁵⁶ Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth & Co., 1977, p. 180. Emphasis added.

⁵⁷ *Equalinrights* (2004-2011) was a joint initiative of the Dutch Development Agency ICCO and the Netherlands Institute of Human Rights. See http://www.aprodev.eu/files/Development_policy/Dev-RBA/budgeting_human_rights-Jan%202007.pdf This methodology is also available through other means. See the UN Practitioners’ portal <http://hrbportal.org/archives/tools/budgeting-human-rights>

explicit attention to human rights budgeting in relation to many different states parties, e.g. the CRC Committee.

Exemplary in this respect is a doctoral study by Yanqing Hong on qualitative inequality in basic education between urban and rural areas in China examined in the light of the human right to education and the equal in rights principle.⁵⁸ Political economy analysis showed that the contextual background to this inequality in rights lies in the organization of public finance. Strikingly, although this analysis demonstrated evident systemic violations of the ICESCR, which China had ratified, this appears to be an issue on which the country has never been questioned in any UN human rights setting.

Overcoming the Global Human Rights Deficit: A Struggle for True Universality

In much of her work on human rights, Titia Loenen has pointed to the gendered nature of a problematique that is part of what I call the global human rights deficit⁵⁹, viz. the public/private divide. Indeed she advocates a reconceptualization of international human rights law so as to include specific violations that affect women in particular such as domestic violence, forced prostitution, trafficking, female genital mutilation and sexual crimes. What is necessary here is interpretations of the “equal in rights” principle that acknowledge difference and effectuate special measures to protect such essential elements of human dignity as bodily integrity beyond the four walls of privacy, too. Indeed, in our world today women are *not* equal in rights. Intolerable impunity of those responsible for gross and systematic violations of human rights, affecting women in particular, reflects a prevailing acquiescence to major constraints on true universality. Here “equal in rights” may well serve as a wake-up call to break through double standards.

A second component of that global deficit concerns the impunity of state-related perpetrators of human rights violations, viz. those holding powers of government and their subordinates. Although international law has crossed the frontiers of national sovereignty, its range does not extend to the “owners” of major state power. For example, victims of gross and systematic human rights violations in Chechnya, Tibet, Afghanistan, Israel and Palestine -- to mention just a few -- are not equal in international human rights. Indeed, the International Criminal Court (ICC) has itself become a major accomplice to current acquiescence in double standards, since no charges have been filed in relation to these situations.

“Double standards are better than no standards at all”, appears to be the prevailing mood -- even within the international human rights movement itself (except for the laudable advocacy of NGOs with a genuinely universal mission such as Amnesty International). With its legitimacy seriously undermined by double standards, international criminal justice will not be in a position to reach out to the hearts and minds of all global citizens. Here again, “equal in rights” may serve as a wake-up call to truly commit humankind to universality. It is imperative that international criminal

⁵⁸ Yanqing Hong, *Political Economy of the Right to Education in Rural China: Unpacking the Black Box of the State*, Doctoral Dissertation, Utrecht University, 22 December 2011.

⁵⁹ Bas de Gaay Fortman, *Supra*, fn. 1. See also Arts, K. and Mihyo, M. (eds.), *Responding to the Human Rights Deficit. Essays in Honour of Bas de Gaay Fortman*, The Hague: Kluwer Law International, 2003.

justice standards apply equally to all states, regardless of their fungible power or positions within the international system.

Thirdly, major global deficiencies present themselves in the area of so-called minority rights. Markedly, the issue as such is not a problem of minorities but of the ways and means in which dominant (usually majority) power is abused to withhold recognition, protection, resource equality and equal concern from specific categories of people. As minority security depends on the very government that abuses their rights, oppressed collectivities may well be expected to move. In this connection an important aspect of the “equal in rights” principle comes to the fore, *viz.* geographical inequality. During the last two hundred years, global geographical income inequality⁶⁰ in terms of real purchasing power has risen from a factor of 1:3 to over 1:100, meaning that on average an individual born in one of the most destitute spots in our world today “enjoys” a purchasing power of less than one dollar for every one hundred dollars of average purchasing power per capita in the most privileged regions. From an “equal in rights” perspective, the least one would expect here is a universal freedom to move. Yet, in their attempts to flee from absolute destitution people characterized as “economic refugees” drown at sea. Applying human rights criteria to migration policies, one would expect at least some attention to be paid to the need for flexible rather than rigid rules regulating migration. International as well as regional and national refugee laws that allow resettlement only as political asylum seekers neglect the whole prevailing problem of spatial horizontal inequality in a globalized perspective. Again, “equal in rights” might serve as a wake-up call to this predicament.

Finally, and obviously related to the preceding paragraph, another manifestation of the global human rights deficit lies in structural non-implementation of the rights of the poor. Already in the previous century United Nations development agencies called poverty “a brutal denial of human rights.”⁶¹ At the turn of the millennium, the World Bank’s *Voices of the Poor* studies revealed daily hardship in efforts to sustain livelihoods to be a problem of contextual constraints such as failing political, economic and judicial institutions.⁶² Hence, it is not primarily the dissemination of human rights texts that “the poor” require, but also support in actual struggles to secure the basic entitlements that human beings universally require to survive.

In conclusion, *equal in rights* is a strong normative statement directly derived from basic human dignity. It legitimates and supports struggles against exclusion. In respect of formal equality, “equal in rights” constitutes a legal precept of equal protection as well as an injunction against discrimination. In efforts towards substantive equality, it

⁶⁰ S. Mansoob Murshed and Scott Gates call this spatial-horizontal inequality. See their article ‘Spatial-Horizontal Inequality and the Maoist Insurgency in Nepal’, *Review of Development Economics*, Volume 9, Issue 1, pp. 121–134, February 2005. See also L-E. Cederman, K.S. Gleditsch and H. Buhaug, *Inequality, Grievances and Civil War*, Cambridge: C.U.P. 2013, p. 30 ff.

⁶¹ United Nations Development Program, *Integrating Human Rights with Sustainable Development*, (New York: United Nations, 1998), p. 27.

⁶² Deepa, Narayan R. Patel, K. Schafft, A. Rademacher and S. Koch-Schulte. 2000a, *Voices of the Poor. Can Anyone Hear Us?* Oxford: Oxford University Press (for the World Bank); and Narayan, Deepa, R. Chambers, M.K. Shah and P. Petesch. 2000b, *Voices of the Poor. Crying Out for Change*, Oxford: Oxford University Press (for the World Bank).

entails norms and values that may serve as both legal principles in interpretation and principles of legitimacy in making and executing policies. Indeed, “equal in rights” may well function as a crowbar to true universality.