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Herrler, Christoph

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Human rights and climate risks for future generations: How moral obligations and the non-discrimination principle can be applied

by Christoph Herrler

From an ethical point of view, preventing the development of conditions that threaten the existence of future generations is a necessity; but to what extent can this argument be made using the language of human rights? I contend in this article that this language can provide us with arguments for extending greater consideration to the risks we may be imposing on future generations and the need for institutional representation of these generations' interests. The application of a human rights perspective to issues of future concern enables us to formulate obligations to upcoming generations on the part of current ones. Further, I consider how the point in time in which a person is born represents a (morally wrong) ground for discrimination.

Keywords: human rights; discrimination; climate risks; future generations; precautionary principle

Realistic nightmares: Existential risks for future generations

The essay *The Peril of Extinction* by Michael J. Sandel, first published in the summer of 1986, considers “the possibility that human history could come to an end” due to a “nuclear nightmare” (Sandel 2006: 179). As we are aware (and many of us remember), 1986 was the year of the nuclear disaster in Chernobyl. This ‘nuclear nightmare’ returned to public consciousness on its 36th anniversary, as a consequence of Putin’s invasion of Ukraine on 24 February 2022. This invasion provided a horrifying demonstration of the ongoing risk of a nuclear war with its inevitably disastrous outcomes. The existence of nuclear weapons constitutes an existential risk to the current generation and those that will follow it.¹ The Doomsday Clock, created by scientists in 1947 in response to the new threat of nuclear weapons and symbolically showing how close the world is to the destruction of civilisation as we know it, was set at 100 seconds to midnight in January 2022, before the invasion. The board responsible for setting the clock stated two months later that Russia’s invasion had brought the “nightmare scenario to life” that nuclear weapons might be used; “[t]his is what 100 seconds to midnight looks like” (SASB 2022b). The clock’s progenitors and custodians have since 1947 extended its field of reference from nuclear weapons alone to now also considering other disruptive technologies and anthropogenic climate change when determining where to set it (SASB 2022a). There is certainly no lack of risks and threats that could cause the clock’s hands to move still closer to midnight, and there may be existential risks of which humanity is currently unaware.² Alongside risks stand uncertainties, which may likewise constitute threats. Usually, risks refer to cases where the probability of possible outcomes can be determined; in cases of uncertainty no probability can be determined (Caney 2009: 166). Mindful that real-world cases may not follow such an unambiguous demarcation, Nida-Rümelin et al. (2012: 6-10) speak of a continuum at

whose extremes are ‘pure risks’ (with clearly specifiable probabilities of occurrence) and situations of ‘complete uncertainty’ (where no information on probability is available).

Sandel’s essay asserts that a ‘language of individual rights’ is insufficient to address the existential dimension of these threats and risks, which instead require “some kind of communal language”. He goes on to write that along with the deaths of millions of individuals, a nuclear war would entail “the loss of the world” and so “a loss beyond the loss of lives” (Sandel 2006: 182). Is this assessment true? If one thinks that sounds quite plausible, the same might also be true for the language of human rights, which evidently pertain to individuals “born free and equal in dignity and rights”, as expressed in Article 1 of the Universal Declaration of Human Rights (UDHR). Or might the language of human rights instead serve as such a communal language, since the UDHR’s preamble refers to “all members of the human family”? I shall get back to this later; here I want to point out a possible difficulty presented by the quotation from Article 1 mentioned above. This difficulty, in relation to future threats and risks, is the apparent limitation of the wording to existing human beings – it does not appear able to confer human rights (standards) upon those not yet born. Yet we are currently facing another realistic nightmare, the nightmare of anthropogenic climate change, which poses a particular threat to exactly this group of (future) people. In what follows I will focus on this example, because unlike the nuclear nightmare – which ultimately can only be brought to reality by decision-makers in certain states that possess nuclear weapons – many members of the present generation emit greenhouse gases and are therefore partly responsible for anthropogenic climate change. In light of this, I will consider the following key questions: How might a human rights-based approach tackle existential risks to humanity such as cataclysmic climate change? And does the language of human rights apply where these risks endanger future generations, and if so, how?

We are currently facing the nightmare of anthropogenic climate change, which poses a particular threat to (future) people.

Climate risks: the ‘methane nightmare’

The persistence in the Earth’s atmosphere of what are usually called greenhouse gases (such as, carbon dioxide and methane, UBA 2021) means that the impact of global climate change presents a particular threat to those who will inhabit our planet in the future. This risk may gain an existential character if a failure to meet the goals of the Paris Agreement should result in the triggering of tipping points in Earth’s climate system, potentially initiating “a global cascade of tipping points” that leads to “a new, less habitable, ‘hothouse’ climate state” (Lenton et al. 2019: 594). If, for instance, the Amazon rainforest were to collapse (tip-

ping point 1), the greenhouse gases stored there could relatively abruptly be released into Earth's atmosphere. The resulting exacerbation of the greenhouse effect could then accelerate the thawing of the permafrost across the Arctic (tipping point 2), which stores large amounts of methane and carbon dioxide. This, in turn, could trigger further tipping points (see IPCC 2022 for a more detailed discussion of these risks). McKinnon (2009: 187-188) describes this worst-case scenario as a "Methane Nightmare": "In this scenario the majority of life on Earth, perhaps including homo sapiens, could go extinct." Uncertainty as to when which (probably irreversible) tipping points may be reached and as to the exact implications in each case makes it impossible to rule out the possibility of this nightmare coming to pass; continuously increasing greenhouse gas emissions may make its occurrence more likely still. This means, then, that a failure to take drastic action on climate change constitutes an existential risk to succeeding and future generations.

Indeed, Thiery et al. (2021: 158) estimate that "children born in 2020 will experience a two- to sevenfold increase in extreme events, particularly heat waves, compared with people born in 1960, under current climate policy pledges". The imposition on others of a risk of this magnitude, or of existential risks in general, is extremely questionable from an ethical point of view and, as I will show, is susceptible to critique using the language of human rights. More generally, I aim in this article to demonstrate the suitability of this language for formulating, and calling for action on, the concerns of future generations. I believe it can provide a justification for obligations held by current generations to those to come, and it can serve to assert the moral right of people living in the future to receive equal treatment to those living now. In this context, I will argue that the point in time when an individual's birth occurs can constitute a prohibited ground of discrimination. In this light, I will proceed to call for future generations to receive stronger institutional representation with the aim of enabling their participation in present-day political processes.

Preventing a rude awakening: The precautionary principle and the human rights obligations of present to future generations

Before I embark on my discussion of human rights in this context, I shall outline briefly an ethical principle that is of central relevance to risks and uncertainty. Fundamentally, this 'precautionary principle' permits – or, in a stronger version, requires – those in positions of influence to establish decision-making processes that take preventive measures to avoid unacceptable scenarios. This remains the case when uncertainties exist on matters such as the likelihood of these scenarios to occur or their exact impact. It is worth stressing at this juncture, the distinction between uncertainty and ignorance. Scientists do understand the fundamental processes of anthropocentric climate change, although some uncertainties may remain (Gardiner 2010: 7-9). It is evident that the current generation has no grounds for relying on the "excusable-ignorance argument" (Bell 2011b). In a scientifically robust debate, it is untenable to assert that excessive greenhouse gas emissions do not contribute to climate change or to suggest that this causal effect is beyond our knowledge. As such, a precautionary principle provides us with a guideline which might be formulated as "better safer than sorry" (Nida-Rümelin et al. 2012: 105-122) and which appears, for example, in Article 3.3 of the United Nations Framework Convention on Climate Change (UNFCCC). After describing the possibility of a methane nightmare, which is unacceptable due to its existential dimensions, McKinnon (2009:

190) argues for the application of a strong precautionary principle. Political action (that is, the taking of preventative action) is necessary and justified, she asserts, even in the face of uncertainty and insufficient information around possible harms,

"because the worst consequences of not taking precautionary action are worse than the worst consequences of taking precautionary action, and choosing the former course of action is not consistent with treating present and future people as equals when we cannot assign a probability to each outcome, that is, when we are strongly uncertain of each outcome, as is the case with respect to CCCs [= climate change catastrophes]" (McKinnon 2009: 191).

This represents a combination of a maximin strategy – that is, the maximum possible damage a course of action could have is to be minimised – and the precautionary principle. McKinnon further argues that future generations should not be subjected to "unbearable strains of commitment" which would render them unable to engage in the "joint pursuit of justice" (McKinnon 2009: 196). Essentially, she contends here that we cannot expect members of future generations to act in line with principles of justice if their living conditions are so bad, that they restrict them from pursuing their self-preservation and that of their families. Accordingly, the current generation therefore owes it to future generations to provide living conditions that it would accept for itself (McKinnon 2009: 194-197). This line of argument suggests that proportionally sharing the (financial and other) costs of climate action among the generations is the ethical and therefore imperative course of action, which would draw on the notion of "treating present and future people as equals", as McKinnon puts it (see above). Equal treatment is a fundamental aspect of human rights which finds expression in the key principle of non-discrimination. The treatment of individuals *as equals* is a matter pertaining to the moral status of all human beings and should not be confused with treating them *in exactly the same way* or providing them with the same amount of goods or opportunities (Moreau 2020: 8-9). It appears, then, that McKinnon shares the view of other philosophers and climate ethicists that the point in time of a person's birth, the factor which determines whether that individual is among 'present' or 'future' people, does not constitute legitimate grounds for unequal treatment (Herrler 2017: 164-172, Caney 2014: 323-325). However, this postulate – that people should receive treatment as equals regardless of when they are born – raises various questions, including the matters of whether people alive at present have obligations to future generations; and if so, what exactly these obligations consist in; and the grounds of their justification.

A strong 'precautionary principle' requires those in positions of influence to establish decision-making processes that take preventive measures to avoid unacceptable scenarios even where uncertainties exist on matters such as the likelihood of these scenarios' occurrence or their exact impact.

Could the language of human rights help answer these questions? I think so, and in advocating for the legitimacy of its use in this context, I will seek to show that people currently alive are indeed subject to moral obligations grounded upon the human rights of people living in the future. I will call these moral duties 'obligations with advance effect'. In asserting their validity, my argument will acknowledge and reflect the fact that it is difficult to speak

of the capacity of subjects who do not yet exist to have, and thus (be able) to exercise, rights. From a juridical point of view, in the words of Germany's Federal Constitutional Court, neither "unborn persons [n]or even entire future generations [...] enjoy subjective fundamental rights" (BVerfG 2021: para. 109, also para. 146). While mindful of this objection, I am nevertheless of the view that the language of human rights can draw our attention to the equal *moral* status of human beings living in the future with those currently alive. "It is almost undisputed that we have present obligations and responsibilities towards future persons" (Tremmel 2009: 56); but the acceptance of this equality of moral status would imply the rejection of the notion that duties owed to future people are a lesser priority than other moral duties or obligations.

The starting point for my argument is the premise that human beings are, regardless of their identity,³ holders of human rights as soon as they are born.⁴ As we already have seen stated in Article 1 of the UDHR, all human beings are "born free and equal in dignity and rights". Proving the existence of obligations with advance effect requires us to make three further assumptions:⁵

- A) Holders of human rights will live on Earth in the future.
- B) Actions of those alive in the present have the capacity to affect the human rights entitlements of these future rights-holders.
- C) This potential impact on future rights-holders is particularly the case for human rights entitlements pertaining to basic human needs that are likely to remain the same over time.

Assumption B describes the largely one-way direction of the impacts unleashed by the actions of present-day people, a circumstance which constitutes 'the pure intergenerational problem' (Gardiner 2003). This problem makes itself evident to us in the effects of anthropogenic climate change, and may entail the acknowledgement of existential risks to future generations flowing from the actions of those living now. Such existential risks might be considered a challenge to assumption A; however not as an essential challenge in terms of threatening the status of future human beings as rights-holders, but rather in terms of threatening the living conditions they require if they are to exercise these rights. The reference to basic human needs that is exemplified in assumption C operationalises an argumentative strategy that seeks to minimise opportunities for objections which cite the multi-faceted uncertainties invariably associated with the contention of an impact yet to come. As we cannot predict the future, such objections will likely arise, to varying degrees, in relation to all assumptions about the future. Karnein (2015: 47) encapsulates the epistemic challenge posed by these uncertainties thus:

"First, we do not know how many future generations there will be. Second, it is unclear what anyone can know about future generations' values and preferences because there is no chance of directly exchanging our views with theirs. Third, it is difficult to tell what the precise consequences of our actions will be, especially when it comes to the further future."

This notwithstanding, it is barely deniable at present that human beings will continue to need adequate food, clean water, and safe places to live even in the more distant future. For instance, Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses these needs. The precise nature of each need and the associated entitlement will obviously vary from case to case, with members of some populations, for exam-

ple, requiring an adequately heated home and others needing an adequately cooled one – needs and entitlements on which global heating is already having an observable impact. It should be noted in this context that Caney (2010), who is using this type of argumentative strategy, even seeks to pre-empt potential objections by intentionally setting out the human rights to life, to health, and to subsistence in terms less rigorous than those found in the UDHR and in the ICESCR. Another argumentative strategy might refer not just to human rights pertaining to basic human needs as in assumption C, but conceptualise *all* human rights as a holistic entity, as a set of freedom rights encompassed in the principle of general freedom of action. The task of such a strategy would then be to successfully undergird the notion that every human right is applicable to members of future generations.

Human rights refer to entitlements that necessarily generate duties or obligations. From a moral point of view, it is irrelevant whether these duties or obligations concern actions with immediate effects or impacts that do not unfold until a point in the more distant future.

It should be recalled at this point that human needs or interests are not the same thing as human rights: "The content of a human right is the content of its associated duties, not of the interests that ground those duties" (Tasioulas 2015: 48). Human rights thus refer to entitlements that necessarily generate duties or obligations. From a moral point of view, it is irrelevant whether these duties or obligations concern actions with immediate effects or impacts that do not unfold until a point in the more distant future. The effectivity in advance of duties or obligations based on rights of others is not unusual; in fact, logically speaking, it seems to be the norm. As Bell (2011a: 107-108) writes:

"[A]ll human rights-based duties are current duties grounded in the future rights of persons living in the future (even if it is the very near or immediate future). [...] Duties come temporally before human rights because actions come temporally before their effects. Human rights come normatively 'before' (i.e., they justify) duties because effects on human interests come normatively 'before' (i.e., they justify) restrictions on actions that cause those effects."

As I have shown, the imperative of avoiding potentially harmful impacts – particularly, not exclusively, in cases of potential existential risk – also appears in the precautionary principle. In a similar manner, the idea of human rights obligations expresses a desire to prevent human rights violations before they can occur. If it is assumed that basic human needs will remain more or less the same in the future and that global heating will jeopardise the human rights entitlements associated with these needs, then one can affirm the current existence of obligations to mitigate and adapt to climate change. Such obligations are effective in advance of the rights-holders' existence and have the aim of minimising, as far as possible, the restriction or violation of these entitlements and freedom rights. From a human rights perspective, then, inadequate climate action would perpetrate intergenerational injustice with a disproportionate impact on future people, who are vulnerable due to their incapacity to effect change in the present time. If one progresses beyond the strictly intertemporal understanding and extends this group to include people already born (and speaks of a succeeding generation, see note 1), the epistemic challenge on the grounds of uncertainty weakens, and it becomes

even more difficult to query the status of this group's members as rights-holders. Further, some members of this group may be able to exert a degree of influence on climate policy decisions; indeed, climate activists from initiatives such as *Fridays for Future* and the German *Letzte Generation* are currently engaged in such action. Incorporating the needs of succeeding generations in considerations of climate impacts renders the task less abstract and therefore significantly easier than the determination of needs and impacts relating to generations of the distant future.

Specifying the human rights obligations

An instructive object lesson in this context is the challenge facing Germany's Federal Constitutional Court as it ruled on the constitutional complaints brought against the 2019 Federal Climate Change Act. In its Order of 24 March 2021, the Court's First Senate provides some guidance on how one might conceive more specifically of human rights obligations in the context of anthropogenic climate change.⁶ Partially upholding the constitutional complaints against the Act, the Court crucially set out the notion of "an advance interference-like effect on the freedom of the complainants [...] that is comprehensively protected under the Basic Law" (BVerfG 2021: para. 184).⁷ In my view, this idea leads us to the same line of reasoning as does the proposition of an obligation with advance effect. Other parts of the Order make specific mention of 'duties' and 'obligations'. Indeed, as early as the Order's first headnote, the Court observes that the "state's duty of protection [...] encompasses the duty to protect life and health against the risks posed by climate change" and can "furthermore give rise to an objective duty to protect future generations" (BVerfG 2021: headnote 1). One can thus follow what appears to be the First Senate's thinking in conceiving of human rights obligations with advance effect as *obligations to protect* not only individuals already alive, but also people yet to be born. Additionally, one may consider such obligations as *obligations to respect*, because "[u]nder certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations" (BVerfG 2021: headnote 4). In this context, the reference is to the costs and burdens associated with far-reaching climate action and the need to avoid imposing them disproportionately onto people living in the future. Alongside this, the Court points to the necessity of treating the natural foundations of life with care, so "that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence" (BVerfG 2021: headnote 4). This point, reminiscent of McKinnon's argumentation as set out above, implies an obligation to respect future people *as equals* to those currently alive; it is this moral standard that one will presumably have to apply if one is to identify an inappropriate or disproportionate intergenerational distribution of the opportunities associated with fundamental freedom. Finally, human rights obligations are also *obligations to fulfil*, and as such require states to take positive action to enable people to exercise their human rights to the fullest possible extent (Krennerich 2013: 106). The Court's view is that "[r]especting future freedom also requires the transition to climate neutrality in good time" (BVerfG 2021: headnote 4); continuing, the Order advises that "[i]n all areas of life [...] developments need to be set in motion to ensure that in the future, meaningful use can still be made of freedom protected by fundamental rights, but then based on CO₂-free alternatives" (BVerfG 2021: para. 248). While recognising that "the state itself has neither the capacity to achieve

this transition alone nor the sole responsibility for doing so", the Court notes that "[c]onstitutional law nevertheless obliges the legislator to create the underlying conditions and incentives that would allow these developments to occur" (BVerfG 2021: para. 248, see also headnote 5).

The conception of human rights obligations emerges here as obligations to protect, respect, and fulfil human rights.

The conception of human rights obligations that emerges here, as *obligations to protect, respect, and fulfil human rights*, is established in human rights discourse (UN ECOSOC 1987: sections 67-69). This is not the case, however, for the application of human rights to future generations. Significantly, a report on the relationship between climate change and human rights asserts:

"Human rights treaty bodies have alluded to the notion of intergenerational equity. However, the human rights principles of equality and non-discrimination generally focus on situations in the present, even if it is understood that the value of these core human rights principles would not diminish over time and be equally applicable to future generations" (UN HRC 2009: section 90).

If the value of the mentioned 'core human rights principles' does not diminish over time, one might wonder then, whether there might be the possibility of a wrong discrimination on the basis of the generation a person is born into. In the section that follows, I will set out an argument for the possible existence of such discrimination and the capacity of failure to act on climate change constitutes an instance thereof. While doing so, I will keep in mind that "the formulation of human rights remains an unfinished business" and that it "requires openness for further adaptations, modifications, amendments and reformulations" (Bielefeldt 2022: 77).

Does the imposition of climate risks on future generations constitute wrong discrimination?

Lewis (2018: 165) observes that, despite some juridical limitations, "there is still significant rhetorical and moral value attached to the language of human rights and consequently much to be gained from its continued linkage with climate change". In my view, engaging the concept of discrimination in this context would much advance the unfolding of this value's full impact. At the present time, the generation a person is born into does not appear in typical lists of prohibited grounds of discrimination; such lists, however, are non-exhaustive by design, leaving space for new protections – notwithstanding any uncertainties around their practical effect in the juridical dimension of human rights. Article 2 of the UDHR, for example, lists "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" as prohibited grounds of discrimination; the closing "or other status" emphasises the list's non-exhaustive character. General Comment No. 20 of 2 July 2009 (E/C.12/GC/20) on non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the ICESCR) specifies in its sections 24-26, that in this context, 'birth' refers not to the point in time of a person's birth, but to its circumstances, such as the parents' marital status. Adding 'generational discrimination' (or a similar concept, named differently) to the list would require both the application of discrimination as a concept to the intergenerational context and its characterisation as morally wrong

in this same context. I will therefore commence the argument with reference to authors on the ethics of discrimination. It is my impression that many of their discussions of age discrimination refer to age groups (such as children and the elderly) rather than to birth cohorts (Bidadanure 2018). Unequal treatment of those belonging to different age groups is not of crucial interest in relation to the issues of intergenerational justice I discuss in this article. Indeed, taken over a person's lifetime, such unequal treatment may not in fact result in inequalities because the age group to which a person belongs changes – unlike the point in time of their birth (Bidadanure 2016: 239-240). Instead, I focus here on the disparate effects of specific practices on birth cohorts, such as the unequal risk of exposure to extreme climatic or meteorological conditions.

What do we mean when we speak of 'discrimination' in general? Put somewhat roughly, discrimination occurs where a subject, X, perceives (accurately or otherwise) the object of discrimination, Y, as possessing property P, and treats Y differently from another individual, group or entity, Z, that X does not perceive as having P. The use of 'subject' and 'object' here is in a grammatical sense; X, Y and Z could be individuals of any gender, or "superindividual entities such as private companies, social structures, and states" or indeed "possible people" (Lippert-Rasmussen 2014: 14-22; quote on p. 19). Discrimination, then, generically describes unequal, usually disadvantaging treatment on the basis of an actual or perceived property or trait. Let us assume a person living in the future (Y) has been, or will be, born later than another person (Z); P stands for the point in time at which Y's birth occurs. Let us further assume, for the sake of simplicity, that Z is a contemporary of the currently living X. If the consequences of an action by X have a disadvantageous effect on Y that is disproportionately greater than their deleterious effect on Z, it may be the case that Y has suffered discrimination on the basis of the point in time or generation of their birth. An example of such disadvantage might be an event precipitated by greenhouse gas emissions, which has a serious impact on Y, possibly to the extent of threatening their ability to live and meet their needs. Risks stemming from an act are 'imposed risks' when those affected by the act's possible consequences were not its agents (Nida-Rümelin et al. 2012: 8).

When considering the moral status of this type of discrimination, one can usefully draw on the conceptualisation of the issue proposed by Moreau (2020: 1-11), who considers wrongful (that is, in most cases morally unacceptable) discrimination not to be a matter of drawing erroneous, or wrongful, distinctions between individuals or groups, but rather one that prompts us to ask, "[w]hen we disadvantage some people relative to others on the basis of certain traits, when and why do we wrong them by failing to treat them as the equals of others?" (Moreau 2020: 7). In so doing, Moreau observes that the focus shifts from those perpetrating discrimination, and their intentions, to those discriminated against and the impact they sustain. This question additionally emphasises the fact of unequal treatment being visited upon people of equal moral status – the establishment and enshrinement of which is, as set out above, a key concern of the language of human rights, which asserts all human beings' right to enjoy equal respect. Moreau (2020: 12-24) further makes reference to the commonly drawn distinction between direct and indirect discrimination (or, in the US context, 'disparate treatment' and 'disparate impact'). It might appear at first glance that indirect discrimination is of greater relevance to the intergenerational context than is the direct form. Indirect discrimination, while it does not entail the use of

a characteristic as grounds for explicitly singling out a person or group, does see those with that trait or property put at a disadvantage because of it. In this way, an act or practice, such as emitting greenhouse gases, has an *impact* on one group, such as currently living people who benefit from access to sources of energy, that is *disparate* from the impact it has on another group, such as people living in the future who bear the long-term cost or disadvantages of these emissions. In this example, the trait of the two groups that leads to their unequal treatment is the period of time within which their birth occurs. The causal chain initiated by the act – i.e. the emission of greenhouse gases causes the greenhouse effect that leads to global heating and its serious implications – thus results in unequal treatment of the two groups. As such the act constitutes discrimination, although the perpetrators do not necessarily have to be aware of this effect and it can thus arise without any malicious intent on their part (Hellman 2008: 138-168). A failure to take adequate climate action does not have to be deliberately intended to harm or to wrong future generations for it to discriminate against them.

The distribution of costs and benefits⁸ that occurs, for example, through a failure to take adequate action on climate change, seems particularly unfair because those that benefit from this lack of action and those that suffer from it belong to different groups. In an analogous manner, existential risks seem more serious if they are imposed risks, that is, risks whose negative impact extends beyond the actors who bring those risks into being. Whether, for instance, an actor chooses to take the risk of crossing the Mediterranean in a rubber boat is a matter for them alone; the case is different, however, if they find themselves indirectly forced to make this journey because the situation in their home country has become intolerable. It is admittedly the case that a decision someone takes can run counter to their long-term interests; this, though, rather than being an imposed risk in the narrower sense, would count as an unwise course of action. Decisions in which those negatively affected by them had no participatory voice are more serious from a moral point of view, as both Thompson (2010: 20) and Caney (2016: 138-139, 2010: 170) emphasise. Thompson (2010: 17) goes as far as to use the term 'presentism', evidently in analogy to sexism, racism, and so on, to describe the intergenerationally unequal distribution of opportunities and risks. He defines the concept as signifying "a bias in the laws in favor of present over future generations" and identifies its presence in democracies in, for example, "laws that neglect of long-term environmental risks". The Federal Constitutional Court echoes this train of thought when it speaks of the democratic political process being "organised along more short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term" (BVerfG 2021: para. 206). In addition to Thompson (2010: 19) and Caney (2016: 143), Gardiner (2003: 491) and MacKenzie (2016: 25-30) draw critical attention to the short-termism of many political (and economic) decision-making processes. It is, of course, not necessarily, let alone always, morally wrong to have an interest in relatively short-term successes; one needs, then, to identify the point at which 'presentism' becomes morally wrong discrimination on the basis of the point in time of an individual's birth.

It is not necessarily morally wrong to have an interest in relatively short-term successes. One needs to identify the point at which 'presentism' becomes morally wrong discrimination on the basis of the point in time of an individual's birth.

Returning to Moreau's question regarding "when and why [...] we wrong [people] by failing to treat them as the equals of others", it should be noted that she puts forward three answers in this context. To assess them in detail would exceed the scope of this article, but I believe that they can provide us with food for thought in the context of our considerations. Moreau (2020: 39-75) suggests, first, that discrimination can be morally wrong if it entails an "unfair subordination" of some people to others.⁹ She refers to existing stereotypes that contribute to the disadvantaged status of the group discriminated against; she defines such stereotypes as "generalizations about particular social groups that ascribe most of their members certain desires, dispositions of behavior, or obligations, simply because they possess whatever trait defines that group, as a group" (Moreau 2020: 54). A potential objection to the application of this argument in the context of future generations could be the difficulties possibly associated with determining which "certain desires, dispositions of behavior, or obligations" issue from the point in time of an individual's birth, particularly where that birth lies in the future. Moreau's (2020: 59-60) approach further appears to assume that the 'needs' of the subordinated group differ from those of the privileged group. If we consider the era of someone's birth as a protected characteristic on the basis of basic human needs that are presumably consistent and unchanging (assumption C above), attempts to identify supposed stereotypes or the neglect or denial of specific needs may not be helpful in making this argument. I am therefore sceptical about the use of vocabulary such as 'subordination', 'demeaning' and 'inferior' in a critique of 'presentism', even though views on this may of course diverge.

I find greater traction in the remaining two answers Moreau provides to her question. The second of the three asserts that the wrongfulness of discrimination may arise from its violation of a person's "deliberative freedoms" (Moreau 2020: 77-110), that is,

"the freedom to deliberate about one's life, and to decide what to do in light of those deliberations, without having to treat certain personal traits (or other people's assumptions about them) as costs, and without having to live one's life with these traits always before one's eyes" (Moreau 2020: 84).

Taking 'the point in time of a person's birth' as such a trait may initially sound unfamiliar; however, future generations – possibly faced with living on a planet in a 'hothouse' climate state – might well ask themselves whether they are still "born free and equal in dignity and rights" compared to people alive at the beginning of the twenty-first century. It may be a legitimate part of the remit of human rights institutions and activists to address this question in the present and to pose it to those in danger of committing discrimination. The current generation faces the choice of either imposing these risks on future people or attempting to avoid or at the least mitigate their dire consequences. In this case, freedom, which Moreau (2020: 89-90) links to the human capacity for autonomy, can be related to "the general freedom of action [...] as the elementary fundamental right to freedom" (BVerfG 2021: para. 184) and the obligation "to spread the opportunities associated with freedom proportionately across generations" (BVerfG 2021: headnote 4). The implication of this line of argument is that imposing a risk means – to borrow Ferretti's phrasing (2016: 262-264) – interfering with a third party's "set of sets of options" and diminishing the "overall freedom" enjoyed by that third party. Ferretti (2016: 262) contends that "[d]ecreasing people's overall

freedom under a certain acceptable level fails to treat them in the appropriate manner", that is, fails to respect them as moral equals. What remains undetermined at this juncture is the exact point at which this acceptable level of freedom is no longer being met. Which types of imposed risk call for the operation of a strong precautionary principle because, for instance, the risk's realisation could pose an existential danger? This question would need further consideration.

The third answer given by Moreau (2020: 121-151) relates to people's access to basic goods. Citing the lack of safe drinking water in reserves for indigenous populations in Canada, she notes:

"The water crisis does not just deny indigenous peoples something basic to survival, to which they have a human right. In the process, it prevents them from participating fully and as an equal in Canadian society. And it also denies them the ability to be seen as full and equal participants, and to see themselves as such" (Moreau 2020: 125).

As is evident from this example, Moreau's insistence (2020: 125-126) is that a good is a "basic good" for a particular person if "[a]ccess to this good is necessary in order for this person to be a full and equal participant in her society; and [...] in order for this person to be seen by others and by herself as a full and equal participant in her society." The concern with interactional inequalities among contemporaries that appears predominant in this argument makes it harder for us to apply Moreau's line of thinking to the idea that the point in time of someone's birth could constitute a trait meriting protection against wrongful discrimination. This said, this focus also enables us to raise some important questions for our context. If the barriers to accessing basic goods that marginalised people face in the present prevent these people, now, from participating in what McKinnon terms the "joint pursuit of justice", can it be morally defensible to impose these barriers, and their implications, on what are likely to be larger numbers still of people living in the future? Particularly if one looks beyond the relatively wealthy societies of the global North, it can be observed in the present day, that "acute food insecurity and reduced water security", alongside "adversely affected physical [...] and mental health", are among the consequences of global heating (IPCC 2022: 11-13). This global injustice taking place in our time has the potential to educate the populations of the Global North on the conditions that likewise pose a threat to their succeeding and future generations, to whom they presumably have closer emotional ties than to the inhabitants of the Global South. I do not, of course, wish to suggest that injustice done to the former group would be any more deplorable than that done to the latter, but simply to note the potential capacity of relatability to 'our people' or 'people like us' to prompt action among those thus far insulated from the impacts of climate change.

Human rights hold progressive potential because, while they protect specific standards, they may not necessarily extend the same protection to the currently established paths to these standards' achievement or maintenance.

It can be seen, then, that the effects of climate change in our own time are already limiting people's access to basic goods, a matter that falls within the purview of human rights. If this is already the case now, it seems certain that greater numbers of people will find access to their basic needs restricted in the future (see assumption C above). Should it really be more difficult for future

than for current generations to enjoy, for example, their human rights to an adequate standard of living and to health? Speaking in terms of the comparative, such as using the comparative adjective ‘more difficult’, leads to a further issue in relation to the concept of discrimination on the basis of a person’s generation. One can describe this issue as concerning the quality of the inheritance we wish our descendants to receive from us. This is the core question of intergenerational justice. Does the present generation owe those of the future living conditions that are merely sufficient, or as good as, or indeed superior to, those currently in place (Roser/Seidel 2013: 45-59, Herrler 2017: 178-186)? A human rights-based approach does not automatically have to advocate for providing future people with the exact same amounts of basic goods, made available in exactly the same way, as are accessible to those living now. In my understanding, human rights hold progressive potential because, while they protect specific standards, they may not necessarily extend the same protection to the currently established paths to these standards’ achievement or maintenance (Herrler 2020). However, such an approach is able to point out, among other things, that the ‘obligation to respect’ imposes on the current generation the duty to care for the natural foundations of life in such a way as to ensure future people’s freedom to enjoy them and to preserve them in their turn. If this view is taken, one can read the definition of basic goods in terms of human rights as minimum standards of living to which all human beings of every generation are entitled (Roser/Seidel 2013: 55-56). In any case, a human rights-based approach would oppose the notion that future generations are not owed sufficient living conditions and would therefore denounce policies that, intentionally or otherwise, would see this notion realised by putting future people’s access to basic goods at risk. Such policies would entail taking decisions about people who have little or no influence at all on these decisions, that is, who cannot participate *as equals* in the process leading up to them. Ultimately, this also raises the question of who counts as part of the demos in a democracy and whose entitlements decision-making processes should at least consider. The concept of human rights obligations effective in advance advocates for the consideration of people living in the future on their behalf. The implication of such consideration is not, of course, that only the assumed needs of those very young or yet to be born should hold decisive weight in decisions and actions taken now; it should be noted here that there are cases in which discrimination may be justifiable “all things considered” (Moreau 2020: 11-12). Used to denounce discrimination on the basis of the point in time of someone’s birth, the language of human rights can and should require decision-makers to explicitly state, and explain the legitimacy of, the reasons for decisions that disadvantage future generations. One may justifiably doubt the existence of such legitimate, convincing grounds for inadequate action on climate change in many cases.

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Participation via representation: Bringing future people into our present consciousness

What, then, might be the specific, real-world implications of my argument as set out thus far? First, I believe that human rights ob-

ligations that are effective in advance have the capacity to undergird calls for strong action on climate change. In general, my argument also supports preventative efforts with the aim of keeping the risks imposed on future generations within reasonable limits; a further example might be advocacy for nuclear disarmament (SASB 2022a: 9-10). At this point, I would like to address another requirement that emerges from such obligations, on which I touched at the end of this article’s previous section – that of participation in decision-making processes.

A generally necessary concomitant of duties and obligations is someone who demands or enforces compliance with them. Notwithstanding the fact that voluntary compliance is evidently desirable, it is equally evident, in the case of practically implemented climate action in the real world (as opposed to laudable stated goals), that such an ideal situation is far from being regular reality. In terms of human rights, it would likewise be desirable for those affected to formulate and demand their rights and entitlements themselves, in the spirit of the disability rights movement’s slogan ‘*nothing about us without us*’.¹⁰ However, it is frequently the case that vulnerable groups whose human rights are in particular need of protection find themselves neither seen nor heard in decision-making processes that concern them, resulting in decisions that fail to properly consider their needs. Their vulnerability therefore co-emerges from their marginalised position in relation to power structures. Compounding the vulnerability of succeeding and future generations is the fact that many of them are literally invisible and voiceless. At the political level, this problem emerges where actors seek to adhere to the democratic principle of ‘*all affected interests*’, which provides, roughly speaking, that a person should at least be able to have a say and be heard on matters concerning them, so they can, for example, demand that other actors comply with obligations towards them in relation to that matter. This opportunity is of importance to duties and obligations based on human rights. “To have a right implies the possibility *to insist* on its being respected” (Bielefeldt 2022: 28). If those affected by a decision or course of action cannot take this opportunity themselves, then representatives must take it on their behalf. In so doing, they both make those they represent ‘present’ in the decision-making process and – in this specific case – bring these future generations into our present time and our present consciousness. The literature in this area to date contains numerous proposals for institutional representation for future generations (see, for example, González-Ricoy/Gosseries 2016, Cordonier Segger et al. 2021). The task of representing future generations is not without its problems (Karnein 2016) and would require considerations around the remit and powers of the institutions charged with this representation, the source of their legitimation, the selection of suitable candidates for the associated roles, and cooperation with other institutions. Ultimately, however, notwithstanding the uncertainties around the needs and values of the future generations, on whose behalf such institutions would act, it is a plausible assumption that “the only standard [these future generations] could reasonably be expected to accept is to be treated with equal respect”. Institutionalised representation of future generations would therefore need to take particular heed of the fact “that we [as the current generation] would have to justify our decisions to future generations *as if they were present today*” (Karnein 2016: 93).

The representatives working within this context could use the language of human rights to, for instance, condemn the imposition of existential risks on young human beings and those not yet

born. They could then require decision-makers to protect, respect, and realise their human rights entitlements, and, potentially, to use the concept of discrimination to shine a light on ‘presentism’. While ‘discrimination based on the point in time of a person’s birth’ may still sound a strange notion to many ears, I believe it is a conceivable one with potentially considerable moral force, particularly if it is employed in concert with people’s entitlement to fundamental freedoms. If it could shift the burden of justification in favour of future people, much would be gained. It is desirable that taking action is no longer solely focused on its short-term advantages to the current generation, but aware of the action’s capacity to impose (possibly impermissible) long-term disadvantages on future generations. In the case of existential risks, treating people living in the future as equals to those living today would presumably occasion greater risk aversion in decision-making, in the spirit of a strong precautionary principle. Bielefeldt (2022: 43-58) highlights – quite rightly, in my view – the character of human rights as rights pertaining to individuals; he also, however, notes that they are ultimately not individualistic rights, but “relational rights”, a point which brings us full circle to Sandel’s assertion of the need for “some kind of communal language” in this context. If we wish our relationship to the generation that follows ours, and those that succeed them, to be characterised by equal respect, then we should refrain from imposing inappropriate risks on these generations. Instead we should advocate for the fairer distribution of the advantages and disadvantages of our political decisions across generations. The purpose of human rights is not to enable each individual to live a self-sufficient and self-centred life apart from communities. The principles of equal treatment and non-discrimination that underlie them aim rather to enable and empower all human beings to live together in freedom and peace – an aim that certainly has an intertemporal dimension. The full realisation of the human rights ideal of freedom and equality in all political communities will likely remain a dream for a very long time to come, but it remains our obligation to at least refrain from consigning future generations to an ecological nightmare.

1 This understanding of the term ‘generation’ is chronological-intertemporal, classing all people currently living as belonging to one generation (the ‘current’ or ‘present’ generation), whereas members of a ‘future generation’ do not yet exist at the time the reference is made (Tremmel 2009: 20-26). As future generations are dependent for their existence on the current one, the existential risk to those alive in the present is likewise a risk, indirectly, to them. My argument will primarily engage with problems arising from the “asymmetry of power” (Barry 1989: 496) in intergenerational relations, which also affects many young people who have already been born. I will use the term ‘succeeding generation’ if I intend to refer to a future generation whose members partly do already exist (Tremmel 2009: 64-65).

2 Not all such merit the term as ‘risk’ understood in the definition espoused by Nida-Rümelin et al. (2012: 7-8), which holds that risks are always connected to decisions or actions taken by specific actors. Such an understanding of risk would exclude, for instance, the danger of a meteorite impact, although the failure to take defensive measures in light of this danger would then establish a connection to an actor.

3 Rights-based approaches can get around the non-identity problem (Parfit 1984: 351-379) more easily than can competing person-affecting views (for further discussion, see, for example, Baatz 2016: 95-104; Herrler 2017: 159-163; Meyer 2018: 89-106; Page 2006: 132-160).

4 I will refrain from discussing the disputed and contentious issue of when exactly a subject of rights comes into existence (birth, procreation, or similar), as it is irrelevant to the further course of my argument.

5 What follows here draws most closely on the argument proposed by Bell (2011a: 104-110); other authors (Baatz 2016: 93-95, 111f.; Düwell 2016: 79-80; Kleiber 2014: 287-289; Meyer 2018: 83-89) make or discuss similar assumptions.

6 The Court, of course, does not refer to ‘human rights’, but to the fundamental rights codified in the German Basic Law (= Grundgesetz [GG]). The Basic Law specifies ‘all Germans’ as the holders of some of the fundamental rights it enumerates; I will, for the sake of simplicity, refrain from explicitly distinguishing between these and those applying to all people without specification of nationality. However, Article 2 GG, which is key to the Court’s argumentation, is not limited to Germans in its formulation.

7 The quoted passage continues as follows: “The Basic Law protects all human exercise of freedom through special fundamental rights to freedom, as well as through the general freedom of action enshrined in Art. 2(1) GG as the elementary fundamental right to freedom” (BVerfG 2021: para. 184). This means that ultimately, a strategy referring to all human rights was the successful one in this case, even though the matter engaged the legal rights of complainants already born (Ekardt/Heß 2021: 579-580).

8 I use the terms ‘costs’ and ‘benefits’ here in reference to the ‘Pure Intergenerational Problem’, whose essential cause is the fact that groups, or rather generations, have “access to goods which [...] give modest benefits to the group which produces them, but impose high costs on all later groups” (Gardiner 2003: 483-485). The use of these terms is in no way intended to suggest that economic cost-benefit calculations are better suited to advocacy for climate action than is the language of human rights. Indeed, I believe the reverse is true (Herrler 2020).

9 The approach employed by Hellman (2008) uses a similar angle, identifying “demeaning” treatment as a defining factor in wrongful discrimination. But her idea of “demeaning” treatment is closely dependent of the specific contexts and cultures in which it occurs. This places limitations on the concept’s applicability to future generations, because it implies, as she herself concedes, a potential conflict with universal human rights (Hellman 2008: 27-42).

10 It is worth noting here that “it would be wrong to infer that only those personally affected should feel entitled to talk about discrimination. Non-discrimination agendas are a political project that requires broad alliances of people from different backgrounds and with a variety of experiences and skills, also across the minorities-majorities-divide” (Bielefeldt 2022: 107 [note 217]).

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At the time of writing, Christoph Herrler was a postdoctoral lecturer and researcher at the Chair of Political Philosophy, Political Theory and History of Political Ideas, Institute of Political Science, Friedrich-Alexander-University Erlangen-Nuremberg, Germany. His main research interests are climate ethics, discrimination and human rights.

Email: christoph.herrler@fau.de