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Liberales Institut

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What are Human Rights?



OccasionalPaper 6

Imprint:

Published by
The Liberal Institute of the
Friedrich Naumann Foundation
Truman-Haus
Karl-Marx-Str. 2
D-14482 Potsdam

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Production
COMDOK GmbH
Office Berlin
Reinhardtstr. 16
D-10117 Berlin

Printed by
ESM Satz und Grafik GmbH
Wilhelminenhofstr. 83-85
D-12459 Berlin

Second Edition 2005

What are Human Rights?

Hardy Bouillon

Paper presented at the international colloquium
"The Fate of Liberty" of the Friedrich Naumann Foundation,
Potsdam, 17-19 September 2004

„LIBERALS GENERALLY WISH TO preserve the concept of „rights“ for such „human“ rights as freedom of speech, while denying the concept to private property. And yet, on the contrary the concept of „rights“ only makes sense as property rights. For not only are there no human rights which are not also property rights, but the former rights lose their absoluteness and clarity and become fuzzy and vulnerable when property rights are not used as the standard.“

Murray Rothbard, *Ethics of Liberty*

Introduction

Given the impact of human rights as a topic in political debate, it may come as a surprise that the theory of human rights plays no bigger role in the theoretical treatises of liberal thinkers.¹ Probably, the main reason for this is that human rights are usually presented as a logical inconsistent bundle of rights and claim-rights.² As Murray Rothbard – whom we owe the introductory quote – continues in his *Ethics of Liberty*: „In the first place, there are two senses in which property rights are identical with human rights: one, that property can *only* accrue to humans, so that their rights to property are rights that belong to human beings; and two, that the person's right to his own body, his personal liberty, is a property right in his own person as well as a „human right.“ But more importantly for our discussion, human rights, when not put in terms of property rights, turn out to be vague and contradictory, causing liberals to weaken those rights on behalf of „public policy“ or the „public good.“³

The logical inconsistency of human rights „when not put in terms of property rights“ derives not only out of the fact that human rights theory has various intellectual roots that are logically incompatible; it also results from the fact that the various intellectual sources – e.g. Locke's *Two Treatises of Government*, the French

1 Note, that Rothbard uses the term „liberal“ to denote the American Democrats and their adherents, while we use „liberal“ in the classical European sense.

2 Frank van Dun addresses this incoherency when writing that „over the past fifty years, the UD [Universal Declaration of Human Rights, HB] has generated a hyperinflation of rights that can only destroy the value of rights altogether.“ (Frank van Dun, „Human Dignity: Reason or Desire? Natural Rights versus Human Rights“, in: *The Journal of Libertarian Studies*, Vol. 15, No. 4, Fall 2001, p. 2)

3 Murray Rothbard, *The Ethics of Liberty*, chapter 15, <http://www.mises.org/rothbard/ethics/fifteen.asp>

Declaration of the Rights of Man and Citizen and the American Bill of Rights - „do not concern the rights of man as such, but rather the rights of the citizen, i.e., the rights of members of „political associations“ (e.g., states).“⁴

A third reason seems to root in the Aristotelian tradition of essentialism. Take for instance the title question „What are human rights?“ Willy-nilly, it assumes that there could be an answer that would unravel the genuine essence of the phenomenon called human right. However, as the German philosopher of science, Gerard Radnitzky, pointed out, a question of the type „What is ... ?“ [or What are ...?“, HB] is nonsensical if understood as a question for the essence“ of an entity or phenomenon. It reveals the justificationist belief that one could deliver a „true“ definition of what an object or phenomenon „really“ is.⁵ He who takes a question of the type „What is ...?“ as a question for the true definition of something, obviously confuses an empirical question with a definitorial question.

More plainly, Radnitzky's point is that real definitions do not deliver what they pretend to do. They do not define reality. Reality cannot be defined by language. It can be explained with the help of the sciences and the conceptions developed in the course of scientific evolution, namely explications. (And the falsificationist method as developed by Karl Popper is an appropriate way to go on in ones scientific endeavour.) Hence „What are human rights?“ is not a question to any empirical science, despite the fact it might become one in a special context.

„What are human rights?“ asks for what we mean by human rights, how we define them, or with respect to the *Universal Declaration of Human Rights* of 1948, how the General Assembly of the United Nations and the subscribers to the Declaration defined human rights.

Bearing this in mind, this paper to a large extent addresses to the definition of human rights as we find it in the *Universal Declaration* and sheds some light on the disputable aspects of the definition of human rights as it is to be found there. The two flashlights I shall use are side-products of, firstly, an analysis of the three types of sources of human rights, and, secondly, of an analysis of the two sorts of human rights. Once the conclusions of these considerations are drawn, I shall discuss the question whether or not political associations and its legal powers can safeguard human rights.

4 Frank van Dun, „Human Dignity: Reason or Desire? Natural Rights versus Human Rights“, in: *The Journal of Libertarian Studies*, Vol. 15, No. 4, Fall 2001, p. 3.

5 See Gerard Radnitzky, „Definition“, in: *Handlexikon zur Wissenschaftstheorie*, edited by Helmut Seiffert and Gerard Radnitzky, Munich: Ehrenwirth 1989, p. 30.

Sources of human rights

It is a traditional philosophical and ongoing dispute whether human rights are facts or norms or both. Adherents to natural rights theories usually claim that human rights are not only given to humans, hence are facts, but also by necessity to be obeyed by everybody, and hence normative too.

Although by distinguishing three types of sources of human rights this position is to be criticized in this section, I first of all want to draw the reader's attention to the fact that the *Universal Declaration* seems to treat human rights mainly normatively, or, more precisely, the universal respect of human rights as a goal. As we read it towards the end of the preamble: „THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.“⁶

Two things should be mentioned here. Firstly, as in subsequent paragraphs, especially in the beginning (§2) and towards the end (§28, §29), the General Assembly speaks of rights and freedoms without saying by which criteria we are to distinguish between these two.⁷ Secondly, the General Assembly does not strive for universal human rights but limits its ambitions to the peoples of Member States and to the peoples of territories under their jurisdiction.⁸

However, if we move on, we notice that the General Assembly also most probably thought of human rights as facts, quote (§1): „All human beings are born free and equal in dignity and rights.“

Beside the fact that the intertwined conception of human rights as norms *and facts* is confusing, one should acknowledge - with David Hume - that it is logically impossible to infer from facts to norms.

6 Hereinafter all quotations taken from the Universal Declaration of Human Rights follow the online version at <http://www.un.org/Overview/rights.html>

7 For a profound distinction between freedoms and rights see Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism*, London: IEA 1991, chapters 2&3.

8 See footnote 4.

This in turn leads us to a more general question, namely where human rights can originate, and thus to the three sources of rights. These sources can be defined through a process that exemplifies a *generating dichotomy*: If we look at the possible creators of such phenomena like rights, we may either turn to nature (divine or non-divine, as you like it) or to humans. And as per humans, we may draw a distinction between rights that come by intention and those that don't. Or, to put it in a frame we owe to Friedrich August von Hayek, who applied it to sources of order⁹, we either have natural rights, spontaneous rights or designed rights.

If I am not mistaken, these three sources of human and other rights cover all the various proposals made in the course of history of the philosophy of rights. Authors of different schools either claimed rights to result from nature (divine or non-divine), as we know it from the long tradition of natural rights theory, or claimed rights to originate in the spontaneous results of human interactions – think of conventions – or, finally, assumed that rights were designed and defined by humans. Of course, some schools or individual authors developed rights approaches that adapted elements out of two or out of all three types of sources. What is of interest here is *if*, and if so, *how* these three sources of rights differ with respect to the binding force they can and do claim. In other words: Do they, and if so, how do they differ when it comes to legitimacy and its proof.

Interestingly, natural rights theorists as well as those scholars, who claim rights to come by conventions that evolved spontaneously and over time, have one thing in common: The claim they make for distinct rights rests on assumptions whose test criterion is far from being non-problematic or even low-problematic. For example, referring to the *Ten Commandments*, a Jewish or Christian author might claim that human rights exist as described in the *Old Testament*. Hence his claim can rest on the assumption that the *Ten Commandments* are a valid source of rights and that his reading of that source is the correct one. Obviously, the test criterion is highly problematic, for there exists no non-problematic (or low-problematic) document upon which the claim can rest. The origins of the bible are as highly disputable as are its interpretations. Also, a defender of conventional rights might refer to certain traditions and his reading of these traditions. But what is the criterion by which we easily can test his claim? He has no non-problematic (or low-problematic) document (or any other unproblematic means that could serve in the test process) upon which the proof can rest.

9 See F.A. Hayek, *Law, Legislation and Liberty*, London: Routledge & Kegan Paul, 1973.

Things change dramatically when it comes to designed rights. Take rights that originate in contracts. The test criterion to prove that these rights exist as the result of an agreement does not face the problems described above. The identification is non- or low-problematic, for there exists a document towards we can refer for the purpose of identification, namely the contract.

What can be said in addition to the distinction between natural rights and conventionalist approaches on one side and contract approaches on the other is that the latter per se can offer a document, namely the contract, that can easily be used to identify the voluntary consent of the agreeing parties. The two other approaches have nothing of this kind to offer. The consent of the parties involved is at best claimed.

Of course, we face an entirely different situation when the contract is not documented, i.e. when it is purely fictitious. One might think of Rousseau's *contrat social* or of modern social contract theorist.¹⁰ Fictitious contracts are like natural rights and conventionalist rights approaches in two respects. Their underlying claim for distinct rights rests on assumptions whose testability is largely dubious, and they provide no proof of the voluntary agreement of the parties involved that could easily be identified.

The *Universal Declaration* includes the problematic types of sources of rights as well as the non- or low-problematic ones. In some parts the *Universal Declaration* reminds us of the old idea of a societal contract without human's consent, notwithstanding a proof of their consent, for instance when it claims in §1, I quote again: „All human beings are born free and equal in dignity and rights.“ This reminds us of Rousseau's famous opening passage: „MAN is born free; and everywhere he is in chains.“¹¹ Of course, the *Universal Declaration* is also a document, and it may well be argued that at least those who signed it declared it is binding to them. Hence, the assumption that human rights exist – in the sense that the rights create obligations to the subscribers of the *Universal Declaration* – can easily be tested by referring to this document. However, problems come up as soon as it is claimed that the *Universal Declaration* is also binding to anybody else.

To sum up: The *Universal Declaration* is *principally* laden with specific problems when interpreted as a version of those approaches that claim human rights

10 For example, John Rawls. See also the chapter on *safeguards of human rights* in this booklet.

11 *The Social Contract or Principles of Political Right* by Jean Jacques Rousseau, 1762, translated by G. D. H. Cole, public domain, Book I.1

to exist. These problems do not appear if the *Declaration* is seen as a document expressing consent of the signing parties on the acceptance of certain rights as described in the *Universal Declaration*. Hence, it would be advisable to those who wish to propagate the *Universal Declaration* successfully to have many individuals as possible signing it. But doing so, one should take note of the problem of inconsistency within that Declaration, as mentioned above and illustrated in the subsequent section.

Sorts of human rights

Most of the rights expressed in the *Declaration* are formulated as defensive rights against various forms of aggression or intervention by others. Such we may interpret several of the paragraphs, for instance: „Everyone has the right to life, liberty and security of person.“ (§3), „No one shall be held in slavery or servitude;“ (§4), „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.“ (§5), „No one shall be subjected to arbitrary arrest, detention or exile.“ (§9), „No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence,“ (§12), „Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.“ (17), „Everyone has the right to freedom of thought, conscience and religion,“ (§18), „Everyone has the right to freedom of opinion and expression,“ (§19), or: „Everyone has the right to freedom of peaceful assembly and association,“ (§20)

All of these rights are exemplifications, or say, can be interpreted as exemplifications of private property rights and the right to individual freedom understood as the absence of coercion.

However, other rights stated in the Declaration are offensive claim-rights in the sense that they constitute a claim against other people – which are not specified, by the way – and thus exemplify titles to intervene into the individual freedom of others. In other words, the human rights listed in the *Universal Declaration* are inconsistent. The following quote might serve as an example:

„(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring

for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.“

While „The right to work, to free choice of employment“ is an expression of individual freedom that does not include aggression or interference with the individual freedom of others, the following rights logically include such interventions, for if one is entitled to find „just and favourable conditions of work and protection against unemployment“, someone has to provide these conditions and measures of protection. And given he does not voluntarily do so, he has to be coerced to meet that claim of his contemporary.

Similarly, if one „has the right to equal pay for equal work“, someone else is obliged to pay to him what he pays to his other employees for equal work. Also, if, „[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection“, someone has to provide all this.

Finally: „Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.“ (§25) and, „Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.“ (§26).

Again, someone has to provide the means for the standards of living, the means for free education and the institutes of higher education. All this is not manageable without interference with the private property of other people. Moreover, the final quote also reveals that human rights in the *Declaration* are limited to adults, for it is recommended that elementary education shall be mandatory.

Summarizing what we have noted about the two kinds of rights among the human rights in the *Universal Declaration*, we can conclude the following: Liberal human rights and illiberal claim-rights do not match together. Moreover, the claim-rights among the human rights of the *Universal Declaration* are also difficult to interpret; for which living conditions meet human dignity and which do not? And which size of social protection is necessary to be supplementary, given that too much can lead to an insufficient use of human powers as for Wilhelm von Hum-

boldt has warned us?¹² There is no criterion that could claim to be unproblematic and unanimously consensual. Views on the living conditions and the supplementary provision probably differ widely. Who is going to decide? On which basis?

For Humboldt there was no higher end than man himself, no highest purpose of nature, and to him all limits to human action were solely for the sake of individual liberty, only for the sake of the true end of man. In his ideas *On the Limit of State Action* he put it very clearly: „The true end of Man, or that which is prescribed by the eternal and immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole. Freedom is the first and indispensable condition which the possibility of such a development proposes.“¹³

Hence the state (or civil society) exists only because it serves man and his human rights. Civil society is to Humboldt not an end in itself, left alone the highest purpose of nature. There are several statements in Humboldt's *On the Limits of State Action* that can be fully understood only if this anthropological element is entirely taken into account. For instance, on laws and state institutions he wrote: „A State, in which the citizens were compelled or moved by such means to obey even the best of laws, might be tranquil, peaceable, prosperous State; but it would always seem to me a multitude of well-created-for slaves, rather than a nation of free and independent men ... none of these [laws, HB] lead to true moral perfection ... If it were possible to make an accurate calculation of the evils which police regulations occasion, and of those which they prevent, the number of the former would, in all cases, exceed that of the latter.“¹⁴

Thus, to Humboldt the true end of man makes freedom indispensable and requires universal respect of human rights. Since man alone knows his powers, and since he alone knows how to develop them, the state cannot and may not overtake

12 Wilhelm von Humboldt, *The Limits of State Action*, ed. By J.W. Burrows, Cambridge: University Press 1969, Chapter 3.

13 Wilhelm von Humboldt, *op. cit.*, p. 22. To get a taste for Humboldt's prose and spelling, I quote from the original: „Der wahre Zweck des Menschen - nicht der, welchen die wechselnde Neigung ihm vorschreibt - ist die höchste und proportionirlichste Bildung seiner Kräfte zu einem Ganzen. Zu dieser Bildung ist Freiheit die erste, und unerlassliche Bedingung“ (Wilhelm von Humboldt, *Gesammelte Schriften*, edited by the Königlich Preussische Akademie der Wissenschaften, vol. I, Berlin 1903, p. 106).

14 The latter part of the quotation from Humboldt (1969, pp. 79–81) has to be interpreted carefully. Humboldt is not saying that laws and police regulations produce criminals. Not at all. It is that those occasion moral evils, although physical evils might be reduced by them. These moral evils, i.e., stifled energy, are, according to Humboldt, by far more fatal to man than physical evils.

the task of leading man to his completion. Humboldt argues anthropologically and morally in favour of human rights, understood as property rights. But this fact is not the only reason for us to quote him here. The second reason is that Humboldt brings in the argument that the whole purpose of the state is to provide the conditions under which individual freedom and human rights are preserved. The question to which we turn now is whether or not the state and its powers are qualified to serve as a safeguard to human rights.

Safeguards of Human Rights

It is a standard approach in modern political theory to expect from democracy the best of all possible solutions to political problems whatsoever.¹⁵ However this may be in general, when it comes to the preservation of human rights, the very nature of democracy is far from providing a feasible solution. On the contrary! Since a democratic society has the constitutional means to reduce the private sphere and human rights by enlarging the public sector proportionally, there is little hope to find ways that could lead to a protection of individual liberties and human rights without questioning the principles of a democratic constitution.

The renaissance of classical liberalism has shown such ways. Among the most serious and interesting approaches are the ones of Friedrich August von Hayek and James M. Buchanan. Hayek offers a definite framework of a state in which a constitutional protection of individual liberty and human rights should be ensured. Buchanan's way is a different one: He assumes the possibility that rational individuals would agree unanimously to decision rules that were to be followed when searching for the rules of a constitution. All individuals are assumed to agree to these decision rules, since each recognizes the advantage of having such rules, and nobody could be certain of possible advantages or disadvantages of any of the decision rules (veil of uncertainty). The next step from these unanimous decision rules should lead to the rules of a constitution of liberty. Before analyzing Buchanan's suggestion, let us turn to the Hayekian model constitution.

15 Only recently, the implicit and explicit assumption of the primacy of the democratic model was seriously questioned by Hans-Hermann Hoppe, *Democracy. The God that failed*, New Brunswick: Transaction Books 2001.

Hayek's model constitution

Hayek suggests to split up the parliament into two separate, independent assemblies: one (the governmental assembly) has to look after the interests of the citizens (who elected the parliament), the other (legislative assembly) has to make laws.¹⁶ The separation of „interest“ (the concrete wishes of the citizens for particular results) from „opinion“ (views about what kind of action is right or wrong) is, according to Hayek, necessary to avoid the possibility that the interest of the majority gets the status of a law. To Hayek, laws are to codify just conduct, rather than to push through the interests of particular groups. Thus – on first side – one could assume that his proposal could help to safeguard human rights against the interests of the majority.

But looking closer at Hayek's proposal one might ask: On what conditions does the legislative assembly convert rules of just conduct only, and not particular interests into laws? Hayek addresses his model constitution to that question. Firstly, those who are to be elected – out of a group of people who themselves have to be elected by contemporaries to whom they are known fairly well, since they are of the same age and at least remotely acquainted with each other – should be in the middle of their lives, and their membership should last 15 years. They should be respected people, because of their performances in profession and public life. They should be honest, and their salary should „be fixed by the Constitution at a certain percentage of the average of, say, the twenty most highly paid posts in the gift of government.“¹⁷ The salary should guarantee the legislator a carefree future after the tenure and should make him/her resistant to bribery.

There is little doubt that a legislative assembly of that sort could think of such general rules, e.g. ‚Private property should be respected‘, ‚Nobody should be aggressed by another‘, and brand them human rights. These rules would fulfill the criterion of applying to any person of the community chosen at random, and not solely to a particular group and thus they would allow us to separate aggressive claim-rights from liberal human rights – simply by pointing to the fact that the former contradict these rules.

However, Hayek's suggestion is problematic; not so much because of some technical questions. An election of such a legislative assembly could certainly be

arranged, although with several technical problems.¹⁸ The main problem of Hayek's model constitution results from the interest structure of men: Certainly, a community of honest and in most respects noble men and women who would care about human rights could be found, but it is less probable that they became elected. The electors have no interest in preferring an honest legislator to a less honest one, since the latter would publicly argue that he will suggest „rules of just conduct“ which only appear to be „true“ rules of just conduct – left alone what „true“ rules of just conduct in practice should look like –; however, these rules would actually be in the personal interest of the legislator's voting clientele.¹⁹

However, there exist many alleged general rules that are factually and formally addressed to a particular group, for instance the right to vote: It is democratic standard that only adults should be allowed to vote. (Whether or not there might be good arguments to exclude the immature from the right to vote is a question which is not significant for our purpose.) Once a non-universal rule – as the right to vote – is accepted to be a *general* rule, a new element joins the game. Now we have a precedent which allows restriction of the application of the very rule. Now it is accepted that we might discuss narrowing or widening the group of people to which the rule is to be addressed. Each change of the rule is assumed to be – and in most cases will be – advantageous or disadvantageous at least to one particular subgroup of the community, despite the formal character of the rule. (Or else there would be no change. In the extreme case, the change could be advantageous or disadvantageous – though perhaps not intended – to the whole community.)

Suppose, the human right to vote is given only to those who are 18 years old or older. Now assume that this rule should be altered: The right to vote will be given to people between 16 and 90. This would clearly improve the situation of those who are 16 and 17, whereas the situation of members of the community over 90 would be worse than under the status quo. Given the alteration of the rule would aim at a rise of the voting age, say 21 and higher, then the situation of those who are 18, 19, or 20 would be worse than under the status quo.

Many of the very important general rules have clauses qualifying the group of

16 Hayek, F. (1979). *Law, Legislation and Liberty*. Vol. 3: The Political Order of a Free People. London: Routledge & Keagan, p. 111ff.

17 *Ibid.*, p. 114.

18 See Volker Nienhaus, *Persönliche Freiheit und moderne Demokratie*, Tübingen: Mohr 1982.

19 Hayek is aware that elected legislators could – in principle – become unfaithful to their noble cast of mind. To avoid this, he suggests a council of elders who would have to control the legislators. However, the problem caused by the interest structure of men is not solved, though less acute. It is moved to a higher level. The question ‚Who guards the guards?‘ still has to be answered.

persons to which they are addressed. To these belong property rights, since only matures may make proper use of them.

For another reason, the purely formal character of a general rule is not sufficient, since the application of such a rule takes place all the time in certain historical situations. The assertion of the rule depends on the extent of sanctions for rule-deviating. For example, whether the rule ‚pacta sunt servanda (contracts are to be fulfilled)‘ is practiced, depends, though not only, on the sanctions for rule-breakers. It depends on how they will be punished by law, given they will be accused. But each regulation of the extent of punishment is in the interest of a particular group: Assumed the extent of punishment is large, it is in the interest of the plaintiff. If it is small, then it is in the interest of the accused. And each change of the status quo in either direction is of advantage for either one or the other group (plaintiff or accused).

Despite their gravity, these problems of Hayek's model constitution are not the gravest. The crucial weakness of his model is that the laws, which should be given by the legislative assembly, are not necessarily those that guarantee individual liberties and hence human rights. We cannot know whether that assembly will choose those „rules of just conduct“ which safeguard human rights or not. The legislative assembly is simply not a warrant for a constitution of liberal human rights.

Buchanan's model of consensus

It goes without saying that if one proposal fails to be a safeguard of liberal human rights it does not follow that no other proposal could be conceived that would succeed in being one. It is exactly this point that is made by James Buchanan and Geoffrey Brennan, who wrote: „Unanimous agreement on some proposed change in the rules must be at least conceptually possible.“²⁰ This statement cannot be falsified. It can only be verified, because it is an existence-statement. For such statements – as Rudolf Carnap's famous example „There is a colour whose recognition causes horror“ – it holds that it is not logically impossible to prove them.²¹

20 Geoffrey Brennan and James M. Buchanan, *The Reason of Rules*, chapter 9, <http://www.econlib.org/library/Buchanan/buchCv10Contents.html>

21 On verifiability and falsifiability see Karl Popper; „Falsifizierbarkeit, zwei Bedeutungen von“, in: Helmut Seiffert und Gerard Radnitzky, *Handlexikon zur Wissenschaftstheorie*, Munich: Ehrenwirth 1989, p. 83

However, looking closer at Buchanan's model of consensus, one has to concede that it does *not* verify the statement made by Buchanan and Brennan.²²

Nevertheless, it should be noted that Buchanan's idea of a social contract is in one respect preferable to all other proposals in the classical liberal tradition: It is not necessary to include external normative criteria (for example: natural rights, efficiency, or whatever). The social contract is conceived as a contract to which all members agree freely – like all freely agreed contracts.

According to Buchanan, this agreement is possible and probable if the contract is about rules that have advantages, i.e., to have rules, for all members and no special advantages or disadvantages for any particular group of members. Man can, according to this idea, recognize, or at least assume, the common advantage of these rules, and he can make the assumption that – to the very moment – the agreed rules do not offer a separate plus or a minus to any member of the group.

To find a constitution that is not only to the benefit of a particular group, we should look for meta-rules, i.e. decision rules. These decision rules should have the above described character: they should be impartial to any person chosen at random. The impartial character of the decision rules is of special importance: all further rules will – as a consequence – be legitimated by the impartial decision rules. Constitutional rules as well as all other rules of a community can be decided on by obeying the meta-rules.

However, as Anthony de Jasay has shown, each decision rule and each constitution has a bias.²³ In nuce, it is impossible to find impartial rules, no matter on which meta-level they should exist, since man always ties some expectations on rules; he always assumes that whatever rule he has to agree upon, it will benefit especially him. Buchanan's approach is based on an epistemological misconception: On the one hand it presupposes that contract partners could come to an equilibrium of expectations²⁴ and could – as rational, calculating human beings

22 An elaborate examination of the path James Buchanan suggests to end up with a constitution of liberty cannot be delivered here. On this see Anthony de Jasay, „Is limited government possible?“, in: Gerard Radnitzky and Hardy Bouillon (eds.), *Government: Servant or Master?*, Amsterdam: Rodopi 1993, pp. 73-97, especially paragraph 7. There, Jasay put forward arguments that convincingly make it clear that Buchanan's constitutional approach does not – necessarily – lead to a constitution of liberty.

23 Ibid., paragraphs 6, 9 and 10.

24 James Buchanan, *The Limits of Liberty*, Chicago, p. 89

– decide for meta-rules on recognizable collective advantages. On the other hand it claims that the same individuals will not have any guesses and cannot build any expectation about contingent individual advantages which might generate out of „impartial“ meta-rules, and, consequently, that they cannot rest their decision for such meta-rules on possible individual advantages.

However, with respect to the aim of finding a constitution of liberty, this is not the main problem of Buchanan's approach. The main problem of his consensus conception is the same problem that we find in Hayek's model constitution: It does not guarantee a constitution of liberty. All other constitutions can possibly result from generating a constitution from alleged impartial rules. This „contract-theoretical nihilism“²⁵ cannot be the right means to a constitution of liberty.

Since both, Hayek and Buchanan, offer incomplete schemes for a constitution of liberty, their undertakings cannot be regarded as successful. Both intend to defend individual freedom, both provide good arguments for a liberal constitution. In other words, they argue for a liberal constitutionalism. These arguments make plausible only why a constitution can be useful, but not why that constitution would be no other than a constitution of liberty. In other words, they do not provide a foundation for a constitutional liberalism.

Whether or not other constitutional proposals provide a safeguard to liberal human rights cannot be said here.²⁶ However, a strong argument that questions the potential of constitutional solutions as safeguards of liberal human rights *in general* is that constitutions create artificial monopolies to those who represent the exclusive powers of a state. Once they have this power, though only temporarily, they face incentives to misuse it, i.e. in their own interest, disregarding the original intention. It is irrational to assume that political actors (who are human beings after all) should in any case withstand those temptations.

25 See Reinhard Zintl, *Individualistische Theorien und die Ordnung der Gesellschaft. Untersuchungen zur politischen Theorie von James M. Buchanan und Friedrich A. v. Hayek*, Berlin: Duncker & Humblot 1983, p. 90, and Volker Nienhaus, op. cit., p. 47.

26 It is not logically impossible to prove that one constitutional arrangement can function as safeguard of human rights (see footnote 21).

Safeguarding Human Rights

This paper ends with a short application of the aforesaid to the EU with respect to the fact that in most countries the demanded standard of human rights as we find it in the *Universal Declaration* is far more distant from completion than it is in EU Member States. In comparison to many other countries, it holds for the EU that many human rights are protected, the right to life, liberty and security of person. Though the cases might be serious ones: Only from time to time it is reported that someone was subjected to torture or to cruel, inhuman or degrading treatment or punishment, or subjected to arbitrary arrest, detention or exile, or subjected to arbitrary interference with his privacy, family, home or correspondence, and we know little cases of slavery and servitude. Most people enjoy the right to freedom of peaceful assembly and association, or the right to freedom of thought, conscience and religion, or the right to own property alone as well as in association with others, and only little is reported of inequality before the law.

To members of countries in which torture, arbitrary arrest, detention, or exile and arbitrary interference with his privacy, family, home or correspondence are the order of the day, complaints about violations of human rights in EU countries might deserve comparatively little compassion. Indeed, a drowning man will have little understanding for someone who laments that his feet become wet.

However, one should not forget that, although the standard of human rights and the cases of violations of human rights might differ from country to country, the mutual help that we can build up in order to make human rights come true everywhere rests on the resistance to all kinds of violations.

In other words, in order to promote the standard to human rights across the world, it is necessary, but not sufficient to object to violations against human rights that are exemplifications of individual freedom, such as the right to life, liberty, and property, the right to freedom of thought, conscience and religion, to freedom of opinion and expression, and to freedom of peaceful assembly and association; also the right to live free of slavery and servitude, free of torture, arbitrary arrest, arbitrary interference with ones private sphere. It is also necessary to object to entitlements or offensive „claim-rights“ that willy-nilly are violations of individual freedom and hence violations of a genuine human right.

However, in the name of human rights, governments in the EU continue to promote the welfare state and lift barriers to individual freedom only by creating new ones. Thus they contribute to the ongoing erosion of the liberal society that, if we look back to history, proved to be the most powerful tool to promote human

rights everywhere were the free market and its ideals became respected. It would be short-sighted to put this tool at risk. Against this background, I shall end with a modest proposal.

EU countries should do much more for the respect of human rights. They should give up all trade barriers. Trade barriers violate human rights within and outside the EU in so many ways that one should question why human rights groups do not tackle this issue as they tackle other human rights issues.

In September 2003, shortly before the WTO Meeting in Cancun, CNE, a Brussels based think tank, launched a study called *EU Trade Barriers Kill*.²⁷ This study showed that as a result of EU trade barriers, by estimate 6,600 people worldwide die every day. If the EU were to lift the barriers, and Africa as a result were to increase its share in world trade by a mere one percent, its annual income would increase by more than 70 billion – enough to lead 128 million people out of extreme poverty.

Without cynical intention, one is inclined to say that the EU – and of course every other political body who erects trade barriers – does not need to infringe on such human rights, as the right to life, in order to help people die. To the same effect, it is sufficient to interfere with one's right to exchange with other people. And often it is even the more efficient way to help people die. All the more should we make clear how scandalous these violations of human rights are.

Summary

Human rights are usually presented as a logical inconsistent bundle of rights and claim-rights. This inconsistency is one of the reasons why human rights theory plays a lesser role than its political impact would make us expect. Nonetheless, this logical inconsistency can be resolved if human rights are put in terms of property rights. Doing so, human rights approaches could become much more respectable positions in political philosophy and beyond.

In this paper, we had a closer look at all possible sources of the origin of (property-based human) rights, namely nature, convention, and contract. That helped us to realize that only rights deriving out of contracts appear to be low-problematic, whereas natural rights approaches as well as rights approaches based on the idea

of spontaneous convention seem to be inappropriate to support the preservation of liberal human rights.

Against this background, we had a closer look at the *Universal Declaration of Human Rights*. With the help of the distinction between claim-rights and human rights we identified two incompatible sorts or classes of rights in the *Universal Declaration*. And we concluded that this inconsistency cannot be resolved unless claim-rights are excluded.

Finally, we looked at the potential of two constitutional approaches as safeguards of human rights and the potential of democratic polities in general to safeguard human rights. Moreover, we illustrated – with respect to the EU – that violations against economic human rights are capable of eroding human rights in general.

27 Stephen Pollard, Alberto Mingardi, Sean Gabb, *EU Trade Barriers kill*, http://www.cne.org/pub_pdf/2003_09_04_EU_barriers_kill.pdf

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