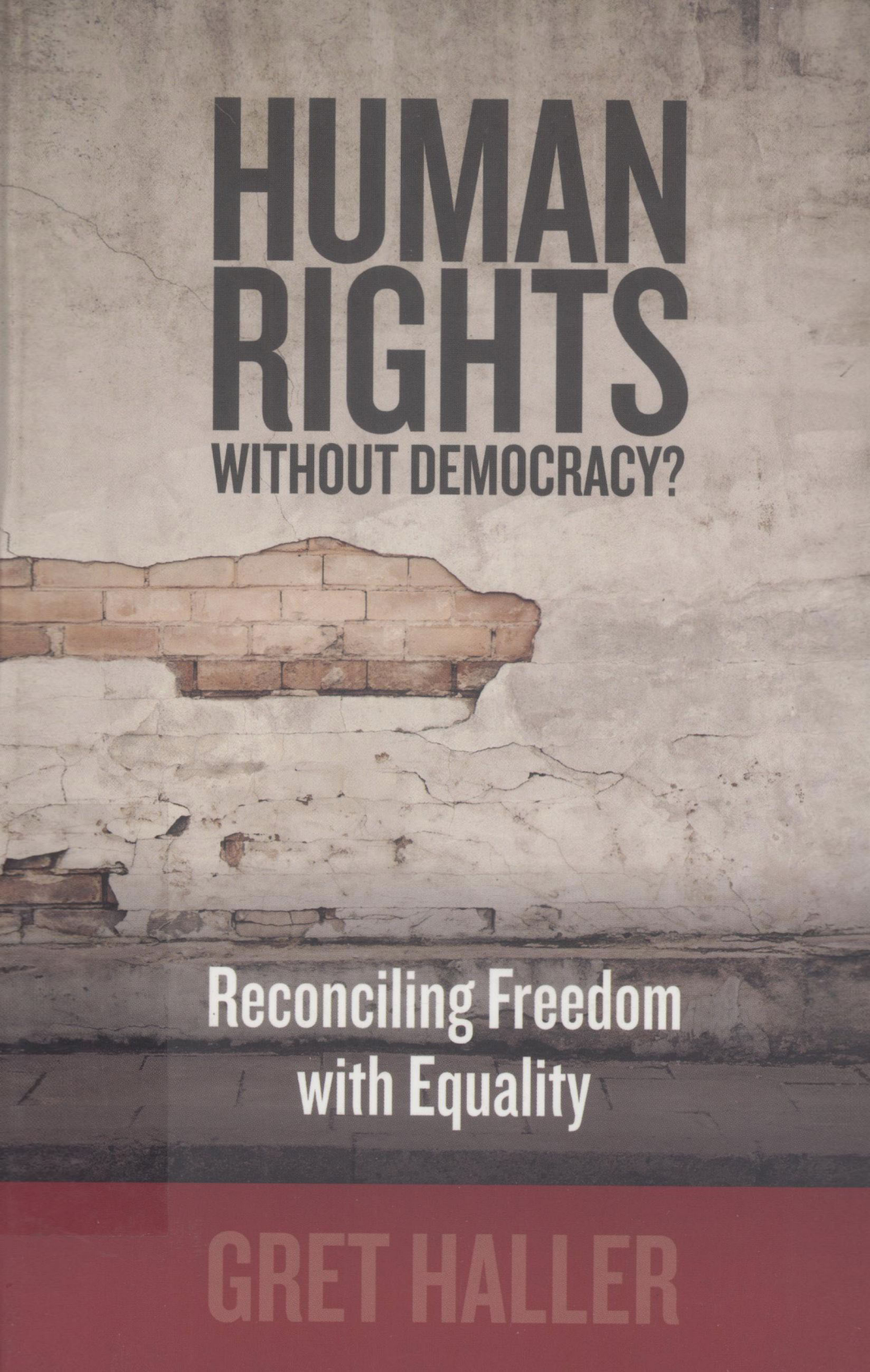
HUMAN RIGHTS
WITHOUT DEMOCRACY?
Reconciling Freedom with Equality
GRET HALLER

Human Rights without Democracy?

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Human Rights without Democracy?

Preface

This work strives to bridge a gap between theory and praxis in human rights. Toward the end of my career, I want to pause and connect various experiences to form a coherent whole. Most of the stations in my professional life have, in one way or another, involved issues of human rights; at first from a generally legal perspective, then increasingly in terms of practical application in politics and diplomacy.

A decade ago I began to question the practice of human rights and to share my insights in various publications. Five years ago I began seeking support for those insights by exploring the theory of human rights. It deepened my thought, relativized some of my ideas, and enhanced others.

Nonetheless, my view remains shaped by years of practical experience gained in serving various functions. I now add a critical challenge made possible by having attained a certain detachment.

This work was completed during a five-year stay at the Goethe University in Frankfurt am Main. I owe much to Ulfrid Neumann, who made my stint as a guest professor there possible. He helped me move from the perspective of practical work to that of work in theory and made several suggestions. I also owe much to Klaus Günther, who helped me to access background information and enabled my participation as an associated member in the cluster of excellence program called "The Formation of Normative Orders." Many contacts made in that setting were useful for my work. I would like to particularly mention Christoph Menke, who helped me understand the revolutionary aspect of human rights. Luise Schorn-Schütte helped me better understand John Locke, especially in terms of his own times.

Discussion with Christoph Möllers from the Humboldt University in Berlin helped me not only in comparing national and constitutional law, but also with the democratic aspect of human rights. During a joint course in Alpbach (Tyrol) on the topic of "Human Rights and Morals," Gerhard Luf from the University of Vienna helped me more deeply explore many questions that are important for this work. Heiner Bielefeldt from the University of Erlangen-Nuremberg made helpful critical comments on the manuscript. I thank everyone who participated in valuable discussions there, even the many I cannot list here. Finally, I would also like to thank Maria Matschuk for editorial assistance, Martino Mona from the University of Bern for checking terminology, and Cynthia Klohr for rendering the book in English.

Gret Haller

Contents

Part I

The Notion of Human Rights Prior to 1789

The development of what we today call human rights was not linear. Some epochs saw groundbreaking new insights, only to be followed by setbacks. Historically speaking, the idea did not unfold smoothly; some of its meanings developed in parallel, some meanings enhanced, and others contradicted one another. The developments presented in this book do not give the complete picture; they highlight only certain points along the overall emergence of the idea. My emphasis is particularly on those aspects that pertain to specific issues concerning human rights that have arisen in the aftermath of the Cold War.

Chapter 1

The Prehistory and the Context of Human Rights

More than two thousand years ago, ancient thinkers, too, had notions of human rights. Theirs remained philosophical ideals, however, that were practically irrelevant for everyday life. In medieval times, Christian ideas and, later, the rise of citizen freedom in city-states contributed to the historical development of the concept of human rights but without effecting their actual instatement. The most important growth of the idea began in the seventeenth century. And it was not until the late eighteenth century that the idea of human rights came to be articulated more precisely.

The concept of genuine human rights must be distinguished from the concept of human dignity. Human rights protect human dignity. The first articulation of human rights that emerged in the late eighteenth century meant to do just that. The concept of human dignity had already been around for a long time. We shall take a look at the development of the notion of human dignity first, then, before tracing the philosophical development of the concept of human rights.

The Concept of Human Dignity

Human dignity was an idea familiar to the ancients.[1] The concept had two different meanings: For one, it described a person's status within society. But it also elaborated the value of man in contrast

to other species, indicating as it were the intrinsic worth of the human being. At first that dignity was established on the grounds that human beings have the power of reason. Later, in early Christianity and in medieval times, human dignity came to be seen as defining man's place within the overall framework of creation. According to the Bible, God created man "in His own image," making human dignity something derived from a "resemblance to God." During the Renaissance, Italian humanist Giovanni Pico della Mirandola extended that resemblance to imply that man, as a small world in himself, has all the possibilities that exist in the great world created by God and that human dignity consists in having a free choice from among all those possibilities.

With the beginning of modern times and the Enlightenment, the idea emerged that human dignity follows from man's capacity for reason. German philosopher and jurist Samuel Pufendorf said that not only is human dignity based on the human capacity for reason, but that all people are capable of it. This made human dignity the same for everyone.

Philosophers of the sixteenth and seventeenth century began to define the individual's concrete right to freedom based on the idea of human dignity. The labor movement in the nineteenth century made the notion of human dignity the central concept of political struggle, demanding for workers material circumstances "worthy of human existence" and thus adding to the concept yet another aspect, namely, that of what is just. While human dignity remained a philosophical distinction on which to establish human rights, it also began to enter the realm of specific claims to rights, thereby becoming a category of jurisprudence. One example of that transition is the Weimar Constitution of 1919. In the introduction to its passage on the conduct of commerce the Weimar Constitution states that commercial activity must be so organized that it complies with "the principles of equity and the aim to warrant human existence worthy of all."

In response to the unparalleled contempt of human dignity witnessed in World War Two, the preamble to the charter of the United Nations, declared on 26 June 1945, called for "faith in fundamental human rights, in the dignity and worth of the human person." The UNESCO statutes from 16 December 1945 also strove to counter any renouncement of democratic principles and to promote human dignity, equality, and mutual respect. The preamble to the United

Nations Universal Declaration of Human Rights, from 10 December 1948, centers on human dignity. Article 1 says, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."

Anchoring human dignity in this way in international documents eventually makes it a juridical concept, without dismissing philosophical justification for human rights.

Let us now turn to jurisprudential guarantees of human dignity as set down in national constitutions. These make clauses on human dignity a matter of interpretation by the courts. But the debate can get very controversial when such clauses are applied in real-life situations. Some reveal the inconsistencies among diverse interpretations of human dignity. Beginning in the mid-twentieth century and increasingly over recent decades, legal debate over what is meant by human dignity has become part of discourse on how to properly enunciate human rights. Since their first articulation in the late eighteenth century, the struggle to define human rights has never ceased.

Charters of Liberties and the Social Contract

Before human rights were spelled out for the first time, the late Middle Ages saw centuries of development toward what was to become "modernity." In feudal times, people were born into social classes, where they remained—as peasants, craftsmen, nobility, or the clergy—for the entirety of their lives. It was considered an order prescribed by divine provenance. But gradually individualism emerged, especially as people living in cities began participating in municipal decisions. To some extent, it had always been possible to overcome rigid class barriers: sons of peasants, for instance, could enter the clergy when educated for it, or they could become craftsmen and then eventually even become citizens by moving to a city and residing there for a number of years.[2]

The same period saw the emergence of the legal concept of "charters of liberties." One of the oldest known documents describing such liberties, the *Magna Carta Libertatum*, dates from the year 1215. In it the English king agreed by contract to respect certain liberties of his subjects. It was to become a prototype for written

constitutions in Europe, written albeit by kings and not by parliaments. The Magna Carta declared that the king could not make certain decisions on his own, but only in consultation with a council of royal vassals. Thus the Magna Carta was a first step toward European parliamentarianism.[3]

Similar documents followed, such as the Petition of Right in 1628, the Habeas Corpus Act in 1679, and ultimately, in 1689, the Bill of Rights, which granted certain rights to the people of England and their representatives. Charters of liberties were historical realities, negotiated and established between rulers and their subjects. These documents did not of themselves question the fact of rule; their purpose was to secure a few customary liberties within the framework of an accepted order. And naturally they could only be drafted on the condition that a state already existed, to which they would then apply.

A charter of liberties, then, differed considerably from what came to be known as the "social contract," a notion of seventeenth-century philosophy. A social contract is not a historical factum; it is an idea, a virtual construct that by definition must precede the establishing of a state. It was pivotal for thought on justice and government. English philosopher Thomas Hobbes (1588–1679) contributed greatly to the rise of the idea. Before Hobbes, the individual was seen solely in terms of his dependence on a divinely prescribed social order, fated to cooperate. If the individual had any rights at all, these followed from a duty toward God and one's fellow men to better oneself and one's existence. Hobbes focused on the individual, who, by nature, is free, and on that individual's rights, which constitute the cornerstone for establishing social order. Such social order could only be secured by surrendering certain personal liberties to the community. That is what Hobbes meant by "social contract."

Basically, the idea presupposes that by nature individuals are born free but that they choose in mutual agreement to establish a political and legal community. It reverses how order relates to freedom. Medieval charters of liberties awarded the individual certain liberties within prescribed class order, their primary goal being to maintain that order. This meant that liberties were awarded only members of a privileged class. In contrast, the philosophical rationale for order based on a social contract addresses the issue of freedom, on which, in turn, order is built. While charters of liberties left existing forms

of political power unquestioned, the idea of the social contract reestablished and justified political sovereignty by the people.

Inseparably bound to the notion of freedom was the notion of equality for everyone. Historical charters of liberties stated the criteria that individuals had to fulfill in order to enjoy the liberties conferred on them by a monarch. Some liberties applied only to upper classes or certain occupations; others depended on property ownership. Behind the idea of the social contract, in contrast, stands the notion that all men are born free and equal. Since we are all, by nature, born free, we must also, by nature, all be equal. Freedom and equality go hand in hand. If freedom were not bound to equality, we would need some preemptive decision or declaration of who is privileged and who is not, or some criterion for determining who is or is not born free. Such distinctions, however, are not compatible with the theory of social contract, where all men are born free and freedom is not something that can be conferred. Thus one significant difference between charters of liberties and the idea of the social contract is the latter's focus on equality.

Notes

1. See Peter Häberle, "Die Menschenwürde als Grundlage der staatlichen Gemeinschaft," in *Handbuch des Staatsrechts*, vol. 1, §20, eds. Josef Isensee and Paul Kirchhof (Heidelberg, 1987), 834ff.
2. "City air liberates" was the catchphrase. For a discussion of breaking the hold of dominance by religion and tradition, see Hasso Hofmann, "Die versprochene Menschenwürde," in *Archiv des öffentlichen Rechts* (quarterly journal) 1993, 353–77, particularly p. 373 and references. See also Uwe Wesel, *Geschichte des Rechts in Europa* (Munich, 2010), 321.
3. See Wesel, *Geschichte des Rechts in Europa*, 186, 195.

Chapter 2

First Concepts of Human Rights

The idea of the social contract enabled eighteenth-century philosophers to develop the notion of human rights. The following condenses the history of that development, mentioning only those moments of the greatest significance for understanding the concept of human rights. We find such moments particularly in Hobbes, Locke, Rousseau, and Kant.

Hobbes

It was Thomas Hobbes (1588–1679) who first elaborated the idea that social order is not a matter of divine providence. If only in theory, it is up to freely born individuals to create social order. This reflects a transition from prescribed order to an order of choice.[1]

In a prescribed order, liberties can be assigned to specific persons or classes because divine direction determines which persons and classes those shall be and under which conditions such liberties will be granted. Suspending divine order, however, changes the signs. Universal and equal freedom replaces conferred liberties. It is up to humankind to create social order. Since the sixteenth century and Hobbes, mankind has made considerable effort to meet this challenge, and it is still working at it. Hobbes's visionary transition from prescribed to chosen order laid the groundwork for the subsequent

development of human rights. Today one might say that the individual is no longer the product, but the producer of social order.

Hobbes thus founded a tangible philosophy of human rights inasmuch as he postulated the birthright of freedom and equality for everyone. But he also had another idea that has been just as important for the development of human rights: Hobbes claimed that in lawmaking a ruler must be absolutely free, responsible only to the community that has authorized him to rule and declare law. It meant the end of rule by divine or natural providence. It presupposed, however, a new authority, namely, the joint authority of the individuals united by social contract—individuals of free and equal provenience.[2]

In Hobbes's plan for society, however, freedom and equality soon become, for the most part, illusionary. Hobbes sought a solution for the seventeenth century's bloody disputes—religious war on the Continent and civil war in England. His concept of the social contract was one way to justify political rule based on individual freedom. But even on his theory, freedom can be precarious; in a theoretical state of nature we would eventually have "war of every man, against every man."[3] For Hobbes the powerful state and the absolute monarch are the solution for law-related uncertainty that is unsettling for society. The people surrender to their sovereign not only the power of legislation, but their freedom and all their rights, too, with the exception of the right to life, which for Hobbes was the only right granted the individual.

Hobbes's arguments lead to absolutist rule. The scheme implies that people can protect their own rights by handing them over to an absolute ruler.[4] Thus for Hobbes freedom and equality exist only within the framework of subjugation. That hardly makes him a human rights theorist. And yet, he did prepare the way for the subsequent development of genuine human rights.

Locke

English philosopher John Locke (1632–1704) took the next step toward more firmly establishing what is meant by human rights. Like Hobbes, who was several decades his senior, Locke started with the natural state of man, where all are free and equal and pursue sur-