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Review

The Heart of Human Rights

Allen Buchanan. New York: Oxford University Press, 2013. 336pp.

Brian Kin Ting Ho^{*}

Allen Buchanan's book is an impressive addition to the contemporary philosophical discussions about human rights. It covers a wide range of topics, including the nature of justifications in human rights (chapters 2 and 3), the problems existing accounts face (chapter 2), a justificatory account of human rights as a system of international law (chapters 3 and 4), the nature of legitimacy-judgments in political philosophy (chapter 5), the supposed "supremacy" of international legal human rights (chapter 6), and ethical relativism and pluralism (chapter 7).

Despite the breadth, the book has a straightforward and focused aim. It attempts to move the focus of the contemporary discussion away from the "orthodox" analysis, which Buchanan thinks pays insufficient attention to the *legalistic* character of the existing regime, and to replace it with an account that focuses on the fact that human rights are *legal* rights. The ultimate goal of any philosophical account of human rights, Buchanan holds, ought to be one that justifies the practice of human rights as one that centres on international laws.

Given this aim, anyone familiar with the literature might be tempted to place Buchanan in the "political conception" camp, which has Charles Beitz as its most prominent advocate. The temptation is reasonable, for the political conception of human rights similarly urges us to shun the moral approach. Instead, both Buchanan and Beitz

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hold that theorizing about human rights must involve paying proper attention to the fact that international human rights is a “practice” (Beitz 2009). Both types of accounts are hence dissenting voices from the orthodox.

However, Buchanan explicitly distances himself from the political conception camp, particularly Beitz’s version. The main reason is that, Buchanan argues, the political conception does not go beyond the mere “characterizing” of the practice of human rights. Seeing himself as doing more, Buchanan thinks that his account provides *justification* of the international legal practice, too, and he thinks that is something a philosophical account of human rights must be able to address (81–83). The political conception of human rights—at least Beitz’s version—fails to achieve that.

The most significant philosophical contribution that Buchanan makes is undoubtedly his dismissal of the “orthodox” philosophical accounts of human rights. Buchanan powerfully forces philosophers of human rights, especially those who hold the orthodox view, to confront the problem of *institutional* justification. Even with the rising prominence of the political conception of human rights, much of the human rights discourse is still conducted without too much thought about justifying human rights *as a legal system*. After Buchanan’s *The Heart of Human Rights*, however, it will be difficult to imagine how future contributors to the philosophy of human rights can ignore this issue any longer.

It will be quite a task they face, too, for Buchanan has presented us with a compelling, legally-informed, and reality-oriented case that can potentially change the direction of an entire discourse. If Buchanan is right—and he certainly has presented a convincing case—then contemporary philosophical discussions about human rights would need a major re-orientation to remain relevant. Buchanan’s warning here is clear: failing to do so will result in the contemporary philosophical discussions over human rights being increasingly removed from the realities of human rights as something far more than, and in fact different from, just a list of moral rights.

This review begins with and focuses on Buchanan’s dismissal of the orthodox view. While finding his arguments compelling, I will suggest that there are a number of issues that one could raise. Secondly, and more briefly, this review will discuss a methodological point which I find important. It is that throughout the whole book, Buchanan makes frequent references to “the Practice” and the “existing system” of international legal human rights. That part of the review will suggest that more thought is

needed regarding the justification behind Buchanan's understanding of these two notions as *the* understanding.

THE ORTHODOX VIEW—THE MIRRORING VIEW

Buchanan argues that something has gone wrong in the contemporary philosophical discussions about human rights. He thinks, standardly, philosophers in this area commit themselves to the "Mirroring View," which holds

that the standard or typical justification for an international legal human right must appeal to an antecedently existing, corresponding moral human right (while allowing for the possibility that some justified international legal human rights are specifications of more abstract moral human rights or valuable instruments for realizing moral human rights). (51)

What is wrong with this View? As Buchanan sees it, there are two issues.

First, the Mirroring View is assumed, not argued for, and false to boot. Second, even if the Mirroring View were true, producing a theory of moral human rights would... only be one necessary condition for justifying international legal human rights; the bulk of the work of justification would still have to be done. Justifying assertions about the existence of certain moral rights is one thing; justifying an institutionalized system of international law designed to realize them is quite another. (51)

EVEN IF THE MIRRORING VIEW IS CORRECT?

I will first quickly address the second line of complaint. I argue that while this line of argument is convincing—and indeed it has to be correct—the more fruitful mode of enquiry would be to focus on the first complaint.

Buchanan has indeed hit upon something right here: by having developed an account of moral human rights, theorists like James Griffin have left a lot of subsequent and important work still to be done (51). Buchanan argues that those who are too obsessed with the moral story is likely to miss out on the more, as it were, "practical," legal dimension.

Griffin is a recurrent target in the book, so let's consider his view. Griffin's famous "personhood" account, detailed in his *On Human Rights*, is no doubt unapologetically an *ethical* account of human rights. "My focus," Griffin proclaims a few lines into the book, "is ethics" (Griffin 2008: 1). By arguing that human rights are grounded on what he calls "normative agency" or "personhood," Griffin thinks that this gives us an ethical account of not only the *grounds* of human rights, but their *content*. So far, the case is strong for Buchanan.

However, although Griffin's treatment of the legal, practical side of the story is no doubt brief, the methodology of, and plan for, how such a subsequent story shall be told are perfectly clear. The critical engagement with legal human rights is conceived of as an *application* of the moral account. Griffin clearly thinks that to engage in the process of thinking about what legal human rights there should be, we are to be guided by the ethical account of human rights itself. Griffin goes on to sketch what that critical process, relying on his personhood account, would look like (Griffin 2008: 191–211). This is, of course, a clear manifestation of the Mirroring View.

What can defenders of Griffin say here? I think they can at least maintain that there is nothing in the Mirroring View itself that precludes the moral story about human rights to be further drawn out so as to have philosophically interesting things to say about legal human rights or the international practice of human rights. Theorists like Griffin can, and *do*, draw implications on legal human rights from the moral point of view, if only less concretely than perhaps ideally so.

Of course, Buchanan recognizes all of this; but Buchanan replies to this kind of response by saying that, despite that, the Mirroring View is ultimately philosophically "indefensible" (18–19). Whether Buchanan is entitled to this conclusion is something I return to, but it is worth highlighting that if this is indeed Buchanan's line of rebuttal when confronted with the fact that orthodox philosophers *do* talk about, and justify, *legal* human rights, then the second complaint Buchanan makes simply collapses back into the first. The actual disagreement between theorists like Griffin and Buchanan over *whether* a moral account of human rights can make contributions to discussions over legal human rights is rather small. In reality, they both agree that it really can. It is merely that Buchanan thinks *the sort of contribution* friends of Griffin make is indefensible. Given this, one might find the first line of complaint (i.e., that the Mirroring View is *wrong*) being the more fruitful way to conduct this debate, since the "even if correct"

conditional argument might merely be masking over the more important disagreement between the two camps, as captured by the first complaint.

BUCHANAN AGAINST THE NECESSITY CLAIM

Let us then move on to the core of Buchanan's challenge: i.e., the first complaint, which is that the Mirroring View is "unargued for," and in any case "false." That the Mirroring View has been largely assumed is obvious—and Buchanan has given us a good survey of existing accounts to substantiate this point. But of course that does not entail that it is false, so what are his arguments?

Buchanan's argument is twofold. First, a moral, pre-existing human right is neither necessary nor sufficient for a corresponding legal human right, or a system of international legal human rights containing these legal human rights, to be justified. Second, there is a long and important list of legal human rights that *simply cannot be justified* under the Mirroring View. I won't be offering a full critique of Buchanan's arguments due to the lack of space and indeed the nature of this review, but I hope what I say points to something that is worthy of attention about Buchanan's argument which will lead to further investigations.

Regarding the first argument, I think Buchanan has presented us with a plausible critique, but it comes with a number of important caveats. As noted, Buchanan's first move is to argue that to justify a legal human right, it is *not necessary* to do so via identifying a pre-existing moral human right to which the legal right corresponds. Instead, Buchanan argues that the justification of legal human rights can admit of a more diverse and varied mode of justification than the Mirroring View assumes. For instance, he says:

A legal entitlement to goods, services, and conditions that are conducive to health, which include but are not limited to healthcare, can promote social utility, contribute to social solidarity, help to realize the ideal of a decent or a humane society, increase productivity and to that extent contribute to the general welfare, and provide an efficient and coordinated way for individuals to fulfil their obligations of beneficence. Taken together, these distinct lines of justification, none of which appeals to an antecedently existing moral right to health, make a strong case for having a legal right to health. (53)

This quote captures an important feature of Buchanan's view: legal human rights are *instrumentally valuable*. As Buchanan continues: "individual legal human rights are instruments that can serve a number of purposes including moral ones of various types. The moral purposes for which individual legal rights are instrumentally valuable are not restricted to the realization of antecedently existing individual moral rights" (55).

This argument, I think, sounds quite plausible, but it rests on the assumption that international legal human rights *do* admit of these diverse modes of justification, and that they are to be conceived of as "instruments that can serve a number of purposes."

I find this assumption attractive on its own, yet it is unclear whether Buchanan has given us a very strong argument to motivate it. The only explicit argument supporting this assumption is that that is the nature of legal rights *in general*. Buchanan claims we all acknowledge that legal rights (*not* legal *human* rights) are not solely grounded on moral rights. A legal right can be justified by many considerations, among which the existence of a pre-existing moral right is only one. To this end, he cites a legal right to physical security and a legal right to health as examples to illustrate his point: one shouldn't, Buchanan says plausibly, expect to find a corresponding moral right to physical security and another to health (54–55).

Now even if we grant that legal rights can indeed be justified without ultimately having to appeal to moral rights on some deeper level, it is still unclear to me whether we must grant Buchanan the further claim about legal *human* rights. It remains a leap to move from a claim about the modes justification of legal rights *in general* to a conclusion about what can justify legal *human* rights in particular.

For instance, it doesn't sound implausible for one to hold that legal rights *in general* and legal *human* rights in particular do not share everything about what justifies them. While considerations like "promoting social utility" or "increase productivity" might, we can grant, justify a legal right under a particular jurisdiction, it remains entirely consistent for one to argue that the same kind of consideration might not justify a legal *human* right.

Thus, while I am sympathetic to Buchanan's argument (and the aforementioned assumption on which it is based), one would wish to see a more powerful and specific defence of his claim about the possible modes of justifications of legal *human* rights.

BUCHANAN AGAINST THE SUFFICIENT CLAIM

Similar things can be said about Buchanan's argument that the Mirroring View is also wrong because the existence of a moral human right is not sufficient for justifying a legal human right. Using a similar strategy, Buchanan begins his argument by noting: "It should be obvious that, generally speaking, the existence of a moral right is not a sufficient reason for establishing a corresponding legal rights..." (56). He then takes the same approach and argues that just as having a moral right to something doesn't always give us conclusive reasons to make it into a legal right, the same goes with the relationship between moral human rights and moral legal rights.

Again, one feels entitled to question whether Buchanan is warranted to make this inference. Echoing my arguments in the previous section, it doesn't seem obvious that one can simply transpose something about the relationship between moral rights and legal rights *in general* and infer something about the relationship between moral *human* rights and legal *human* rights in particular.

SOME LEGAL HUMAN RIGHTS JUST CAN'T BE JUSTIFIED BY MORAL HUMAN RIGHTS?

Another line of attack that Buchanan holds against the Mirroring View is that there are some highly plausible legal human rights which, for philosophical reasons, cannot be justified by a pre-existing corresponding moral human right. In making his case, Buchanan draws inspiration from a point that has long been acknowledged in the theories of rights literature: i.e., there are certain rights that, by common consensus, cannot be justified by appealing to certain features of the right holder himself.

Joseph Raz's discussion in his *The Morality of Freedom* (1986) is where this discussion began. Raz is a prominent proponent of the 'interest theory' of rights. According to him, A has a right to X if and only if X protects some important aspect of A's interests—and that the interests are of sufficient importance to ground some other people having duties owed to A regarding the fulfilment or delivery of X (Raz 1986:166). Thus, standardly, why each and one of us has a right against torture is because non-torture is of sufficient importance to our interests that it grounds other peoples' having a duty to not torture us.¹

Raz himself, however, notes a problematic case, that of a journalist's right to free speech. The idea is that the journalist's interests to free speech, *by itself*, cannot possibly be important enough to ground other peoples' having duties owed to him regarding his

freedom of speech. In cases like this, Raz famously said that the way to justify this right is to consider the interests of a greater number of people (i.e., the public) being served, not just of the journalist's: that makes the interests, so "summed up," to be sufficiently important to ground duties owed to the journalist (Raz 1986: 179). Buchanan seems to take this to mean that there can't, after all, be a journalist's moral right to free speech, only a legal right (59–60).

Buchanan takes the cue from here and argues that for a large number of very plausible legal human rights, if they were to be (as the Mirroring View would hold) justified by some pre-existing moral human rights, these purported counter-part moral human rights would face the same problem, thus can't be said to really exist after all (59–62). Take the legal human right to adequate healthcare as an example. It is, if anything is, a highly plausible candidate of a legal human right. Buchanan argues that, however, to justify a moral human right to adequate healthcare is highly problematic. Why? Because one person's interest in having adequate healthcare cannot possibly be important enough to justify other peoples' having duties owed to that individual to put in the vast amount of resources, the setting up of the institutions etc. to bring about adequate healthcare. Thus, while there is (*arguendo*) a legal human right to adequate healthcare, there cannot be a moral human right to adequate healthcare; therefore, the Mirror View must be wrong. In other words,

No matter who you are, you are not important enough to justify a set of duties that correlate with the panoply of legal rights that constitute the modern rights-respecting welfare state, much less important enough to justify a system of international human rights law that serves to support the welfare state's system of rights. But the interests and autonomy of large numbers of people like you are important enough. (64)

Note that this class of rights, Buchanan thinks, includes a lot of human rights that are commonly taken to be at the core of the human rights regime, including the right to democratic government, due process, and many other so-called "welfare" human rights.

This particular argument has already attracted some attention in the literature. For instance, Rowan Cruft has discussed two lines of potential response to Buchanan's critique on this point, and has dismissed both of them (Cruft forthcoming).² Yet neither of the responses he discusses questions the beginning premise of Buchanan's argument:

that for a lot of these legal human rights, the (supposed) corresponding moral human rights are problematic, and hence has a questionable existence-status, because they are so “costly” or burdensome that a single individual’s interests cannot possibly justify others’ having the duties corresponding to the right.

However, I would like to raise some queries about the underlying assumption behind this criticism. It is unclear to me what the rules of this game are: what, concretely, is it that determines while some human rights fall prey to this problem, some don’t? More pointedly, what is it that makes certain aspect of my wellbeing, or certain feature about me, as an individual right holder, that is “important enough” to justify some duties, while some fail to do so? At what point does the corresponding duties that go with my right to something become too costly or burdensome for my own interests, and mine alone, to justify some other peoples’ having them, and that some other peoples’ interests must be brought in to make the maths work? And how are we to understand the idea of “costly” (a phrase used by Cruft) here? Is it meant to be a “monetary” kind of cost? If not (and I suspect it isn’t), then just *what* is the standard? (The very same set of questions, I think, equally apply to Raz and his journalist case in the first place.)

I do not for a moment suggest that these questions cannot be answered (and perhaps Cruft, Buchanan, and Raz would all think that the answer is going to depend on the particular kind of account of moral rights in question), but until they are, I caution against subscribing fully to Buchanan’s—and indeed Cruft’s and many others’—assertion that there are indeed many *moral* human rights that face this problem.

THE PROBLEM OF PROLIFERATION

So far, I have highlighted what I take to be Buchanan’s most important contribution to the philosophical literature on human rights, and have raised a number of critical remarks against it. Before I move on to the next and final point in this review, let me say one more thing about Buchanan’s arguments against the Mirroring View.

In the concluding chapter, Buchanan talks about the problem of proliferation of human rights. He anticipates that his opponents might, at this point, argue that we need to “resurrect” the Mirroring View in order to tackle the problem of proliferation, but Buchanan pre-emptively dismisses this strategy, arguing that it will (1) lead to a very modest and “lean” list of human rights, and (2) it is unlikely to influence actual agents who create international legal human rights (288–89). Instead, he proposes some

alternative options with (he admits) varying degree of plausibility, which he thinks are all better-placed to deal with the question of proliferation of human rights (289–92).³

Here I think defenders of the Mirroring View might actually have a stronger reply. They are less likely to bring back the View at this point to act as a *solution* to the proliferation problem; rather, I think they are far more likely to insist that without the Mirroring View, or at least some similar views that maintain a close relationship between moral human rights and legal human rights with some regulatory dimension, it is not at all clear how we even begin to make sense of the very idea of proliferation. When one considers there is an issue of overexpansion (what Griffin calls “inflation”), it is natural to ask: an inflation *against what benchmark*? It is unclear what Buchanan’s answer to this is going to be—and the alternatives Buchanan proposes are unable to answer this question, for they are designed to be *solutions to*, not *explanations of*, the proliferation problem.

It is certainly true that there *are* other ways to deal with the benchmark question that is non-Mirroring View-based, and I am not even arguing that the Mirroring View is the best answer to the question. What I want to point out, however, is Buchanan’s dismissal of Mirroring View *as a solution* to the problem of proliferation is only half the story; friends of the Mirroring View might have more to say.

“THE PRACTICE,” AND THE “EXISTING SYSTEM,” OF INTERNATIONAL LEGAL HUMAN RIGHTS

The second and the final issue I want to raise regarding Buchanan’s argument is that, throughout it, Buchanan has been certain and confident that, when he refers to the “existing system of international legal human rights,” or “the practice of human rights” (“the Practice” for short) (5), he is picking out a widely accepted conception or understanding.

By “the Practice,” Buchanan includes a wide range of international and national political processes and entities, including the processes by which declarations and treaties are created, ratified, enforced, etc., the international, regional, and supranational courts of human rights, lobbying groups, the UN Security Council, and many more (5–6). The system of international legal human rights, on the other hand, refers more specifically to the system of international human rights *laws* that are UN-based and the European legal

human rights system (6). More concretely, Buchanan argues that the system has two functions: a “status egalitarian function” and a “wellbeing function” (27–36, 68–72).

Note that these understandings of what the system, and what the functions of the system, are both play an important role in Buchanan's overall argument. First, it is his prime criticism in his book that the existing philosophical discussions fail to justify *this system* (or something similar to it); building on his attacks against the Mirroring View, it is his goal to conclude that the orthodox view, *even if* it has in fact come up with a plausible and defensible philosophical account of *moral* human rights, it still falls short of justifying *this practice* and *this system* (or a type of system that is similar to the particular one that we have).

Second, these understandings play another important role: his justificatory story for international human rights is obviously directed to something like the existing system. In chapter 4, which is entirely devoted to justifying a system of international legal human rights, Buchanan explicitly intends for the justification he offers to be one that is directed to a system *like the existing one* (107).⁴ Thus, Buchanan's overarching argument in his book hinges heavily on just how he understands the existing system (and the practice) of human rights.

Yet Buchanan has not said much to bring his reader on board on this point. Again, Cruft has already raised a related sceptical remark in passing: “I have heard some people question whether international law really is the heart of contemporary human rights: What of activism, journalism, academia, or the bills of rights in national constitutions?” (Cruft forthcoming).

Whereas Cruft's worry—which I share—is one about *focus*, the point I am pushing here goes further. In the closing section of the book, Buchanan reflects on the future and potential crisis for the human rights enterprise. In the final paragraph, Buchanan turns to China:

China is perhaps unique among the powerful states in explicitly repudiating the basic idea that undergirds the system of international legal human rights, namely, that it is proper and indeed morally necessary for international law to regulate the international affairs of states. China instead seems to view human rights documents simply as public pledges by states to conform to the norms they list.... (303)

By Buchanan's own admission, China pays at most lip service to subscribing to the system of international human rights as a system of international *law*; at best, the Chinese government sees human rights treaties and laws as slogans of aspirations of sorts. Although Buchanan focuses on China, the same view applies to many authoritarian states and indeed some academics from a non-Western-liberal environment.

This leads to the inevitable question: *which* conception of human rights captures *the* existing system? When we refer to the "international system of legal human rights," whose conception do (should) we use—Buchanan's, or that of the Chinese government?

It is very tempting to dismiss this worry: we might want to say the Chinese government is deliberately misleading, or self-deceiving, or that they are, quite simply, *wrong*, on an almost factual level. The existing human rights system *just isn't* what they claim to be.

I am indeed sympathetic to this type of response—but on what philosophical basis, following Buchanan, can we offer such dismissals? How can we insist that we got it right, and they got it—intentionally or otherwise—wrong?

This problem, I think, has plagued the political conception of human rights from the beginning (especially Beitz's version), for they, too, talk about "the Practice" of human rights as if there is an entirely non-controversial and universal understanding of what that means. Insofar as Buchanan relies on the idea of "the Practice" or "the existing system," he suffers from a similar weakness.

Early on in the book, Buchanan cautions us against being what he calls "conceptual imperialists" about human rights, who "have assumed, without argument, that there is only one concept of human rights (namely, theirs)" (10). This is an insightful warning. But the warning must equally apply to the very act of identifying and characterizing "the Practice" and system of international human rights.

NOTES

1. Buchanan claims that his argument has force even if the interest theory is wrong and that the will theory is correct. I do not have the luxury to deal with this further stipulation. See (60, fn.10).
2. As mentioned, Cruft discusses two potential objections. First: There *are*, after all, individualistically justified moral rights we can uncover beneath these allegedly problematic cases of legal human rights. For example, even in the case of a legal

human right to healthcare, there *is* a moral human right “mirroring” it. That bypasses Buchanan’s objection. Second: perhaps, contra Buchanan, moral rights *can* be non-individualistically justified. Therefore, there is no existence issue regarding these allegedly problematic cases. Just because an individual’s (moral) right to health cannot be justified by some features of that individual exclusively, it doesn’t follow that this (moral) right to health has a questionable existence. Cruft dismisses both options, but I will leave those arguments aside in this essay.

3. The list of Buchanan’s proposed solutions is a long one, containing seven proposals. Notably, it includes: delegating the overexpansion issue to be decided by a panel of experts, having constraints put in place during the state of ratifications of human rights treaties, and urging restraints to be exercised by international and domestic judges in their interpretation of international legal human rights.
4. They are (1) the *benefits* the system brings, (2) the *necessity* of having such a system for the justifiability of the current international order, and (3) the *obligations of states and governments* to support the system (105–131).

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