

# Justifying International Legal Human Rights

Jesse Tomalty  
University of Bergen

Accepted for publication in *Ethics & International Relations* in October 2016

In *The Heart of Human Rights*,<sup>1</sup> Allen Buchanan emphasizes the distinction between *moral* human rights (MHRs) on the one hand and *international legal* human rights (ILHRs) on the other. MHRs are the moral rights held universally by all humans simply in virtue of being human. ILHRs are the legal rights of international practice, which are articulated in the United Nations' International Bill of Rights and related legal documents. One of the most controversial aspects of Buchanan's account of human rights is its denial of any significant role for MHRs in the justification of the content of ILHRs. This is at odds with the orthodoxy according to which there is a close connection between MHRs and ILHRs. In particular, Buchanan challenges what he calls the 'Mirroring View' according to which each ILHR constitutes the reflection of some corresponding MHR.

Buchanan is right to subject the Mirroring View to scrutiny, and although I agree that it should be rejected, in what follows I argue that his alternative account of the justification of ILHRs is also problematic. I argue that rejecting the Mirroring View does not entail the irrelevance of MHRs to the justification of the content of ILHRs, and I propose an alternative account that avoids the shortcomings of the Mirroring View while nevertheless placing MHRs at the core of the justification of ILHRs.

## 1. Reflections on the Mirroring View

According to the Mirroring View, the function of ILHRs is to give legal expression and force to antecedently existing MHRs. On this view, each ILHR is taken to be the reflection of some corresponding MHR. The reflection need not be perfect: Proponents of the Mirroring View accept that ILHRs can be context-sensitive, and therefore more detailed, specifications of MHRs. But even allowing for this, opponents of the Mirroring View argue that the content of MHRs is so narrow as to exclude some of the core content of ILHRs.<sup>2</sup> According to its critics, the Mirroring

---

<sup>1</sup> Allen Buchanan, *The Heart of Human Rights* (Oxford University Press, 2013). All page numbers in brackets refer to this text.

<sup>2</sup> As we shall see, Buchanan makes this kind of argument. A similar argument is also advanced by Charles Beitz in *The Idea of Human Rights* (Oxford University Press, 2009), pp. 66-67.

View therefore has unacceptably revisionary implications. In this vein, Buchanan argues that the Mirroring View should be rejected because it ‘cannot account for some prominent ILHRs that are appropriately included in the system’ (274), including the right to health, the right to democratic governance, and the right to freedom of expression (58-64).

Before going on to consider whether this is in fact the case, it’s worth reflecting for a moment on why this would be damaging to the Mirroring View. It’s certainly not obvious that an account with highly revisionary implications for the practice should be rejected for that reason. The kind of account of human rights that Buchanan intends to provide is meant to be normative and not merely descriptive. Why not, then, think that if the Mirroring View has highly revisionary implications for the practice, that is just so much the worse for the practice? If a theory of human rights is meant to be normative, then why should we be wedded to the actual content of the system as it currently exists? To reject the Mirroring View by arguing that it excludes some ILHRs that are appropriately included in the system at first glance appears to beg the question against the it by assuming precisely what it denies, namely that ILHRs can appropriately be included in the system despite not being justifiable with reference to corresponding MHRs.

To see why Buchanan’s rejection of the Mirroring View is not question-begging, it helps to clarify the kind of project that he is engaged in. A central question Buchanan aims to answer is whether a system of ILHRs *like the one that currently exists* can be morally justified (67-68 and 85). This question is distinct from the question of whether the existing system of ILHRs *in its current state* is morally justifiable; but it is equally distinct from the question of what, if any, human rights norms would apply in an idealized conception of global justice. Answering the question of whether a system of ILHRs like the existing one can be morally justified requires an account of the system in question; but the task is not merely descriptive. The aim is to evaluate an idealized version of the existing system – not idealized based on *external* standards, but rather based on the ideals expressed by the system itself. The task is therefore an interpretive one. What makes for a successful interpretation of an institution or system is a difficult question, but it seems reasonable to suppose that an account of ILHRs that implies the exclusion of many or prominent rights from the existing system is unlikely to be recognizable as an account of that system, and therefore implausible as an interpretation of it. This brings us back to Buchanan’s claim that the Mirroring View excludes some prominent ILHRs and should therefore be rejected.

According to Buchanan, it is because MHRs must be ‘solely subject-grounded’ that they cannot alone account for the extensive content of ILHRs (59). On his view, in order to justify a right of any kind one must show that a duty is owed to a particular right-holder. That is to say that one must show that the alleged right-holder is entitled to the performance of the duty in question on the part of the alleged duty-bearer. In the case of *moral* rights, he argues, this involves identifying something about the alleged right-holder (usually an interest) that is sufficient to ground the directed duty. This is not necessary in the case of *legal* rights, presumably because the direction of the duty and the corresponding entitlement are already contained in the relevant legal doctrine. By contrast, moral rights must be solely *subject-grounded*, according to Buchanan, since we otherwise lack a reason to connect the performance of a particular duty with the entitlement of a right-holder.

Because legal rights are not constrained by the requirement of being solely subject-grounded, they can have much more extensive content than moral rights. This, Buchanan argues, is true for a number of ILHRs. The ILHR to health, for example, entitles right-holders to provisions beyond what they could possibly claim solely on the basis of their individual interest in health. As Buchanan points out ‘protecting and promoting an individual’s interest in health will require large-scale social investment for the provision of public goods’ whose cost and restrictions on liberty could not be justified by appeal to any single individual’s interest in health (61). It is only because the interests of many individuals can be positively affected that these costs and restrictions on liberty can be justified. He argues that the same holds for some other ILHRs including the right to democratic governance and freedom of expression. Because these and other ILHRs cannot be fully justified by appeal to corresponding MHRs on Buchanan’s account of what is required for MHRs to be justified, the Mirroring View would have the highly revisionary implication that the content of ILHRs should be radically scaled down.

It’s not entirely clear that Buchanan’s worry is justified. If everyone has an interest in some good, then the fact that a single person’s interest in that good is not on its own sufficient to justify the imposition of corresponding duties on others appears to be beside the point. MHRs are meant to be grounded in interests that are held universally by all humans. It’s difficult to see how a situation could arise in which only one person has an interest in the kind of goods whose provision is required by, for example, the ILHR to health. If there is a right at all, there have to be duty-bearers; and if there are duty-bearers, then they too will have this interest (notwithstanding certain science fiction scenarios). But even if we could imagine a case in which only one person has the interest in question, it seems irrelevant to our current situation in which everyone has it.

Regardless of my doubts about Buchanan's argument, I agree with him that the content of MHRs is considerably narrower than that of ILHRs, and that the Mirroring View therefore has unacceptably revisionary implications. Whereas Buchanan thinks this is because MHRs must be solely subject-grounded, I think it is because MHRs are meant to be natural rights. MHRs are natural in the sense that they are held by all humans simply in virtue of being human, and not on account of any special relationships in which right holders stand to duty bearers.<sup>3</sup> As such, they must be held by each and against all, and their corresponding duties are therefore owed by each and to all. MHRs, I argue, have narrower content than ILHRs because ILHRs include positive rights, and few, if any, positive rights can meet this requirement.<sup>4</sup> Positive rights are those whose fulfilment requires action on the part of the relevant duty-bearers. They stand in contrast to negative rights whose fulfilment requires only omission. The objects of the positive rights articulated in the IBHR (e.g. subsistence, health care, education, and employment) cannot be claimed by each of us against all other moral agents since no moral agent alone could possibly provide these goods to all those in need of them. In order for these rights to be justified, institutional mechanisms must be in place to allocate specific duties to specific duty-bearers. But this means that the rights in question are in fact special, and therefore not natural, as MHRs are meant to be: They are held partly in virtue of the institutions that allocate specific duties to specific duty-bearers, and not simply in virtue of the humanity of the right-holders. If this is right, then the Mirroring View implies that the international human rights system should not include positive rights. Given the large number of positive rights articulated in the IBHR and related documents, the implications of Mirroring View are, then, so revisionary as to undermine its plausibility.

## 2. Buchanan's proposal

Having rejected the Mirroring View, we are faced with the question of how ILHRs are in fact justified, and what, if any, relevance MHRs have. Buchanan proposes a 'pluralistic justificatory strategy' for ILHRs that puts MHRs almost completely out of the picture. Although he thinks that the best justification for a very few ILHRs will make reference to some corresponding MHR (159), in general he thinks that ILHRs are fully justified without any reference at all to MHRs. Rather

---

<sup>3</sup> See H. L. A. Hart, 1955, 'Are There Any Natural Rights?', *The Philosophical Review* 64 (2): 175-191, p. 175.

<sup>4</sup> This line of argument is pressed by Onora O'Neill in 2005, 'The Dark Side of Human Rights', *International Affairs* 81(2): 427-439. It has been further developed elsewhere, for example in Simon Hope, 2014, 'Kantian Imperfect Duties and Modern Debates over Human Rights', *Journal of Political Philosophy*, 22(4): 396-415; and Jesse Tomalty, 2014, 'The Force of the Claimability Objection to the Human Right to Subsistence', *Canadian Journal of Philosophy* 44(1): 1-17.

than giving legal expression and force to MHRs, Buchanan argues that ILHRs have two functions: one is to protect and promote well-being; the other is to protect and promote equal status of persons (28-36). On Buchanan's account, all that is required for the justification of an ILHR is (a) that it fulfils one of these functions, and (b) that it is reasonable to include such a right in international law. (It's worth pointing out that Buchanan's view would collapse into a version of the Mirroring View if it were the case that only the existence of a corresponding MHR could make it justifiable to include a right in international law; but Buchanan denies that this is the case. On his view, it can be justifiable to include human rights in international law regardless of whether a corresponding MHR can be justified.)

Buchanan's pluralistic justificatory strategy does better than the Mirroring View when it comes to accounting for the content of ILHRs in the practice, but I argue that in denying the relevance of MHRs to the justification of ILHRs, it sits awkwardly with the preambular language of core ILHR documents, which strongly suggests that the rights contained therein are intended to give legal expression and force to the rights held by all humans simply in virtue of being human. For example, according to the preamble of the Charter of the United Nations, one of the purposes of the institution of the United Nations is 'to reaffirm faith in fundamental human rights'. It doesn't proclaim these rights or call for their enactment. It *reaffirms faith* in them.<sup>5</sup> And this, of course, is prior to the drafting of the Universal Declaration of Human Rights (UDHR), and so it can't plausibly be understood as reaffirming faith in previously articulated *legal* human rights. Likewise, the preamble of the UDHR states that 'recognition (...) of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (...)'. A natural reading of this passage suggests that the UDHR *recognizes* a set of moral rights that all humans already have.

Buchanan anticipates this line of objection and dismisses it by arguing that, to the extent that international human rights practice has developed in ways that do not recognize the justificatory constraints of the Mirroring View, 'such developments should be regarded as progressive, rather than degenerate' (73). But while the practice may not recognize all of the strictures of the Mirroring View, it is far from clear that it has departed from the orthodox understanding of the function of

---

<sup>5</sup> See Carl Wellman, *Moral Dimensions of Human Rights* (Oxford: Oxford University Press, 2011), p. 5.

ILHRs as giving legal expression and force to MHRs.<sup>6</sup> What Buchanan fails to consider is the possibility of an account of ILHRs that sees them as grounded in MHRs, but that does not thereby require that *each* ILHR constitutes the reflection of *some* corresponding MHR. I explore this possibility in the next section.

Buchanan provides a strong case for thinking that a satisfactory justification for many, if not all, ILHRs can be given without appeal to corresponding MHRs.<sup>7</sup> But what he fails to show is that his pluralistic justificatory strategy constitutes a better interpretation of the existing system than one that is more in line with the preambular language. It is, of course, unlikely that any interpretation could account for all of the elements of the system of ILHRs as it actually exists; but an interpretation that can account for more of the core elements of the system will be a better interpretation than one that cannot – and the idea that ILHRs are grounded in MHRs is surely a core element of the system. The plausibility of my claim that both the Mirroring View and Buchanan’s alternative should be rejected therefore hinges on the availability of a theory that does better than both at accounting for the core elements of the system of ILHRs. I think that such a theory is available.

### 3. A better alternative?

I have argued so far that neither the Mirroring View nor Buchanan’s alternative provide plausible interpretations of the existing system of ILHRs. The Mirroring View has overly revisionary implications for the content of ILHRs, while Buchanan’s alternative doesn’t capture the spirit of the international human rights enterprise expressed in the preambular language of core ILHR documents. A better alternative would be one that could both account for the actual content of ILHRs while preserving the idea that MHRs are at the heart of the enterprise. In what follows, I sketch an account that promises to meet these conditions.

Contrary to Buchanan, I think the Mirroring View gets the function of ILHRs right. ILHRs should be seen as giving legal expression and force to MHRs. However, contrary to what is suggested by the Mirroring View, this does not entail that each ILHR must reflect the content of an MHR. While some ILHRs can be seen as giving both expression and force to corresponding MHRs, others may give them force but not expression. ILHRs can give legal force to MHRs through the

---

<sup>6</sup> See, for example, Maglosia Fitzmaurice, ‘Interpretation of Human Rights Treaties’, in *The Oxford Handbook of International Human Rights Law*, edited by Dinah Shelton (Oxford University Press, 2013), pp. 739-771.

<sup>7</sup> See especially pp. 158-171.

institution of rights that *indirectly* protect and promote MHRs. While the Mirroring View supports a kind of one-to-one mapping of MHRs to ILHRs, my proposed alternative allows for the indirect derivation of some ILHRs from MHRs. This view finds support in the preambles of the International Covenants, according to which ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights (...)’.

The idea of the *enjoyment* of rights is developed by Henry Shue in his influential work on human rights.<sup>8</sup> According to Shue, in order for the substance of a right to be enjoyed, the right-holder must have reasonable guarantees that the object of their right will be protected against standard threats. Enjoyment of a right therefore requires more than its non-violation. It requires that there are guarantees in place that the right will not be violated. Providing such guarantees involves reducing right-holders’ vulnerability across multiple dimensions. For example, the enjoyment of MHRs requires that an effective and fair judicial system is in place. Furthermore, it requires that people are adequately well-off and well-educated to be able to navigate these and other social systems.

These kinds of so-called ‘linkages’ between the enjoyment of MHRs and the institutionalization of other rights strongly suggest that something like the extensive list of ILHRs could be justified by appeal to the mandate of international human rights law to promote the enjoyment of MHRs, even where MHRs are taken to have quite narrow content. This is because enjoyment of MHRs necessitates the institution of other rights. These other rights can reasonably be included among ILHRs even though they don’t correspond directly to any particular MHR, given that we understand the point of ILHRs to be the promotion of the enjoyment of MHRs and not just their articulation in law.

This is merely a sketch of an alternative account of ILHRs, but it is well worth further exploration. This is because, if borne out, it would have the advantage over the Mirroring View of being able to account for much of the content of the existing system of ILHRs, as well as the advantage over Buchanan’s account of maintaining a strong connection between MHRs and ILHRs, thus keeping in line with the preambular language of ILHR documents.

---

<sup>8</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2<sup>nd</sup> Edition (Princeton University Press, 1996).

