

Are Moral Rights Necessary for the Justification of International Legal Human Rights?

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Allen Buchanan's *The Heart of Human Rights*¹ powerfully challenges philosophers writing on human rights to clarify the relation between moral rights and international legal human rights. He claims that the dominant perspectives on human rights are committed to, though they never explicitly avow, what he calls the "Mirroring View," namely, the view that the existence of an individual moral right is both necessary and sufficient for the justification of any international legal human right (ILHR). Such individual moral rights serve as necessary and sufficient conditions for justifying ILHRs in one of three ways: either (1) ILHRs have exactly the same content as correspondent moral rights (for example, ILHRs against torture might be justified because there are underlying moral rights against torture); (2) ILHRs are a specification of a moral human right (in the same way as freedom of the press is a specification of the more general right to freedom of expression); or (3) ILHRs are instruments for serving or protecting moral rights (for example, a right to democratic participation might serve to protect or realize an underlying moral right to equal status). He then argues that the Mirroring View is false: an underlying moral right is neither a necessary nor sufficient part of the justification of a corresponding ILHR in any of these three senses.

In this essay I will not assess whether Buchanan is right to attribute the Mirroring View to any particular contemporary writer on human rights. I will also grant that the existence of a moral right—even a general moral right—is not sufficient to justify a corresponding ILHR. This is because the sufficiency claim strikes me as self-evidently false: not every individual moral right ought

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37 to be legally protected. Among my moral rights, I have a general moral right not to
38 be lied to. But it would be absurd to claim that I therefore ought to have an ILHR
39 not to be lied to.² The necessity claim—the other half of the Mirroring view—is
40 much more interesting. If Buchanan is right, then it becomes very unclear whether
41 philosophers should continue spending so much time focusing on the moral rights
42 that are often claimed to undergird human rights practice. They ought instead to
43 focus on the ILHR system and keep an open mind about what considerations
44 might best justify it.

45 I argue here that Buchanan is wrong to reject the necessity claim, and that the
46 existence of an underlying moral right is a necessary part of any successful justi-
47 fication of an ILHR or set of ILHRs. This underlying moral right need not have
48 precisely the same content as the ILHR it aids in justifying, but it must serve as
49 an essential part of the rationale for the implementation of the ILHR. I will call
50 this claim the “Grounding View” to distinguish it from the much stronger
51 “Mirroring View.”

52 53 AGAINST THE NECESSITY CLAIM

54
55 Buchanan advances his argument against the necessity claim mainly through a se-
56 ries of examples. Here is one to which he often returns:

57 [The legal right to health] admits of a powerful pluralistic justification that does not
58 include an appeal to an antecedently existing moral right to healthcare. A legal entitle-
59 ment to goods, services, and conditions that are conducive to health, which include but
60 are not limited to healthcare, can promote social utility, contribute to social solidarity,
61 help to realize the ideal of a decent or a humane society, increase productivity and to
62 that extent contribute to the general welfare, and provide an efficient and coordinated
63 way for individuals to fulfill their obligations of beneficence.³

64 The key to the argument lies in Buchanan’s use of the distinction between *directed*
65 duties on one hand and *nondirected* duties and broader social goals on the other.
66 Buchanan assumes that the moral rights in question are what Wesley Hohfeld
67 called *claim* rights.⁴ A claim right gives its possessor a claim to the performance,
68 by some specified third party, of an action or set of actions. Claim rights thus cor-
69 relate with third-party duties owed to the right-holder. The duties are *directed* du-
70 ties: by violating them one does not just do wrong in general but wrong *to* the
71 individual right-holder. When I break my promise to you, I wrong you in partic-
72 ular. Not all moral duties are, however, directed. I might have a duty, for example,

73 to promote the general welfare. If I violate this duty, I do wrong, but I wrong no
74 one in particular. One influential explanation for why the former but not the latter
75 is a directed duty points to the structure of the interests in each case.⁵ The fact that
76 in the first case it is your general individual interests that explain the moral force
77 of my duty not to lie implies that when I break my promise I wrong you, rather
78 than merely do wrong in general. On the other hand, because no one individual's
79 interests are sufficient to ground moral duties to promote the general welfare, the
80 latter duty is nondirected. I will rely, as does Buchanan, on this interest-based ac-
81 count of the directedness of a duty. Although I will not make good on this claim, I
82 believe the same argument would hold were we to adopt a will-based or demand-
83 based account of the directedness of the duties or other, more complicated, hybrid
84 accounts.⁶

85 The distinction between directed and nondirected duties gives Buchanan a
86 strategy for rejecting the necessity claim: If Buchanan can show that at least
87 one ILHR can be justified by appeal solely to nondirected duties and broader so-
88 cial goals, then he has shown that underlying moral rights are not a necessary part
89 of any successful justification of an ILHR. I will argue Buchanan's argument does
90 not succeed, and does not succeed for reasons that he himself has provided in his
91 book.

92 93 AN EXAMPLE

94
95 To make my task even more difficult, I will work through Buchanan's preferred
96 example, namely, the right to health. If any ILHR is susceptible to a justification
97 without appeal to underlying moral rights, then the right to health, we might
98 think, would be one.

99 According to Human Rights Watch, there are an estimated 10 to 15 million ar-
100 tisanal gold miners working worldwide.⁷ In some regions, 20 percent are children.
101 Most miners—including children—use mercury to extract gold from the ore.
102 Prolonged exposure to mercury can cause severe cognitive impairments in chil-
103 dren; in adults, symptoms of exposure include tremors, twitching, vision trouble,
104 headaches, and memory and concentration problems. Mercury can also adversely
105 affect the cardiovascular system, the kidneys, the gastrointestinal tract, the im-
106 mune system, and the lungs. Human Rights Watch mentions in particular Mali
107 and Papua New Guinea, where there has been very little enforcement of health
108 and safety regulations to protect workers, and where workers are not informed

109 by employers or by the government regarding the effects of mercury.⁸ This is a
110 paradigmatic instance of a violation of the right to health.

111 Have any individual moral rights been violated? If we accept Buchanan's posi-
112 tion, then we must conclude that there need not be. We must conclude that to
113 explain the moral urgency and force of the workers' claims, it would be sufficient
114 to advert to any of the broader social and moral goals listed in the passage cited
115 above, such as solidarity, social utility, efficiency, beneficence, and so on. This does
116 not strike me as plausible. The workers' claims are compelling not simply as as-
117 pects of broader and valuable goals or nondirected moral duties. Rather, they
118 are compelling because the workers have morally weighty individual interests in
119 living a life free of debilitating illness and cognitive impairment—interests that
120 are sufficiently weighty to put employers and the governments under directed
121 moral duties to inform and protect workers (especially children) from the harmful
122 effects of mercury poisoning. The legal human right to health is therefore justified,
123 on this understanding, (in part) as a mechanism for protecting individual moral
124 rights to notification and warning by employers and governments. By violating the
125 legal human right by failing to notify, we therefore wrong the individuals involved,
126 rather than merely do wrong in general.

127 One might grant that the legal right to health can be justified by appeal, in such
128 paradigmatic cases, to the existence of directed moral duties, and hence to moral
129 rights. But that claim is not enough to show that such an appeal is necessary for
130 the justification of an ILHR to health *in general*, let alone that such a justification
131 is necessary for *all* ILHRs. It might seem that to provide such a case I would need
132 to individuate and enumerate the justification for each and every (justified) ILHR,
133 which would be unwieldy and well-nigh impossible. There is another route, how-
134 ever. If I can show that the *very point* of any ILHR is to single out standards whose
135 violation morally wrongs us as individuals, and hence violates a set of directed du-
136 ties, then I can show that any plausible justification of ILHRs must include a ref-
137 erence to moral rights. In short, I will argue that, for a (justified) international
138 legal right *simpliciter* to plausibly count as an international legal *human* right,
139 it must serve to protect a universal-concern-meriting individual moral right.
140 This is what makes ILHRs distinctive, and what makes them worth fighting for.
141 If this is true, then any plausible justification of an ILHR must show how the
142 right functions to protect an underlying moral right. And I want to claim that
143 Buchanan himself is committed to this claim.
144

145 INTERNATIONAL LEGAL RIGHTS AND INTERNATIONAL LEGAL
146 HUMAN RIGHTS

147
148 There are many international legal rights that could not plausibly be considered
149 ILHRs. Legal rights establishing the powers, privileges, claims, and immunities
150 of state parties to the treaties establishing the European Union provide one exam-
151 ple. But so do the legal rights of diplomats to immunity from prosecution. These
152 are legal rights held by individuals and justified on the basis of nondirected duties
153 and broader goals. More specifically, they are justified on the basis of protecting
154 the ability of diplomats to conduct negotiations without fear of retaliation by
155 host governments, and so are based on more general individual interests in
156 peace. So why cannot they be plausibly considered ILHRs?⁹ After all, they are
157 held by individuals against states, enshrined in international law, and issue in a
158 range of legal duties. Buchanan himself provides the answer:

159
160 *The basic idea of the system of international legal human rights is to develop a regime of*
161 *international law whose primary function is to provide universal standards for regulating*
162 *the behavior of states towards those under their jurisdiction, for the sake of those individ-*
163 *uals themselves.*¹⁰

164
165 Because international diplomatic rights are enacted for the sake of the states that
166 implement them, and ultimately, therefore, for the sake of general interests in
167 peace rather than for the sake of individual diplomats themselves, they cannot
168 plausibly be considered ILHRs.¹¹ This strikes me as exactly right, but it has the
169 implication that ILHRs must protect, ultimately, individual moral rights. Let me
170 explain. If the essential, defining function of ILHRs is to serve, for their own
171 sake, the individual interests (or status¹²) of the right-holders themselves, then
172 any plausible justification of an ILHR must demonstrate how it serves that essen-
173 tial function. This implies, however, that for an international legal right to be an
174 international legal *human* right, the interests of the right-holders themselves must
175 play a necessary role in explaining why others have morally justified legal duties to
176 serve or protect those interests. If that is true, however, were third parties to violate
177 the morally justified legal duties protecting those interests, they must also morally
178 wrong the individuals whose interests they are. To illustrate: When a diplomat is
179 rightfully charged and convicted for shoplifting, their legal rights to immunity
180 have been violated, but it would be implausible to argue that they have been

181 morally wronged as a result. This is precisely because their individual interests
182 play no essential role in justifying the legal duties borne by the host government.

183 Contrast this case with that of the gold miners. Because their individual inter-
184 ests play an essential role in grounding legal rights to notification that are essential
185 components of the legal right to health, thwarting those rights morally wrongs
186 them as individuals. Since moral wrongings entail directed duties, and so moral
187 rights, we can conclude that for an international legal right to be an ILHR, it
188 must ultimately serve to protect underlying moral rights, and so be justified (at
189 least in part) in terms of those rights. And this makes sense. When we fight the
190 injustice of the gold miners' situation, or when we bring attention to their plight
191 in a Human Rights Watch report, we fight for *them* rather than for some broader
192 nondirected moral duty or social goal owed to no one in particular. But, given
193 what makes ILHRs distinctive among legal rights, this, I have suggested, is true
194 not just for the gold miners but for all those on whose behalf we fight when
195 their ILHRs have been violated.

196 Could Buchanan grant that all justified ILHRs must indeed serve to protect and
197 serve underlying moral rights, but claim that a consideration of the nondirected
198 duties and broader goals promoted by a proposed ILHR might still provide us,
199 in some cases, with sufficient reason to implement it? If this were the case, then
200 Buchanan could maintain his claim that the consideration of moral rights is
201 not a necessary part of any successful justification of an ILHR. This strikes me
202 as implausible for the reasons I have already given: If a justification for an
203 ILHR merely mentioned broader social goals and nondirected duties, then we
204 would not know whether it serves the essential function of all ILHRs, and so
205 we would not be able to determine whether it is plausibly considered to be an
206 ILHR or whether it is better classed among those international legal rights, like
207 diplomatic immunity rights, that are worth implementing in their own right.
208 Given the urgency and individualism associated with any human rights claim,
209 this distinction is important, and would therefore form a crucial part of any suc-
210 cessful justification of the legal right in question.

211 212 LEGAL DUTIES OUTSTRIP MORAL DUTIES 213

214 So far I have argued that individual moral rights must play a necessary role in the
215 justification of any ILHR. I have also claimed that these moral rights need not
216 have the same content as the ILHR they aid in justifying. ILHRs can, that is, be

217 justified in virtue of their instrumental contribution to moral rights with a differ-
218 ent content, or in virtue of being specifications of broader moral rights. This qual-
219 ification is important because it allows us to evaluate Buchanan's other important
220 objection to the Mirroring View, to which we turn in this section. We need to con-
221 sider, even if it succeeds against the Mirroring View, whether the argument suc-
222 ceeds against the Grounding View. I will argue that it does not.

223 Buchanan argues that the existence of an underlying moral right cannot justify
224 many important legal human rights—such as the legal human right to freedom of
225 the press, democratic participation, and health—because the legal duties associat-
226 ed with each of these ILHRs far outstrip what could possibly be justified by appeal
227 to the interests of the individual right-holder alone.¹³ To construe: The individual
228 interests of any one person cannot plausibly ground stringent, third-party moral
229 duties to set up, say, the wide-scale investment in public and social infrastructure
230 required to realize a right to health, or the mechanisms for securing free and fair
231 elections necessary to realize a right to democratic participation. Buchanan con-
232 cludes that there cannot be a moral right to health or democratic participation
233 that justifies the corresponding legal right. Here is the argument, which is
234 worth quoting in full:

- 235
- 236
- 237 1. Many important international legal human rights have corresponding du-
238 ties the fulfillment of which requires large-scale social investment and
239 limitations on the liberty of large numbers of people.
- 240 2. Such duties, and hence the corresponding rights, are justifiable only
241 because their fulfillment would positively impact the interests (or auton-
242 omy, etc.) of large numbers of people.
- 243 3. In the case of moral rights, the corresponding duties must be justifiable by
244 appealing solely to some morally important aspect of the individual to
245 whom the right is ascribed, because the duties are supposed to be
246 owed, morally speaking, to the individual to whom the right is ascribed.
247 (In contrast, in the case of legal rights, the fact that the correlative duties
248 are owed, legally speaking, to the individual right-holder does not imply
249 that they are grounded solely in the moral importance of some aspect of
250 the right-holder.)
- 251 4. (Therefore), there are no moral rights that correspond to (i.e., have the
252 same content as) many important international legal human rights.

- 253 5. If there are no moral rights that correspond to many international legal
254 human rights, then for many international legal human rights, it is not
255 possible to justify them by appealing to corresponding moral human
256 rights.
- 257 6. Yet many international legal human rights that cannot be justified by ap-
258 pealing to corresponding moral human rights are justifiable—they are
259 suitable for inclusion in a system of international legal rights, given the
260 functions such a system is supposed to perform and given the moral ap-
261 propriateness of those functions.
- 262 7. (Therefore), in the case of many justifiable international legal human
263 rights, showing that the legal right helps to realize a corresponding
264 moral human right will not fully justify the legal right, not because
265 there would be unacceptable consequences of legally realizing the moral
266 right (as with the case of the right to be treated with respect), but because
267 the moral right has a narrower scope than the legal right.¹⁴
268

269 Is this argument really any threat to the Grounding View? I am happy to accept
270 point 4: Not all ILHRs must be justified by moral rights with precisely the same
271 content. I am therefore also happy to accept both 5 and 7, which simply say that a
272 moral right cannot be *sufficient* to justify many *corresponding* ILHRs. Nothing in
273 this argument demonstrates that moral rights cannot be a *necessary* part of any
274 successful justification of an ILHR, and so nothing in this argument impinges
275 on the Grounding View.

276 We can illustrate this conclusion via a discussion of the right to democratic
277 participation. In 1996 the Turkish Constitutional Court ordered the United
278 Communist Party of Turkey (TBKP) to disband because it was a “threat to the
279 territorial integrity of the Turkish nation.” This decision was taken on the basis
280 of a chapter in the party’s program that referred separately to the Kurdish and
281 Turkish nations, and to the ongoing strife between them. The Constitutional
282 Court concluded that this reference reveals that the party aimed to secure separate
283 self-governing rights for the Kurdish people, which is in contradiction with the
284 principles and territorial integrity of the Turkish Republic. The Republic, it
285 went on to claim, recognizes only one people (of which the Kurds are a part).
286 The European Court of Human Rights claimed that the Constitutional Court’s
287 order violated Article 11 of the European Convention on Human Rights
288 (ECHR), which protects rights to democratic assembly and association. It also

289 noted that the rights protected by Article 11 should be interpreted in light of rights
290 to freedom of expression and opinion enshrined in Article 10.¹⁵

291 Let us assume that the Constitutional Court did violate the individual legal
292 human rights of members of the TBKP under the ECHR, and that these rights,
293 and the Court's decision, are morally justified. The key question for us is, *On*
294 *what basis* was this decision morally justified? The decision (let us assume) pro-
295 tects the functioning of democracy and pluralism in Turkey, and so promotes
296 (let us assume) the general welfare of the Turkish people and the rule of law gen-
297 erally. But as we have seen, this is not enough to establish that the right to dem-
298 ocratic participation is a bona fide ILHR. To do that, we need to determine how it
299 serves the individual interests of, in this case, party members for their own sake.
300 And here we turn to the interests of party members (many of whom are Kurdish)
301 in freedom of expression and opinion, and to their interests in being recognized as
302 full and equal members of Turkish society—interests that are strong enough to
303 ground directed *moral* duties on the government not to undermine the ability
304 of these party members to express their political opinions without fear of reprisal
305 and not to arbitrarily exclude them from the political process. Using the analysis
306 above, we then conclude that, in disbanding the party, the Constitutional Court
307 violated not simply the legal rights of individual party members to democratic
308 participation as established by the ECHR but also their deeper moral rights to
309 freedom of expression and equal status. We therefore grant that there may not
310 be a general *moral* right to democratic participation sufficiently broad to explain
311 all the legal institutions that might be required to fully realize an ILHR to dem-
312 ocratic participation (which would require reference to many broader goals and
313 nondirected duties, as well as reference to particular consequences of legalization),
314 but claim that any full justification of ILHRs to democratic participation must, at
315 a deeper level, always refer to how such rights *also* serve urgent, universal-
316 concern-meriting moral rights (such as, in this case, moral rights to freedom of
317 expression and equal status). In the absence of this connection to underlying
318 moral rights, democratic rights to participation could not function as ILHRs.

319 320 CONCLUSION

321
322 *The Heart of Human Rights* makes a powerful case for the need to consider
323 the moral justification not just of particular ILHRs or sets of ILHRs but also for
324 the legitimacy of the ILHR system as a whole. Buchanan is right to say that the

325 evaluation of the legal dimension of human rights practice is very important and
326 often overlooked by philosophers working on human rights. However, I have ar-
327 gued that he is wrong to claim that the justification of ILHRs need not make any
328 appeal to particular kinds of moral rights—such as, for example, those moral
329 rights that deserve, say, universal moral, political, and legal concern.¹⁶ Any suc-
330 cessful justification of an ILHR or set of ILHRs must make reference, at some
331 level, to the way it serves to protect or realize an underlying moral right. This un-
332 derlying moral right need not have the same content as the ILHR it serves to jus-
333 tify, and the underlying moral right will only in rare cases be sufficient to justify
334 the ILHR, but it is still a necessary part of any plausible justification.

335 What implications does the Grounding View have for the philosophy of human
336 rights in general? First, it demonstrates that the focus of predominant philosoph-
337 ical theories of human rights on particular kinds of moral rights—namely, those
338 that merit the title of (moral) human rights—is not misplaced. While they can do
339 better to explain the way such rights justify ILHRs, they are correct to see such
340 rights as forming the core of human rights practice. Second, the Grounding
341 View helps to focus the agenda for further research in this area: Which particular
342 moral rights underlie the most important ILHRs and sets of ILHRs? How do such
343 moral rights participate in the justification of the system as a whole? In this essay I
344 have discussed the moral right to equal moral status, to freedom of expression,
345 and, in the case of health, to notification and fair warning. But how, more precise-
346 ly, do each of these moral rights contribute to the overall justification of the ILHR,
347 and how do they interact with broader goals and nondirected moral duties? Notice
348 further that the fact that there is no necessary correspondence between the under-
349 lying moral rights and ILHRs allows for there to be many moral rights that go into
350 the justification of a single ILHR or set of ILHRs, depending on the particular as-
351 pect from which we view the right. This multiplicity becomes particularly evident
352 when we focus on ILHR *violations*, and when we focus on very complex legal
353 rights, such as the right to health, as I have done here. There is much yet to be
354 done in the philosophy of human rights, but we owe a great deal to Buchanan
355 for illuminating the need for a broader focus on the legal aspects of human rights
356 practice.

357 NOTES

358 ¹ Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013).

359 ² When pressed, one might try then to tighten the conditions on what kinds of moral rights count as
360 sufficient for justifying a corresponding ILHR. One might say, for example, that only those moral rights

361 that are of international concern or in some way basic or that would merit international intervention
362 ought to be legalized. But even here it strikes me that Buchanan is right that any of these fixes would still
363 not make the constrained moral rights sufficient. Until we know how the moral right would be legalized
364 and what further consequences such legalization would have, we cannot be sure that the creation of a
365 corresponding ILHR would be all-things-considered justified. At most, we could say that the con-
366 strained moral rights give us *pro tanto* reasons to seek their legalization, but, absent further argument,
367 we would not therefore be able to say whether we ought or ought not to implement the ILHR in
368 question.

369 ³ Buchanan, *The Heart of Human Rights*, p. 53.

370 ⁴ W. N. Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning* (New Haven: Yale
371 University Press, 1964).

372 ⁵ See, for example, Joseph Raz, "Rights and Individual Well-Being," *Ratio Juris* 5, no. 2 (1992), pp. 127-
373 42; and M. H. Kramer, "Rights without Trimmings," in M. H. Kramer et al., ed., *A Debate Over Rights*
374 (New York: Oxford University Press, 1998), pp. 60-100.

375 ⁶ See, for example, Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120, no. 3 (2010), pp. 465-94;
376 and Leif Wenar, "The Nature of Claim-Rights," *Ethics* 123, no. 2 (2013), pp. 202-29.

377 ⁷ For this example, I draw on my Andrea Sangiovanni, *Humanity without Dignity: Moral Equality,*
378 *Respect, and Human Rights* (Cambridge: Harvard University Press, forthcoming, 2017).

379 ⁸ See Human Rights Watch, "Protecting Child and Adult Gold Miners Against Mercury: A Right to
380 Health Issue," October 17, 2011, [www.hrw.org/news/2011/10/17/protecting-child-and-adult-gold-
381 miners-against-mercury-right-health-issue](http://www.hrw.org/news/2011/10/17/protecting-child-and-adult-gold-miners-against-mercury-right-health-issue).

382 ⁹ Of course, one might just decide to call them legal human rights by, for example, embedding them in a
383 treaty, but it is uncontroversial to claim that this would be to radically misunderstand the nature of the
384 international legal human rights system for precisely the reason that Buchanan gives, and which I quote
385 in the text.

386 ¹⁰ Buchanan, *The Heart of Human Rights*, p. 27, emphasis in the original.

387 ¹¹ *Ibid.*

388 ¹² I am adopting a largely interest-based theory of rights for the purposes of illustration (as does
389 Buchanan), but the argument would hold if we substituted "status" for "interests," so I leave the distinc-
390 tion aside in what follows.

391 ¹³ See Buchanan, *The Heart of Human Rights*, p. 58ff; and Gopal Sreenivasan, "A Human Right to
392 Health? Some Inconclusive Scepticism," *Aristotelian Society Supplementary Volume* 86, no. 1 (2012),
393 pp. 239-65.

394 ¹⁴ Buchanan, *The Heart of Human Rights*, pp. 63-64.

395 ¹⁵ This summary is based on materials reproduced in Henry Steiner, Philip Alston and Ryan Goodman,
396 *International Human Rights in Context* (New York: Oxford University Press, 2008), p. 936ff.

397 ¹⁶ I say much more about this specification of moral rights—i.e., moral human rights—as well as how it
398 compares to both Orthodox and Political accounts of such rights in ch. 4 of Sangiovanni, *Humanity*
399 *without Dignity: Moral Equality, Respect, and Human Rights*.