

The philosophy of human rights II

HUMR 5131 Fall 2018, lecture 4
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Overview of the lecture

1. On justifying human rights
2. Buchanan on justifying international legal human rights
3. Implications of human right-claims (briefly)



Justifying human rights: some preliminary remarks

What do we justify?

1. The existence of moral human rights?
 - If so, is it the existence of MHR understood as «natural rights», i.e. as rights we have just in virtue of being human?
2. The existence of legal human rights?
3. The existence of HR understood in light of contemporary HR practice and discourse?



Descriptive vs normative ethics

- **Descriptive claims:** claims about how things are

vs.

- **Normative claims:** claims about how things should be

(difference in direction of fit)

- **Descriptive ethics:** Description of a person's/group's normative claims


vs.

- **Normative ethics**



The difficulty of justification in ethics

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 (This and next slide: Dagfinn Føllesdal, "The emergence of justification in ethics", *European Review*, vol. 13. no. 2. (2005))

The problem with circular justifications?

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Possible criteria for a valid justification of moral human rights

- Must give normative force to HR-claims, and provide duty-bearers with reason for action
- Must provide the *right kind* of argument for HR
- Must allow us to say *which* HR there are
- Must have critical force in relation to generally acknowledged human rights
- Must show fidelity to the concept of HR one is working with
- The list of rights be suitable for public, practical use
- Must show why interference with sovereignty is acceptable



Exercise

Choose a specific human right, and discuss how you can justify it



Foundational vs derivative justifications of rights

- Cf. Nickel p. 87-91
- Derivative justifications:
 - specifying a recognized right
 - showing why a HR is necessary for/
supports the realization of a recognized right
- Cf. "cantilever arguments": no relevant moral difference between the case for a recognized HR to A and a new HR to B (David Miller, Joseph Carens)



1. Prudential justifications

«In terms of my (your) own interests, I am (you are) likely to be better off, and hence I (you) have good reason to accept and support human rights» (Nickel p. 55)

Problems:

- Is it a moral justification?
- What about powerful groups?



2. Utilitarian/consequentialist justification

Consequentialism =

1. A theory of value, allowing us to rank
outcomes

+

2. A theory of right action, telling us to
produce the best outcome of those
available to us



2. Utilitarian justification

Step 1: Utilitarianism: «we should judge norms and institutions entirely on the basis of their likely consequences for the general welfare». (Nickel p. 59)

Step 2: «Satisfaction of fundamental interests is a large part of people's welfare, so if human rights contribute greatly to the satisfaction of most people's fundamental interests, the utilitarian will take this to be a strong argument in support of human rights.» (p. 59)



Questions for consequentialist justifications

- The argument is contingent on empirical circumstances
- The argument «gets the right answer for the wrong reasons»
- Justifying moral human rights or justifying institutions/laws and/or the inculcation of prevalent beliefs about moral human rights?



The wrong reason?

Feinberg:

“Having rights enable us to ‘stand up like men’, to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others.”
 (“The Nature and Value of rights”)



3. A common structure for non-consequentialist justifications of HR

1. A feature of humanity which we value (human dignity)



2. A set of basic needs/interests/freedoms



3. A set of basic, general rights



4. Specification of the basic rights: a set of "proto"-HR



5. Various "filters" applied to the set of "proto"-HR



6. The final list of human rights



3. A non-consequentialist justification (Nickel)

Step 1: Identifying «four secure claims»:

- A secure claim to have a life
- A secure claim to lead one's life
- A secure claim against severely cruel or degrading treatment
- A secure claim against severely unfair treatment

”A unifying idea for these four secure claims is that, perfectly realized, they would make it possible for every person living today to have and lead a life that is decent and minimally good” (p. 62)

Step 2: use these claims as part of an argument for specific human rights (chapter 5)



Filter: Nickel's six tests for specific rights(ch 5)

1. Substantial and recurrent threats ("regularly present and dangerous" p. 74)
2. Importance of what is protected
3. Can it be a universal right? [More correctly: does it fit our concept of a human right?]
4. Would some weaker norm be as effective?
5. The burdens are justifiable
6. Feasibility in a majority of countries



5. The burdens are justifiable

Cf. Beitz: "rights talk tends to focus on the beneficiaries of rights, so it might seem that we can explain the moral importance of an adequate standard of living without having to refer to anything other than facts about the beneficiary's 'humanity' - for example, her physical needs. However, this is only half the story - and the easier half at that. A complete explanation of the right would also have to say where the resources should come from to satisfy the right and why anyone has a duty to provide them." (Beitz, "What Human Rights Mean" (2003) 42-3)



6. Is it feasible to realize the right?

- Ought implies can: If it is the case that I have a duty to X, it must be the case that I can do X.
- Sen: “why should complete feasibility be a condition of cogency of human rights when the objective is to work towards enhancing their actual realization, if necessary through expanding their feasibility?”
- Nickel: “The duties imposed by rights should be ones that a majority of the addressees are able to fulfil.” (p. 81)

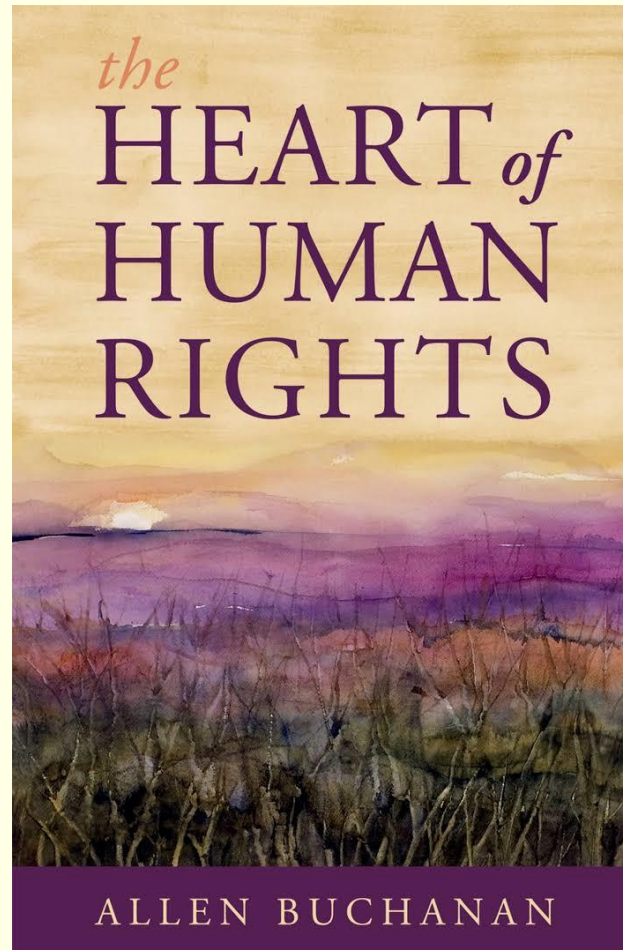


Other filters?

- Is the need/interest such that it can meaningfully be made the object of a *right*? Ex tranquility of mind (Sen), romantic love (Tasioulas)
- A proper subject of international concern?



Buchanan on the justification of international legal human rights



According to the mirroring view,
justifying a ILHR can take three
forms:

1. Arguing that the corresponding MHR exists
2. Arguing that the ILHR is a specification of an existing MHR
3. Arguing that the ILHR is instrumentally necessary for realizing an existing MHR.



Two aspects of the Mirroring View

1. A MHR is necessary in order to ground a ILHR
2. Any MHR is sufficient in order to ground a ILHR.



The mirroring view and the founders

Cf. UDHR, preamble:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”

Cf. the preambles to ICCPR and ICESCR

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,...



Possible implications of the Mirroring View

1. New ILHR should be introduced
2. Some existing ILHR should be removed or «downgraded»
3. If a proposed new ILHR is not grounded in a MHR, it should not be adopted

In short: the mirroring view provides us with a critical «test» for accepting or rejecting ILHR



Buchanan's first line of criticism

MHR are **insufficient** for grounding ILHR

1. Not all MHR are fit for legalization, ex. the right to be treated with respect
2. MHR do not have sufficient weight for justifying extensive duties
3. MHR do not allow for the social coordination necessary to justify extensive duties



MHR do not have sufficient weight for justifying extensive duties

- Many ILHR are quite costly to realize, e.g. the right to health, the right to due process, i.e. they involve costly duties
- A MHR only exists if the corresponding duties can be justified
- The duties corresponding to MHR must be «*solely subject-grounded*»: something about the individual subject having that right must be sufficiently important to justify the cost



Buchanan's second line of criticism

- MHR are **not necessary** for grounding ILHR

- Buchanan's instrumental approach:

“The fundamental and quite general point is that legal rights, whether domestic or international, do not presuppose corresponding moral rights. This should be no surprise, given that 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” (Buchanan, HoHR)



An example of the instrumental approach

The legal right to health can be justified because it:


- “can promote social utility
- contribute to social solidarity
- help to realize the ideal of a decent or humane society
- increase productivity and to that extent contribute to the general welfare
- and provide an efficient and coordinated way for individuals to fulfill their obligations of beneficence”

(Buchanan, HoHR)



Briefly on Buchanan's second line of criticism: the moral force of ILHRs is lost

David Luban, “Human Rights Pragmatism
and Human Dignity”.

Luban: “Why should state leaders (pretend
to) feel ashamed about violating [ILHR], any
more than they feel ashamed about violating
technical regulations about the size and
 shape of cartons in international shipping?”

Implications: What follows from a valid HR claim?

1. To whom do HR give obligations?
2. What kind of duties follow from a HR claim?
3. What is the strength of the corresponding duties?
4. Must a HR claim always imply specific duty-holders?
5. Is it feasible to realize the right?
6. How do we deal with conflicts of rights?

