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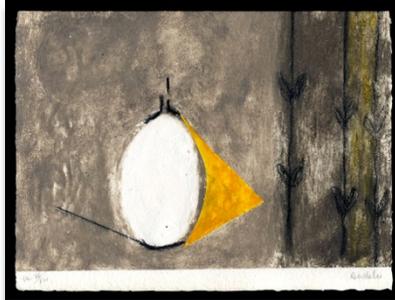


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International Human Rights Law and Mirrors

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Introduction

In his recent and illuminating book *The Heart of Human Rights* (Buchanan 2013), Allen Buchanan criticizes what he calls the “Mirroring View” of the (moral) justification of international human rights law.

According to him, the Mirroring View assumes that one can and should justify legal human rights solely by reference to pre-existing moral human rights. On that view, “legal human rights are simply moral human rights in legal dress” to the extent that they are justified by reference to their having a pre-existing counterpart right in human rights morality, i.e. a corresponding individual moral right with the same content and correlative duties. According to Buchanan, the view usually accommodates two exceptions: first, the possibility that some legal human rights may “specify” their counterpart moral human rights, and, second, the possibility that some of them may not be justified directly by reference to corresponding moral human rights, but only indirectly by being “instrumentally valuable” to the realization of another pre-existing moral human right (Buchanan 2013: 17, 50-1, 65).

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There are two problems with the Mirroring View that make it “indefensible”, according to Buchanan: appealing to a moral human right is neither necessary (i) nor sufficient (ii) to justify a legal human right in most cases, i.e. well beyond the scope of the two exceptions (Buchanan 2013: 21, 53-64). This is because many legal human rights may be justified by reference to other moral considerations than moral human rights (such as solidarity for the legal human right to healthcare) (i), and because many legal human rights give rise to State duties whose scope is too broad and “cost-intensive” to be grounded only in a single individual’s interests and hence in a pre-existing moral human right (such as vaccination programmes that cannot be grounded solely in the individual moral right to healthcare) (ii). As a result, human rights theorists should primarily look beyond human rights morality to find (moral) justifications for international human rights law (Buchanan 2013: 62-4).

Buchanan is right in his characterization and critique of the Mirroring View. What I would like to argue, however, is that his account not only underestimates the relationship between legal and moral human rights (1.), but it also too quickly discards mirrors as a resource for the universal albeit pluralistic justification of international human rights law (2.).

1. Against the Mirroring View

While I agree with Buchanan that it is wrong to approach most legal human rights as merely reflecting pre-existing natural-moral human rights and that we should reject the Mirroring View, it is also important to realize that the relationship between legal and moral human rights is much more capacious and hence central to the international legal human rights practice than he concedes.

There are three aspects of the relationship between legal and moral human rights one should not underestimate (contra: Buchanan 2013: 300-1 and, albeit in a more nuanced way, Buchanan/Sreenivasan 2018): first, the normativity of law, and hence the nature of legal human rights; second, the nature of moral human rights; and, third, the interaction between legal and moral human rights.

First of all, the nature of legal human rights. This is not the place to enter into complex debates about the nature of legal reasoning and how it relates to moral reasoning in general. While one should, of course, appreciate the possibility that legal rights may sometimes only be called “rights” by mistake and without amounting to moral rights –and I am not considering the other kinds of legal norms encountered in international human rights law that are not protected as

“rights” like principles, imperfect duties or goals (Buchanan 2013: 305-9)—, it is an untenable account of the practice of law to consider that this kind of mistake can be a general feature of human rights law. This is especially clear if one looks at both domestic and international human rights adjudication. The reasoning of domestic and international human rights courts and bodies show all the features of moral reasoning with individual rights and directed duties (e.g. when specifying human rights duties or assessing justifications for their restrictions) (Letsas 2014; Besson 2017). Of course, this does not mean that one should not *also* be interested, like Buchanan, in the *other* moral reasons there are to set up a system of legal human rights in general or even individual legal human rights, i.e. reasons that are *independent of the normativity of the law* itself (such as justice, solidarity or peace) (see Buchanan 2013: 22, 43, 68; Buchanan/Sreenivasan 2018: 219-23). However, what should matter to human rights lawyers and, by extension also to human rights theorists interested in justifying human rights law, are the kind of moral reasons the law itself gives when justifying the corresponding legal human rights duties. For the law to have the legitimate authority it claims, those reasons should match the moral reasons that apply to us independently of the law. In the case of legal human rights, this means that the reasons individually directed legal human rights duties give should match those that directed moral rights duties would give us, and that those, in turn, should be grounded in the corresponding individual moral rights (Besson 2013b; Besson 2016).

To the extent that this is a defensible conception of the nature of legal human rights *qua* law and hence *qua* source of norms, it would seem to contradict Buchanan’s argument that the correspondence to a moral human right is not *necessary* for the justification of a legal human right—note that the reverse may not be true to the extent that not all universal moral rights need to be legalized into legal rights (Buchanan 2013: 56-7; Tasioulas 2017). Of course, as I will explain later, that moral human right need not pre-exist the legal human right: our moral and legal reasons may arise at the same time in given circumstances, and the law may create a moral human right through a legal human right. The important point at this stage is that there should be a correspondence of reasons between them (see also Raz 2010a; Raz 2010b). That correspondence matters for the law’s authority and its reliance on our independent moral reasons (see also Letsas 2014; Cruft 2015). True, there may be cases where the law is not successful in asserting its authority when it refers to a given legal human right as a “right” and to the corresponding legal human rights duties as “duties”. However, one does not build a theory of law on the law’s failures.

Second, the nature of moral human rights. Moral human rights do not only amount to natural-moral rights. They also include conventional-moral ones (see also Cruft 2015). I am thinking of pre-existing conventional-moral human rights, like the human right to property, which do not require the law to protect them to arise but cannot exist outside a social and institutional practice that makes such rights valuable, but also of conventional-moral rights that arise together with legal rights, like the human right to democratic participation, for the latter do not only require a valuable social and institutional practice but one that is political and hence legal (Besson 2018a). Importantly, conventional-moral rights may be accounted for within the same interest-based structure of human rights as natural-moral rights. Those rights protect individual interests in that valuable social or institutional practice and the corresponding collective goods. What this means is that the instrumental moral justifications of a given individual legal human right need not be restricted to indirect justifications by reference to *other* natural-moral human rights in order for that right and the related duties to be sufficiently social in scope (contra Buchanan/Sreenivasan 2018: 227): they can amount to a direct justification by reference to a corresponding conventional-moral right.

The proposed account of the nature of moral human rights undermines Buchanan's argument that the correspondence to moral human rights is not *sufficient* for the justification of most legal human rights. Moral human rights need not be restricted to natural ones (Besson 2018a; Tasioulas 2017). This is particularly important for social and economic rights in international human rights law to the extent that their social dimension makes it difficult to account for them purely in natural-moral and pre-institutional terms (Besson 2018a). Buchanan and I agree on the importance of accounting for such rights as proper legal human rights (Buchanan 2013: 58, 61-3), but unlike him, I do not think that the way to do so is to cut their justification off from human rights morality. Not only is that not correct in terms of human rights law's inherent normativity, but it implies an impoverished account of human rights morality.

Third, the interaction between legal and moral human rights. A few legal human rights do reflect pre-existing natural-moral human rights. However, as mentioned already, legal human rights may also create moral human rights, those rights being conventional-moral rights of course (e.g. the human right to democratic participation). Furthermore, legal human rights may also, in a more intermediate and much more common fashion, contribute to the specification or qualification (e.g. regarding the material or personal scope) of pre-existing natural-moral rights or, even more frequently, of conventional-moral ones (Besson 2016; Besson 2018a). What this means is that there are intensive normative relations at play between legal and moral human

rights (Besson 2013b). This focus on the moral-legal mutual constitution or specification of conventional-moral human rights enables us to account for the kind of extensive and cost-intensive positive State duties Buchanan rightly identifies as being in need of justification in international human rights law (Buchanan 2013: 58, 61-3). My claim, however, is that this could and should be done from within human rights morality itself rather than outside it.

The proposed account of the relationship between legal and moral human rights contradicts Buchanan's argument that the correspondence to a moral human right is neither *necessary* nor *sufficient* for the justification of a legal human right. Of course, Buchanan is right about the Mirroring View: a moral human right need not *pre-exist* the legal human right (i), need not be *natural-moral* (ii) and their correspondence need not be perfect and *mirror-like* (iii). However, provided one understands that legal human rights should also be moral to ground proper directed moral duties (i), that moral human rights are not necessarily natural, but may also be conventional (ii), and that the normative correspondence between legal and moral human rights is not only about mirroring a pre-existent morality, but also about moulding and even creating it (iii), the relationship between legal and moral human rights does not only appear to be more central to the international legal human rights practice than Buchanan concedes. It should also play a pivotal role in the justifications of legal human rights, at least in those that purport to justify individual legal human *rights* rather than only the international human rights *system* as a whole and its *institutions*.

2. In Defence of the Mirroring Structure

Zooming out of the relationship between legal and moral human rights, there may be another deeper reason for Buchanan's rejection of the Mirroring View: his anti-foundationalism about the justification of international legal human rights. Interestingly, the Mirroring View was initially referred to as the "Grounding View" in his earlier work (Buchanan 2013: 42), before being renamed in what I would like to argue is not an accidental choice of terms.

I share Buchanan's concern about the traditional grounding of human rights in individual human nature (and e.g. individual well-being, dignity or equality) and the difficulties it raises for the universality of the justification of international human rights law in circumstances of reasonable ethical pluralism where international legal human rights that claim to bind universally also need to be justified to people and States with non-individualistic moralities (Buchanan 2013: Ch. 7).

Like other human rights theorists, I consider that legal human rights may be justified in a pluralistic way by reference to a plurality of interests those rights protect. There is no single ultimate value to found or ground them in, therefore. On the contrary, I have argued elsewhere that, rather than found human rights in basic moral equality, we should approach international legal human rights as being themselves constitutive of our political equality or equal moral status *qua* relational status (Besson 2013a; Besson 2017). In this egalitarian account of human rights, international legal human rights enable us to identify publicly the capacities that make us equal and to protect them. We make each other social and political equals, in other words, and spell out what it means to be one another's equals by granting each other legal human rights (Arendt 1973: 301; see also Waldron 2017a: 52-3, 58-9, 249).

If the proposed egalitarian account of international human rights law is correct, international legal human rights could be described as a *socio-political mirror* in which we recognize our basic moral equality. What one may refer to as the "Mirroring Structure" of justification in international human rights law may therefore be amenable not only to a non-foundationalist reading but also, and even better for universal justification purposes, to a non-strictly individualistic one.

Let me explain, first, how mirrors became part of the dogmatic structure of international human rights law, and, second, how the Mirroring Structure of justification has actually evolved, countering some of its fundamentalist implications.

First of all, as we all know, the concept of human rights that still predominates in current international human rights law is Western. More precisely, it originates in what the Western moral but also legal modern culture still owe, albeit in a much diluted and transformed fashion, to Christianity. In a nutshell, when the importance of the Christian religion started to wane in the Western moral tradition, when law was gradually separated from religion and when the modern State was created, legal "dogmatics", i.e. State-referential systems of beliefs, were arguably developed within Western legal orders as an institutional replacement of God (Legendre 1994). It has now become commonplace to argue that the "religion of humanity" progressively replaced the Christian religion in Western States, and that its new secular religion's creed was domestic human rights law. What needs to be emphasized, however, is that therein lies, as Supiot claims, the origin of the Mirroring Structure of justification of human rights in the Western moral and legal tradition (Supiot 2005: 276). Arguably, indeed, the structure of justification of those rights still echoes the mirror-based notion of *imago dei*. More precisely, *imago hominis* progressively

replaced *imago dei* in the dogmatic structure of morality and law, and so did the latter's justification by reference to individual "human nature" (Supiot 2005: 275-8).

The internationalization of human rights law in the 20th century was, at first at least, largely steered by Western States. To that extent, the transposition of the Mirroring Structure of justification of domestic human rights law onto the international plane should not come as a surprise. Importantly, the resilience of that structure in contemporary international human rights law need not imply endorsing the continuity of the Western modern human rights concept, without interruption and change, from Christianity over to 20th century-international human rights law (see Moyn 2015). The fact is, however, that the Mirroring Structure of justification is still clearly recognizable in international human rights law (see also Buchanan 2013: 72-4, 268-70). Evidence for this, for instance, is the influence of *imago dei* concepts, albeit turned secular and human-centred, of the "subject" and especially the "one-and-indivisible" "individual" subject, but also of legal "personality" that still characterize individual human right-holders and their protection in international human rights law treaties (Supiot 2005: 279-85).

Besides, and maybe because of its empowering effects on individual human liberty, the Mirroring Structure of justification of international human rights law has also contributed to the rise of three kinds of Western human rights fundamentalism, albeit of a secular kind and grounded in human nature (Supiot 2005: 285-300). First of all, and this is the kind of foundationalism Buchanan is targeting (Buchanan 2013: Ch. 7), one should mention the imperialistic and neo-messianic kind of human rights fundamentalism that justifies imposing the Western conception of human rights in a literal manner across the world as the only way to protect our universal individual moral human nature, without consideration for its cultural origins and hence without taking any other cultural conceptions into account (human rights imperialism). A second mention should go to the communitarian form of human rights fundamentalism that shows awareness of those cultural origins, but considers the Western conception of human rights as being superior and hides behind cultural relativism not to take non-Western conceptions of human rights seriously (human rights communitarianism). Finally, one should also flag a third form of Western human rights fundamentalism, i.e. human rights scientism that reduces human nature to scientific truth, and human rights to what biologists, but also, more recently, economists or even computer scientists can tell us about our true nature (human rights scientism and "economism").

We should resist all three forms of Western human rights fundamentalism, especially as they have already fuelled other counter-fundamentalisms, religious but not only. One temptation, of

course, may be to disparage the Mirroring Structure altogether, as Buchanan does (Buchanan 2013: Ch. 7). The problem is that that structure runs deeper than the Mirroring View of the relationship between legal human rights and pre-existing natural-moral rights (see also Risse 2017: 181, 186), and that we should not leave it unaccounted for. It would be naive therefore to expect that justifications of international legal human rights could escape the Mirroring Structure merely by cutting them off from the search for pre-existing individual natural-moral human rights (see e.g. Luban 2015, 266-70 and 277-8's reaction to Buchanan 2013).

There is a way, however, and this is my second point, not to approach the Mirroring Structure of justification in international human rights law as a burden, but to turn it into a resource in the effort to pursue the common and truly universal albeit pluralistic human rights project (Waldron 2017b; Besson 2018b).

First of all, self-critical transparency. By being open about the genealogy of international human rights law, we can hope to make the negotiation of a more universalistic conception possible and to signal our readiness to start an inclusive process of interpretation thereof (see e.g. Ignatieff 2017). The recent publication of the 1947-48 UNESCO human rights survey in its full extent (Goodale 2018) reveals how human rights comparison and distinction, and not the identification of a common denominator, contrary to what has been claimed for years *pace* Jacques Maritain and Mary Ann Glendon, were at the core of the resulting examination of the potential grounds of an international declaration of human rights. Re-discovering such a differentiated and culturally sensitive philosophical discussion of human rights allows us to hope for reinvigorated debate around pluralistic interpretations in international human rights law after a long interruption, albeit on a truly universal plane this time and with historical hindsight. In short, openly acknowledging the Mirroring Structure of international human rights law can provide Western human rights lawyers and philosophers with the means to resist more effectively against human rights imperialism.

Second, reflexive epistemology. The Mirroring Structure of justification of international human rights law amounts to an important epistemological tool in the process of interpretation of those rights. It can contribute to ensuring that legal human rights-reasoning is sufficiently reflexive of our common albeit pluralistic humanity. It accounts in particular for the pivotal role of transnational human rights comparison in current domestic human rights law (see Waldron 2017b), but also arguably in international human rights law (Besson 2018b). On that account, indeed, we should endeavour to interpret legal human rights on the basis of the transnational domestic practice in which they are materially realized albeit under different forms every time.

This concern for reflexivity in human rights interpretation is actually in line with Buchanan's recent work on the social-moral epistemology of human rights (Buchanan and Powell 2018). On this understanding, the Mirroring Structure of international human rights law offers a means to resist effectively against human rights communitarianism, and in particular against the top-down imposition, in the name of the need to protect ourselves against cultural relativism, of self-certifying conceptions by some Western experts sitting on international human rights courts and bodies.

Finally, political equality. On the egalitarian account of the justification of international legal human rights proposed before, the Mirroring Structure takes a more relational and social dimension (Besson 2013a; Besson 2017). If this is correct, individual legal human rights should no longer be justified or grounded in the mirroring of a pre-existing natural-moral individual self, but should themselves be approached as a socio-political mirror in the reflection of which we collectively construct ourselves as conventional-moral equals to one another. This offers a means to resist more effectively against human rights scientism or "economism", but also, more generally, against the global narcissism of Western human rights fundamentalism according to which individuals have come to regard themselves as entirely self-referential.

The proposed relational conception of human rights as a socio-political mirror could actually provide a much more amenable basis of negotiation with other moral and legal cultures' conceptions of legal human rights, in view in particular of the value some of the latter place not only on the group *qua* right-holder (Buchanan 2013: 254), but also on actual relationships among people (Risse 2017). Of course, this egalitarian conception of international human rights law requires strong political institutions, but also political processes in which we can actually recognize one another as equals both domestically and internationally. That institutionalization requirement was actually consolidated internationally in the second half of the 20th century thanks to the international law entrenchment of political equality and democracy, not the least through the customary international law principle of individual equality. When one knows how blurred our domestic institutional mirrors of equality have become lately, however, there is no time to lose, not only in order to polish those mirrors again, but also to set up and/or strengthen global ones.

Conclusion

As Buchanan argues in his seminal book, human rights morality and human rights law do not mirror one another. What I have argued in this short reply, however, is that we should take the relationship between legal and moral human rights even more seriously than he does and look deeper into the normative heart of legal human rights, but also that we may benefit in our common interpretation of international legal human rights from understanding how human rights law itself was originally constructed as a mirror.

It is only if we, Western lawyers and philosophers, look into that mirror that we will be able to become more self-critical of our conceptions of human rights and be open to negotiate with other legal cultures' conceptions towards a truly universal albeit pluralistic interpretation of international legal human rights law. This is also one of the ways in which our common human rights practice could become sufficiently reflexive and comparative to track justified conceptions of international legal human rights. Finally, this could also hopefully give us the "strength" to become one another's equals (Arendt 1973: 301), albeit not only on a domestic scale this time, but also on a global one.

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References

- Arendt, H., *The Origins of Totalitarianism*, 2nd edn, New York: Harcourt, Brace and Jovanovich 1973.
- Besson, S., 'In What Sense are Economic Rights Human Rights? Departing from the Naturalistic Reading of International Human Rights Law', in Queralt, J. and van der Vossen, B. (eds), *Economic Liberties and Human Rights*, London: Routledge 2018, forthcoming.
- Besson, S., 'Comparative Law and Human Rights', in Reimann, M. and Zimmermann, R. (ed.), *Oxford Handbook of Comparative Law*, 2nd edn, Oxford: Oxford University Press 2018, forthcoming.
- Besson, S., 'Justifications', in Moeckli, D., Shah, S. and Sivakumaran, S. (eds), *International Human Rights Law*, 3rd edn, Oxford: Oxford University Press 2017, 22-40.
- Besson, S., 'Legal Human Rights Theory', in Brownlee, K., Lippert-Ramussen, K., and Coady, D. (eds), *Blackwell Companion to Applied Philosophy*, London: Blackwell Wiley 2016, 328-341.
- Besson, S., 'The Egalitarian Dimension of Human Rights', (2013) *Archiv für Sozial- und Rechtsphilosophie Beiheft* 136, 19-52.

- Besson, S., 'The Law in Human Rights Theory', (2013) 7:1 *Zeitschrift für Menschenrechte – Journal for Human Rights* 120-50.
- Buchanan, A., *The Heart of Human Rights*, Oxford: Oxford University Press 2013.
- Buchanan, A. and Powell, R., *The Evolution of Moral Progress. A Biocultural Theory*, Oxford: Oxford University Press 2018.
- Buchanan, A. and Sreenivasan, G., 'Taking International Legality Seriously. A Methodology for Human Rights', in Etinson, A. (ed.), *Human Rights: Moral or Political?*, Oxford: Oxford University Press 2018, 211-29.
- Cruft, R., 'Human Rights Law without Natural Moral Rights, Book Review of: The Heart of Human Rights, Allen Buchanan', (2015) 29:2 *Ethics and International Affairs* 223-32.
- Goodale, M. (ed.), *Letters to the contrary, A Curated History of the UNESCO Human Rights Survey*, Stanford: Stanford University Press 2018.
- Ignatieff, M., *The Ordinary Virtues. Moral Order in a Divided World*, Cambridge, MA: Harvard University Press 2017.
- Legendre, P., *Dieu au miroir*, Paris: Fayard 1994.
- Letsas, G., 'Allen Buchanan. The Heart of Human Rights. Review', (2014) *Notre Dame Philosophical Reviews*.
- Luban, D., 'Human Rights Pragmatism and Human Dignity', in Cruft, R., Liao, M. and Renzo, M. (eds), *Philosophical Foundations of Human Rights*, Oxford: Oxford University Press 2015, 263-278.
- Moyn, S., *Christian Human Rights*, Philadelphia: University of Pennsylvania 2015.
- Raz, J., 'Human Rights in the Emerging World Order', (2010) 1:1 *Transnational Legal Theory* 31-47.
- Raz, J., 'Human Rights Without Foundations', in Besson, S. and Tasioulas, J. (eds), *The Philosophy of International Law*, Oxford: Oxford University Press 2010, 321-37.
- Risse, M., 'Approaching Human Rights Law Philosophically: Reflections on Allen Buchanan, *The Heart of Human Rights*', (2017) 36 *Law and Philosophy* 169-90.
- Supiot, A., *Homo Juridicus. Essai sur la fonction anthropologique du droit*, Paris: Seuil 2005.
- Tasioulas, J., 'Exiting the Hall of Mirrors. Morality and Law in Human Rights', King's College London Law School Research Paper No. 2017-19. Available at SSRN: <https://ssrn.com/abstract=2915307>.
- Waldron, J., *One Another's Equals. The Basis of Human Equality*, Oxford: Oxford University Press 2017.
- Waldron, J., 'Human Rights: Universalism or the Integrity of a Common Enterprise?', 1 March 2017, NYU School of Law, Public Law Research Paper No. 16-48. Available at SSRN: <https://ssrn.com/abstract=2848611>.