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Review of Buchanan's *The Heart of Human Rights*

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BOOK REVIEWS

Allen E. Buchanan, *The Heart of Human Rights* (New York, Oxford University Press, 2013), ISBN 978-0-19-932538-2, 320 pages.

This is a massive book that covers so much ground that nothing of review length could do it justice, so I'll focus on what I believe is the most interesting and fruitful aspect of the book—its assessment of whether the legal order of international human rights is, at present, capable of anything more than a diagnosis of global problems. Put otherwise, can this system to which so many look for remedies actually offer remedies, or is something more needed to fix the world's more entrenched forms of injustice?

Before we dive into that question, let us glance at the book's broader ambitions. Allen Buchanan does a good job taking the reader through many of the dominant schools of philosophical thought about human rights, asking whether any offer adequate justification for their positions. He does justice to what each position asserts but ultimately argues for taking international human rights as a *legal* practice to be viewed instrumentally for its usefulness rather than as a "mirror" to any one set of original principles. Concerns that rights discourse is too individualistic are overstated, Buchanan insists, because human rights always focus on the social setting in which conditions for leading a good life must transpire. We just do live with others, and rights discourse is one way we have found to manage conflicts that inevitably arise between persons and

groups. Many who argue for rights for individuals on a *a priori* grounds of human dignity worry that any other approach threatens to sacrifice individuals to consequentialism, but Buchanan contends that one can recognize the importance of securing public goods without denying protection to individuals. He also reminds us that protecting individuals does not solve every problem of injustice, as rights regimes can coincide with systemic discrimination. One must look at the small and large pictures simultaneously in order to do justice.

That is why Buchanan argues for an "ecological" view of the legitimacy of human rights legal institutions: "it is often not possible to determine the legitimacy of an institution in isolation; instead, its legitimacy may be a function of how it fits into a network of institutions."¹ If we think of the legitimacy of international human rights law in this way, the question is not only whether the United Nations Security Council, treaty-making bodies, or the International Criminal Court are legitimate, but how all these parts of the larger whole operate together to provide what constituents need and expect. And if that is how legitimacy is created, then there is also room for nongovernmental organizations (NGOs) in international human rights law, even though they are, as Buchanan puts it, "reliable external agents to gather and integrate the information and make it available in understandable form to relevant stakeholders."² So, though NGOs are external to states, and must be in order to be legitimate, that legitimacy also depends on how their

1. ALLEN E. BUCHANAN, *THE HEART OF HUMAN RIGHTS* 198 (2013).

2. *Id.* at 218.

work serves the legitimacy of states by offering neutral judgments about states' human rights records.

The worry remains that a robust international system is not compatible with individual states' constitutional democracies. Buchanan visits both sides of the problem and argues that, though international human rights law may modify constitutional democracies' policies, at times without democratic authorization, the risk may not be more weighty than that posed by the kind of indeterminacy that always is part of law. He adds, however, that one should not blithely dismiss concerns about loss of self-determination when international law is not treated carefully by domestic jurisdictions. Instead of posing the problem as a false dilemma—international rights or domestic constitution—Buchanan recommends judgment: the common practice of balancing competing values.

That leads us back to his main idea: human rights as they are practiced at present are largely a legal phenomenon (which means we escape the need to agree on a moral foundation for them), and the legal system created to express them may not be up to some of the larger tasks that proponents of human rights might expect the system to fulfill. Per Buchanan, "the most basic idea of the international legal human rights system is to use international law to set standards for how all states are to treat individuals under their jurisdiction, for the sake of those individuals themselves, considered as social beings, rather than for the sake of promoting state interests."³ The fact that there is such a system is no small achievement, if one steps back and looks at the history of state relations. As Buchanan points out, it very easily could

have never come to pass that an international order of states would concern itself with individual human beings. But the existing international "regime" of human rights that does provide protections to many, if imperfectly, is still blind to larger, deeper conditions of inequality in which it is complicit (in part due to that blindness). Buchanan does a good job balancing between idealism and pragmatism in his discussion of the limitations of human rights norms at present and what remedies might be possible. He reminds us that the field of international human rights law does not currently have any way of regulating how non-state actors influence human rights abuses—the International Monetary Fund and World Trade Organization are not subject to human rights conventions, though states cooperating together could make such enforcement possible; the international order is also very shaky on how to respond to states that do not fulfill their obligations to protect their own citizens—whether the danger comes from inter- or intra-state conflict or widespread neglect of the well-being of those who reside in a territory; and the system of global human rights has not figured out how to think meaningfully (let alone act) about structural violence built into its own composition.

This last truth forces us, Buchanan argues, to "be more critical about the very meaning of the commitment to affirming and protecting basic equal status that I have said is central to the international human rights enterprise."⁴ At present, it seems most states adhere to what Buchanan calls an intra-societal interpretation of the commitment to protecting human rights: states protect their own citizens and expect others to

3. *Id.* at 278.

4. *Id.* at 292–93.

do the same. But if we switch to a global interpretation, international human rights law is given a more ambitious set of goals: protecting all human beings from abuse, regardless of the territory in which they live. Such an ambition is clearly found within the philosophical underpinnings of human rights, but has not yet been formed into compelling institutional rules and practices. Nonetheless, Buchanan contends, it is hard to make an argument (philosophical or pragmatic) in favor of equal status of persons within states without implying that persons ought also to be equal regardless of where they “belong.”

So we are left with an exigency—to grant meaningful human rights to all human beings—in a regime of human rights law that cannot live up to the task. Human rights law can diagnose the problem, but is unable to solve it. Buchanan does not think this renders human rights law meaningless, as it would be wrong to assume any one instrument could solve all of the world’s problems: “the problem is not lack of legal coverage. The problem is that so far the Practice has not developed adequate mechanisms, whether legal or political, for ensuring that the most basic social and economic rights (and economic liberties) of people in the less economically developed countries are realized.”⁵ If the Western world has not found a practice that would live up to its human rights ambitions, that may be so, not because the West has formulated rules that benefit its privileged citizens rather than those less well off, Buchanan speculates, but because the founders of international legal human rights have “overgeneralized from the experience of economic prosperity in the West. They may not have appreciated how difficult it would prove to be for many countries

to achieve the adequate standard of living to which the system says each individual has an international legal human right.”⁶ And if that is true, what is owed may be more than formal equality can provide.

Buchanan may be right that this failing is due to an oversight of the founders; however, it is one deeply entrenched in the liberal rights tradition, as one can see from the history of arguments over whether political and civil rights should be ranked higher than social, economic, and cultural rights. If “the West” has argued for that ranking, part of the reason for that preference will be philosophical or ideological, although part also will have been pragmatic. It is easier to provide formal equality than it is to create meaningful equality.

It is relatively easy to determine who must act when we say that states are responsible for protecting their own. Governments must act, and governments are responsible, when that is the standard. But if injustice is built into the global structure, then even in a world where all governments fulfilled their human rights duties, some lives would not be granted minimal conditions of human thriving. That is where it becomes difficult to determine who or what is responsible for fixing the problem.

It is an important point. I find it interesting, then, that Buchanan does not really develop a theory of responsibility. What he argues seems to require that those who care about human rights reform their understanding of responsibility, so that it becomes something other than the kind of legal culpability where agents are responsible only for their acts and formal/legal equality gets equality’s job done. Such a reformed understanding may be difficult to manage if a legal

5. *Id.* at 296.

6. *Id.*

order is, as his title suggests, the heart of human rights. But even though Buchanan does not take up a theory of responsibility directly, he does show that, in order to remedy the problem, we will need more than the current system. States need to create and take on new duties, and this might be better expressed in a vocabulary of fairness rather than rights, Buchanan suggests. In other words, a system of human rights needs more than rights in order to make good on its promises. Buchanan believes that this can be achieved by a new kind of international law. One could also argue that something other than law is needed here—without slipping back into the argument about moral grounding, which I do think Buchanan is right to step away from in this book. Buchanan's aims are reformist rather than revolutionary, as he argues in his chapter on ethical pluralism. I agree with him that it may not be wise to "throw out" human rights when that discourse has clearly lent support to so many struggles for self-determination for both groups and individuals. What I do not see, however, is how states or persons end up creating and taking on the new duties that a global form of human rights would require without a theory of responsibility—a real revision of how the rights tradition describes responsibility and its limits.

When we think of ourselves as consenting to duties, it is easy to think we do not owe things to people far away or that we are not responsible for things we did not directly do. That kind of reasoning will likely not be up to the task put before us by the more ambitious form of human rights that Buchanan describes. So, rather than arguing about moral grounding or resting satisfied with a narrative of state responsibility, those who care about human rights need to admit that its full realization is compatible with wide-scale

deprivation, and, for that reason, they ought to begin reformulating what it means to be responsible for justice. Such a responsibility will not only be the result of culpable acts or sovereign duty, but also of acknowledgement of the human condition: the human world is built by human beings (and states) responding to each other, for better and for worse. We are affected by others whether we like it or not—that is both a real limit to consent theory and a reason why we want equality and rights protections in the first place. Buchanan argues something similar, but I want to hear more about what it is, beyond law, that will get that work done. It may be that in wanting that I have fallen farther on the side of idealism than legalism would allow. But I also think that seeking out a new theory of responsibility for justice is as pragmatic as it is idealist. When questions arise about why, if we care about human rights, individuals or states may owe more than what they would consent to owe, the grounding does not come only from law or moral philosophy, but also from practical realism: how else will the job of human rights get done?

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