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Considering a Human Right to Democracy

by

JODI GEEVER-OSTROWSKY

Under the Direction of Christie Hartley

ABSTRACT

Human rights are commonly taken to include both behavioral freedoms, such as a right to express opinions, and safeguards against the behaviors of others, such as a right not to be tortured. I examine the claim by Allen Buchanan and others that democracy should be considered a human right. I discuss what human rights are, what they do, and what they obligate moral agents to do, comparing this framework to attributes of democracy. I conclude that while democracy itself is both too nebulous and too specific to be the subject of a human right, it may be proper to speak of a human right to state self-determination.

INDEX WORDS: Political philosophy, Human rights, International law, State legitimacy, Normative ethics, Democracy, Governance, Ethics, Philosophy, Allen Buchanan, Charles Beitz, Kwasi Wiredu

CONSIDERING A HUMAN RIGHT TO DEMOCRACY

by

JODI GEEVER-OSTROWSKY

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

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2011

Considering a Human Right to Democracy

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May 2011

DEDICATION

This work is dedicated to my amazing family and friends for their love, encouragement, and support; for late-night conversations; for getting me through the tough times; and for always making me laugh.

This work is also dedicated to the memory of my brother, Devin Geever, for teaching me to laugh at myself and for always reminding me that being a philosopher is awesome.

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1 Assessing the Normativity of Human Rights Claims¹

1.1 Introduction

The existence of human rights is sometimes taken as a “fact of the world.”² Such rights, if grounded, would supply agents with reasons to act on the demands they entail. Those who assert that human rights exist, however, disagree on what grounds human rights as normative claims. In this chapter I examine Allen Buchanan’s idealized, morally grounded, naturalistic account.

1.2 Considering a Moral Foundation of Human Rights

Buchanan, seeking to address shortcomings in the present system of international law, argues for the adoption of an idealized system based on moral principles. Buchanan implies that international human rights law currently does not recognize the inherent value of human life because the law is not grounded in systematic moral theory. Buchanan argues that deliberate moral reasoning is needed to create a “mutually supporting set of prescriptive principles”³ which can inform any substantial legal guidance on issues of human rights.

Justice is prominent among the prescriptive principles of Buchanan’s system because it is fundamental to a morally grounded account of international law: “principles of justice specify the most basic moral rights and obligations that persons have.”⁴ All institutions with the power to affect people, Buchanan insists, “must be designed to function in conformity with principles of justice.”⁵ International law, acting as one such institution, must also be evaluated by the

¹ I am grateful to my amazing proofreaders, Katy Fulfer and Elizabeth Victor for their comments on earlier drafts of this work.

² Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 1, quoting Richard Rorty.

³ Allen E. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2007), p. 15

⁴ *Ibid.*, p.1.

⁵ *Ibid.*.

standards of justice. If justice informed the practice of international law, Buchanan believes the norms endorsed by law would become more just. Consequently, he hopes just legal practice would result in improved treatment of people. Principles of justice “ascribe basic and relatively uncontroversial rights to all persons as such,”⁶ which are taken to include basic human rights on Buchanan’s account. Accordingly, justice serves as a morally obligatory “primary goal of international law;” the content of this goal arises from “a conception of basic human rights.”⁷

Though moral precepts underpin all human rights, *legal* human rights are distinct from *moral* human rights, which are to be understood as a subset of moral claim rights that “have two essential elements: a permission or liberty and a correlative obligation”⁸ not to infringe it. These obligations are not absolute, but “have special priority” on agents’ actions and apply to all persons simply because they *are* persons. Moral human rights, unlike legal human rights, “exist independently of whether they are enshrined in legal rules or not.”⁹ Furthermore, human rights as moral rights “have meaning independent of any particular legal system [and] are able to serve as a critical touchstone for reforming the law.”¹⁰

Legal human rights, by contrast, are those rights actually recognized by law and upheld by institutions and legal procedures. These rights may not always correspond directly to an underlying moral human right. Granting state legitimacy on this account ought to be contingent on the state’s upholding at least legal human rights. Buchanan cautions that recognizing a state as legitimate must be “supported by legal principles that require the state to satisfy certain minimal standards of justice.”¹¹ Upholding minimal standards of justice entails requiring and protecting certain forms of governance under international law, if we accept Buchanan’s account. Specifically, he contends that a human right to democracy must be recognized by international law. I contend Buchanan is mistaken in his belief. I return to this point in

⁶ Ibid., p. 4

⁷ Ibid., p. 61

⁸ Ibid., p. 123

⁹ Ibid., p. 119

¹⁰ Ibid.

¹¹ Ibid., p. 6

subsequent discussions. If a nation is recognized by the global order as legitimate only when it complies with minimal standards of justice, and if principles of justice specify persons' most basic moral rights and obligations, then even merely legal human rights in a legitimate state have a moral foundation.

1.3 The Universality of Moral Human Rights

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¹² Ibid., p. 15

¹³ Ibid., p. 1

¹⁴ Ibid.

¹⁵ Ibid., p. 4

¹⁶ Ibid., p. 61

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¹⁷ Ibid., p. 123

¹⁸ Ibid., p. 119

¹⁹ Ibid.

²⁰ Ibid., p. 6

1.4 Basic Human Rights

An interest should be protected by a human right, Buchanan argues, if it satisfies certain criteria: it must be indispensable enough to “warrant extraordinary protection”; it must be an interest of all persons; and there must be “institutional arrangements” capable of protecting the interest that are “reasonably effective.”²¹ According to this model, “human rights norms [express] basic moral values that place constraints on institutional arrangements.”²² Buchanan believes that the interests that ought to be protected by basic human rights are those that are common to all persons as “condition[s] for a decent human life.”²³ A *decent* human life is not equivalent to a flourishing human life or the *best* human life. The conditions necessary to a decent human life are minimal and depend on “what human beings are, and more importantly what they are capable of.”²⁴

In illustrating the importance of respecting what human beings are capable of, Buchanan turns to Martha Nussbaum’s “capabilities view.”²⁵ Buchanan’s conception of a decent human life incorporates and further develops the ideas initially offered by Nussbaum’s view. Nussbaum asserts

First, that certain functions are central in human life... that is, their presence or absence is typically understood as the presence or absence of human life, and second... that there is something that it is to do these functions in a truly human way, not a merely animal way.²⁶

As Buchanan understands Nussbaum’s view, “principles of international law should foster the capabilities of every person to exercise [their] distinctive central human functions.”²⁷ Accordingly, respecting moral and legal human rights, on Nussbaum’s view, requires the

²¹ Ibid., p. 119

²² Ibid., p. 127

²³ Ibid., p. 128

²⁴ Ibid.

²⁵ Ibid., p. 137

²⁶ Ibid., quoting Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), p. 71-72

²⁷ Ibid.

protection and promotion of “persons’ capacities for truly human functioning.”²⁸ Buchanan embraces Nussbaum’s “ten central functional capabilities”²⁹ as conditions to a decent human life. Nussbaum conceives of these capabilities as including

being able to live to the end of a human life of normal length; being able to have good health, including reproductive health; being able to move freely from place to place; being able to use the senses, to imagine, to think, and reason; being able to have attachments to things and people outside ourselves; being able to form a conception of the good and to engage in critical reflection about the planning of one’s life; and being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction.³⁰

The “capabilities view” outlined by Nussbaum is important to understanding Buchanan’s own conception of a decent human life because the capabilities view emphasizes the importance to a decent human life of being able to interact with other humans. Buchanan endorses Nussbaum’s “capabilities view” in his own account of human rights and their role in a decent human life because it supplies “crucial content for the idea of treating persons as moral equals”³¹ in accord with the MEP.

Basic human rights for Buchanan are those “whose violation poses the most serious threat to the individual’s chances of living a decent human life.”³² Buchanan’s catalogue of basic human rights includes “the right to life, the right to bodily integrity, the right against torture, the right of security of person, the right against arbitrary arrest, detention, or imprisonment, the right to resources of sustenance, and rights of due process.”³³ On Buchanan’s account, certain freedoms are also protected by basic human rights. These include “freedom from religious persecution and [...] the more damaging forms of religious discrimination, freedom of expression and association,”³⁴ and finally the “right against persecution and against at least the

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid., p. 137-138

³¹ Ibid.

³² Ibid., p. 129

³³ Ibid.

³⁴ Ibid.

more damaging forms of discrimination on the grounds of ethnicity, race, gender or sexual preference.”³⁵

Ensuring an individual’s best chance at a decent human life does not necessarily entail equal treatment of persons. A decent human life only requires that the MEP be respected so that all persons are granted equal moral *consideration*. A decent human life does not entail the necessity of equal *treatment* of persons, only that persons’ interests be equally considered. Equal consideration of interests is entailed by the MEP’s criterion to treat persons with equal moral regard. Granting two people equal moral regard does not entail the necessity of the equal *treatment* of these two persons. For example, a professor and a graduate student are not treated equally by their academic department in terms of rank, pay rate, or work load, but they are still granted equal moral regard in the case where a moral decision must be reached — not to use either the professor or the graduate student as a means of uncompensated labor. This example is intended to illustrate Buchanan’s idea that, “the notion of a decent human life does not mandate anything so strong as equality of treatment, while at the same time emphasizing that it does place significant restrictions on unequal treatment.”³⁶

1.5 A Natural Duty of Justice

It is clear that Buchanan wants this idealized legal system to rest on moral precepts, specifically the precepts of justice. In support of this end, Buchanan notes that “taking the MEP seriously commits us to [a] natural duty of justice.”³⁷ The Natural Duty of Justice (NDJ) holds as a universal moral obligation and requires us “to treat every person with equal concern and respect.”³⁸ Furthermore, this duty squares with the MEP because, “a proper understanding of the MEP implies that to show proper regard for persons we must help ensure that their basic

³⁵ Ibid.

³⁶ Ibid., p. 130

³⁷ Ibid., p. 87

³⁸ Ibid., p. 27

rights are protected.”³⁹ We can fully discharge the obligations placed on us by the NDJ if we “help ensure that all persons have access to institutions that protect [their] basic human rights.”⁴⁰

The argument for the NDJ, as Buchanan conceives of it, rests on three premises. First, “all persons are entitled to equal respect or concern.”⁴¹ Second, treating persons with equal respect entails agents’ compliance with an obligation to help “ensure [all persons] are treated justly where this primarily means helping to make sure that their basic human rights are not violated.”⁴² Third, treating persons justly requires the creation and implementation of “just institutions, including legal institutions.”⁴³ Buchanan’s account of the need to uphold just institutions as a means of protecting basic human rights is influenced by Rawls’ account, but departs from it in one significant regard: on Buchanan’s view, “there are principles of justice that apply directly to individuals.”⁴⁴ As an example, Buchanan offers the “Natural Duty of Justice itself which [...] directs individuals to contribute to the development of just institutions where this is needed to ensure that all persons have access to institutions that protect their basic human rights.”⁴⁵

By contrast, Rawls’ account of a duty to uphold just institutions holds that “the most basic principles of justice apply only to institutions or to persons in their institutional roles.”⁴⁶

1.6 The Role of Just Institutions in State Recognition

Buchanan recognizes that states, more specifically state governments, function as institutions that ought to protect basic human rights. Accordingly, his idealized account of the international legal system suggests that the proper goal of the international legal system

³⁹ Ibid., p. 87

⁴⁰ Ibid., p. 27

⁴¹ Ibid.; Buchanan notes that, in Kantian terms, all persons are to be treated first as ends in themselves.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid., p. 87

⁴⁶ Ibid., p. 86

includes justice, not simply peace or equality among states. He contends that “[t]o participate without protest in a practice of recognition that empowers governments that engage in systematic violations of human rights is to be an accomplice to injustice.”⁴⁷ Buchanan further argues that, “unless an entity meets certain minimal standards of justice, it ought not to be regarded as a primary member of international society.”⁴⁸ That is, if a state does not hold itself to minimal standards of justice, recognition as legitimate may justifiably be withheld from the state. He further suggests that a state’s treatment of its people ought to have a greater effect on that particular state’s ability to create, apply and enforce international law than the specific type of governance that is practiced by any particular state.⁴⁹ This is to say that, on Buchanan’s idealized account, a state that treats its people unjustly to a severe degree (or systematically violates basic human rights) would not be granted recognition in the international legal order, thus such a state would not be able to contribute their voice in international institutions. The effects of removing or denying recognition from a state would extend beyond not having a vote in matters such as accepting international treaties. Trade and aid that would otherwise be made available to the state may also be restricted or altogether withheld if a state fails to comply with human rights norms.

The justice model of state recognition is intended to address a flaw in the equality model of state recognition that is currently practiced in international law. This flaw is that the equality model of state recognition wrongly privileges political equality among all states over the moral equality of persons. If we accept the equality-of-states model, it follows that a state such as North Korea, whose government regularly violates or altogether thwarts its citizens from enjoying many of Nussbaum’s capabilities for a characteristically human life, including freedom of movement and freedom of thought, would have equal voice and vote to Canada, whose government facilitates all of Nussbaum’s capabilities, when making changes to extant

⁴⁷ Ibid., p. 3

⁴⁸ Ibid., p. 6

⁴⁹ Ibid., paraphrase

international law. It follows from Buchanan's view that it is unjustified for North Korea (whose government routinely violates the human rights of its people) and Canada to have equal political power in the realm of international law because granting equal legal powers and immunities to these two states represents a violation of the MEP. The MEP must not be violated.

If Buchanan's justice-based model of international law were allowed to replace the current state-centered model, the practice of international law would be closer to achieving moral soundness than it is at present. Greater moral soundness would be achieved because only entities which satisfied some minimally moral standard of treatment of their own people would be granted full access to participate in international legal affairs.

I grant it is a laudable goal to attempt to address this shortcoming in contemporary international law. If human interests are ignored or otherwise not protected and human rights are consistently violated by a state, the international legal order is right to withhold recognition and political participation from that state. Still, Buchanan's attempt at amending the shortcoming by requiring states to be democratic is troubling. I address my concern at length in the chapters to follow but I will gesture to the heart of my concern briefly here. First, implementing democratic governance in any legitimate state is not the only means by which this flaw can be adequately addressed. Moreover, in requiring as a pre-condition to recognition that states to be democratic, Buchanan allows the possibility that the MEP could be violated. Consider that a hierarchal state which otherwise represented the interests of its people, was established by the people, and adequately protected the human rights of its people would not be counted as legitimate on Buchanan's account simply because it was not constitutional democracy. Failing to recognize all governments that represent the interests of their people and otherwise protect human rights as legitimate exposes a shortcoming of Buchanan's account. He is right to be concerned to offer a morally founded conception of international law and to suggest how this account might be best applied. However, in arguing for a human right to democracy, Buchanan loses sight of his main concern: that states protect basic human rights.

2 Considering Democracy as Human Right

2.1 Introduction

After outlining who has human rights and which basic interests those human rights are intended to protect, Buchanan turns his attention to the question of whether people have a human right to democracy.⁵⁰ Buchanan defends the position that international law should *require* that states be governed democratically; further, he argues that persons possess a *basic* human right to democratic participation.⁵¹ In this chapter I argue that the foundation for Buchanan's claim that persons do, in fact, have a right to democracy, understood as the content of the "democratic minimum,"⁵² can be satisfied even in the absence of a fully developed representative democracy.⁵³

2.2 Justifying a *Legal Right to Democracy*

Buchanan seeks to establish a practice of international law rooted in moral precepts. If international law were underscored on these precepts, he believes those precepts would provide moral support for the inclusion of a particular type of governance as a human right. This form of governance is a constitutional democracy. Buchanan recognizes that "a moral theory of international law must answer two questions"⁵⁴ regarding human rights and governance. The first asks whether international law should require states to adhere to one particular type of governance⁵⁵ as a condition of their legitimacy. The second asks if the legitimacy of the international legal system itself ought to be contingent on its adherence to a particular form of governance. Buchanan seeks to answer only one of these questions: what type of governance

⁵⁰ Ibid., p. 142 (paraphrase)

⁵¹ Ibid., paraphrase

⁵² Ibid., p. 145

⁵³ Ibid., p. 147 (paraphrase)

⁵⁴ Ibid., p. 142

⁵⁵ Buchanan is concerned to show that this type of governance should be democracy.

should be required of a morally ordered international legal system. His answer is elaborated in his argument for democracy. As he sees it, democracy is, at minimum, a legal human right.

Buchanan offers three arguments in favor of democratic governance as a human right: the Equal Consideration Argument, the Instrumental Argument, and the Legitimacy Argument. The Equal Consideration Argument argues for democratic governance as a *moral* human right. The argument concludes that only under democratic governance can equal consideration of persons be realized⁵⁶. Since equal moral consideration of persons is demanded by the MEP and the MEP is the foundation for all human rights, if democracy is the only type of governance that ensures this equal consideration among persons, then democracy itself must be counted as a human right. According to the Equal Consideration Argument, “equal consideration requires that all persons have the same fundamental *status*, as equal participants, in the most important political decisions in their societies.”⁵⁷ Further, according to this view, only democracy allows “the institutional recognition of the equality of persons, [...] apart from [the maximization] of social welfare.”⁵⁸

The Instrumental Argument is primarily a pragmatic, rather than moral, argument. It concludes that democracy ought to be required of government because “democratic governance is the most reliable way of ensuring that human rights properly speaking are respected.”⁵⁹ According to the Instrumental Argument, democracy functions as a means of accountability for governments. Buchanan believes the feature of governmental accountability is inherent to democratic governance. This feature of governmental accountability allows democracy to function as a safeguard of other human rights. To illustrate the value of the Instrumental Argument for democracy, Buchanan draws on the example of democracy’s role in famine prevention first offered by Amartya Sen. Sen shows that fully developed democracies only experience food shortages rather than famines. Famines, on Sen’s account, are “a purely

⁵⁶ Ibid., p. 143 (paraphrase)

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

political phenomenon.”⁶⁰ Food shortages are not inherently political, but “political mismanagement” by a state government can exacerbate the problem, creating a famine where there was originally only a shortage. Buchanan and Sen maintain that law and order break down when famines occur; thus many human rights are violated during a famine beyond an inability of governments to satisfy a human right of sustenance. After Buchanan considers Sen’s famine example, he concludes that “[w]here governments are democratic, they are accountable [to their people and the international community] , and accountability tends to prevent them from persisting in the mismanagement that is an essential contributor to the occurrence of famines.”⁶¹ Consequently, the Instrumental Argument concludes that even if democracy is not a proper *moral* human right it ought to be counted as a *legal* human right because of the goods it supports and brings about.

The Legitimacy Argument is an attempt to justify the belief that the primary function of governments is “to represent or serve as agents of their citizens.”⁶² It seeks to ensure that “the international acts of state leaders actually reflect the [...] interests of their citizens”.⁶³ Buchanan contends that this goal of accurate representation can be attained only through implementing democratic institutions in particular states. Buchanan maintains that “democratic institutions are necessary [...] in international law.”⁶⁴ The argument concludes “only if governments are democratic is it appropriate to treat them as agents of their peoples and hence legitimate.”⁶⁵

Buchanan believes it is a mistake to conclude that these arguments contradict one another. He understands these three arguments to be compatible and further asserts that “together they provide strong support for recognizing the right to democratic governance as a basic human right under international law.”⁶⁶ Yet, Buchanan focuses his argument for

⁶⁰ Ibid.

⁶¹ Ibid., p. 143

⁶² Ibid., p. 144

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid., p. 145

democracy as a basic legal human right primarily on the grounds of the instrumental argument. To this end he suggests that, “if, as the instrumental argument asserts, democratic governance is the most reliable protector of human rights, then ascribing the right of democratic governance to individuals as a human right under international law provides important institutional support for human rights.”⁶⁷

2.3 The Democratic Minimum

Believing his arguments to have established a human right to democracy, Buchanan now turns his focus to the proper content of this requirement. As a matter of international human rights law, each government ought to have the following three characteristics, which collectively function as “the democratic minimum”⁶⁸ or “minimal democracy.”⁶⁹ The minimum serves as a standard of accountability. Toward describing this accountability, Buchanan offers these three characteristics.

First, no competent citizen should be excluded from participation in representative, majoritarian systems for deciding basic laws. Second, such representative, majoritarian systems ought to be able to remove government officials from any position. Third, citizens ought to have the freedom to talk about political decisions and form political parties, including the legal ability to assemble for these purposes. Buchanan also recognizes that majoritarian politics ought not to be allowed to violate certain basic individual rights.⁷⁰

2.4 The Role of Accountability in the Democratic Minimum

The notion of accountability is central to Buchanan’s view of state legitimacy. Accountability is central because he believes only if governments are accountable can they adequately protect human rights⁷¹ and further maintains that only democracies possess each of

⁶⁷ Ibid., p. 147

⁶⁸ Ibid., p. 145

⁶⁹ Ibid., p. 147

⁷⁰ Ibid., p. 146-147

⁷¹ Ibid.

these characteristics. Buchanan follows the instrumental argument in its assertion that democratic governance is “the most reliable protector of human rights”, and accordingly, “the right to democratic governance as having the minimal content [discussed above] ought to be included in the list of basic human rights in international law.”⁷² Buchanan argues that since only constitutional democracies have the characteristics he outlines as necessary for a government to be substantively accountable, such democracies are superior to other forms of governance insofar as they are best equipped to protect persons’ basic human rights. Buchanan’s main concern is that basic human rights be protected and respected, but his focus on democracy potentially dilutes his concern for the respect and protection of basic human rights.

Returning to the notion of accountability, I agree that accountability to its people is a necessary feature of governments which adequately protect and respect human rights. However, I believe that even though Buchanan is right to note this feature’s importance, he conflates the necessity of accountability in governance with the perceived necessity of democratic governance. Buchanan repeatedly calls attention to a feature of some democracies which he takes to be a fact following from all democracies, namely, that democracy serves as the best protection against violations of other human rights. Buchanan fails to recognize in his discussion that even if he were correct in this assertion, it does not follow that democracies, in any form are the only safeguard of other human rights. As one example in illustration of this point consider a system of governance based on the ideal of consensus.⁷³ Writing about the culture in which he was raised, Kwasi Wiredu explains that the Akans of West Africa have “what you might call a culture of consensus.”⁷⁴ For an Akan, consensus means that theoretical or practical differences between people do exist but can be reconciled.⁷⁵ Wiredu asserts that consensus-based governance is “conducive to the securing of ... the citizen's right of representation with respect to every

⁷² Ibid., p. 147

⁷³ Kwasi Wiredu, *Cultural Universals and Particulars: An African Perspective* (Bloomington and Indianapolis: Indiana University Press, 1996).

⁷⁴ Ibid., pl 173

⁷⁵ Ibid.

particular decision – *a right which ... is not consistently recognized in majoritarian democracy.*⁷⁶ If Wiredu offers an accurate characterization of Akan consensus government, it seems that this government would both adequately represent the interests of its people and in so doing also adequately protect and respect the human rights of the people, while at the same time being non-democratic. This counterexample cannot be addressed by Buchanan's view as it stands. Even if Buchanan were to argue that consensus governments constituted democracies he would have to at least acknowledge that no form of democracy strives to satisfy the interests of its people in *every* particular decision it makes. In this regard, the most a democracy can claim is that it *considers* persons interests. Still, Buchanan must recognize that consideration of interests does not necessarily entail that those interests will be meaningfully represented in laws and practices.

2.5 Considering Rights of Sovereignty

Granting for the moment that governments must both satisfy the democratic minimum and possess the characteristics of accountability outlined by Buchanan in order to be recognized as legitimate by the international community, now consider what rights and responsibilities follow from recognizing state legitimacy. Buchanan suggests that legitimate states have the limited authority to “specify how human rights norms are applied”⁷⁷ within its borders. Buchanan suggests that implementing this requirement would accomplish three important goals. Those goals are:

“(1) allowing the supremacy of international law to serve as a limit on state sovereignty for the sake of achieving justice, understood ... as the protection of basic human rights ... (2) [creation of] a protected space for diversity in the institutional implementation of human rights norms ... specifically, [allowing that there would be no requirement of adherence to] one particular conception of democracy”⁷⁸ and (3) that the content of human rights claims would remain, at least to some degree, objectively substantive.⁷⁹

⁷⁶ Ibid., p. 173 (emphasis mine)

⁷⁷ Buchanan, p. 187

⁷⁸ Ibid., p. 189-190

⁷⁹ Ibid. (paraphrase)

That is, Buchanan posits that if states were required to act only in accord with the requirements of the democratic minimum, human rights claims would be far less likely to be interpreted or implemented according to a particular government's subjective view of these claims. At the same time, Buchanan allows that human rights norms in themselves do not contain "concrete prescriptions for international design".⁸⁰

2.6 Implications of Democracy: A Legal and Moral Human Right

According to Buchanan's account, the human right to democracy is connected to the rights of legitimacy and state sovereignty. Further, a state's having *legitimate* status is itself a moral and legal matter. A state must meet *legal* minimums regarding the treatment of its people in order to earn recognition as legitimate. If a state is recognized as legitimate, the recognition of this status (of legitimacy) entails that the international community will *respect* the state's borders, laws, and other decisions. This respect is grounded in the idea of equal consideration among states, which is justified as an extension of the MEP. Equal treatment among states is understood as any legitimate state having equal voice to all other legitimate states. On these grounds, the international community will, out of this respect for the state, allow the state some degree of participation in international affairs. If a state is recognized as legitimate, the state will be granted rights of sovereignty by the international community. If a state is granted rights of sovereignty, the international community will view that state as, practically and for the most part⁸¹, autonomous. That is, as long as the state continues to protect the basic human rights of its people, the state may conduct its affairs in any way that seems fit in accord with the other norms of the international community.

Buchanan remains steadfast in his position that democratic governance is the best way to protect human rights. At the same time Buchanan wants his account of human rights to be

⁸⁰ Ibid., 190

⁸¹ I make this stipulation because any legitimate state that is sovereign must conduct itself in accordance with international provisions. If the state fails to conduct itself in this way the state will be stripped of its sovereign, legitimate status.

able to accommodate semi-democratic forms of governance. That is, any state that is operating as a fledgling or aspiring democracy ought to be protected as well as fully developed democratic models. To illustrate this point, recall that Buchanan allows for the possibility that states may be recognized as legitimate even in the case that all states do not practice the same *form* of democracy⁸². The implication of this concession is that newly emerging states, operating under not yet fully developed democracies, could be recognized as at least provisionally legitimate. If this implication follows from Buchanan's concession that any form of minimal democratic governance could offer sufficient protection of basic human rights, one might worry that a rogue state could masquerade as democratic while actually operating as a totalitarian regime. In other words, such a state might mimic democratic requirements while remaining at base, undemocratic. Any argument entailing a requirement of one particular form of governance over others will have to address this concern. It is of course possible that any state could masquerade as practicing one form of governance while actually practicing some other, recognizing this problem only lends support to my concern. That is, if masquerading as outlined above cannot be avoided by requiring some form of governance as a condition to a state's legitimacy, it follows that the matter of real concern is the protection and respect of human rights, rather than adherence to a particular form of governance.

I fully answer this worry in the following chapters by arguing, contra Buchanan, that any form of *actually* representative governance (including, but not limited to, representative democracies) ought to be recognized as at least potentially able to adequately protect human rights just as well as democratic governance.

⁸² I want to draw attention to these implications on the basis of Buchanan's claim that "there is no requirement ... of one particular conception of democracy" (Ibid., p. 189)

3 Beitz's Pragmatic View

3.1 Introduction

Although Charles Beitz posits that “the doctrine of human rights is the articulation in the public morality of world politics of the idea that each person is a subject of global concern”⁸³, he nonetheless contends that any attempt to justify the normativity of human rights claims on moral grounds fails. This chapter examines Beitz’ argument in favor of adopting a pragmatic view toward the practice of human rights and considers the plausibility of his account.

3.2 Beitz’ Rejection of Naturalistic Accounts

Naturalistic accounts take human rights to be a subset of “moral rights” which are universally held by “all human beings as such or solely in virtue of their humanity.”⁸⁴ Beitz suggests that these accounts are mistaken to claim that human rights “express and derive their authority from some deeper order of values.”⁸⁵ On the basis of this assumption, naturalistic accounts maintain that it is permissible to judge “the extent to which the international doctrine [of human rights] conforms to [this supposed deeper moral order].”⁸⁶ These approaches cannot adequately justify the normativity of human rights claims, according to Beitz, because they all mistakenly presuppose the existence of a deeper moral order to which one’s argument may rightly appeal. Such accounts fail, in part, because human rights discourse is “an existing normative practice” and yet naturalism fails to consider the various embodied functions that “the idea of a human right is meant to play and does play [within] the practice.”⁸⁷ In criticizing the practice of human rights on the “basis of a governing conception that does not [...] take

⁸³ Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 1

⁸⁴ *Ibid.*, p. 7

⁸⁵ *Ibid.*, p. 8

⁸⁶ *Ibid.*, p. 7

⁸⁷ *Ibid.*, p. 8

account”⁸⁸ of these features, all moral accounts amount to insufficient attempts to justify the normative force of human rights claims.

In an attempt to address the perceived shortcomings of naturalistic accounts, Beitz takes up the project of exploring, and ultimately endorsing a “practical approach” to addressing the question of the source of the authority of human rights claims. This position does not appeal to any deeper moral order. Instead it “exploits the observation that the enterprise of human rights [exists] within a global practice.”⁸⁹ The practice operates within the context of the larger community and provides the content for “a set of norms for the regulation of the behavior of states.”⁹⁰ Following Beitz’ argument, if we accept these norms as legitimately constraining behavior we must also accept that these norms regulate behavior. That is, they also supply agents with reasons to act. Since Beitz asserts that the practice determines the norms and the norms apply to behavior, Beitz concludes that the authority of human rights claims is rooted in the practice itself.

The international practice of human rights has this authority, Beitz contends, because “its norms seek to protect important human interests against threats of state-sponsored neglect or oppression.”⁹¹ If we accept that human rights norms serve this function, Beitz suggests, “we have a *prima facie* reason to regard the practice as valuable.”⁹² Unlike other fully developed practices, it is necessary to our understanding of human rights as a practice to recognize that the practice is emergent and developing rather than constant and mature. As an emergent practice, the global enterprise of human rights “constitute a set of rules for the regulation of the behavior of a class of agents”⁹³ each of whom hold some degree of the belief that “these rules ought to be complied with.”⁹⁴ In support of this end, “institutions and informal processes” are societally

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid., p. 11

⁹² Ibid.

⁹³ Ibid., p. 114

⁹⁴ Ibid., p. 42

upheld for “the propagation and implementation”⁹⁵ of these rights. As was the case with Buchanan’s account, according to Beitz’ view “every person has human rights.”⁹⁶ Moreover, “responsibilities to respect and protect these rights may, in principle, extend across social and political boundaries.”⁹⁷ Accordingly, states play an important role on this account. Namely, “states are responsible for satisfying certain conditions in the treatment of their own people.”⁹⁸ In the event that a state falls short of discharging this obligation, the world community is justified in taking preventative action as an attempt to counteract any further acts of abuse or neglect by a state. Thus, one purpose of human rights is to serve as “standards for the governments of states [in the treatment of their people] whose breach is a matter of international concern.”⁹⁹ Like Buchanan, Beitz recognizes that human rights ought to reflect Nussbaum’s conception of human capabilities. He notes Nussbaum’s list of human capabilities to be “of central importance in any human life.”¹⁰⁰ He further follows Buchanan in asserting these capabilities as “the basis of human rights.”¹⁰¹ Yet, given Beitz’ skepticism toward the plausibility of a moral grounding for human rights claims, he bases his argument for the normativity of these claims on a Neo-Rawlsian, rather than a purely ethical framework.

3.3 Human Rights, Rawls’ Account, and Beitz’s Model

One reason Beitz embraces an account of human rights inspired by John Rawls’ conception is that the account recognizes human rights “as one element of a larger conception of public reason.”¹⁰² Beitz understands public reason to represent “shared principles and norms of which human rights constitute one class.”¹⁰³ In its recognition of the importance of the role of public reason, Beitz takes Rawls’ account at least minimally succeeds where naturalistic

⁹⁵ Ibid.

⁹⁶ Ibid., p. 1

⁹⁷ Ibid.

⁹⁸ Ibid., p. 13

⁹⁹ Ibid., p. 32

¹⁰⁰ Ibid., p. 63

¹⁰¹ Ibid.

¹⁰² Ibid., p. 96

¹⁰³ Ibid., p. 97

accounts fail because it addresses human rights claims within the global practice, rather than appealing to their existence and authority in a higher moral order. Beitz further follows Rawls in his understanding of human rights as “standards whose satisfaction guarantees a society against external intervention and is necessary for acceptance as a cooperating member of a society.”¹⁰⁴ The main shortcoming of Rawls view, as Beitz understands it, is that it does not endorse the full complement of rights that are stipulated by the main human rights conventions. Beitz endorses Rawls’ conception of human rights as “a special class of urgent rights [...] which are indispensable to any common good conception of justice.”¹⁰⁵ Further, on Rawls’ account these rights are universal and are “politically significant” in virtue of “their special role in [...] public reason.”¹⁰⁶

Beitz reasons that “although people may disagree about the [proper] content of human rights, they may agree about the role of human rights in practical reasoning about the conduct of global political life.”¹⁰⁷ Accordingly, Beitz notes that one important aim of human rights discourse is to attempt to “achieve conditions in which [...] peoples can engage peacefully while determining their own individual futures free from the interference of other [outside sources].”¹⁰⁸ In light of this understanding of the role of human rights within global discourse, Beitz disagrees with Buchanan in an additional and salient regard. Where Buchanan argues that democratic governance ought to be protected by a human right, Beitz contends that the “proper scope of human rights requires international toleration.”¹⁰⁹ It is a matter of primary importance and a necessary condition to a state’s legitimacy that human rights standards be respected and upheld in any given state. However, Beitz recognizes what Buchanan does not; namely that democracy in addition to other forms of governance can and do adequately protect and respect human rights. Thus, if there is a human right to governance, that right should be extended to

¹⁰⁴ Ibid., p. 100

¹⁰⁵ Ibid., p. 97

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., p. 99

¹⁰⁸ Ibid., p. 100

¹⁰⁹ Ibid., p. 99

include any non-democratic forms of governance that otherwise protect and respect human rights. If the primary purpose of human rights is to protect human interests, and in so doing to regard persons as subjects of primary moral concern, then to not recognize certain non-democracies as legitimate in this regard undermines this purpose.

3.4 A Further Discussion of Democracy

Beitz maintains democracy is not the only form of governance that encourages people's political awareness and involvement, or that rewards critical participation in public life. Economic stability and relative affluence are two factors that will contribute to the success or failure of attempts to implement democratic regimes in states, as will the degree to which a particular democratic regime is developed.¹¹⁰ In considering these practical attributes of states, it seems fair to conclude that developing or stalled democracies should not be preferred over other types of non-democratic governance. Preferred status should potentially be withheld from democracies because, if restricted by severely limited resources, democracies and other forms of governance perform equally, in terms of protecting persons' other basic interests. Given this information, if Buchanan were to respond to Beitz on this point he would have to argue that he envisions some idealized and otherwise fully developed form of democracy as being eligible for protection by a human right. Nonetheless, Buchanan's account is flawed in its discussion of democracy as a human right at least to the extent that his discussion does little if anything to address how his account can be applied to developing but not yet fully developed democracies. In championing toleration of various governances and focusing primarily on protection of human rights, Beitz' account is more fully satisfactory as compared to Buchanan's.

In an attempt to address the concern that democratic governance is too narrow to be protected by a corresponding human right, Beitz suggests that there instead be a political right to self-determination. Such a right would be held by states, some of which might be democracies. Accepting a model of collective self-determination also means that if international

¹¹⁰ Ibid., p. 177-178 (paraphrase)

law includes a human right to governance, when a non-democratic form of governance would better protect persons' other interests, a human right would also protect that form of governance, provided other conditions were met. For Beitz, a society ought to be considered self-determining if it satisfies three conditions: first, that "political decisions result from, and are accountable to, a process in which everyone's interests are represented"; second, that all persons have "rights of dissent"; and third, that "public officials explain their decisions in terms of a widely held conception of the common good."¹¹¹ According to this model, any political regime that is "decent" in Rawls' sense ought to be protected by the right to self-determination.

A *decent* society, in Rawls' sense, is one that protects some conception of human rights, engages in "genuine cooperative schemes", and operates on a "common good conception of justice" according to which "public institutions must express the principle that the good of every member of society counts."¹¹² Additionally, decent societies are structured in accordance with principles that would be embraced by reasonable people. Reasonable people acknowledge the burdens of judgment and are willing to propose and accept fair terms of cooperation for their society while at the same time not imposing their particular conception of the good on any other society.¹¹³ Counting any decent society as self-determining entails both non-interference and political recognition under international law, *regardless* of the particular type of governance practiced in that society. The political right to self-determination, then, should be understood as more inclusive than a right only to democratic governance.

¹¹¹ Ibid., p. 181, following Joshua Cohen, "Is There a Human Right to Democracy?," in *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, ed. Christine Sypnowich, 226-247 (Oxford: Oxford University Press, 2006).

¹¹² Buchanan, 163

¹¹³ Ibid., p. 162 (paraphrase)

4 The Need For a Moral and Practical Foundation

4.1 Introduction

In this chapter I argue that neither a moral nor a practical account of the normativity of human rights claims can stand on its own as a fully developed justification. I argue that these two underpinnings—moral and practical—must be taken together to fully underscore human rights’ normative force on agents. Further, I suggest that while a moral foundation is necessary to properly ground human rights claims, the MEP cannot be used to justify a human right to democracy. I argue that any human right related to forms of government must not rule out any form of governance a priori, but should instead require that the government of every state need not conform to the requirements of democracy. What should be required of state governments is an ability to adequately represent the interests of its people and not otherwise violate human rights.

4.2 Beitz’s Rejection of Morally Grounded Naturalistic Accounts of Human Rights

While Beitz recognizes that human rights doctrine constitutes a “common moral language [in the] public discourse of peacetime global society,”¹¹⁴ he at the same time maintains that the normative force of such rights cannot be justified by appeals to any naturalistic account. Naturalistic accounts maintain that the normative force of human rights claims is best understood as a product of their place in a higher moral order. Further, such accounts hold that persons’ and their interests have value in their own right, *as such*. Beitz maintains that no moral account can sufficiently justify the normative force of human rights claims because no particular moral account is sufficiently broad to be found acceptable by all persons to whom it may apply.

¹¹⁴ Beitz, p. 1

In support of this belief, Beitz attempts to argue that the framers of human rights doctrine “aspired to a [offer] a doctrine that could be embraced from many [moral and political] points of view.”¹¹⁵ Beitz embraces such an account because he believes only a broad account can adequately serve as a basis for human rights claims even in light of wide moral disagreement among the world’s cultures. Moreover, Beitz suggests that moral accounts that attempt to justify the normativity of human rights claims cannot be successful in this undertaking, because such accounts fail to recognize that such claims are embodied components of an emergent practice. As a practice, human rights claims “consist of a set of rules for the regulation of the behavior of a class of agents” who hold varying degrees of a “widespread belief that these rules ought to be complied with.”¹¹⁶ Moreover, this belief informs the conduct of institutions and societal processes in an attempt to ensure that human rights ideals are upheld. The practice is emergent because in the case of human rights “these dimensions are less fully developed than in mature practices.”¹¹⁷ Instead of embracing a naturalistic view, he suggests we cannot begin to understand the content of human rights claims on the basis of appeals to their place in a deeper moral order “without any reference to [their] role in global political life.”¹¹⁸ Accordingly, he suggests that a different type of account is needed to understand why human rights claims levy normative force on agents, giving those agents reasons to act in accord with the demands of a human rights claim.

In rejecting naturalistic accounts, Beitz argues that human rights claims ought to be justified by the fact that these rights play an important role in global discourse. Beitz takes his account to be a practical account, one which attempts to understand human rights in the context of their role in a larger global practice. Their role is to function as a “set of norms for the

¹¹⁵ Ibid., p. 8

¹¹⁶ Ibid., p. 42

¹¹⁷ Ibid., p. 43

¹¹⁸ Ibid., p. 65

regulation of the behavior of states.”¹¹⁹ However, rights cannot serve this purpose unless the global community recognizes “the practice’s norms as reason-giving”¹²⁰ for the relevant agents.

One complication arises when we realize that although human rights claims function as normative constraints, there may still be disagreement within the community regarding the scope, content, and weight of human rights claims in the overall discourse. This complication must be addressed by any successful account of human rights that aspires to be action-guiding for the agents to which it applies. Beitz believes that his pragmatic account can satisfactorily answer the indeterminacy concern because, within the global community, the practice itself is recognized as providing agents with a set of reason giving norms which agents are to take as reasons in their deliberations about how to act¹²¹. I contend that this account does not supply compelling reasons to accept it. If the practice’s norms are to be reasons which guide agents actions, the practice cannot ground itself. The normative force of the practice must come from some source outside itself otherwise, the practice risks susceptibility to relativism over time. Given these indeterminacies and potential tensions, it is difficult for either Beitz’ or Buchanan’s account to discern how to best apply human rights claims in many particular situations.

A naturalistic account, such as Buchanan’s, must also address these tensions, but it may do so by appealing to the underlying moral value or worth inherent to all persons as such. Consequently, one benefit of adopting a morally based naturalistic account is that the normativity of human rights claims originates from outside itself, thus, such accounts are potentially less likely to be negatively affected by appeals to relativistic values. However, considered in isolation of practical application, naturalistic morally grounded accounts are too abstract to address the questions left by the indeterminacy concern. Such accounts could be bolstered if they were considered in conjunction with Beitz’ pragmatic account. The benefit of a morally grounded naturalistic account is that it grounds the normativity of human rights claims

¹¹⁹ Ibid., p. 8

¹²⁰ Ibid.

¹²¹ Ibid. (paraphrase)

outside the practice itself. But this approach alone cannot fully justify human rights' normative force. A complete account of human rights normativity must both be grounded outside of itself and acknowledge human rights place and function within the global practice. Beitz's practical account maintains that the global practice itself grounds the authority possessed by human rights claims. Beitz argues that the global practice that encompasses human rights claims endows these claims with authority. Since human rights norms "seek to protect important human interests against state sponsored neglect or oppression," Beitz maintains persons have "a *prima facie* reason to regard the practice [...] as valuable."¹²² On Beitz's account, the demands of human rights claims affect many agents. The pragmatic account also cannot stand on its own as a full account of the normative force of human rights claims. A moral underpinning is needed to help ensure that the power of the practice does not silence the possibility of the authority of a moral foundation. I do not mean to suggest, however, that a moral foundation is sufficient to understand the source of the authority of human rights claims. What I do mean to suggest is that only a moral foundation married to a pragmatic account can fully address the question of the source of the normative force of human rights claims.

Beitz and Buchanan agree that human rights are intended to protect important human interests. However, one salient difference between their accounts is the central role of states in Beitz's view of human rights practice. That is, for Beitz human rights primarily serve as regulations on the actions and behaviors of states and their agents "in the treatment of their own people."¹²³ States and their agents are most deeply obligated by human rights claims because, from a practical perspective, states have the greatest opportunity and resources available to uphold human rights, and the practice holds states accountable. If states fall short of satisfying the obligations levied on them by human rights claims, the world community is justified in taking "preventative action"¹²⁴ in an attempt to restore respect and protection of human rights in

¹²² Ibid. (emphasis mine)

¹²³ Ibid., p. 13

¹²⁴ Ibid.

accord with the idea that “each person is a subject of global concern.”¹²⁵ In this regard, states have a duty to address the correlative obligations carried by human rights claims. This duty is so compelling that failure by a state to satisfy these obligations may result in the world community’s overriding that state’s sovereignty. Thus, while Beitz contends that the state serves as the “basic unit” responsible for the protection of human rights, he also recognizes that the obligation to treat each person’s rights as a matter of global concern is so great that it supersedes all other competing considerations, even state sovereignty. Buchanan’s account too, recognizes that states play an important role in upholding human rights claims but unlike Beitz’ account, Buchanan’s allows that not all duties related to the protection of human rights fail immediately or primarily to states. Rather, Buchanan allows that some such duties rest with people (consider as an example the Natural Duty of Justice) while others rest with people and with states. Even given this difference, like Buchanan¹²⁶, Beitz acknowledges that the responsibility to protect and respect rights, “may, in principle, extend across social and political boundaries.”¹²⁷ This practical account grants that the practice of human rights discourse has a broad scope and takes the “central concern” of the practice to be the protection of “individuals from the consequences and omissions of their governments.” On this account, human rights correspond to a wide array of interests persons may have. Further, the interests human rights purport to protect ought to be protected as a measure of respect and protection of the “equal dignity of all persons.”¹²⁸

4.3 Beitz’s Neo-Rawlsian Approach to Human Rights

Beitz’s account of the normativity of human rights claims places a considerable amount of weight on human rights’ perceived role in global practice and seeks to offer an account that accurately reflects the extant practice of international law. To this end, he adopts a modified

¹²⁵ Ibid., p. 1

¹²⁶ Buchanan stresses, for example, that since the Natural Duty of Justice is primary and applies to all persons and institutions, states are morally obliged to all persons within and beyond their borders.

¹²⁷ Beitz, p. 1

¹²⁸ Ibid., p. 19

idea of Rawls' conception of a "society of decent peoples"¹²⁹ to serve as a model for his own partially idealized account of the practice. Beitz believes that such a model can adequately justify the normativity of human rights claims while avoiding many problems morally grounded accounts cannot satisfactorily address. In addition, Beitz takes this account to partially alleviate one of the main tensions in the global practice, namely, the lack of agreement among people regarding the content of human rights claims. Beitz suggests that while people may disagree considerably about the proper "content of human rights claims, [...] they may agree about the role of human rights in the practical reasoning [which guides] the conduct of global political life."¹³⁰ Beitz embraces a neo-Rawlsian view of human rights practice because, in at least the idealized case of liberal or decent peoples, human rights are recognized as "part of the public reason of international society."¹³¹ He also endorses the purported aim of a society of liberal and decent peoples, which he understands as attempting "to achieve conditions in which different peoples can engage [with one another] peacefully" while at the same time "determining their own individual futures free from the interference of others."¹³² Adopting this position and applying it to the practice of international law would facilitate and protect the pluralism of views represented in the practice. However, in an effort to offer an account that accurately represents the contemporary practice of human rights, Beitz does not simply endorse Rawls' view as it stands. Rather, he is critical of Rawls' account insofar as its catalog of rights does not fully reflect those rights protected by international law.

Beitz's model presupposes that human rights function in part as institutional protections of "urgent interests"¹³³ or standard threats. Urgent interests represent those interests that are "recognized as important in a wide range of lives."¹³⁴ The obligations entailed by protecting human rights apply to states' conduct towards its people. Accordingly, respect for human rights

¹²⁹ Ibid., p. 101

¹³⁰ Ibid., p. 99

¹³¹ Ibid., p. 100

¹³² Ibid.

¹³³ Ibid., p. 110

¹³⁴ Ibid.

must be reflected in a state's laws and public policies. Finally, Beitz's model takes human rights' protection as a matter of international concern because all persons must be treated as "subjects of global concern."¹³⁵ If states fail to treat their people in this regard, outside intervention by the global community is justified. However, even though states' actions towards their people are regulated by human rights norms, Beitz does recognize that "governments have limited discretion to choose the means to carry out these requirements."¹³⁶

Beitz's pragmatic account is not without its merits. Beitz is right to insist that a fully robust account of human rights must address the extant state of the global practice. Further, he is right to attempt to provide an account of the normativity of human rights claims that stresses the necessity of protecting all persons' urgent interests. He also properly situates all persons as "subjects of international concern" and is right to recognize that the protection of persons' most urgent interests justifies the existence of corresponding human rights in international law.

However, Beitz is mistaken to insist that the normativity of human rights claims can be fully justified without any moral underpinnings. Recall that Beitz contends that "human beings are subjects of international concern."¹³⁷ Treating persons in light of this fact requires that human rights be in place to protect at least persons' urgent interests. Beitz further asserts that "international recognition of human rights is necessary to protect the equal dignity of all persons." Seeing persons as subjects of international concern is a moral underpinning as is protecting their urgent interests with human rights out of concern to protect the equal dignity of persons. Beitz account is weakened because of his failure to recognize that his pragmatic view is itself morally underscored. Beitz attempts to justify the need to protect the equal dignity of persons on the grounds that "equal human dignity is a value in its own right."¹³⁸ Yet, simply claiming that equal human dignity is a value in its own right that must be protected if persons are to be recognized as subjects of global concern is not a satisfactory justification for this claim.

¹³⁵ Ibid., p. 1

¹³⁶ Ibid., p. 109

¹³⁷ Ibid., p. 19

¹³⁸ Ibid.

If persons have equal dignity, then this dignity must originate from some underlying value possessed by all persons. Equal human dignity cannot be adequately explained as “a value in its own right,”¹³⁹ because all values must have some grounding source. Appealing to equal human dignity may sufficiently account for the source of human rights claims normativity. Thus, equal human dignity may be the grounding source of human rights claims. Further, I contend that human dignity is the root source of the value of human rights claims and that equal human dignity is, in fact, the only basic value. If we do not accept my view and instead allow Beitz argument for equal human dignity as a value in its own right to stand, there will be an explanatory gap present in Beitz’ account. Beitz must more fully account for the appeal to human dignity his account relies on. If he cannot supply a satisfactory argument for accepting equal human dignity as the source of the normativity of human rights claims, the explanatory gap will remain. Its presence in Beitz’ account suggests that a pragmatic account of the normativity of human rights claims cannot serve on its own as a complete justification of human rights purported normative force on agents. A moral foundation is also needed.

4.4 Embracing a Naturalistic Account

Buchanan’s idealized vision of a morally grounded system of international law can provide the content of a moral foundation. Buchanan is right to attempt to construct a morally underpinned idealized conception of international law with justice at its core. By seating justice at the center of his idealized account, Buchanan is able to make the case that protection of human rights is an essential element of treating persons justly. Accordingly, Buchanan argues, “the moral foundation for the international legal order is [all agents’] limited obligation to help ensure that all persons have access to [just] institutions—those that protect basic human rights.”¹⁴⁰ By morally grounding international law, Buchanan is able to offer an account of human rights founded on human dignity. The source of the value of equal human dignity is the

¹³⁹ Ibid., p. 19

¹⁴⁰ Buchanan, p. 5

underlying moral value of all human beings. Buchanan's account is strengthened in recognizing this connection, while Beitz' account is weakened at least insofar as it fails to recognize this moral underpinning, while at the same time relying on it to further the argument.

On Buchanan's account, the moral status of persons supplies the authority of at least moral human rights claims while also carrying "especially weighty" moral obligations. One such obligation is to "treat every person with equal concern and respect."¹⁴¹ Buchanan refers to this obligation when he appeals to the Moral Equality Principle (MEP). Since Buchanan classifies human rights as a sub-set of moral claim rights, he believes that the MEP applies when human rights are protected. Recall that Buchanan distinguishes between moral human rights and legal human rights. While noting that these two types of rights may not hold a one-to-one correspondence to each other, he stresses that legal human rights must square with moral principles, namely principles of justice. Toward this end, even legal human rights are minimally morally constrained, according to Buchanan's account. Moral human rights are possessed by human beings in virtue of their status as persons, regardless of whether or not these rights are enshrined in legal sanctions. Taken as a moral obligation, the MEP requires that all persons be granted equal consideration. Equal consideration does not entail equal treatment of persons; rather, it only requires that all persons' interests be *considered* equally. Buchanan contends that there is some subset of interests basic to all persons. His conception of this list mirrors the set of interests Beitz refers to as urgent. On both accounts, basic or urgent interests are those that must be protected as a matter of ensuring an individual's best chance at living a decent human life.

Buchanan is correct to call attention to persons' inherent moral worth as a means of explaining why persons have human rights and corresponding obligations. Further, if we hope to give a full and satisfactory account of the normative force of human rights claims on agents' actions, we should merge these accounts. Buchanan's account *as it stands* cannot be the proper

¹⁴¹ Ibid., p. 27

moral account to underpin the normative force of human rights claims because he overextends his moral account of international law when he attempts to argue that democratic governance is itself a moral obligation. Buchanan is rightly concerned to offer a morally grounded account of international law that prioritizes protecting basic human rights. As I have shown, democratic governance is not a necessary condition to the protection of these rights. Further, if a legal human right enshrines democratic governance and no other forms, the MEP is effectively violated because at least some persons' interests would not be equally considered. When I speak of *consideration* of a person's interests, I take that term to require that their interests not be excluded a priori from the realm of possibility. A nation whose people voted to install or affirm a monarchy would ironically be deemed a non-legitimate state if its government took the form for which its people voted. The right of that nation's people under the MEP to equal consideration would be violated if democracy were considered a human right.

Buchanan is mistaken to adulterate his morally grounded account of international law by insisting that democracy be the sole form of governance that is eligible for protection by a human right. Buchanan makes several arguments in support of his belief that a human right to democracy ought to be included in any corpus of human rights, but none of these arguments adequately justifies this belief. First, Buchanan appeals to a simple pragmatic argument in favor of including minimal constitutional democracy among a list of human rights. He claims, "we [...] know enough about human beings and institutions to be *fairly confident* that what might be called minimal constitutional democracy is *generally* the most reliable political institutional arrangement for protecting basic human rights."¹⁴² While this claim might be empirically true, as formulated by Buchanan it represents fallacious reasoning. That is to say, even if it is the case that minimal constitutional democracies are consistently correlated with the protection of other human rights in many circumstances, it does not follow that there should be a human right to democratic governance.

¹⁴² Ibid., p. 66 (emphasis mine)

The Instrumental Argument for democracy hinges on the idea that “where governments are democratic they are accountable, and accountability tends to prevent [governments] from persisting in the mismanagement that is an essential contributor to [...] the breakdown of law and order”¹⁴³ that often accompanies human rights violations. Note that Buchanan’s pressing concern in this argument is that human rights not be violated. Granting Buchanan’s premise that accountable governments are far less likely to engage in systematic and persistent human rights violations does not show that *only* democracy can facilitate or mandate this accountability.

Other forms of governance may safeguard against human rights violations at least as well as democracy, or at least sufficiently well. For example, Rawls suggests that constitutional monarchies may be able to serve in this way¹⁴⁴. Additionally, some forms of consensus-based governance are not constitutional democracies but are arguably adequate to protect and respect persons other human rights¹⁴⁵. Thus, the instrumental argument in favor of a human right to democracy contains a critical flaw that Buchanan must repair if he is to rescue his argument. The most that this argument can prove is that democracy is usually the best means of protecting other human rights, not that this is always so. That is, even if democracies are in fact the most reliable form of government for protecting human rights, it still does not follow that other governments cannot adequately protect human rights. However, Buchanan ought to be concerned to protect *any* form of governance that can be shown to act as a sufficient protector of human rights, and is thus mistaken to privilege democracy on this count.

Next, Buchanan turns to the legitimacy argument in favor of including democratic governance among the institutions that ought to be protected by a human right. The legitimacy argument presupposes that the primary purpose of a state is to act as an agent of its peoples. Even granting this premise, Buchanan cannot show that only or all democratic states act as

¹⁴³ Ibid., p. 143

¹⁴⁴ Ibid., p. 99 (paraphrase)

¹⁴⁵ Kwasi Wiredu (p. 173) speaks of one such circumstance in recalling the culture in which he was raised. He classifies this form of governance as Akan consensus.

agents of their peoples. A government need not have been installed through an election in order to represent the interests of its people. For example, a competent monarch can represent her people and their interests; that she *will* do so is not guaranteed by monarchy—but neither does democracy guarantee that the state will represent the long-term interests of its people rather than the short-term interests of officials who are running for reelection and whose livelihoods depend on campaign contributions. To be clear, what this example highlights is that the Legitimacy Argument depends on an assumption that every state with that form of government tends to conduct itself in ways conducive to human rights simply by virtue of that government's structure. Hence, the Legitimacy argument too, fails. The most we can derive on the basis of the Legitimacy argument is that democracy is usually the best form of government insofar as it acts as an agent of its peoples' interests, not that this is always so. The Legitimacy Argument does not show democratic governance to be unique in its ability to uphold this requirement. Accordingly, democracy may not be counted as a human right on the basis of this argument either.

Finally, Buchanan makes an argument that democracy must be included in the list of human rights because democracy is grounded in the equal consideration of persons. If Buchanan can successfully deliver this argument, he will have also shown that the MEP requires that governments be democratic. Buchanan here overlooks the flaws of some democracies and the strengths of some other forms of governance. It is not the case that democracies necessarily grant all persons as equal consideration in governmental participation; some mentally competent adult citizens are entirely excluded from participation in some Western democracies subsequent to being imprisoned for a serious crime. The United Kingdom's ban on prisoners voting in parliamentary elections while they remain imprisoned has drawn the censure of the European Court of Human Rights¹⁴⁶, and the United States does not even automatically restore voting rights after a felon has served their full sentence. On the other hand, a consensus-based form of governance—in which all reasonable objections must be addressed—can do more to

¹⁴⁶ *Hirst v United Kingdom (No 2)*, [2005] ECHR 681.

uphold the right of participation for those who hold a minority opinion. Majoritarian democracy permits the opinion of 49% of a state's citizens to be utterly ignored if the other 51% so agree. Buchanan's argument fails because democracy is not the only form of governance that upholds the Moral Equality Principle. That is, the structure of a practice may serve as a means of understanding why human rights must be morally grounded. Nonetheless, this understanding does not entail that democracy is necessary in order to uphold human rights.

4.5 Conclusion

Buchanan's main aim in offering a morally grounded foundation of international law is to ensure that human rights are not violated. In light of the flaws present in each of Buchanan's arguments for democracy, I think Buchanan's account ought to allow any form of governance that otherwise adequately protects and respects human rights. Privileging any single form of governance as a precondition of recognition as a legitimate state does not honor all persons' right of equal consideration. Accordingly, no one form of governance should be unilaterally protected by a human right and required of states seeking recognition as legitimate. Instead, any form of governance that can be shown to adequately protect and respect human rights ought to be upheld as satisfying a requirement toward recognition.

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