

## Human Rights and Status Egalitarianism

David Miller

In this essay I am going to focus on one specific claim that Allen Buchanan makes in the course of his powerfully argued account of human rights, namely that to understand the system of international legal human rights, we must acknowledge not only their 'well-being function' but also a second function that he calls their 'status egalitarian function'. Thus, on the one hand, the human rights system 'protects people from harms and abuses inflicted by their own states and it requires all states to provide the goods and services characteristic of the modern welfare state'<sup>1</sup>, thereby securing at least a minimum level of well-being for all. But according to Buchanan it does more than this. It further '*exhibits a robust commitment to affirming and protecting the equal basic moral status of all individuals*',<sup>2</sup> or as he also puts it, it serves 'to foster the public recognition of equal basic status for all people, in all societies'.<sup>3</sup> Buchanan believes that it is a common fault of existing theories of human rights, such as James Griffin's, that they fail to recognize this status egalitarian function, and are therefore unable to make proper sense of international human rights practice.<sup>4</sup> In contrast, it occupies centre stage in the theory of human rights that he presents in the book we are discussing in this symposium.

I want to examine these claims closely. What does 'status egalitarianism' mean in this context? Is it part of the purpose of human rights to promote it? I am going to leave aside other features of Buchanan's theory: I shall assume that the object we are investigating is the international legal human rights system, and I shall say nothing either for or against the 'Mirroring View' that he spends a good portion of the book attacking. I do, though, need to say something about the kind of claim being made when Buchanan says that the human rights system has a status egalitarian function. Speaking in terms of 'function' here might strike readers as odd. Functional claims are often straightforwardly empirical. If I say that the function of the spleen is to filter blood and remove antigens, or the function of a carburettor is to blend air and fuel prior to combustion, these statements can be verified by observation. But can we identify the 'function' of the human rights system just by looking at it? In some places Buchanan seems to be claiming this. He says 'it is important to distinguish clearly between a description of the existing system and a proposal for how it might be rationally reconstructed or a hypothesis about what the system is like on the best interpretation of it....At this point I am simply trying to describe the system.' But what is then involved in describing the human rights system as having a certain function? Is this a claim about the purposes of the many different people who over time have first initiated and then developed the system? Or is it a claim about the effects that the system has in the societies to which it is applied?

The answer, I believe, is ‘neither of the above’. Buchanan’s account of the human rights system is more normative than he lets on when he says that his aim is simple description. Indeed it is much closer to being ‘a proposal for how it might be rationally reconstructed’ where ‘rational reconstruction’ makes reference to the values that Buchanan believes the system should serve. For evidence that the theory has this normative component, we might refer to the book’s concluding chapter which contains an impressive discussion of rights inflation, and the measures that might be taken to combat it. But if we were simply describing the system as it exists, then rights inflation over time would just be one of the features that we would observe along with several others. That Buchanan is *bothered* by the phenomenon of rights inflation tells us that he has in the background a normative theory of what things should be recognized as genuine human rights and what things shouldn’t. No doubt that theory is deeply informed by human rights practice as evidenced by the covenants, treaties, legal rulings and so forth. Nonetheless it is a normative theory: it does indeed aim to give the ‘best interpretation’ of the practice by showing that it has two main ethical purposes, both of them coherent and valuable, namely ‘helping to ensure that all individuals have the opportunity to lead a minimally good or decent life’ (the well-being ‘function’) and ‘constraining sovereignty in order to affirm and protect equal basic status’ (the status egalitarian ‘function’).<sup>5</sup>

Having clarified the kind of claim that Buchanan is making when he speaks of the international human rights system as serving status egalitarianism, we need next to investigate what it means to promote the ‘equal basic status’ of all individuals. This is perhaps easiest to do by seeing what would undermine equality of this kind. According to Buchanan, ‘the public recognition of one’s equal basic status is threatened when one is treated in ways that, given the historical context, put one at risk of being regarded as naturally inferior in certain respects, where being naturally inferior in those respects is thought to disqualify one from participation as an equal in important social practices or roles, and where natural inferiority is understood as the normal condition of individuals of the sort of human being one is....’.<sup>6</sup> This complex claim needs some unpacking. Buchanan assumes that equal status is threatened in the case of people who belong to identifiable groups – racial minorities and homosexuals are among the examples he cites. People in these groups are then treated in ways – presumably ways that are less favourable than those experienced by people outside of the group – that may produce a belief in their natural inferiority (e.g. that they are less intelligent or are less rational). This also means that they are thought not to be qualified to take part on equal terms in important social practices (such, presumably, as voting in elections). In other words, people in the group are ascribed a lower social and political status simply by virtue of the characteristic that marks them out as belonging to the group. Equal basic status is realized when

none of this happens, and Buchanan's claim is that one of the two main functions of international legal human rights is to ensure that it doesn't.

So 'inequality of basic status' is not simply a matter of a group's being treated unfavourably, but also of the mindset this produces, either in members of the group or in the wider society (Buchanan is not explicit about this) that involves labelling people as inferior in certain respects by virtue of some characteristic that they share with other members. There is no dispute here about whether this is undesirable. In contemporary Western societies (and I'll come back later to the significance of this clause) status equality in Buchanan's sense is an important political value. Many of our social practices have been redesigned to ensure that no person and no group is placed in a position of inferiority vis-a-vis another (for a recent example, think of the introduction of same-sex marriage). Where I am going to disagree with Buchanan is not over whether status equality is valuable, but over whether it should be seen as part of the *raison d'être* of international human rights to promote it. We both agree that human rights cannot be regarded as a universal cornucopia. As we have seen, Buchanan criticizes rights-inflation and says explicitly that 'there is a large gap between saying that something is a morally important or urgent interest and showing that there ought to be an international legal right to protect it'.<sup>7</sup> So why assume that basic status equality is an international human rights matter rather than an important domestic policy goal that some societies, but perhaps not others, may choose to pursue?

As evidence that international human rights have a 'status egalitarian function', Buchanan cites five features of that system that I will paraphrase for the sake of simplicity:

1. Everyone has human rights.
2. Everyone has the same human rights, with the same weight.
3. Everyone's human rights must be made effective by the state.
4. There must be equality before the law, with effective legal remedies for everyone.
5. There must be strong anti-discrimination rights, including rights against informal practices of discrimination.<sup>8</sup>

The first three features can be summed up by saying that the state must protect every citizen's human rights equally. If this is achieved, it certainly creates equality in one dimension: everyone is equal with respect to (effective) human rights protection. But although this might be a precondition for status equality of the kind we outlined above, by itself it creates no wider form of equality. Henry IV is supposed to have promised the common people of France that they should have a

chicken in the pot each Sunday. If he kept his promise they would be equal in that respect. But no-one would suppose that the Henry's aim was to create status equality in a wider sense. Just as providing one chicken per household doesn't mean that some households won't dine far better than others, or enjoy higher social status, so having human rights uniformly protected doesn't mean that some individuals won't have far greater resources, opportunities and social prestige than others.

Consider next equality before the law, which as Buchanan reminds us includes the provision that the legal system should provide legal remedies on a non-discriminatory basis when rights are violated. As many have observed, this principle does not tell us anything about the content of the law, other than that it should be formulated as general rules potentially applicable to all persons. The remedies requirement entails that people must have sufficient resources to make effective use of legal procedures when they need to, and this might seem to place limits on overall inequality. However the requirement could also be satisfied by specific provisions, such as supplying legal aid to those who cannot otherwise afford a defence lawyer. So again we have no reason to think that a human rights system that includes equality before the law as one of its provisions must have status equality as one of its wider aims.

So for Buchanan's claim that international human rights have a status egalitarian function to go through, a great deal rests on the fifth element, the presence of a human right against discrimination in the international covenants. The question is, how should we construe this right? What does it require? On one reading, it prohibits the state from making discriminatory laws, that is laws that would place a burden on some but not others in the exercise of their human rights. Thus a law that prevented women from working or a law that denied health care to a racial minority would violate the right against discrimination. But understood in this way, it merely reiterates (perhaps with greater emphasis) the previous four elements – the provision that everyone should possess and enjoy the same human rights, for example. To move beyond that, the right against discrimination must require not only that the laws themselves should not be discriminatory, but also that there should be laws to prevent all forms of discrimination, whether it occurs in the public or private sphere. This seems to be what Buchanan has in mind when he refers to statements such as Article 26 of the *International Covenant on Civil and Political Rights*, which states that the law must 'guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion....etc.'

The problem with interpreting the Article as calling for a blanket ban on all forms of discrimination, however, is that there are going to be a number of contexts in which it is quite acceptable to discriminate between people on one of the grounds it mentions, because in that context having the

feature in question is relevant to what is being provided. It was presumably not the intention of Article 26 to prohibit affirmative action programmes for disadvantaged racial groups, to prevent media positions in multilingual societies being offered to those fluent in the relevant language, to ban separate sporting competitions for men and women, and so forth. The Article only makes sense if it is read as prohibiting discrimination on grounds that are irrelevant to whatever benefit is being offered. But in that case the aim of the human right against discrimination is to achieve a certain form of justice, rather than basic status equality. Of course it's possible that someone who is unfairly discriminated against – on grounds of race, say – will feel not only that he has been unjustly treated, but also that he has been consigned to an inferior social status (this is more likely to happen if the discriminatory treatment becomes routine). So I am not trying to underplay the badness of wrongful discrimination. The question, though, is whether the presence of a human right against discrimination is sufficient evidence that one of the 'functions' of human rights is to bring about status equality in the quite ambitious sense outlined earlier, where what matters is not just how people are treated materially, but how they understand their social position as members of a particular group. I am suggesting that the anti-discrimination clause can be read more narrowly as aiming to prevent a particular form of distributive injustice.

The purpose of the fifth element in Buchanan's list therefore remains in some doubt. But one might ask why, if what we are doing is presenting the best rationale for the existing system of international human rights (see my earlier remarks about method), we should not include the ambitious goal of status equality. The answer will depend on whether think it an important feature of human rights that they should be justifiable in terms that can be accepted by people from a wide range of social, political and religious backgrounds – or in other words that they should not be 'sectarian' in the sense of being acceptable only to people who already subscribe to liberal-egalitarian principles. Given the political role that Buchanan assigns to the human rights system (*'to provide a set of universal standards, in the form of international law, whose primary purpose is to regulate the behaviour of states towards individuals under their jurisdiction, considered as social individuals, and for their own sakes'*<sup>9</sup>) it seems that he should accept this condition. And indeed he shows he is sensitive to the danger of sectarianism by including, in Chapter 7, a discussion of the challenge that 'ethical pluralism' might pose to the human rights system. He regards it as important to show that the international legal human rights regime can be justified from the perspective of non-Western moralities. However he then goes on to characterise those moralities in a way that sidesteps the particular question under discussion here: he contrasts 'individualistic' with 'collectivistic' moralities on the basis of how far they value individual autonomy on the one hand, or the flourishing of relationships within groups on the other. He then goes on to argue, as others have done before,

that moral collectivists too should on balance value the protective role (for both individuals and groups) that human rights can play.

But the key issue for the present discussion is not collectivism in general but whether ‘basic status equality’ is a principle that all reasonable social moralities can accept. Here it is important not to conflate status equality as Buchanan understands it with moral equality – the idea that all human beings are of equal moral worth. Moral equality in that sense may indeed be an axiom that all reasonable moralities must include. But status equality is a different matter: it makes a claim about how societies should be constituted, namely in such a way that no group of individuals is regarded as having lower standing than any other group. The contrast here is with ideas of social order in which people occupy higher or lower ranks depending on features such as their gender, their inherited status, their occupation, their seniority, their religious affiliation, and so forth. Such orders are sustained by the claim that people belonging to every rank benefit when the hierarchy is maintained, because each person performs a function that suits their nature.<sup>10</sup> Although alien to contemporary liberals, such ideas have prevailed in most places throughout human history, and still prevail in many places today – especially in societies in which a religious establishment provides the backbone of authority. Where this is so, there will inevitably be a clash between local morality and human rights if it is indeed the case that international human rights entail status egalitarianism. Fortunately for human rights, this entailment does not hold, for reasons that I have already suggested.

The alternative is to justify human rights by appeal to human needs and human interests that are recognized as such in all societies, and indeed this is the kind of justification that Buchanan favours when he presents the ‘well-being function’ as that of securing the conditions for leading a minimally decent human life.<sup>11</sup> So why would it not be sufficient to ground human rights in that way?<sup>12</sup> Buchanan seems to think that doing so would severely reduce their content. At one point he says that removing the status egalitarian features of human rights would entail ‘a truly radical revision of international human rights law that amounts to eviscerating it’.<sup>13</sup> But this of course depends on whether we really need to appeal to the idea of basic status equality in order to derive a list of rights that comes close to those recognized in existing practice. Buchanan argues that a set of rights justified exclusively by appeal to the well-being function might grant some people more extensive or weightier rights than others. But this overlooks the fact that what human rights do in all cases is provide a *sufficient* level of protection for whatever basic need or interest is at stake – enough bodily protection, sufficient freedom of movement or expression, an adequate level of health care, and so forth. There will always be debate as to where the relevant threshold should be set, but whatever the answer turns out to be, respect for human rights demands that it be adhered to universally: the

state is obliged to provide everyone it is responsible for with the full roster of rights. Of course some states may choose to go further along one or more of these dimensions, supplying their citizens with additional levels of education, or health care, perhaps on an unequal basis, but this will not be a human rights concern: it will be a matter of social justice.

So to conclude: why is a mistake to present human rights as serving to promote status equality? I believe it ties them too closely to an ethical ideal that is powerful in the modern West, but is rejected elsewhere, especially in societies in which traditional religion plays a central role. The aim of human rights is not to revolutionise the social structure of these societies. It is to prevent their governments from persecuting minorities, locking up political dissidents, and so forth. Both the practice of international human rights and the justifying theories that we offer should reflect this modest aim, so that human rights cannot be written off as Western liberal dogma. We have other language with which to defend full equality for women, gays, ethnic minorities, and other disadvantaged groups.

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<sup>1</sup> Allen Buchanan, *The Heart of Human Rights* (New York: Oxford University Press, 2013), p. 32.

<sup>2</sup> Buchanan, *The Heart of Human Rights*, p. 28.

<sup>3</sup> Buchanan, *The Heart of Human Rights*, p. 88

<sup>4</sup> For his more extended critique of Griffin, see A. Buchanan, 'The Egalitarianism of Human Rights', *Ethics*, 120 (2009-10), 679-710. This is in response to J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

<sup>5</sup> Buchanan, *The Heart of Human Rights*, p. 37.

<sup>6</sup> Buchanan, *The Heart of Human Rights*, pp. 90-91.

<sup>7</sup> Buchanan, *The Heart of Human Rights*, p. 82.

<sup>8</sup> For the full statement, see Buchanan, *The Heart of Human Rights*, pp. 28-30.

<sup>9</sup> Buchanan, *The Heart of Human Rights*, p. 86

<sup>10</sup> This idea is famously expressed in one of Ulysses's speeches in *Troilus and Cressida*:

'O, when degree is shaken,  
Which is the ladder of all high designs,  
The enterprise is sick! How could communities,  
Degrees in schools, and brotherhoods in cities,  
Peaceful commerce from dividable shores,  
The primogeniture and due of birth,  
Prerogative of age, crowns, sceptres, laurels,  
But by degree stand in authentic place?

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Take but degree away, untune that string,  
And hark what discord follows.'

(K. Muir (ed.), *The Oxford Shakespeare: Troilus and Cressida* (Oxford: Clarendon Press, 1982), pp. 72-73.)

<sup>11</sup> It is also the route followed by many other philosophers writing on human rights, including J. Nickel, *Making Sense of Human Rights*, 2<sup>nd</sup> ed. (Oxford: Blackwell, 2007), C. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), J. Tasioulas, 'On the Foundations of Human Rights' in R. Cruft, S.M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015) and myself, 'Grounding Human Rights', *Critical Review of International Social and Political Philosophy*, 15 (2012), 407-27, significant differences between these accounts notwithstanding.

<sup>12</sup> In an earlier discussion, Buchanan seemed more willing to concede this possibility: 'The first five egalitarian items could perhaps be adequately grounded in instrumental considerations alone as providing valuable protections for individual well-being. Recognizing their role in safeguarding equal status augments the instrumental case for them, but it may not be essential.' (A. Buchanan, 'The Egalitarianism of Human Rights', *Ethics*, 120 (2009-10), p.688.

<sup>13</sup> Buchanan, *The Heart of Human Rights*, p. 143.