

1. Human rights: moral or legal?

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If we have reason to go beyond existing laws to give human rights their due, we also have reason to focus particularly on the importance of public reasoning. Indeed, public discussion is centrally important both for the recognition of human rights, and for their realization and advancement.

Amartya Sen, 2006¹

No one who is inspired by, or even just attracted to, the idea of human rights is likely to doubt that they have great moral significance. Human rights are generally understood as constituting the most fundamental and important moral claims that human beings can justifiably make on or against each other. This is manifest in the evident moral import of their standard content, as exemplified in the Universal Declaration of Human Rights and the numerous subsequent treaties and conventions.² Whatever else we may say about them, human rights carry a high moral charge. It is also generally accepted that human rights are indeed *rights*, rather than goals, values, guidelines or aspirations, in that they represent the most basic *entitlements* of all human beings and can, therefore properly be demanded or required rather than merely sought or requested.³

It seems apposite therefore that human rights be regarded as a class of *moral rights*, these being understood as morally justified claims on other people relating to the protection and furtherance of interests or autonomy of the rights holders. The distinctiveness of human rights within the

¹ Amartya Sen, 'Human Rights and the Limits of Law' [2006] 27 *Cardozo Law Review* 2913, 2927.

² Such as The International Covenant on Civil and Political Rights 1996, The International Covenant on Economic, Social and Cultural Rights 1996, The Convention of the Elimination of All Forms of Discrimination against Women 1979 and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

³ Thus, Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974); Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978).

category of moral rights is then traced to a combination of their universality and their overriding moral weight.⁴

The claimed universality of human rights is twofold. First, and generally agreed, human rights are said to be unconditionally possessed by all human beings everywhere and at all times. Second, and more contested, human rights are held against all other human beings, or at least all those capable of moral agency. One of the contested issues here is whether or not human rights claims are directed primarily and distinctively against states. It is certainly assumed that governments, in addition to sharing the universal correlative obligations of all moral agents, are the prime human rights abusers as well as the principal medium for the fulfilment of human rights obligations. States have a special role in the protection and promotion of the human rights of both their own citizens, and to some extent, the human rights of all human beings, present and future. Commonly, similar duties are increasingly laid on other powerful institutions, such as corporations.

The other standard distinguishing characteristic of human rights is their overriding moral importance, in that they take precedence over all other moral considerations, including other moral rights. Human rights are in a moral class of their own with respect to moral stringency, although in practice their enhanced moral weight varies from complete priority over all other considerations in the case of 'absolute' human rights, to a strong but nevertheless *prima facie* claim that can be overridden by incompatible morally powerful claims, not all of which are themselves human rights.

Putting the universality and the moral importance of human rights together in the context of government and politics, the non-violation and protection of human rights is taken to be a precondition of both the internal political legitimacy of all states and a precondition of the standard sovereignty right of nonintervention held by every state against all other states. In all this it is taken as a defining feature of a human right that its existence does not depend on any legal or other institutional recognition, or indeed on any social recognition, including that of the rights holders themselves.

There would seem to be no dichotomy here. On this orthodox or 'moralist' view, human rights are highly important and universal moral rights, which ought to be, but may or may not be, recognized in legal,

⁴ For such accounts, see James W. Nickel, *Making Sense of Human Rights* (Blackwell 2007) 22–34; John Tasioulas, 'On the Nature of Human Rights' in G. Ernst and J.-C. Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 25, 26–39.

political or social institutions. This accounts for their considerable moral clout in holding governments, corporations and courts to account, the justifications they provide for law reform and regime change, and their aura of superiority to ordinary political considerations. And yet despite the perceived attractions package, the moralist analysis of human rights is challenged both in terms of their standing as *moral* rights and in terms of their standing as moral *rights*.

The first challenge to human rights as moral rights is that human rights, even if they are correctly conceived of as rights, are not *moral* rights. This is argued on the grounds that human rights are paradigmatically an identifiable type of legal right. Thus domestically human rights are said to be the legal rights that feature in constitutional law to define and limit the powers of governments, especially with respect to the interests of minorities and the preconditions of democratic institutions. Internationally human rights are taken to be, in the main, rights the violation of which legitimates or requires, in international law, intervention in the affairs of sovereign states. The term 'human rights' is thus in effect shorthand for 'human rights law'. While there may be very good moral reasons for having such laws, these reasons are not themselves rights, and what there are very good moral reasons for having, is a type of *legal* or 'positivist' right.⁵

The second challenge to human rights as moral rights assumes that they are indeed moral in character but denies that they are *rights*. The argument is that to have a right is to have an officially or socially recognized entitlement to which appeal can be made and through which support is available for the protection and promotion of the interests or freedoms of the person who is the right holder. The status of so-called 'human rights' as *rights* is questioned because human rights are said to exist independently of whether or not they are socially or legally recognized, so that they exist whether or not they are there to be appealed to or to provide support for the so called 'right holder'. Despite their name, human rights may be no more than moral imperatives, goals, guidelines or aspirations, but they are not, in the distinctive meaning of the term, rights.⁶

The 'legalist' (or 'positivist') position is that the term 'human rights', when used in the moral mode, is a rhetorical device based on the

⁵ See, Tom Campbell, *Rights: A Critical Introduction* (Routledge 2006) Chapter 5.

⁶ These may be expressed in terms of interests, or needs or capabilities. For the last, see Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

extrapolation of the concept of rights from its distinctive role in social and legal discourse, which concerns socially recognized entitlements, to the sphere of activist political debate where it feeds off the confusion between rights that people do have and the rights that they ought to have. Claiming that human rights are rights all human beings have is a rhetorically powerful way of arguing for the creation and implementation of actual entitlements backed by some form of social or legal pressure which provide significant practical guarantees. On the legalist view 'human rights' in this rhetorical form are better regarded as fundamental moral values, such as human equality, dignity, wellbeing or autonomy, that ought to be protected through effective institutional arrangements, including the creation and implementation of certain universal rights. Calling these values 'rights' and suggesting that these rights exist, even when not recognized, may be a useful metaphor to adopt when promoting a moral case for the establishment of the real human rights which provide some guarantee of the protection and promotion of certain key human values or interests.

These challenges to regarding human rights as moral rights can be read as questioning the coherence of the very idea of moral rights. In its strongest form the challenge is that the term 'moral rights' is a contradiction in terms, unless what we mean by the term is 'the rights that ought to exist',⁷ or 'those interests that ought to be collectively protected',⁸ in which case they might be called 'proto-laws' or 'laws in waiting'⁹ or 'manifesto rights' or 'the permanent possibility of rights'.¹⁰ However if a so-called 'human right' is in actuality a moral proposition or judgement, then this does not in itself make it a right, and if it is a right, then it cannot be necessarily moral. The underlying thesis here is that rights are institutional creations and exist only when appropriate public norms are in place and operative.

The legalist contends that human rights are widely and reasonably understood primarily as a type of legal right, perhaps long established in domestic constitutions and increasingly within the sphere of international law. This is readily intelligible and much less mysterious than the idea of

⁷ David Miller, *Social Justice* (Clarendon Press 1976) 82: 'ideal rights' are 'derivative and strictly from an analytical point of view, misleading'.

⁸ J S Mill, 'Utilitarianism' in J. M. Robson (ed.), *Collected Works*, vol 10 (Routledge 1969) 250: 'when we call anything a person's right we mean that he has a valid claim on society to protect him in the possession of it, either by force of law or by that of education and experience'.

⁹ Sen (n 1) 2918.

¹⁰ Joel Feinberg, *Social Philosophy* (Prentice Hall 1973) 67.

socially unrecognized moral rights. Human rights, or something very like them, feature within traditional common law systems. They may be, usually under that name, part of justiciable bills of rights as a type of constitutional right. They are to be found in international law as key elements within international treaties, international institutions and international courts. In brief human rights are best identified as a category of legal rights, with particular legal functions and specific legal implications. Hence human rights are readily locatable within the domain of human rights law and human rights lawyers.

Should we be human rights moralists or human rights legalists? Are human rights the rights that we all have, or the moral rationales for the rights that we all ought to have? These conflicting perspectives set up the alleged dichotomy between human rights as moral rights and human rights as legal rights. Perhaps the dichotomy is beneficial since it exhibits a creative tension between the moral and the legal which we can put to good use in the practical world. Indeed is the whole human rights movement not about developing a morality that is focused on legal modes of achieving social progress? Or perhaps the core of human rights discourse should be conceived of as some sort of halfway house between morality and law, a combination of fundamental moral values and the institutional arrangements that facilitate these values. This might lead us to regard human rights as a political phenomenon, which can be distanced from both its moral foundations and its existing legal manifestations, so that human rights are political rather than either moral or legal.¹¹

Here I argue that the dichotomy between human rights as moral and as legal is real enough and does have important implications for deciding what is the best way of fitting human rights discourse into contemporary morality, law and politics. I suggest in particular that the dichotomy has significant implications for two related current issues. One is the ongoing debate about the democratic legitimacy of human rights-based judicial review of both legislation and the common law. The other concerns the need to develop other types of legal and political means for implementing human rights. In relation to these issues, I contend that the vacillation and tension between moral-form human rights and legal-form human rights generates a dangerous ambiguity which leads us to acquiesce in constitutional arrangements which are inimical to human rights values

¹¹ Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 321–38.

and also to underestimate the potential of non-legal mechanisms for the promotion and embodiment of human rights in our societies. In this case, the contemporary significance of the old dichotomy in question is that it generates a degree of troubling confusion between the moral and the legal. This confusion disguises crucial objections to some of the institutional arrangements that have been set up in the name of human rights, and detracts attention from important non-legal ways of realizing fundamental human rights objectives.

There is reasonable disagreement as to how this position is best conceptualized. There are some grounds for retaining the idea of moral rights as a form of justified moral demands not to wrong other people by unjustifiably damaging their interests. In this case it may be sensible to regard human rights as at base an abstract set of moral rights, albeit with major relevance to the creation and maintenance of certain legal mechanisms. To this extent there is force to the moralist view that human rights are a species of moral rights with a legal telos. This is contemporary philosophical orthodoxy.

Nevertheless, because of the confusion that is generated by the moral/legal ambiguity of 'human rights', on balance I prefer a legalist analysis in which moral-form human rights are at the most 'proto' or manifesto rights, communicating the idea of powerful moral claims for articulating more precise universal legal provisions, a sort of halfway house between moral values and fully formed rights. This is more intellectually satisfying from the point of view of conceptual clarification and more strategically effective than designing domestic and international legal institutions around a superficial epistemological consensus on a set of highly abstract moral affirmations, a practice which has the unfortunate effect of undermining the rule of positive law and confusing the role of political and legal institutions in a democratic polity.¹²

For these reasons it may well be best to adopt a rigorously Benthamite rejection of moral rights and dispense with moralist human rights talk altogether. The values affirmed in the contemporary human rights discourse can be expressed in terms of the values of equality, wellbeing, autonomy and justice, and decisions about how to turn these values into political policies and law reform measures can be hammered out through democratic processes and international diplomacy. Human rights as a type of law can then be conceived of as those legal provisions which are considered to be vital to the social and political embodiment of these

¹² See Tom Campbell, K. D. Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001).

basic human values. This is how we might interpret Amartya Sen's contention that 'human rights are best seen as articulations of social ethics' or 'ethical claims', whose 'functional usefulness lies in their role in practical reason'.¹³

1.1 LEGAL REDUCTIONISM

What I call the legal (or positivist) reductionist position on human rights is that human rights, like all rights, are to be identified with legal or socially recognized rights of one sort or another.¹⁴ In its most distinctive form, the legal reductionist view is that human rights law has distinctive legal functions, such as providing constitutional grounds for overriding legislation. A weaker version of legal reductionism is that human rights are ordinary legal rights, but with a particular content, dealing with such matters as discrimination, democracy and the rule of law. What both versions of human rights legal reductionism exclude is the idea that human rights can exist without legal or quasi-legal social instantiation, so that it makes no sense to say that there are moral human rights which provide the justification for having legal human rights. This is not to say that there cannot or should not be moral criticism of creating that sort of legal rights category, or of the human rights that are in place in a particular jurisdiction or within global institutions. It does mean however that this moral evaluation cannot or should not be articulated in terms of human rights as a type of moral rights.

The classic statement of this position is of course that of Jeremy Bentham. Bentham's famous dictum that 'natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts', rests on the view that all rights are legal or socially recognized rights.¹⁵ Bentham himself noted that there are good utilitarian reasons for having rights, but this does not mean that there are such entities as moral rights, unless we are talking about positive morality. He accepts that we can give meaning to the discourse of moral rights if we understand it as drawing attention to the moral reasons for having 'real rights'. This Benthamite analysis can be applied to human rights by

¹³ Sen (n 1) 2916.

¹⁴ See Derrick Darby, *Rights, Race and Recognition* (Cambridge University Press 2009) and Carl Wellman, *Real Rights* (Oxford University Press 1995).

¹⁵ Jeremy Bentham, 'Anarchical Fallacies' in J. Waldron (ed.), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen 1987), 53.

denying that human rights, in the moral mode, exist, but accepting that we morally ought to have certain universal legal rights where this is consequentially justified in moral terms.¹⁶

Rights on this view are socially or legally recognized and supported entitlements whose existence or non-existence can be established as a matter of fact. The question as to what rights ought to exist is another quite different matter. This means that it is a mistake to try to morally justify human rights, or indeed any rights, in terms of rights. Within a legal framework one right may be legally justified by showing that it is implied by another legal right, but this does not constitute a moral justification.

Thus within the legal reductionist model human rights may be characterized as instituted normative mechanisms for protecting and promoting some very significant moral values, such as human life, human dignity, and human happiness or human wellbeing. A common analysis is that human rights are the rights that are designed to protect and further basic human needs. How do rights do that? Well, they do so in the way that, distinctively, rights do what they do. Rules are accepted or created, expressing or establishing obligations that are non-optional or in some sense mandatory requirements as to how those addressed are required to behave towards each other. Where these rules mandate conduct that is generally beneficial for other people, then those other people may, dependent on the rules characteristically involved in such systems, claim or waive the fulfilment of the obligation, and/or call on, or have the support of others to bring about success in such claims that they choose to make.¹⁷ It follows that whether a right exists is a matter of institutional fact and precisely what having a particular right involves is also itself a matter of institutional fact.¹⁸ What then distinguishes human rights from other rights is their *de facto* normative priority and universal form, perhaps in conjunction with their particular legal function, as with interests or autonomy protecting constitutional rights.¹⁹

¹⁶ Jeremy Bentham, 'Nonsense Upon Stilts' in P. Schofield, C. Pease-Watkin and C. Blamires (eds), *Rights, Representation and Reform* (Clarendon Press 2004) 330.

¹⁷ Tom Campbell, *The Left and Rights* (Routledge 1983) Chapter 5.

¹⁸ Neil MacCormick, *Institutions of Law* (Oxford University Press 2007) 10–14.

¹⁹ This aspect of rights as a type of institutionalized norm, is nicely captured in terms of Raz's ascription to them of 'exclusionary reasons' which override the considerations which would otherwise be relevant to the issue in question: Joseph Raz, *Practical Reason and Norms* (Hutchinson 1975) 35–45.

Intellectually the legal reductivist (or positivist) analysis claims to capture what is distinctive about the language of rights. One way of demonstrating this distinctiveness is that legal reductivism enables us to distinguish having rights from being right. Thus, just because I have a right to have or do something, it does not mean that I am right to have or do it.²⁰ If I have a right to spend my money on fast cars and new golf clubs that does not mean that these are the right things for me to do. Conversely, but not perhaps so evidently, if it is right for me to have or do something, this does not mean that I have a right to have or do it. It may be right, on some occasions, for me to use your umbrella without your permission but this does not mean that I have the right to do so. Certainly rights enter into the consideration of what it is right to have or to do, but rights are simply one sort of consideration that relates to the question of what it is right to have or to do. So what sort of consideration is that? The best answer is: an entitlement. Rights constitute that which the right holder is entitled to have or to do. That answer does not help much in distinguishing right from rights if what we are entitled to do is equated with what it is right to do. But it does help if by 'entitled' we mean conforming to a set of authorized or accepted existing rules which indicate what those to whom they apply may or may not have or do. I have the right to give away my golf clubs because they are my golf clubs in terms of the existing authorized rules of property that apply to me. Whether I am right or wrong to do so is another matter.

Building on such basic distinctions we may contend that legal rights provide the paradigm of rights in general, for legal systems are the most evident locus of existing and in some way authorized rules, some of which clearly create entitlements. And it is with respect to legal rights that we can most readily express the truism that just because you have a right to have or to do something this does not mean that you are right to have or to do it.

Even if legal reductionists have a compelling case to offer about the distinctive role of rights, it would appear that by using legal rights as the paradigm of what rights are, they are caught by the objection that legal rights are just one sort of right. If there are legal rights this suggests that are non-legal rights as well. And these non-legal rights may turn out to be, for instance, moral rights. However a more convincing alternative is to understand non-legal rights as related to rules which are established norms in a particular community or society. In any actual society, although more in some than in others, there are a plethora of rules that

²⁰ Jeremy Waldron, 'A Right to do Wrong' (1981) 92 *Ethics* 21–39.

are generally accepted as constituting acceptable behaviour in a society or social group, which constitute a whole range of entitlements, although they are not formalized in a set of social institutions which identify, apply and enforce the norms in question. Rather, these non-legal rules exist in the consensus of a social culture and are manifest in the expectations and practices, in particular the phenomena of praising and blaming others for not doing what they are meant to do in accordance with the practices of that collective, and through their socially formed conscience, praising and blaming themselves.

There are therefore non-legal socially grounded rights and these are often referred to as 'moral rights', although to avoid confusion it might be better to think of them as social (as opposed to legal) rights. Or, since this is somewhat ambiguous (as between 'social' in the sense of socially accepted and social in contrast to economic or political), I prefer the neologism of 'societal rights' to cover the socially but not legally recognized rights creating rules that we have in mind here. This 'positive' (or 'positivist') morality is logically similar in its meaning and operations to 'positive' (or 'positivist') law. Maybe indeed it is the existence and individual internalization of societal rights that leads us to the very different view that there are rights which exist in a pre-social world. One thing is clear however: these societal rights are not moral rights of the sort that is meant by those who insist that human rights are moral rights. What the human rights moralists have in mind are rights that people have even if they are not recognized or acknowledged either as societal or as legal norms.

There is certainly sufficient formal similarity between legal and what I have called societal rights for us to accept the latter as a type of rights. Thus the famous and enduring Hohfeldian categorization of jural relations into privileges, or pure liberty rights, claim rights which have correlative obligations, either negative or positive, along at least with some features of immunities and powers, are clearly present within societal norms, such as promise keeping, which may be very clear as to precisely who has an obligation to do precisely what for precisely whom. Moreover there are sufficient similarities in content for us to see societal rights in a social continuum with legal rights, which is particularly clear in the affinity between customary morality and customary law. It is usual for societal rights to be used as a basis for the introduction of equivalent legal rights, often simply because having legal rights will promote the clarity and effectiveness which may be lacking in societal rights. In this conceptual scheme so-called moral rights when understood as societal rights, may indeed feature as grounds for adopting legal rights when

indeterminacy of content or lack of compliance undermines the functions of societal rules.²¹

Moreover those who are supportive of human rights are generally keen to see these rights embodied in what may be called common morality as well as, or indeed sometimes in preference to, legally binding norms. This is because public or common opinion is often a more effective means of controlling behaviour than often unenforced legal requirements. Modern industrial societies have more need of legal norms as their moral consensus breaks down in the face of new cultural pluralities within polities. This raises important considerations for the determination of what sort of rights (societal or legal) best promote human rights, but it does not involve the sort of universal and pre-societal rights that are contrasted with positivist rights, societal or legal.

In summary the legal (or positivist) reductivist position is that all rights, or at any rate, all real or actual rights, as distinct from imagined, projected or metaphorical rights, are institutional or culturally embedded entities, so that there can be no such things as human rights if these are defined as rights which exist independently of social or institutional recognition. This leaves it open for legal (and societal) reductivists to identify moral and therefore human rights normatively as the rights that all people morally ought to have. These may then be identified in terms of a variety of criteria, such as moral weight, or particular types of moral justification, such as welfare, equality, justice or respect. Additionally or alternatively human rights as legal (and societal) rights might be distinguished by their particular legal (or social) function, as in justiciable bills of rights or international conventions with particular types of enforcement mechanisms. In neither case, nor any of their combinations, need moralist-type moral rights feature. From this perspective it is the legal function which dominates and human rights are featured primarily as a type, or a bundle of types, of law and social conventions.

1.2 MORAL REDUCTIONISM

‘Moral rights reductivism’ is less radical than legal (or positivist) reductivism since moral reductivists do not dismiss the conceptual coherence of the idea of legal rights. Moral reductivists simply want to vindicate the conceptual and epistemological independence of moral

²¹ H. L. A. Hart, *Essays on Bentham* (Clarendon Press 1982) 86–93.

rights and the normative priority of human rights as moral rights. Moral reductivism asserts the primary status of human rights as important universal moral rights. In the sphere of human rights, moral reductivists claim a definite priority for understanding human rights as moral rights, taking the view that human rights are to be identified and interpreted in terms of their moral existence not with respect to any existing set of societal or legal rights. Human rights are never reducible to the legal rights that we ought to have, they are rights that we all do have by virtue of our humanity. According to the moral reductivist, human rights may be implemented in many different ways, including what we call human rights law, but they exist independently of that law or other societal or cultural norms, and provide the justification for a wide range of practical implementation. So for the moral reductionist no legal right is a human right simply because it features in a particular legal form, such as a bill, charter or convention of rights. Whether a right is a human right is a moral not a factual question and is to be determined by moral reasoning not by institutional arrangements. This is regarded as the orthodox philosophical position.²²

In so far as moral rights reductivists are only seeking to defend the proposition that there are such things as moral rights, they would appear to be on strong ground. Moral rights look like an integral part of our moral vocabulary, in that we ordinarily use the terminology of rights in non-legal contexts. It is neither awkward nor opaque to say that a good worker has a right to a day off even where there is no law requiring this, and no such customary expectation. Nowhere is this more evident than in the discourse of human rights. We understand what it means to say that human beings have the right to life, whether or not their lives are in fact valued or protected by others or indeed by themselves. We object to how some governments treat their citizens, and how some citizens treat each other, because of the moral rights these people have, without relying on the prior existence of any positive rights. That is the moral talk, the moral insight, on which the whole human rights movement and the justification of its institutionalized forms rest. One purpose of human rights law for instance is to give effective recognition to or implementation of the rights, the moral rights, that we already have, and always have had, even when the concept of human rights did not exist, at least in the human mind.

²² Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 7–13.

This approach is backed up by the fact that there are, within human rights discourse in both a historical and contemporary context, elements which do not fit easily into the simple picture of legal reductionism. Thus there is a standard position on political obligation according to which governments gain or lose their legitimacy accordingly as they respect or violate the human rights of their citizens. On this view, for instance, legal rights are not morally binding if they needlessly conflict with human rights. According to the traditional human rights theory of political obligation human rights are the rights violation of which releases members of a society from their normal moral obligation to obey all the laws of their state, even those laws with which they morally disagree. This is a limitation that has been applied to all human sources of law: be they courts or legislatures.²³

Similarly there is the easily intelligible role of human rights in the articulation of the limits of state sovereignty, as with the view that violations of human rights by a state limit the application of doctrines of nonintervention in the internal affairs of other states by justifying what is now called humanitarian intervention. This may now be part of international law, but it is also commonly and understandably presented as a moral human right deriving from an overriding moral duty to protect human rights universally.²⁴

All this can be analysed in terms of a conceptual scheme within which a (justified) moral obligation, grounded in protecting or promoting the interests, wellbeing or autonomy of another person, correlates with the 'right' of that other person to receive the benefit in question, and usually to demand or waive the performance of that obligation. The penumbra of implications that surround such non-institutional rights derive mainly from the bare meaning of 'morally ought'. However, it is difficult to argue that all moral 'oughts' correlate with rights in any distinctive sense. To be a necessary ingredient in the analysis of a right the 'ought' in question would have to go deeper than supererogation to reach that which is morally mandatory in a way which can be explicated in terms of the blameworthiness of non-compliance, in contrast to acts and omissions

²³ This may be traced back to John Locke, *Two Treatises on Government* (Peter Laslett (ed.), Cambridge University Press 1988). See also James Griffin, *On Human Rights* (Oxford University Press) 246; Allen Buchanan 'Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 79–96.

²⁴ Charles Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 128: 'Human rights are standards for domestic institutions whose satisfaction is a matter of international concern'.

which are praiseworthy but are not morally required. It would also have to enable us to distinguish those mandatory 'oughts' where failure to comply with the moral imperative 'wrongs' other people in the specific sense of a failure to do that which is in some way 'owed to' the right-holder.²⁵ If this can be done, then there is some basis for believing in the existence of non-institutional claim rights which are moral, as distinct from legal or societal.

Moreover it can be argued that rights of this sort exhibit the same idea of 'the right to do wrong' that I earlier associated with the legalist view of rights but is also present in the realm of societal morality in which the discourse of owing and debt exists as an institutional fact. Only in this social context could it be the case that those harmed by the omission in question (and the same story can be told in terms of commissions) can be said to be correctly resentful at being wronged by non-compliance with the correlative ought and are not remiss if they fail to express gratitude when there is conformity, as is associated with the idea of entitlements.

From there on the moral reductivist's task is to identify what distinguishes human rights from other moral rights, and it is here that the criteria of universality and moral importance feature. At this point other considerations crowd in, particularly in relation to the determinants of moral importance or moral weight. This takes us to the vast literature that seeks to ground non-institutional human rights in terms of human interests, needs, autonomy, dignity and suffering. Where these considerations are drawn from theories of human nature, there is a connection with the older tradition of natural rights, although human rights are more commonly related to human capabilities, potential and wellbeing, given that it is now recognized that there is no clear connection between what occurs naturally or in nature and what grounds our strongest mutual moral obligations.

This is contested territory for philosophers who in their attempt to explicate the idea of human rights look for a common moral or valid basis for all the rights that they think should be considered as human rights. Here human rights are not defined institutionally, but in a more detached conceptual and moral manner as the fundamental rights that all human beings do have, independently of any positive rights that may or may not exist. At this point, we enter a mass of seemingly irreconcilable disagreement. The most philosophically popular version is that derived

²⁵ Leif Wenar, 'Rights and what we owe to each other' (2011) 8 *Journal of Moral Philosophy*.

from Immanuel Kant and exemplified by Alan Gewirth²⁶ and James Griffin²⁷ in terms of moral agency, as the distinctive human characteristic on which the high and equal worth of all human is based, with basic material requirements featuring simply as the necessary conditions of being able to act a moral agent. This can be used to give some content to the otherwise intangible concepts of respect and dignity, thus removing them from their unfortunate hierarchical flavour. At the other extreme we can draw on the idea of negative utilitarians who make the relief of suffering the prime basis of human rights, with civil and democratic rights being valued as essential instruments for the amelioration of distress.²⁸ Although tidy minded philosophers may despair about the ongoing disagreement of the moral foundations of human rights, some comfort can be taken from the fact that many such rights would appear to be justified on both types of grounding with the clash of basic values coming to the fore at the peripheries rather than the core, at least of minimalistic versions of moral human rights when expressed in very general terms.

On this basis, human rights morality can be used to criticize not only human conduct in general and state conduct in particular but human rights institutions including human rights law, thus establishing the normative priority of moral-form human rights over human rights institutions and human rights laws. This may not be fully reductionist but it establishes the philosophical pecking order of human rights morality over human rights law, a prioritarian rather than a reductivist account. Further it sets out fundamental principles for deciding what are our moral human rights and a moral basis for tackling the implementation of these fundamental values in social and political practice through cultural change, new legislation, constitutional protections, international organizations and personal conduct.

1.3 COMPROMISES AND AVOIDANCE STRATEGIES

As presented so far, it would appear that moral reductionism (or prioritarianism) comes out on top as far as human rights are concerned. Indeed it might seem futile to argue that we should altogether dispense with the discourse of moral rights including moral human rights. Perhaps

²⁶ Alan Gewirth, *Human Rights* (Chicago University Press 1978).

²⁷ Griffin (n 23).

²⁸ Tom Campbell, 'Humanity Before Justice' (1974) 4 *British Journal of Political Science* 1–12.

the best thing to do would be to distinguish clearly between moral human rights, as rights established by moral argument, and societal and legal human rights, as established in social practice or positive law, and then discuss how moral-type human rights are or should be related to legal human rights, while acknowledging the justificatory priority of the former over the latter, and at the same time bringing out the practical advantages of the latter.

The simplest compromise is to say that moral human rights are fundamental moral reasons for establishing legal rights, and perhaps also societal rights in the form of normative social expectations. This means that human rights are essentially moral in character, encapsulating the idea of a common duty to protect and promote certain fundamental human interests, but doing so primarily by establishing positivist rights in law and normative social consensus concerning acceptable interpersonal conduct, perhaps focusing on a particular type of law, involving for instance constitutional guarantees as articulated and enforced by courts or international organizations.

We might give legal reductionism its limited due by conceptualizing human rights as moral truths which serve the function of justifying legal and societal human rights, or combine the two modes by saying that a human right is a legal right that is justified by a moral human right, or even that a human right is a legal right (1) with particular functions (say overriding other legal rights or legitimating intervention in the internal affairs of a sovereign state)²⁹ and (2) that is justified by a moral human right.³⁰

However it seems unduly restrictive to confine the role of moral human rights to the justification of legal rights. Also perhaps it too readily concedes that real rights are legal or societal rights since so-called moral rights are rights only in the derivative sense that they justify these rights. Neither of these implications will be welcome to the moral reductionist who is keen to establish the practical significance of moral human rights far beyond the enactment of certain legal rights, and who sees legal rights as being just one instrument for the realization of the more ontologically basic moral human rights. The human rights as moral reasons compromise seems rather one sided to the advantage of the legal reductionist.

Perhaps this could be remedied by identifying moral human rights with particular sorts of reasons for establishing, maintaining and implementing

²⁹ Beitz (n 24) 128–36; Raz (n 11) 327–32.

³⁰ John Skorupski, 'Human Rights' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 357–73.

legal rights of one sort or another. This takes us back to the philosophical debate which endeavours to identify a special moral consideration as representing the moral point of human rights. Here the most evident contention is between utilitarianism which is usually presented as being incompatible with human rights morality because it calls for disproportionately sacrificing the wellbeing of some individuals for the greater good of the majority of persons. This problem is mitigated but not entirely avoided by rule utilitarianism which can be presented as justifying human rights because it commends the adoption of positivist general rules compliance which maximizes the wellbeing of all, and in theory prevents the exploitation of individuals for the benefit of others.³¹

Assuming that utilitarianism is, for these reasons, unacceptable as a moral basis for human rights, this may explain the tendency to associate rights with deontological moralities relating to intrinsic non-consequential understandings of the value of such things as human freedom, autonomy or agency, thus explaining the persistently close association between intuited moral imperatives and moral rights, particularly when these are seen as fulfilling the function of limiting the scope of utilitarian considerations and so protecting the interests of vulnerable minorities.³²

If something like this can be worked out, then the desired compromise position could be rendered more plausible in that it provides a moral reason why human rights provide justifications for having societal and legal rights that are focused on protecting the autonomy of individuals against the oppression of governments, including democratic governments, which are often seen as threatening the wellbeing of members of culturally minority groups. This could explain the association between human rights and the limits of democratic governance. This comes out most clearly in rights which protect individuals from arbitrary arrest, torture, and interference with their family, religious and private life. Here there seems to be ground for intuiting self-evident moral rights, such as rights not to be detained without trial, tortured or forbidden to practise a religion.

There are however relatively few self-evident moral prohibitions of the sort which fit this form of the compromise model for the moral and the legal elements within human rights. Working on the basis of a list of human rights more or less based on the Universal Declaration of Human

³¹ David Lyons, *Forms and Limits of Utilitarianism* (Oxford University Press 1965); R. B. Brandt, *Morality, Utilitarianism, and Rights* (Cambridge University Press 1992).

³² Dworkin (n 3) Chapters 5 and 7.

Rights, as most moral philosophers do, it is apparent that there are a wide variety of moral considerations that could serve to justify their abstract statement and guide us towards their more concrete articulation (although Griffin argues that all human rights derive from personhood³³). Even if social and economic rights are excluded, it seems clear to many people that the relief of suffering is at least a contributory moral reason against imprisonment and torture and that most civil and political human rights are in part valued because they empower the rights holders to protect interests that range far wider than such considerations as moral agency.

The difficulty of obtaining a global consensus, or even culturally localized agreement, on such matters is one reason why there has recently been a move towards adopting 'political' theories of human rights, particularly with respect to the sphere of international human rights. Here we have an interesting development which provides another sort of compromise outside the boundaries of the dichotomy between moral and legal rights. Thus, Charles Beitz seeks to escape the tangle of philosophical debate over the foundation of moral rights and concentrate instead on the practice of human rights as it has developed since 1946.³⁴ This involves distancing current human rights from the natural rights tradition, on the grounds that human rights are not based on any particular view of the human nature or human agency. Here there is no reliance on a common conception of humanity or the human person. Such deep moral foundation issues are bypassed by going straight to a description of the contemporary practice of human rights discourse. There, human rights are seen as being more specific and more varied than the shorter list of natural rights that was used to limit and overthrow oppressive monarchical systems.³⁵ Beitz concentrates on contemporary human rights doctrine as elaborated in covenants and conventions and supplying the norms of an increasingly elaborate global practice. Underlying this emerging practice is a 'global normative order' for which human rights serve as the background norms by providing criticism and support for a variety of human rights regimes.³⁶

In avoiding dependence on the basic values underlying the idea of human rights, this political account of human rights appears to endorse legal reductionism, the law in question being the international law of human rights, particularly that part concerned with the legitimacy of

³³ Griffin (n 23) 33–7.

³⁴ Beitz (n 24) Chapter 5.

³⁵ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

³⁶ Beitz (n 24) 209–10.

intervention in the affairs of sovereign states.³⁷ However while Beitz points to the emergence of the legal recognition of rights and duties as part of human rights practice he does not identify human rights with human rights law, on the grounds that human rights questions are not settled by an appeal to law. Indeed he explicitly rejects the conceptual need in human rights practice for an institutional capacity involving authoritative adjudication and enforcement. Rather human rights practice is a discursive process concerning the legitimate interest that states take in how each treat both their own citizens and foreign nationals. In this field the practice has emerged in the form of states making claims, which are regarded as legitimate, about matters of concern relating to how other states treat their citizens. However this is as much a political as a legal process, leading to such strategies as conditionality on human rights compliance in international trade agreements and the use of diplomatic persuasion as much as economic and military power.³⁸

Such political theories of human rights could be viewed as representing a third way, either as a compromise between or as a replacement for the moral versus legal debate. As such they have many attractions, including the focus on the practicalities of international law and the primarily political nature of the international normative order as it currently exists. Further the political approach can draw on the diversity of goals it sets for human rights doctrine and practice and the appropriate diversity of methods, legal and otherwise, which can take us incrementally towards these goals. This seems much more useful than searching for a monistic theory that identifies in the abstract the moral basis of human rights as a whole, using foundational concepts such as dignity, agency or equality.

On the other hand, in practice the political approach goes far down the path of identifying human rights with a bundle of morally relevant considerations that have bearing on, but are not decisive about, the ways in which international relations ought to be conducted. This undercuts the hoped-for powerful moral imperative present in human rights discourse. It therefore fails in relation to the paradigm of creating morally overriding legal rights, as Beitz seems to admit by embracing Feinberg's 'manifesto' analysis of human rights. Although this 'manifesto' analysis

³⁷ Developed from John Rawls, *The Law of Peoples* (Harvard University Press 1999).

³⁸ Beitz (n 24) 198–201.

can be action guiding and brings the ‘possibilities of right’, in practice it sits loosely and indecisively on the available practical alternatives.³⁹

1.4 QUALMS AND ALARMS

Abstract discussion of the existence and nature of moral rights may seem to reduce important moral and political issues to a semantic quibble. If human rights have great moral significance, then why not just concentrate on their implementation without fussing about whether they are actual, or metaphorical, or manifesto, or real, or rhetorical rights? That is a common and understandable activist point of view, and there is much to be said for such robust common sense. It is not language, but outcomes that matter. Yet even if we take this no-nonsense line, we come up against the important fact that sorting out our language affects our thinking about and hence our confidence in human rights as a practical discourse. It remains important therefore to consider some qualms and alarms that arise from about thinking of human rights as a form of moral rights.

1.4.1 The Idea of Moral Rights is Dispensable

If the concepts of right and wrong and good and bad are sufficient to express non-institutionalized moral relationships, then we do not need the concept of rights until we come to the idea of institutionally rule-governed conduct, when we do need to distinguish between rights and right. Deploying a conceptual version of Ockham’s razor, if we do not require the term rights in a non-institutional context, then we should drop it. Putting it another way, if we seek clarity, we ought to keep a term, like rights, for its distinctive meaning and uses and resist conceptual expansion and verbal colonization, where possible.

Earlier I accepted that there is some basis for using the idea of moral rights to distinguish those oughts that are directed to and justified by serving the interests of another person and those that are not. However maybe all the moral oughts concerning our relationships with other people terminate, as it were, in protecting or promoting the interests of those other human beings or sentient creatures. It may be helpful sometimes to distinguish obligations which are directed at the wellbeing of particular persons rather than people more generally, but this is also a distinction that operates within rights, for some are individual rights and others collective.

³⁹ Feinberg (n 10) 67, 95.

This analysis of moral oughts may be thought to presuppose extreme utilitarianism, but in fact the most deontological of moral obligations have to do with interacting with others so as not to cause harm, the main distinction between deontology and utilitarianism being between making moral judgements on the basis of the immediate or intrinsic harm of the act in question (deontology) or on the basis also of the harm caused by consequences beyond the act itself (utilitarianism). The search for a special kind of rights, identifying other regarding 'oughts', perhaps in terms of 'wronging' or 'owing' (as distinct from attaching different moral weight to different outcomes), is ongoing but typically unclear and indecisive. So while the label 'moral right' may be given on an ad hoc basis to certain nuances within moral discourse, we can readily do without it until we come to the moral significance of the role of societal or legal rules that provide a basis for turning 'oughts' into obligations, some of which involve correlative rights, in the ways we have explored above.

Yet perhaps we need rights in the terrain of non-institutionalized human relations because without a right holder there is no way we can express the normative relationship whereby one person can require or waive the performance of an obligation. One trouble with this is that not all rights have these mechanisms involved and most times they are not focal to the practical issues involved. There are children's rights, animal rights and absolute rights. So claiming and waiving, useful as they may be in securing interests, are separable from rights in general.⁴⁰

This at least raises doubt as to whether we need the term 'moral rights' to identify a distinctive sort of morally desirable human relationship, which prepares the way for more substantial anti-moral rights considerations, and may help to undermine the unfortunately common assumption that legal human rights can only be morally justified by an appeal to the questionable concept of moral rights.

1.4.2 The Idea of Moral Rights is Dysfunctional

The idea that moral rights are not only dispensable but also dysfunctional is based on the view that a prime function of rights is to settle social and political disputes in a practical way so as to further cooperation and enable orderly and mutually beneficial relations between persons who are

⁴⁰ See Neil MacCormick, 'Rights in Legislation' in P. M. S. Hacker and J. Raz (eds), *Law, Morality and Society* (Clarendon Press 1977); M. H. Kramer, N. E. Simmonds and H. Steiner, *A Debate over Rights* (Oxford University Press 1998).

in regular conflict with each other. Moral rights do not serve this function well because they represent independent and individual moral judgements rather than mutually recognized standards of conduct. Appeals to moral and therefore unrecognized rights tends to exacerbate rather than solve the problems of cooperation, social organization and harmony. Moral rights are dysfunctional because they generate confusion and controversy rather than cooperation.

It may be argued that this is not necessarily so, for in a highly customary society where there is considerable agreement between individuals as to their moral relationships, moral rights can fulfil the required social functions. Shared customary practices may be ideally suited to these purposes. However in that situation, where there exists a commonality of normative requirements, what we are dealing with are societal rules, which through their wide acceptance and recognition as the norms of the collective in question do generate what are perceived as legitimate entitlements. Hence the language and logic of rights is functional and appropriate. This is not the case however with contemporary morally oriented discourse of human rights. As rights which exist whether or not they are recognized moral rights, they cannot serve the social functions of standard and distinctive rights discourse. In other words, moral human rights are simply not fit for the purposes characteristically served by rights.

More particularly, the sort of moral rights that are seen as human rights are characteristically highly abstract norms, expressing the demand for such goals as life, freedom of speech, and a minimally decent standard of living. These provide some orientation, but when it comes to the detail of practical decision making and establishing correlative duties, disagreement and conflict are generated rather than consensus and cooperation. This is due to reasonable disputes as to what such abstract rights require by way of actual practice with respect to the concrete obligations of specific persons and agencies. Moral disputes in the language of moral rights encourages the exchange of claimed absolutes which are self-evident to their believers and taken to be overriding of other moral considerations, and thus not amenable to compromise and further debate in terms of their precise content and anticipated further consequences. And so we get the absolutisms and intransigence of zealous human rights fundamentalism⁴¹ and ineffectual 'transcendental theory'.⁴²

⁴¹ David Kinley, 'Human Rights Foundationalism' (2007) 29 *Sydney Law Review* 55–75.

⁴² Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 10–16.

1.4.3 The Close Juridical Associations of Rights Talk

Presently, while law does not have a monopoly of the language of rights, in contemporary cultures their legal associations are so strong and pervasive that the idea of human rights is readily captured by law and lawyers to the point where its telos is located in legal instruments rather than human outcomes and in legal rather than political process. Rights of any importance are seen as lawyers' business and serve as a counter rather than an inspiration to political process. This can be seen in the difficulty that many people have in dissociating human rights from constitutional provisions (whether or not they are entrenched) involving human rights judicial review, and the increasing association of the very idea of human rights with specific arenas in international law.

There are two problems with this legalization of moral-form human rights, particularly the non-democratic constitutionalization of the political discourse of rights. The first is that it detracts attention from the essentially political nature of human rights and their role in promoting political mobilization, widespread popular debate and deep cultural change, and particularly in relation to constitutionalization, the neglect of human rights as the basis for the political enactment of ordinary legislation that promotes human rights objectives.

A second problem with presenting human rights as a species of moral rights is that it leads to the juridification of human rights in that turning the moral principles embedded in human rights into specific mandatory requirements enforced by law is made the responsibility of courts rather than parliaments and public discourse.⁴³

James Nickel is right to point out that there is nothing in the concept of a right that requires them to be determinate, specific and explicit with respect to their scope and their correlative obligations.⁴⁴ It is however an important element in the rule of law, that the mandatory rules which all citizens must obey and work within are as clear, precise and intelligible as is reasonably possible. Nothing of this sort can be said about standard moral-mode human rights such as we find in declarations, conventions and charters. There is of course some specificity to be found in human rights law, but this is largely the consequence of incremental decision making of courts which inevitably involves a degree of moral choice and

⁴³ Tom Campbell, 'Parliamentary Review with a Democratic Charter of Rights' in Tom Campbell, K. D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 453–71.

⁴⁴ Nickel (n 4) 21–3.

political balancing that runs counter to the supposed separation of powers within a democratic system of government and is far removed from the idea of human rights as part of a discursive process for rendering human rights moral obligations more concrete through a public deliberative process engaged in by those whose interests are at stake.

In defence of juridification it may be argued that higher courts must routinely engage in moral reasoning within the bounds of precedent in order to apply general rules to particular circumstances. This is indeed often the case although not in itself an argument for encouraging vague and ambiguous legislation. However it creates no major political problems where there is legislative review of such judicial lawmaking. Moreover arguably human rights (as distinct from the earlier tradition of natural rights) are a halfway house in that they are at least sometimes reasonably precise statements of the interests that are to be protected,⁴⁵ particularly if we take into account the instruments of international law developed through the United Nations in various treaties and conventions, and include the jurisprudence of the European Convention on Human Rights.

With bills and charters, courts do not have to start by identifying the rights which all human beings have in virtue of their humanity or some such abstraction. This would raise the awesome and challenging task of what we all owe to each other independently of the customs, culture and laws of actual human societies. Courts are however presented not with general moral principles but with references to the reasonably concrete human needs and conditions requiring special protection: life, speech, subsistence, movement, freedom from torture, from arbitrary arrest, retroactive laws, and so on. It can rightly be claimed that human rights are more 'numerous and specific' than old style natural rights.⁴⁶

Nevertheless this relative specificity is largely the result of developing human rights through precedential reasoning that is only loosely connected with the original legal texts and arrived at through a form of argument that is ill adapted to the sort of moral reasoning that is appropriate to translating moral principles into rules capable of providing decisive outcomes in concrete cases. Human rights as we currently understand them represent a variety of important moral values, which all point us in the direction of doing what we can to preserve and support life, speech and choice, and reduce poverty, suffering and injustice, but there are major substantive questions which remain as to the scope,

⁴⁵ Richard Arneson, 'Against Rights' (2001) 11 *Philosophical Issues* 12–20.

⁴⁶ Nickel (n 4) 10.

exceptions, priorities and allocations of responsibility. Nickel concedes this but contends that human rights should be kept to a moral minimum so that they 'leave most political decisions in the hands of national leaders and electorates',⁴⁷ a comment that alerts us to the unconcealed assumption that determining the content of human rights law is considered to be a legal rather than a political matter.

An alternative view is that human rights are indeed an intermediary form of moralized political discourse and that it should be left to the democratic process to determine their legally binding implications. Moral-form human rights take us into the realm of politics where we have to decide not our private moral convictions but what coercive requirements are to be imposed on other people. We have a well-established way of dealing with moral disagreement, called democracy: a device and culture through which we settle differences of opinion about required conduct by discussion on the part of those affected by the outcome in question, mutual persuasion, available information and ultimately voting. Associated with the idea of rule through law in the form of specific and clear general rules, this provides a basis for the adoption of morally justified rules, some of which take the form of positivist rights which can function reasonably well as the framework for an orderly social life.

1.5 CONCLUSION

Having qualms and raising alarms about regarding human rights as a type of moral rights does not imply that human rights are best regarded in a purely positivist way in terms of existing societal and legal rights. Instead we should view human rights primarily as affirmations of fundamental social and political human values and hence as a moral concept which carries important implications for law making and less formal social reforms. Human rights prompt us to change social attitudes and cultures as well as enact laws and develop effective policies, particularly those which counter non-democratic political processes and mobilize dissent with respect to grievous political wrongs.⁴⁸

Here I follow Amartya Sen in suggesting that we think of human rights as a form of ethical discourse that functions as a benign political

⁴⁷ Nickel (n.4) 143.

⁴⁸ Tom Campbell and Nicholas Barry, 'Towards a Democratic Bill of Rights' (2011) *Australian Journal of Political Science* 74–86.

influence, helping us to combat grave injustice and oppressive government. In his words: 'I would argue that human rights are best seen as articulations of social ethics, comparable to – but very different from – utilitarian ethics. Their functional usefulness lies in their role in practical reason.'⁴⁹ Sen sees human rights as a dialogue about freedoms. This is too narrow a view given the moral unacceptability of unnecessary suffering, but the precise scope of human rights is one of the matters which need to be followed through in the dialogue of practical reason rather than solved by abstract philosophical debate.

I am also very sympathetic to another of Sen's contentions, namely that there are routes other than legislation that follow from taking human rights seriously. He mentions the 'high profile social recognition' that follows from the affirmation of human rights, and the 'active agitation' that is motivated and guided by it. However his discursive idea of human rights as those ethical demands on others that withstand public global scrutiny, suggests that their continual formulation and reformulation are best seen as directed at identifying government responsibilities, both with respect to legislation and to the setting and implementation of policies. In the domestic and regional sphere at any rate human rights are human rights precisely because they call for the sort of political guarantees for the attainment of which rule via positive law and full democratic debate and decision making are necessary preconditions.

Not much by way of human wellbeing may seem to depend on the conclusions we reach as to whether or not human rights are a type of moral right, or whether there are such things as moral rights at all. Yet these are no mere semantic matters. What is at issue is the quality of political debate and decision making about what rights we, or others on our behalf, should adopt and implement in practice. For this purpose we need clarity as to the nature of the moral choices that confront us in the political domain. From this point of view it is better not to think of human rights as a type of moral *rights* but as a politically relevant cluster of important moral *values*.

⁴⁹ Amartya Sen (n 1) 2917.