ABSTRACT. It would seem that we in the West are suffering from an increasing glut of rights. To the sixty-odd human rights that the Universal Declaration and its Covenants have long given us, must now be added the particular rights claims of an increasing number of ‘oppressed’ minorities, claims to compensation rights for just about every conceivable harm done and claims to ever more trivial things. This tendency is harmful insofar as it trivialises rights and devalues the coverage of rights. Human rights are fundamental and ought to be protected from these tendencies. Using an analysis of the foundations of human rights, and their function in maintaining autonomy in particular, this article analyses the content of rights – what must be fulfilled in order for a right to be protected – as a means of demonstrating the possibility of reducing the volume of rights without reducing rights coverage and of creating a defensible hierarchy.

KEY WORDS: autonomy, contents, foundation, hierarchy, rights

‘Rights’ is a peculiar idea. It must serve many purposes both as a practical instrument and a philosophical concept. But most peculiar of all is its normative nature. Unlike ‘needs’, ‘wants’ or ‘interests’, ‘rights’ has a morally compelling component. It may be unfortunate if needs are not met or wants go unfulfilled or interests remain unsatisfied, but in none of these can we say that their non-satisfaction constitutes a moral wrong (though on occasion, need is used in this sense). ‘Rights’ is different. The very idea of a right is that its non-fulfilment or abrogation constitutes a wrong that ought to be corrected. If the compulsion to correction is not there, then a right ceases to have meaning. Indeed the whole purpose of talking about rights is their assumed moral compellingness.¹

¹ (In)-justice carries some implication that it ‘ought’ to be put right, but not in the compelling manner that attaches to rights. Injustice ‘ought’ to be corrected but rights ‘must’ be protected. On the moral standing of ‘injustice’, see David Miller, Social Justice (Oxford: Clarendon Press, 1976) and John Rawls, A Theory of Justice (Oxford: Oxford University Press, 1972).
But the normative nature of rights itself has a dual aspect, because it must attach itself to rights both as legal instruments and as a theoretical concept. Thus, when we consider rights in the sense of the human rights catalogued in statutes and convenants, we must take their 'rightness' or 'correctness' as a given. They are rights in practice and if they were continually open to philosophical scrutiny, they would cease to 'work'. And in this regard, the moral compulsion of such rights has some similarity to that of the laws. However, the 'normativity' of rights in codes and statutes does not automatically or necessarily flow from the fact that they are codified. Certainly, we may wish – and with very good reason – to think that the inclusion of a topic (such as freedom of speech) in a set of articles cataloguing human rights, duly agreed and ratified, is what gives it its normativity. Somehow, we tend to think its (mere) inclusion is what gives it compelling moral standing. But this can only be true in the way that social institutions generate consensual ideas of right and wrong. It does not mean that the content of statute rights is in any sense morally compelling in and of itself. Some are, obviously so (a prohibition on torture), but even this probably relies on a sense of revulsion rather than any coherent working out of why things are right or wrong.

What, then, if we were to argue in the reverse direction: that a pre-requisite for the inclusion of a topic in for example, the articles of the Universal Declaration – or any of the other human rights instruments – must be strong evidence (proof is too much to ask for) of its moral compellingness? How this might be done is a part of the content of this paper, but what matters here is the obverse nature of the argument; it is not inclusion in human rights articles per se that makes a topic morally compelling or gives it the status of a legal instrument, but rather, inclusion must depend on prior analysis of its moral standing. Such consideration formed only a part of which articles were accepted for inclusion in the Universal Declaration.

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