A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication

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Introduction: Positive versus Negative Rights

The debate between the respective desirability and enforceability of positive and negative rights has long animated Canadian constitutional scholarship. Identifying the state's role in securing their ultimate fulfilment can most clearly show the distinction between these two types of rights. On the one hand, the negative conception of rights posits a guarantee of state non-interference with individual interests, securing "a whole field of action unhampered by legal precepts… [and] a general condition of free exercise of natural [human] faculties."[1] By contrast, the positive conception of rights is premised on an active and interventionist understanding of the state's role. The vindication of positive rights therefore obligates governments "to act, whether by providing services, money or other benefits"[2] necessary to the fulfillment of rights and freedoms. The question then becomes: how should courts determine when a positive or negative right should prevail in a given case?

The author's thesis is that, notwithstanding the *desirability* of positive rights, negative rights should *generally* prevail. The reason for this is simple: as the value of rights is directly contingent upon the availability of effective remedies to vindicate their infringement, only those rights which are within the constitutional competence of courts to vindicate should be used to impose obligations on government. Thus, whereas negative rights fall squarely within Canadian courts' purview, judicial enforcement of positive rights typically raises "issues of institutional legitimacy and competence."[3] This is particularly true where the enforcement of a positive right involves the (re)allocation of economic resources. Indeed, according to the Supreme Court of Canada, "Absent statutory authority or a challenge on constitutional grounds, courts do not have the institutional jurisdiction to interfere with the allocation of public funds."[4] Negative rights must therefore prevail over positive rights whose vindication or enforcement require such (re)allocative intervention.

The unpacking of this thesis will proceed in three parts. Part I will examine the traditional justifications for confining Canadian judicial intervention to the realm of negative rights. Part II will set out the companion justifications for the non-enforcement of positive rights, with an emphasis on claims whose vindication would require economic resource (re)allocation. Part III will highlight the exceptional instances where judicial enforcement of positive rights is acceptable and legitimate. Although the cases are indeed few and far between, their conceptual utility does much to enrich the positive/negative rights debate. Let us now examine these aspects in detail.

Part I – Negative Rights and the Judicial Role

There are three interrelated justifications for favouring the enforcement of negative rights in Canada. Respectively, these justifications are the following: the concern for the proper judicial role in a liberal representative democracy; the language of the *Canadian Charter of Rights and Freedoms*;[5] and the concerns of legitimacy and accountability.

First, the concern for the proper judicial role in a liberal representative democracy prescribes a triumph for negative rights. The traditional judicial role in the protection of rights and freedoms is to guard against interference by the state with the individual's liberty. Courts are the final rampart preventing the abuse of state power, enforcing a posture of state non-restraint and adherence to the rule of law. This very conception has prevailed since the enshrining of the Magna Carta, most prominently with the contest between the British Crown and courts in the 16th and 17th centuries.[6] The Canadian Constitution also recognizes these principles; the guarantee of judicial independence[7] is complemented by an adherence to the rule of law,[8] and the corresponding judicial power to strike down laws inconsistent with the constitution's guarantees.[9] The traditional judicial role in ensuring limited government is further justified by the relatively easy identification of the contents of constitutional liberty and by the correspondingly straightforward identification of its infringement.

The same cannot be said for positive rights. Positive rights claims and their respective contents do not enjoy the same general consensus, leaving their identification better suited to the legislature. Positive rights such as rights to housing, education, and minimal social assistance are complex issues of social policy, the fulfilment of which often entails the balancing of competing democratic interests and priorities. Positive rights often involve the (re)allocation of economic resources for their implementation. This is beyond curial competence. The adjudication of such claims therefore largely falls beyond the judicial role, which is better suited to the enforcement of negative liberty.

Second, the *Charter*'s rights guarantees are explicitly drafted in negative language. As a triumph in constitutional design, the *Charter*'s scope was deliberately tailored, not only through the inclusion of the s. 1 limitation clause, but also by containing no explicit language supporting the enforcement of positive rights. For instance, the fundamental freedoms found under s. 2 are limited to preventing coercion or restraint with the exercise of "(*a*) freedom of conscience and religion"; (*b*) freedom of expression writ large; "(*c*) freedom of peaceful assembly; and (*d*) freedom of association."[10] As stated by Mr. Justice Rothstein in *Baier v Alberta*, s. 2 "generally imposes a negative obligation on government rather than a positive obligation of protection or assistance."[11] The main exceptions to the *Charter*'s negative rights guarantees are found in the provisions for minority language rights under s. 23. The latter guarantees minority language education for provinces' English or French minority populations and specifically enables judges to allocate funds for their fulfillment. Applying the maxim of *expressio unius est exclusio alterius*,[12] we must take the *Charter*'s framers not to have spoken in vain. In other words, had positive rights been intended under the *Charter*, express language similar to s. 23 would have been included for their enforcement. In the absence of such language in the *Charter*, negative rights must generally prevail, lest we permit judges to extend the limits of their constitutional trusteeship.[13]

Finally, the argument for confining judicial intervention mostly to negative rights extends beyond the concern of proper limitations of judicial power in a constitutional democracy. Quite apart from – but often related to – constitutional competence, the question of institutional competence commands strong restraint on positive rights claims. Indeed, "because their legitimacy as decision makers depends on the nature of courts, judges have to tailor their decision making to situations where their institutional strengths are present."[14] The dictates of these interlinked concerns therefore limit the means courts may use in achieving their constitutional objectives, as an exclusive concern with instrumentality "may well call into question the legitimacy of the entire judicial enterprise."[15] To that effect, "courts may

not exercise non-judicial functions that would diminish public confidence in the integrity of the judiciary as an institution."[16] It goes without saying that creating positive obligations on the state triggers that very concern, especially where resource (re)allocation is involved. Determining whether the state has transgressed the protected cores of individual liberty is quite different from imposing positive obligations on government. Courts should therefore privilege negative rights claims, absent legal or constitutional authority for the enforcement of positive rights.

Part II – The General Non-Enforceability of Positive Rights

The advocation of predominantly negative rights enforcement by the judiciary leads to the corollary argument that positive rights are generally unenforceable. Yet, supplementing the concerns outlined above, there are additional reasons for this position. For one, while the dynamic interpretation of a bill of rights' language facilitates the assertion of a positive rights claim, said language does not transform the judicial role into an unconstrained pursuit of social justice. Indeed, as noted by Mr. Justice John Major in *British Columbia v Imperial Tobacco*, "in a constitutional democracy such as ours, it is the legislature and not the courts which has the major responsibility for law reform."[17]

The concern for the enforcement of positive rights becomes clearer when considering Professor Peter Russell's theory of the "politicization [of the judiciary] from without." Under this theory, the Courts remain aware that ambitious positive rights claims often arise from dissatisfaction with the legislative process' perceived inability (or unwillingness) to deal with contentious social issues. Yet, as Professor Russell predicted almost twenty years ago, this tendency has not "exceed[ed] its modest expansion under the Charter."[18] For instance, the McLachlin Court has exercised considerable restraint and deference where the claimed positive right's vindication requires the judiciary to substitute its wisdom for comprehensive legislative assessment of polycentric policy issues involving resource (re) allocation.

An example of the proper judicial attitude to be exercised towards broad-sweeping positive rights claims is the McLachlin Court's engagement with "structural reform litigation." According to Professor Owen Fiss, the latter refers to a model of rights claims requiring a measure of intervention inconsistent with the judicial function.[19] The positive rights and/or remedies sought by structural reform litigation usually seek "to create a *new* status quo" through the construction of "a new social reality."[20] The 2007 case of *British Columbia v Christie* is a paradigmatic example, evidencing the fiscal, institutional, and constitutional ramifications of structural positive rights claims.

Christie required the Court to consider whether the s. 10(*b*) guarantee of the right to retain and instruct counsel upon arrest or detention[21] extends to include a positive constitutional right to state-funded counsel in all judicial or quasi-judicial proceedings involving an individual's legal rights and/or obligations.[22] The claimants argued in the affirmative, positioning this positive right as a necessary component of the rule of law. The Supreme Court emphatically disagreed. Writing for the Court, McLachlin CJ affirmed that "[i]f the reference to the rule of law [in the *Charter*] implied the right to counsel in relation to all proceedings where rights and obligations are at stake, [then] s. 10(*b*) would be redundant."[23] The structural implications of recognizing a general constitutional right to legal representation also weighed against the asserted positive rights claim. The Court noted that the "logical result" of allowing the claim would be the creation of "a constitutionally mandated legal aid scheme for virtually all legal proceedings." The sole exception would arise where the provision of legal aid was "not necessary for effective access to justice."[24] The creation of such a scheme would evidently represent a major reform to provincial laws and programs designed to achieve that very objective. The task was therefore better left to the representative branches of government, whose dominion over the creation, structuring, and funding of social programs is unquestioned.

The enormous fiscal impact of constitutionalizing the right to state-funded legal counsel

was also influential in anchoring the Court's dismissal of this positive rights claim. Characterizing the evaluation of potential costs as beyond its institutional competence, the Court noted that the costs of recognizing Christie's claim might be virtually limitless. First, no evidence had been provided "as to how many people might require state-funded legal services." Second, a constitutional obligation of "guaranteed legal services" would assuredly encourage a floodgate of new claims from potential litigants.[25] Moreover, and reflecting the pertinence of fiscal impact in the recognition of new positive rights claims, the Court made explicit reference to its significant ramifications for the public purse. According to the Chief Justice,

> …the fiscal implications of the [claimed positive] right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers.[26]

Overall, *Christie* demonstrates that the Court must inevitably premise any positive rights claim on the *Charter*'s text, while remaining attentive to the aforementioned concerns of institutional and constitutional competence. Positive rights claims do not transform the judicial function so as to permit judges to pursue their "own ideal of beauty or goodness," nor "to yield to…vague and unregulated benevolence."[27] Any such benevolence must be exercised within the constraints inherent in the judicial role in Canada's constitutional liberal democracy.

Part III – Exceptions to the General Rule

Whereas negative rights should generally prevail, there are two exceptional circumstances where judicial enforcement of positive rights is acceptable. The first stems from the realization that the exercise of fundamental freedoms will sometimes require state action beyond classical non-interference.[28] The first example of acceptable positive rights enforcement will therefore arise where underinclusive legislative schemes frustrate the enjoyment of a right or freedom secured under s. 2 of the *Charter*.[29] Thus far, only the freedoms of association and expression have been utilized to enforce a positive obligation on the state. Said obligation enjoins the state to act so as to cease the prevention of, or actively foster the enjoyment of the freedoms' exercise, usually by extending the impugned legislation to the excluded class.

Originally developed in *Haig v Canada*, the judicial instrument used for this operation is known as "the statutory platform analysis."[30] Under this framework, three conditions must be met for a positive obligation to be imposed on the state. First, the claim of underinclusion resulting in the frustration of a s. 2 interest must be grounded in one of the fundamental rights and freedoms, "rather than in access to a particular statutory regime."[31] Second, the claimant must establish that the exclusion substantially interferes with the exercise of one or more fundamental freedoms, or that the statutory purpose was to infringe protected activities. Finally, and perhaps most crucially, the state must be directly responsible for orchestrating, sustaining, or encouraging the violation of a *Charter* freedom protected under s. 2. The general thrust is that, with respect to their fundamental rights and freedoms, Canadians have enforceable positive rights against state interference. The second example of enforceable positive rights falls under the "hybrid" right to life, liberty, and security of the person found under section 7.[32] In this instance, rather than imposing substantive obligations at odds with the judicial role, the acceptable positive right is procedural in nature.. These obligations typically arise to ensure that administrative or criminal proceedings function in accordance with the principles of fundamental justice, especially where the claimant's right to life and/or security are engaged. For instance, in *Canada v Khadr*, the Supreme Court held that "where…an individual's…right to liberty is engaged by Canada's participation in a foreign process contrary to [its] international obligations, s. 7... imposes a [positive] duty on Canada to…[the] disclosure [of materials in its possession]."[33] This would be analogous to the rules operating in Canadian criminal law, where

the principles of fundamental justice require the Crown disclosure of relevant information to an accused whose liberty is at stake.

The common thread of these acceptable positive obligations is their general compatibility with the judicial role. First, neither of these obligations involves the (re)allocation of economic resources. Second, both are central to protecting vital *Charter* rights and liberties, and illustrate that a posture of state non-interference will sometimes be insufficient.

Conclusion

Overall, the lesson is that, while negative rights should generally triumph; the enforcement of positive rights by our courts is exceptionally acceptable under our constitutional framework. Any enforcement must have four fundamental elements: the text of the *Charter*; the proper judicial role in a representative democracy; institutional competence and legitimacy; and the avoidance of interference with legislative resource allocation. The result is the reconciliation of Parliamentary sovereignty with constitutional supremacy, and the effective protection of rights and freedoms in Canada's liberal democratic society.

Notes

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1 Roscoe Pound, *Social Control Through Law* (New Haven: Yale University Press, 1942) at 86.

2 Martha Jackman, "*Charter* Remedies for Socio-Economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 279 at 28.

3 *Ibid.*

4 *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43 at para 5, [2013] SCJ No 43, Karakatsanis J , for the majority, and para 127, Fish J, dissenting [*Criminal Lawyers*].

5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 See eg, Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven: Yale University Press, 1957).

7 See eg *Beauregard v Canada,* [1986] 2 SCR 56, 30 DLR (4th) 481.

8 *Supra* note 5, Preamble.

9 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 52.

10 *Supra* note 5, s 2.

11 *Baier v Alberta*, 2007 SCC 31 at para 20, [2007] 2 SCR 673 [*Baier*].

12 It is a fundamental maxim of statutory and constitutional interpretation that the express mention of one thing amounts to the exclusion of another.

13 The idea of Courts as trustees of the constitutional rights found in the *Charter, supra* note 5 was first articulated by Iacobucci J in *Vriend v Alberta,* [1998] 1 SCR 493 at paras 134-135, 141 DLR (4th) 44.

14 Jeremy Webber, "Section 7, *Insite* and the Competence of Courts" (2010) 19 Const Forum Const 125 at 126.

15 Owen M Fiss, "The Social and Political Foundations of Adjudication" (1982) 6 Law and Human Behavior 121 at 122.

16 *Supra* note 4 at para 79, Karakatsanis J, for the majority.

17 *British Columbia v Imperial Tobacco*, 2005 SCC 49 at para 66, [2005] 2 SCR 473.

18 Peter H Russell, "Canadian Constraints on Judicialization from Without" (1994) 15 International Political Science Review 165 at 173.

19 S*upra* note 15 at 122-23.

20 *Ibid* at 126.

21 *Supra* note 5,s 10(b). Section 10(b) provides that "Everyone has the right on arrest or detention…to retain and instruct counsel without delay and to be informed of that right..."

22 *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 27, [2007] 1 SCR 873 [*Christie*].

23 *Ibid* at para 24.

24 *Ibid* at para 13.

25 *Ibid* at para 14.

26 *Ibid.*

27 Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 141.

28 *Supra* note 11 at para 25, citing *Delisle v Canada*, [1999] 2 SCR 989 at para 25, [1999] SCJ No 43.

29 *Ibid* at para 29.

30 *Haig v Canada; Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995, [1993] SCJ No 84. See also *Baier, ibid* at para 23.

31 *Supra* note 11 at para 27, citing *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 24-26, , [2001] 3 SCR 1016.

32 The notion of hybridity is used to suggest that s. 7 may be interpreted as both a positive and a negative right. The same has at least been recognized in, *inter alia*, *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, and *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326 and *Canada (Minister of Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

33 *Khadr, ibid* at para 31.