Positive and Negative Rights

This article was written by a law student for the general public.

Some constitutional rights outline the activities that the government must do, while other constitutional rights outline the activities that the government must not do. This distinction is described by the ideas of positive and negative rights, respectively.

Positive rights require the government to act in certain ways. The government must take a hands-on approach to ensure that guaranteed positive rights are accessible to the rights-holders. Positive rights therefore place a heavy burden on the government by requiring that resources be allocated in specific ways, and with limited flexibility. In the *Canadian Charter of Rights and Freedoms*, there are relatively few positive rights. For example, section 23[1] requires provincial governments to ensure that French or English minorities have access to education in their preferred language, when communities are sufficiently large. When the government has failed to take appropriate actions to ensure that individuals' positive rights are met, courts must enforce a remedy that defines exactly what the government must do to meet its obligations. Because Canadian courts have relatively little experience with forcing the government to do things, there is some controversy surrounding how far they can go.[2]

Negative rights require the government to refrain from acting in certain ways; governments can respect individuals' negative rights simply by doing nothing at all. Negative rights put certain activities off limits for the government, meaning that rights violations occur when the government's actions step too far out of bounds. Many *Charter* rights are negative. For example, section 15(1)[3] prevents the government from unfairly discriminating against people based on certain characteristics; section 2(b)[4] prevents the government from limiting or discouraging free expression. When the government violates one of these rights, courts will deal appropriately with the offending piece of legislation or government action.[5]

---

[1] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 23 (the "Charter").

[2] Abdelrazik v Canada (Minister of Citizenship and Immigration), 2009 FC 580, [2010] 1 FCR 267; and Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 SCR 3 at paras 87-88.

[3] Charter, supra note 1, s 15(1).

[4] Ibid, s 2(b).

[5] See Schachter v Canada, [1992] 2 SCR 679, for example, where the remedies of striking

down, suspended declarations of invalidity, and “reading down” and “reading in” are discussed. Other remedies might be due, depending on the circumstances. See Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624.