Cases in Human Rights: Should Positive or Negative Rights Prevail

Positive and negative rights are two philosophical categories of rights and freedoms which are often in contention. In a human rights complaint filed in 2012, Faith McGregor claimed her freedom from discrimination was infringed upon when Omar Mahrouk refused her a haircut based upon his right to religious freedom. Marouk’s Muslim teachings state he may not touch the hair of a woman who is outside of his family. Of this McGregor said, “these rights are diametrically opposed and I said ‘OK, we can’t come up with a solution — he’s not happy, I’m not happy, I’m going to bring it strictly based on one piece of the code that I feel was in violation of my particular human rights” (Boesveld). Similarly, Bill Whatcott, in the 2013 Supreme Court of Canada case, had his freedom of expression rights contested against the equality rights and freedom from discrimination of others. Both cases are those of graded absolutism in which one absolute must take supremacy over another. Here these positive and negative rights do not comply with each other one must be deemed more important, though both are significant. Since these rights oppose one another, one must be ranked as more important to resolve these conflicts. Negative rights should prevail over positive rights. It will be argued that negative rights should prevail over, commonly understood to be foundational human rights, positive rights for reasons including the understanding that negative rights do not conflict within each other and force no duty upon others.

In order to analyze the two cases, both positive and negative rights must be understood. Positive rights are those in which a person has the right to be subjected to action or provided with a good or service of another person or group. Oppositely, negative rights are those in which a person has the right to not be interfered with or subjected to action by another. John Locke
referred to these as inalienable rights which exist naturally. Positive rights place a duty on another person or group to act while negative rights require no action or simply the avoidance of interference (Skoble). These two philosophical understandings of rights then conflict. The positive right to be free from discrimination held by McGregor and the complainants in Bill Whatcott’s case then directly oppose Mahrouk’s negative right to freedom of religion and Whatcott’s right to freedom of speech respectively.

Within themselves negative rights cannot conflict with one another unlike positive rights. Negative rights are often associated as natural human rights. In TH Marshall’s Theory of Social Citizenship it is recognized that the first type of right to evolve was civil rights. In the 1600s the rights to property, religion, individual freedoms (of speech and thought), and rights of the person (not to be harmed and habius corpus) were established (Marshall). This first wave of rights solely includes negative rights. Using freedom of speech as an example we can see that a negative right of one person cannot conflict with another’s. Person A can say what they choose at any given time without interfering in Person B’s ability to also say what they choose, even if their ideas are extremely different. Similarly, looking at the freedom from violent crime, Person A’s freedom from violent crime will not interfere with Person B’s same freedom in itself. Person B could choose to attack Person A but it is Person B’s choice not freedom from violent crime causing the infringement on Person A’s freedom from violent crime.

Positive rights can, however, conflict within themselves. Positive rights were given rise in the second and third wave of rights and freedoms. They include many social rights such as the rights to food, clothing, housing, welfare, clean drinking water, health care, education, and the freedom from discrimination. Many of these emerged under the Welfare State. These rights state
that one is entitled to a good or service. This is where the issue lies. Scarcity proves to be a roadblock to positive rights (Skoble “Positive and Negative Rights”). Using the example of the right to health care as an example it is clear scarcity can nullify a positive right. To provide health care requires both medical resources and medical professionals including doctors, nurses, and specialists. In the case of an epidemic there are a set number of resources and personnel to deal with the problem. For instance there could be 100 doctors for a population of 500,000. It is therefore impossible for each individual to receive the same, if any, health care services. More practically we see this in triage. The most pressing cases receive treatment first, if ever. This problem of scarcity then applies to all positive rights requiring a good or service to be provided.

In addition to internal conflicts, the infliction of obligations on others causes another issue within positive rights. Within positive rights there is the assumption that by nature humans owe. This is an enforceable obligation thus refusal of giving said good or service cannot be justified (unless it is an impossibility such as in the case of scarcity). This then can infringe upon the negative rights of another unless a consensual agreement exists between both parties. Unfortunately it is not often the case that consensual agreement, such as a contract, exists between such parties. For instance, Mahrouk had no contract with his customers. Therefore to fulfill some positive rights it must come at the expense of another. This can only occur through systematic coercion (Machan). That is to say, some are entitled to what other people must earn (Machan).

In the case of McGregor vs Mahrouk her right to be provided a service without discrimination can only be met through coercion of Mahrouk. Therefore a duty is placed upon others. From a Kantian perspective this is an imperfect duty. This means that it acts upon maxims
desired to be universalized ("Kant's Moral Philosophy"). Conversely negative rights are perfect
duties because they do not result in a logical or practical contradiction of any kind and are
therefore universalized ("Kant's Moral Philosophy"). To put it more plainly, perfect duties have
no exceptions while imperfect duties do. In these ways positive rights infringe upon negative
rights.

In the defense of positive rights there are two widely supported arguments the first of
which is that all rights must be positive rights because each right requires protection to be
meaningful (Machan). Since protection is a service all rights are positive because of the inherent
protection required. Most notably protection is provided through the justice system and
governmental bodies. Some say negative rights require a justice system to enforce them, whereas
positive rights require a governmental body to provide them. This justice system provides the
service of protection therefore validating negative rights as meaningful. However, it is unclear
whether the right to protection could hold true without these negative rights. If, for example, the
freedom from violent crime did not exist there would be no need for police protection services. It
is not completely clear that negative rights cannot exist without protection since protection
services could not exist without an object of protection.

Another defense of positive rights is that negative rights require positive rights to be
meaningful. This is an idea held by communitarians which goes beyond the belief that negative
inherently require the positive right to protection to say that negative rights have absolutely no
meaning unless various other positive rights exist ("Taylor: What's Wrong with Negative
Liberty"). For instance without the positive right to free press the negative right to free speech
could be considered meaningless. Often moral emergencies are used to illustrate the necessity of
positive rights to validate negative rights. To deny this Tibor R. Machan, a professor at the Argyros School of Business and Economics at Chapman University, gives the example of a modern day Jean Valjean. Everyone has the negative right to property therefore there is a moral dilemma concerning the extremely rare case someone is so helpless they must steal food to avoid starvation. Stealing infringes upon the negative right to property this does not mean they should be jailed as prisoner 24601. Yes, if this behaviour became widespread it would undermine production and wealth but private charity could satisfy these needs.

In regards to McGregor and Mahrouk his right to religion should be graded as more important than her freedom from discrimination because of the precedent that would be set otherwise. McGregor was discriminated against through inaction, the refusal to provide a service. Here we see an example of enforceable obligation is involved here. Though McGregor and Mahrouk had no contractual agreement it is assumed that he owes her a haircut. However, McGregor sought the haircut admittedly on a whim and refused Mahrouk’s offer to provide her with the service of finding a barber who would cut her hair (Boesveld). Internal in this specific case Mahrouk’s human dignity would be more harmed by providing McGregor a haircut than McGregor’s would be having been refused the service. McGregor could receive the service from any number of different locations. However, Mahrouk’s religious life would be deeply affected by the transgression of touching a non-familial woman’s hair.

In broadening the scope of examination and looking at the effects of this case on society as a whole there is the potential for a damaging precedent to be set. If determined that McGregor’s rights supersede Mahrouk’s an expectation that in the workplace a worker may have to set aside their religious freedoms could be set. Since in the workplace a good or service is
being provided, any negative rights of the workers could be infringed upon. Doctors act as a great example of professionals who have the right to refuse service to patients, but they have a contract which allow this. In the United States the federal health care provider conscience protection statues allow doctors to refuse services such as abortion and doctor assisted suicide based on their conscious and morals which may be affected by their religion ("Overview of Federal Statutory Health Care Provider Conscience Protections."). This has been suggested in Canada also to accompany the freedom of conscience existing within the Canadian Charter of Rights and Freedoms ("Wildrose Party's idea of "conscience rights" is discriminatory."). Should then Marouk have the right to refuse women services based on their religious beliefs? This is a slippery slope as one could argue that this could be applied to groups such as neo-Nazis. However, extreme cases such as this should not be the base for all rights. Negative rights should be superior to positive rights when there is conflict.

Though Whatcott was ultimately found in violation of the rights of those he discriminated against, his negative rights should prevail over the positive rights of others. The discrimination came in the form of speech and flyers which the Supreme Court of Canada found to be hateful and therefore his freedom of speech and press where deemed less important. In a National Post article Joseph Brean questioned the ruling of the Supreme Court but also made an important distinction in this case. While you cannot punish someone for a subjective emotion, like hate, it is now “clear you can hold them civilly accountable for the effect of public hate messages” (Brean) which can be emotionally distressing but can also have a societal impact. Brean goes on to say that with this ruling also brought back Section 13 (the federal ban on internet hate speech) which was once determined unconstitutional by the Canadian Human
Rights Tribunal. His thoughts may be hateful but they did not call people to enact violence against any individuals or groups.

It is difficult to support the Supreme Court of Canada’s decision to deem Whatcott’s action violative in that his opinions on political issues are being silenced. Homosexual marriage and abortion are both issues that have become politicized. It cannot be correct to silence his thoughts, which were founded in his conservative Christian beliefs, on these issues which he presented through speech and press. Perhaps judgement should be made in the court of public opinion rather than the Supreme Court of Canada. As with any information presented through speech or press others have the ability to accept it as truth or question the validity of its contents. While Whatcott’s statements are discriminatory it cannot be right for him to be largely oppressed by a governing body.

Taking this case and boiling it down to a matter of positive and negative rights it is clear that positive rights can be oppressive to negative rights. Again there is the assumption that one human owes something to another human. It is expected that one will alter their speech as to not offend another based on the criteria of sexual orientation. Another assumption made was that the potential for speech to ignite societal hatred of particular group(s) was more concerning than the possibility of such a ruling being oppressive. This is because negative rights, which were seen as inalienable by Locke, basic human rights believed to be natural are impeded.

Negative rights should prevail over positive rights. Negative rights do not conflict at all with one another while positive rights can be rendered meaningless by other positive rights or through occurrences like scarcity. Positive rights also inflict an unfair duty upon others which is conditional and therefore imperfect. Conversely, negative rights place a perfect duty upon others
which is unconditional. While it has been argued that all rights are positive rights because all
required the service of protection this argument is not stable enough to hold any substance.
Similarly, not all negative rights require positive rights to be meaningful. Bill Whatcott can
exercise his freedom of speech without any goods or services. In both cases it is unjust to oppress
individuals trying to express their thoughts and beliefs.


