

# NEGATIVE AND POSITIVE HUMAN RIGHTS

## A conceptual investigation and proposal

(Translation of a paper published in the Swedish journal *Tidskrift för politisk filosofi* 2/2019, pp. 21–27.)

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**Abstract:** The distinction between negative and positive human rights was at the end of the twentieth century now and then used in political-philosophical discussions, but nowadays it is mostly regarded as somewhat obsolete. The paper claims that this is an unfortunate development. It puts forward a new and more precise definition of the distinction in order to save it from being dismissed only because it is found loose and vague. The distinction is not only needed to precisely distinguish the classic rights from more modern ones, it is also needed in some contemporary issues. Three kinds of such issues are mentioned.

**Keywords:** negative human rights; positive human rights; explication; libertarian state; welfare state.

### 1. The plurality of human rights

Many things are called human rights. In various ways they are in laws and international conventions grouped together and labeled. Of course, many different labels are necessary. A similar reflection applies to laws and statutes that regulate all the different kinds of freedoms we discern. In the latter case, Isaiah Berlin's famous dichotomy between negative and positive freedom has in some situations been found enlightening. In this paper, I propose a related and well defined binary division of human rights into negative and positive. Some issues in which the distinction is important and clarifying are described in Sect. 4.

The dichotomy, certainly, is not without its precursors. However, despite this fact the terminological contrast negative versus positive human rights is not presented under the entry "Human Rights" in *The Stanford Encyclopedia of Philosophy* [1]. Now, Wikipedia's entry "Human Rights" has a link to the entry "Negative and positive rights", but the definition I will propose cannot be found there. The same thing can be said about a couple of other internet publications. Let me take my departure from Amartya Sen.

In his paper "Elements of a Theory of Human Rights" [2], Sen distinguishes between two types of human rights. One is the classic rights of the late 18th century, and the other the type of rights that were added in the United Nations' first declaration of human rights. Dear child has many names, as the saying goes. He gives the latter type of rights three different labels: (i) economic and social rights, (ii) welfare rights, (iii) second generation rights [2] (pp. 316–319, 345–348). The

distinction is by others also referred to as a distinction between old and new rights [3] (pp. 12–14).

It is this somewhat loose dichotomy that I shall try to improve conceptually and emphasize the importance of not forgetting. I will call the old classic rights *negative rights* and the new ones *positive rights*. Let it be noted, though, that of course the negative rights are for human individuals just as positive as those called positive rights.

## 2. A quick glance at the cancelling of the distinction

The contrast between negative and positive human rights that I find important, nowadays few authors writing about human rights find so. Among relevant books published in this millennium, I have only found one in which it is discussed. But its author, Brian Orend, reaches at once the conclusion that the distinction is not viable [4] (pp. 31–32). I see this conclusion as typical of our time, and from a political-philosophical point of view unfortunate.

Orend refers back primarily to Henry Shue [5], where his argumentation can be found in more detail. To my mind, though, Orend presents a good summary of Shue and I will rest content with that. Let me first only quote two sentences from Shue himself: "Frequently it is asserted or assumed that a highly significant difference between rights to physical security and rights to subsistence is that they are respectively 'negative' rights and 'positive' rights. This position, which I will now try to refute, is considerably more complex than it at first appears" [5] (p. 35).

In his argumentation, Orend (following Shue) takes it for granted that where there are rights there must also be some kind of correlated duties. That is, he takes it for granted that *rights implies duties*. Against this view, I have no criticism whatsoever. It is only the view that there is never any need to bother about a distinction between negative and positive human rights that I contest. Orend argues as follows:

A negative right can be defined as one which imposes a correlative duty which calls only for *inaction* on the part of the duty-bearer, be it a person or institution. [...] A positive right, by contrast, can be defined as one which imposes a correlative duty which *does* call for action on the part of the duty-bearer. [...] Many thinkers in the past, such as Cranston, were tempted to claim that negative rights line up with civil and political rights, whereas positive rights line up with social and economic rights: [...] These thinkers concluded that since it is both reasonable and affordable to require non-interference, and both unreasonable and costly to demand provision and aid, civil and political rights are the only genuine human rights in existence. Strictly speaking, this equation does not seem sustainable. [...] a well-functioning legal system is something very near and dear to the defenders of civil and political rights. So here is a case of civil and political right imposing correlative duties that are positive in nature. Thus, the older equation [that there is a difference between "calls for inaction" and "calls for action"] breaks down.

[4] (pp. 31–32)

Orend's view is, to make his brief presentation even shorter, that since negative rights, just like the positive, require real persons who actively make the rights socially real, there is no

difference in kind between them. His and Shue's underlying important point, though, as I understand them, is to claim that positive rights just as much as the negative deserve to be called human rights. In this very respect, I am on Orend's and Shue's side. But this position does not imply that all talk about an essential difference between the first and the second generation of human rights should be a matter of the past. Instead, one can try to make the distinction clearer

### 3. My definitional proposal

Assume that someone claims: "It is a human right ...". As soon as the sentence has been completed one can ask: Is it impossible for me as an individual person to act in accordance with this right vis-a-vis all other human beings? Call this question *the impossibility question*.

In relation to the statements "It is a human right not to be assaulted/killed/stopped-from-speaking/stopped-from-organising" I can answer: "No, it is not in principle impossible for me as an individual person always to refrain from assaulting/killing/stopping-people-from-speaking/stopping-people-from-organising". The rights in question might then be called *not-to-be-stopped-from* rights, but I will call them *negative rights*.

In relation to the statements "It is a human right to get schooling/health-care/elderly-care/employment/unemployment-benefit" my answer must be: "Yes, it is in principle impossible for me as an individual person to give such things to everyone. The rights in question might then be called *to-be-helped-with* rights, but I will call them *positive rights*.

Out my reflections above, I propose the definitions in the next paragraph. Note that they contain no attempt to define what a human right is. The meaning of the term "human right" is taken for granted. It cannot possibly be defined by the definitions below, since it appears both in the definiendum and in the definiens of the definitions. It is only the binary opposition that is defined.

Negative human right =<sub>def</sub> a human right in which the impossibility question can be negatively answered (no, it is not impossible).

Positive human right =<sub>def</sub> a human right in which the impossibility question has to be positively answered (yes, it is impossible).

The resemblance to Orend's distinction between rights that call for inaction and action, respectively, should be obvious. Nonetheless, while he rejects the negative-positive distinction, my way of making it acceptable allows me straightforwardly to ask and answer some for discussions about human rights important questions.

### 4. Applying the distinction

I will use the distinction in three kinds of cases. The first is about the relationship between human rights and basic moral philosophy, the second about an existential first person perspective on human rights, and the third is about the fact that a legalization of human rights costs money.

To legalize is not just a matter of making laws, the laws also require paid people to make sure the laws are complied with.

#### *4.1. Can both the negative and the positive rights be morally justified?*

Libertarians and, for instance, Maurice Cranston [6] are of the opinion that only the negative rights can be morally justified; whereas political philosophers such as Alan Gewirth [7] and Amartya Sen [2] are of the opinion that both types can. My own defense of the latter position can be found in my [8, 9]. Welfare states contain both negative and positive rights, and such kinds of state the libertarians want to abolish.

My morally neutral way of making the distinction between negative and positive human rights makes it clear how moral philosophy enters the discussion.

#### *4.2. Is it reasonable to demand of oneself that one should always act in accordance with the human rights?*

With respect to the negative rights this seem quite reasonable. With respect to the positive rights, on the other hand, it may seem obvious that it is not only unreasonable – it is impossible. The very definition of a positive human right implies that no person can alone realize such a right. But things are a bit more complex. Each single person can, since rights implies duties, regard it as a duty to act in some way or other in order to try to create a national or a global world that contains not only negative but also positive human rights. What duties one has depends of course on one's sociopolitical station.

#### *4.3. How much does it cost to implement negative and positive rights, respectively?*

As far as I can see, most people who have devoted time to the problem thinks that, in general, the positive rights are more expensive. And I am of the same opinion. Brief argumentation: Both the negative and the positive rights require for their implementation both a police force and a judicial system (which, as I have pointed out, makes Orend [4] delete the distinction between negative and positive rights), but the positive rights require even more institutions than the mentioned two. Also schools, hospitals, etc. are required. Therefore, from a short-term societal perspective, it is only in exceptional cases true that the positive rights are no more expensive than the negative.

The short-run economic aspect is also relevant in discussions about immigration. The last term now taken in a broad sense that includes economic immigrants, refugees, and people having right to asylum. If a welfare state (which by definition contains both negative and positive human rights) is compared with a libertarian state (which by definition contains only negative rights), then, under the assumption that there is no lack of work force, immigration is in the short run more expensive for a welfare state than for a libertarian state. A very-welcome-to-us greeting has in the short run different public-economic consequences in the two types of states. Therefore, here the distinction between negative and positive human rights is of importance for bringing clarity into many immigration discussions.

#### *4.4. Summary*

My views, which I think are the same as Sen's [2], can be summarized thus. Both negative and positive human rights can be morally justified. The rights apply to humans as individuals

independently of communitarian position (anti identity politics) and independently of whether a state guarantees them (anti legal positivism). One should try to make these morally justifiable rights legalized, but such a legalization should only take place when there is a realistic chance of having them accepted and adhered to.

Before legalization, human rights are relations between individuals and moral norms. After legalization, they have also become relations between individual citizens and the state they belong to.

## 5. A meta-comment

What have I really done in the sections above? My own answer is that I have done a conceptual *explication* in Rudolf Carnaps's sense. This means that, taking departure from a small group of binary conceptual opposites, I have proposed a new definition of the old opposites. The definition meets four requirements: (i) it retains to a large extent the extension or referents of the old conceptual opposites, (ii) it stipulates a new intension or meaning for the old terms, (iii) the new intension is more precise than the old ones, and (iv) because of the last fact, the new definition is in some situations better and more fruitful to use.

**Funding:** This research received no external funding.

**Acknowledgments:** The author would like to thank Cathrine Felix and Magnus Jedenheim-Edling for very useful comments on an earlier Swedish version of the paper.

**Conflicts of Interest:** The author declares no conflict of interest.

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