# Contents—Outline

Table of Cases xvi
Table of Legislation xx

Introduction 1

## I. UNDERSTANDING POSITIVE DUTIES

2. The Nature of the State: Democracy, Globalization, and Privatization 31

## II. JUDGING AND ENFORCING: COURTS AND COMPLIANCE

3. The Structure of Positive Duties 65
4. Justiciability and the Role of Courts 92
5. Restructuring the Courts: Public Interest Litigation in the Indian Courts 124
6. Achieving Compliance: Positive Duties Beyond the Courts 150

## III. SUBSTANTIVE RIGHTS AND POSITIVE DUTIES

7. Equality 175
8. Socio-economic Rights and Positive Duties 204

Index 241
Contents—Outline

Table of Cases xvii
Table of Legislation xxii

Introduction 1

I. UNDERSTANDING POSITIVE DUTIES

   A. Positive Freedom and Positive Duties 10
      (i) From non-intervention to enhancing choice 10
      (ii) From preference to choice 14
      (iii) Choice in context: care, responsibility, and dignity 15
   B. Individualism and Community 16
   C. The Good and the Right: can the State be Neutral? 18
      (i) Theories of State neutrality 18
      (ii) The perfectionist State and positive duties 23
   D. Who Pays? Reconceptualizing Responsibilities 25
      (i) Reciprocity 25
      (ii) Solidarity and civic virtue 27
      (iii) The harm principle and positive duties 29
   E. Conclusion 30

2. The Nature of the State: Democracy, Globalization, and Privatization 31
   A. Positive Duties and Democracy 32
      (i) Justiciability distinguished 32
      (ii) 'We the people': participation and democracy 33
      (iii) Enhancing democracy through positive duties 38
   B. Globalization and Positive Duties 40
      (i) The 'free market' and positive duties 42
      (ii) Free global markets are the best means to advance human welfare 44
      (iii) The hollowing out of the State 47
      (iv) The WTO and human rights 48
      (v) Globalization and the EU 53
   C. Privatization and Positive Duties: whose Responsibility? 58
   D. Conclusion 61
II. JUDGING AND ENFORCING: COURTS AND COMPLIANCE

3. The Structure of Positive Duties 65
   A. The Indivisibility of Duties 66
      (i) Civil and political rights v socio-economic rights 66
      (ii) Beyond the boundaries 67
      (iii) Redrawing the boundaries: the nature of obligations 69
   B. Understanding Positive Duties 70
      (i) Indeterminacy and incommensurability 70
      (ii) Duties to protect 73
      (iii) The duty to fulfil: specifying the duty 77
      (iv) The duty to fulfil: progressive realization 80
      (v) The minimum core obligation 84
      (vi) Rights and duties: the individual claim 87
   C. Conclusion 90

4. Justiciability and the Role of Courts 92
   A. Introduction 92
   B. Drawing the Boundary 93
      (i) Distorting democracy: privileging duties of restraint 96
      (ii) A difficult distinction 98
   C. Strengthening Democracy through Justiciability 100
      (i) Arguments from democracy: refashioning justiciability 100
      (ii) Justiciability: a democratic role? 103
         Accountability 103
         Participation through deliberation 105
         Equality and the representation reinforcing theory 109
   D. Adjudicating Positive Duties 113
   E. Conclusion 123

5. Restructuring the Courts: Public Interest Litigation in the Indian Courts 124
   A. Introduction 124
      (i) Institutional change 126
      (ii) Social change via the courts 128
      (iii) Courts and transformation: the social conversation 133
      (iv) Activation or paralysis: the judges and the executive 134
      (v) Straying too far? Relaxing the criteria 136
      (vi) Who is the 'public'? The role of the public interest litigant 137
      (vii) Consensus and controversy: the appropriate role of the court 141
      (viii) Urban development 142
      (ix) Environmental cases 143
6. Achieving Compliance: Positive Duties Beyond the Courts 150
   A. Introduction 150
   B. Challenges 151
   C. Applying the Model: Compliance Mechanisms for Positive Duties 159
      (i) The right to work: the European Employment Strategy and the Open Method of Coordination 159
      (ii) Reporting mechanisms and socio-economic rights 165
      (iii) Domestic compliance mechanisms: human rights commissions and triggers for change 166
   D. A Synergistic Approach 169

III. SUBSTANTIVE RIGHTS AND POSITIVE DUTIES

7. Equality 175
   A. Recognition and Redistribution: Negative and Positive Dimensions 176
   B. Equality and the Courts 181
      (i) Principles of justiciability 181
      (ii) Justiciability in practice 182
   C. Beyond the Courts: Positive Duties to Promote Equality 189
      (i) Proactive models: principles and practice 189
      (ii) Achieving compliance 192
      (iii) The deliberative dimension: participation and the participants 199
         Functions of participation 199
         The participants in the process 201
   D. Conclusion 203

8. Socio-economic Rights and Positive Duties 204
   A. Housing and Shelter 204
      (i) Beyond the divide: human rights values and the right to housing 204
      (ii) Sources of positive duties in respect of housing 206
      (iii) Positive and negative duties: distinctions and relationships 209
      (iv) Participation and deliberative democracy 210
      (v) Determining the content 212
      (vi) Monitoring compliance 214
   B. Education 215
      (i) Beyond the divide: human rights values and the right to education 215
      (ii) Positive and negative duties: distinctions and relationships 216
      (iii) Positive duties and distributive consequences 218
Contents—Outline

(iv) Equality and education 220
(v) Justiciability and compliance 222

C. Welfare Rights 226
   (i) Human rights values and the right to welfare 226
   (ii) The content of the positive duty 232
   (iii) Sources of duties 236

D. Conclusion 240

Index 241