Grootboom and the seduction of the negative/positive duties dichotomy

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1 Introduction

A prevailing dichotomy of liberal rights theory is the distinction between the negative and positive duties imposed by human rights norms. A strong duty of accountability is imposed when the State is perceived to interfere with people's enjoyment of human rights, whether through the conduct of officials or legislative, executive or administrative action. Non-existent or much weaker accountability is imposed when State responsibility is attributed to omissions.[1]

This dichotomy has a powerful hold on the human rights imaginary. It is replicated particularly in socio-economic rights scholarship, advocacy, litigation and adjudication (including, at times, my own work). A key manifestation of the dichotomy is expressed in the popular threefold, or sometimes fourfold, typology that originated in the work of Henry Shue.[2] According to this typology, socio-economic rights impose duties on the State 'to respect, protect, promote and fulfil' those rights.[3] Shue

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[1]In the context of US jurisprudence, one of the classic illustrations of the dominant model of 'negative constitutionalism' is *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989). For a critique of this model, see Barber 'Fallacies of negative constitutionalism' (2007) 75 *Fordham LR* 651-668.

[2]Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1980) 1-248.

[3]The UN Committee on Economic, Social and Cultural Rights relies extensively on variants of this typology in its General Comments on various provisions in the International Covenant on Economic, Social and Cultural Rights (1966). See, eg: General Comment no 12 (1999) 'The right to adequate food' (art 11 of the Covenant) UN doc E/2000/22 para 15; General Comment no 14 (2000) 'The right to the highest attainable standard of health' (art 12 of the Covenant) paras 46-52; General Comment no 15 (2002) 'The right to water (arts 11 and 12 of the Covenant) UN doc E/C 12/2002/1 paras 20-

intended his analysis to illustrate that the effective realisation of all human rights imposes a combination of negative and positive obligations, and that one cannot associate particular categories of rights with a single correlative duty.[4]

This typology has been very helpful in breaking down categorical distinctions between the nature of civil and political rights on the one hand, and economic, social and cultural rights, on the other. Showing that socio-economic rights also impose negative duties of forbearance and that, conversely, civil and political rights impose positive duties of protection and fulfilment was a strategy to garner legal legitimacy for claims which were, for a long time, marginalised from mainstream human rights discourse and practise.[5] Thus, it helped to illustrate that all rights impose a combination of negative and positive duties, and that socio-economic rights are similar in structure to civil and political rights, differing only in the extent of the positive duties required for their effective realisation.[6]

In this paper I argue that the application of the negative/positive duties to socio-economic rights claims is not without pitfalls. The danger lies particularly in the application of a rigid and static model of the typology to privilege negative duties in the judicial enforcement of socio-economic rights, and to reinforce the aversions in classic liberal legal culture to the enforcement of positive duties.[7]

Within this tradition, it is claimed that the judicial enforcement of negative duties is relatively unproblematic in that the obligation is clearly defined. It requires that the State refrain from interfering in the existing enjoyment of rights. Moreover such duties of restraint are of universal application to all duty bearers, requiring both public and private actors to refrain from interference with existing access to the relevant rights. Finally, these duties can be enforced through clear and immediate judicial remedies that restrain interference.

29; General Comment no 19 (2007) 'The right to social security' (art 9 of the Covenant) UN doc E/C 12/GC/19 paras 43-51. The African Commission on Human and Peoples' Rights has also made use of this typology in its decisions on communications relating to the economic and social rights in the African Charter on Human and Peoples' Rights (1981). See *The Social and Economic Rights Action Centre (SRAC and the Centre for Economic and Social Rights v Nigeria* Communication no 155/96 (2001) AHRLR 51 (ACHPR 2001) paras 44-48. See generally Koch 'Dichotomies, trichotomies or waves of duties?' 2005 5 *Human Rights LR* 81-103 at 87.

[4]Shue (n 2) 51. See the analysis by Fredman *Human rights transformed: Positive rights and positive duties* (2008) 69-70; McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 97-101.

[5]See the discussion in Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 82-87.

[6]In the *First Certification* judgment, the Constitutional Court expressly acknowledged the positive duties and resource implications of civil and political rights: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* para 76.

[7]Analyses of the 'justiciable elements' of economic and social rights often emphasise negative duties of restraint, and adopt a relatively minimalistic approach to the types of positive duties which are amenable to judicial enforcement. See, eg, Coomans 'Clarifying the core elements of the right to education' in Coomans and Van Hoof (eds) *The right to complain about economic, social and cultural rights* (1995) 11-26, 19-22.

In contrast, the positive duties to protect, promote and fulfil rights are said to pose much greater challenges for adjudication in that the normative content of the duties that they impose are unclear. What precisely is the nature of the measures which are required to 'protect', 'promote' and 'fulfil' rights, and who are the relevant duty bearers? Under what circumstances do these various duties bind particular organs of State and private actors (if at all)? Moreover, the redress of a systemic failure to fulfill positive duties requires a series of steps or measures to be take over a period of time. It is argued that the precise nature of these measures and the relevant time periods are not amenable to clear advance specification or definition.

This categorical distinction between negative and positive duties lies at the heart of the critique of welfare rights as genuine rights by such influential scholars as Onora O'Neill. She argues that, in contrast to liberty rights, which impose primarily negative and 'perfect' duties on clearly identifiable duty-bearers, welfare rights require the establishment of 'institutional structures' in order to define the precise content of the relevant duties and the applicable duty-bearers. Without these institutional mechanisms in place, welfare rights cannot be regarded as genuine rights in the same way as civil and political rights.[8]

This perspective also informs the more deferential approach to the enforcement of positive duties in socio-economic rights adjudication. I will attempt to show that an uncritical acceptance and application of the negative and positive rights dichotomy can constrain the development of a jurisprudence as well as advocacy strategies which address the deep-seated structural causes of both civic and socio-economic inequality and deprivation.

The first part of this paper will examine the application and consequences of the negative/positive rights dichotomy in the context of South Africa's socio-economic rights jurisprudence. In the second part I critically assess the primary theoretical bases for the negative/positive rights dichotomy in human rights law. Three main theoretical arguments in favour of the privileging of negative duties of restraint in human rights law are considered: (a) the presumption of liberty; (b) resource limitations; and (c) the 'indeterminacy objection'. I conclude by sketching the contours of an alternative approach to adjudicating socio-economic rights claims which does not adjust the model of review or the standard of scrutiny[9] applied in a particular case solely on the basis of classifying the claim as involving a negative or positive duty.

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[8]O'Neill *Towards justice and virtue: A constructive account of practical reasoning* (1996) 128-136.
[9]On the distinction between the model of review and the standard of scrutiny applied in socio-economic rights adjudication, see Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for?"' in Botha, Van der Walt A and Van der Walt J (eds) *Rights and democracy in a transformative constitution* (2004) 33-56 at 40, ftns 43 and 45.

2 Tracing the dichotomy in the Constitutional Court's socio-economic rights jurisprudence

The dichotomy between strong negative and weak positive obligations was signalled early on in the development of South Africa's socio-economic rights jurisprudence. Thus in *Government of the Republic of South Africa v Grootboom*,[10] the Constitutional Court located a negative duty upon the State and 'and all other entities and persons' to 'desist from preventing or impairing the right of access to adequate housing' in the unqualified first subsection of section 26.[11] It further held that this negative duty 'is further spelt out in subsection (3) which prohibits arbitrary evictions'.[12] In contrast, the positive duty to achieve the realisation of socio-economic rights for those who lack access to socio-economic rights, or whose current access is inadequate, is both defined and limited by the criteria of reasonableness,[13] progressive realisation and the State's available resources.[14]

The implications of this distinction for the model and standard of review to be applied respectively to negative and positive rights claims were only developed by the Court in its decision in *Jaftha v Schoeman; Van Rooyen v Stoltz*.[15] This case involved a challenge to the constitutionality of provisions of the Magistrates' Courts Act 32 of 1944 that permitted the sale in execution of people's homes in order to satisfy (sometimes trifling) debts. The effect of such sales-in-execution would be the eviction of the applicants from their state-subsidised homes. It was also common cause in the case of the applicants who were evicted that they would have no suitable alternative accommodation and would not be eligible again for a housing subsidy from the State.[16]

The Court characterised the provisions of the Act as authorising a negative violation of section 26(1) in that it permitted 'a person to be deprived of existing access to adequate housing'.[17] This negative duty is not subject to the qualifications in subsection (2) relating to reasonableness, resource constraints and progressive

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[10] 2001 1 SA 46 (CC) (hereafter '*Grootboom*').

[11] *Grootboom* para 34. As early as the *First Certification* judgment, the Constitutional Court held that socio-economic rights were justiciable in that at the 'very minimum, socio-economic rights can be negatively protected from improper invasion'. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) para 78.

[12] *Ibid*.

[13] For an analysis and critique of the Court's 'reasonableness review' jurisprudence for positive socio-economic rights claims, see Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) ch 5; Liebenberg (n 5) ch 4.

[14] See *Soobramoney v Minister of Health*, *KwaZulu-Natal* 1998 1 SA 765 (CC) para 11; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 paras 3-39.

[15] 2005 2 SA 140 (CC) (hereafter '*Jaftha*').

[16] *Jaftha* para 12. The disadvantaged and impoverished circumstances of the applicants are described in paras 3-5 of the Court's judgment.

[17] *Id* paras 31-34.

realisation. Where people are deprived of existing access to housing (and by implication, other socio-economic rights), this constitutes a limitation of their rights which can only be justified in terms of the stringent requirements of the general limitations clause (s 36), including the requirement of a law of general application.

The Court expressly did not elaborate on all the circumstances which would constitute a violation of the negative duties imposed by the Constitution.[18] However, as noted above, the deprivation of people's existing access to housing was held to constitute a limitation of section 26(1). The Court highlighted the severe impact of a deprivation of housing on persons like the applicants in the circumstances of the case:

> In the present matter access to housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be an empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right.[19]

In conducting the limitations analysis in terms of section 36, the Court closely scrutinised the purposes that the relevant provisions of the Act were designed to serve, and found them to be overbroad. They permitted execution against the homes of debtors in circumstances 'where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor.'[20]

The Court thus concluded that the relevant provisions were not justifiable in terms of the general limitations clause.[21] By way of remedy it 'read in' provisions to the Act requiring judicial oversight of executions against the immovable property of debtors taking into consideration 'all relevant circumstances'.[22]

The Constitutional Court's decision in *Jaftha* demonstrates that the Court will apply a different model of review to conduct or legislation which deprives people of their existing access to socio-economic rights. Such conduct or legislation is regarded as a *prima facie* breach of the rights in sections 26 and 27. The burden then shifts to the State to justify the breach according to the stringent purpose and proportionality requirements of the general limitations clause.

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[18] *Id* para 34.
[19] *Id* para 39.
[20] *Id* para 43.
[21] *Id* paras 35-51.
[22] *Id* paras 52-67.

In contrast, the internal limitations of sections 26(2) and 27(2) allow the State a greater margin within which to rely on resource constraints, and the latitude of progressive realisation with regard to an omission to fulfil the positive duties to realise socio-economic rights. The implications of the weaker review standard for positive obligations are graphically illustrated by the Constitutional Court's decision in *Mazibuko v City of Johannesburg*.[23] The first leg of the claim concerned the sufficiency of the City of Johannesburg's policy relating to the quantum of a free basic water supply. In particular, the Court was requested to consider whether the decision by the City to limit its supply of free basic water to 6 kilolitres of free water per month to every account holder in the city was in conflict with the right of access to 'sufficient' water in section 27(1)(b) of the Constitution read with subsection (2), or with section 11 of the Water Services Act 108 of 1997.

In its judgment, the Court gave a narrow construction of the 'reasonableness review' standard for assessing the positive duties imposed by socio-economic rights as developed in the *Grootboom, TAC* and *Khosa* and *Mahlaule*[24] cases.[25]

The Court justified its deferential stance by reference to institutional concerns regarding the 'proper role' of courts *vis-á-vis* the other branches of government. Thus,O'Regan J stated:

> … [O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.[26]

She went on to hold that the Court's role when enforcing the positive duties imposed by socio-economic rights is restricted to two primary scenarios. First, if government does not take steps to realise socio-economic rights, 'the courts will require the government to take steps'.[27] Second, the courts will intervene if the measures adopted by government 'fail to meet the constitutional standard of reasonableness'.[28] Three basic situations would be indicative of unreasonableness: a) where no provision is made for those most desperately in need;[29] b)

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[23]2010 4 SA 1 (CC) (hereafter '*Mazibuko*').
[24]*Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).
[25]For a critique of the narrow construction of the reasonableness review standard adopted in *Mazibuko*, see Liebenberg (n 5) 468-472.
[26]*Mazibuko* para 61.
[27]*Id* para 67.
[28]*Ibid*.
[29]*Grootboom* para 41.

socio-economic policies contain unreasonable exclusions or restrictions;[30] and c) a failure by government 'continually to review its policies to ensure that the achievement of the right is progressively realised'.[31]

It is significant that perhaps the most substantive element of the reasonableness inquiry identified in the *Grootboom* judgment, namely, whether the relevant programme is 'capable of facilitating the realisation of the right',[32] is omitted from this analysis. Reasonableness in this sense implies a substantive conception of values and purposes which the relevant rights seek to promote, and the development of broad indicators for evaluating whether or not the normative goals which the rights seek to advance are being achieved. Secondly, it implies a willingness to interrogate the efficacy of the relevant measures in advancing the achievement of these goals. This has evidentiary implications for both the litigants and the State. Without the necessary evidence regarding the conception, planning and implementation of the measures and the extent to which they are appropriately tailored to the normative goals attributed to the relevant socio-economic right, a court will not be in a position to make a meaningful assessment of whether the relevant measures are indeed capable of advancing its realisation.

In essence, *Mazibuko* stands for the proposition that courts should generally avoid a substantive assessment whether the measures being taken are reasonably capable of facilitating the realisation of the relevant socio-economic right or of the sufficiency of government's provisioning. According to this conception, the role of courts in the territory of socio-economic rights adjudication is essentially to patrol the borders of this territory and to intervene only when there is egregious unreasonableness in the form of a complete failure to act, or unreasonable exclusions or restrictions in the programmes adopted.[33] This

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[30]The Court cites its judgment in the case of *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) (hereafter '*TAC*') as an example of a programme in which the Court simply ordered government to remove an 'unreasonable limitation or exclusion'. For criticism of this reading of the basis for the *TAC* decision, see Liebenberg (n 5) 469.

[31]*Mazibuko* para 67.

[32]*Grootboom* para 41.

[33]For a critique of the deferential approach adopted by the Constitutional Court in *Mazibuko*, see Williams 'The role of the courts in the quantitative implementation of social and economic rights: A comparative study' (2010) 3 *Constitutional Court Review* 1-59. The leading case on the intersection between socio-economic rights and the right against unfair discrimination is *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) in which the Court found that social security legislation which excluded permanent residents from social assistance benefits was both unfairly discriminatory in terms of s 9(3) as well as unreasonable in terms of s 27. A more recent example of a policy falling into this category is *Law Society v Minister for Transport* 2011 1 SA 400 (CC) in which the Constitutional Court found that Regulation 5(1) promulgated in terms of the Road Accident Fund Act, 1996 (as amended) which prescribes a tariff for hospital and other medical treatment for road accident victims was unconstitutional due to its irrationality. The prescribed tariff was so low that it effectively excluded victims from obtaining treatment from private health care institutions. The impact on road accident victims who are

contrasts starkly with the robust model of review and the standard of scrutiny applied in a case such as *Jaftha*. The Court placed the burden squarely on the State to justify its measures according to the stringent purpose and proportionality requirements of the general limitations clause. In contrast, where people lack access to socio-economic resources or they complain that their access is in some way insufficient or inadequate, the State is exposed to less robust forms of constitutional accountability.[34]

It is also instructive to compare the deferential stance of the Court in *Mazibuko* to its willingness to impose extensive procedural and substantive positive obligations pertaining to 'meaningful engagement' and the provision of alternative accommodation in eviction cases where a breach of a negative duty 'triggers' the socio-economic rights violation.[35]

One has considerable sympathy for the strategic importance of preserving at least a sphere of robust judicial protection for a component of socio-economic rights. This is most easily achieved in relation to claims which are similar in structure to negative deprivations of well-established civil and political rights. However, there are serious questions regarding the validity and long-term strategic implications for socio-economic rights adjudication, particularly in advancing the claims of those experiencing systemic patterns of economic disadvantage and marginalisation.

In the next part, I examine and assess the theoretical coherence and strategic implications of key arguments advanced in support of maintaining a distinction between negative and positive rights and their correlative duties.

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rendered quadriplegic or paraplegic would be particularly harsh as they would not be able to obtain the specialised services they required in order to survive (paras 87-99). Moseneke DCJ held that even if the tariff regulation was found to be rational, it would nonetheless be held to be unreasonable in terms of ss 27(1)(a) read with (2) due to its under-inclusiveness (para 100).

[34]In *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33; 2010 4 BCLR 312 (CC), the Court was also unwilling to interrogate the adequacy of sanitation and electricity services in a community which experienced systemic socio-economic deprivations on the basis of a formalistic application of the doctrine of subsidiarity. The Court did order the provincial government to make a decision within 14 months on the municipality's application to upgrade the settlement to a township in terms of ch 13 of the National Housing Code. It was not, however, prepared to evaluate the substantive merits of the communities' complaints of lack of access to the relevant services in the absence of government approving the relevant upgrading programme or determining whether or not a housing emergency exists in terms of ch 12 of the Code. For an incisive critique of the reasoning in *Nokotyana*, see Bilchitz 'Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *SALJ* 591-605.

[35]See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC). See also Liebenberg (n 5) ch 6 and Wilson 'Breaking the tie: Evictions, homelessness and a new normality' (2009) 126 *SALJ* 270-290.

3 Theoretical bases of the negative/positive rights dichotomy

3.1 Liberty as justification for prioritising negative rights

A powerful, unarticulated and frequently unconscious assumption underlying the distinction between negative and positive rights is that rights and constitutionalism exist to protect a sphere of natural liberties which, according to Lockean theory, persons enjoy in a state of nature prior to the institution of government. This gives rise to what the American scholar Barnett describes as a 'presumption of liberty'.[36]

Existing interferences in the 'natural' freedoms of people to transact and acquire and retain property are constitutionally suspect and require special justification. It does not require much imagination to understand why this understanding reinforces a system which favours the existing *status quo* and constitutes a barrier to the adoption of positive, redistributive measures affecting existing property and related entitlements.

The presumption of liberty not only reinforces the negative/positive rights dichotomy, but also reinforces the other pervasive dichotomy of liberal rights theory – the public/private divide. The sphere of liberty is rendered equivalent to a private sphere which should be immunised against anything but the most essential government intrusion. Such intrusion is primarily required to ensure that people do not encroach in the rightful domain of others.[37]

However, even on its own terms the association between liberty and government restraint is mistaken. Liberty itself requires coercive State power to establish and protect. As Barber observes in his critique of Barnett's presumption of liberty:

> Liberty can be an end of government; liberty-from-government cannot be an end of government. …Liberty-from-government can be valuable, but only when it serves as a means to liberty. Sometimes liberty-from-government means loss of liberty, at the hands of third parties, say, or by the loss of forms of liberty that government enables (voting, securing title to property, and enjoying it without fear).[38]

In other words, even if we concede that the protection of liberty is the ultimate justification of government, we need a substantive account of what kinds of freedoms are valuable and worthy of protection as well as a proactive, empowered State able to foster and protect these forms liberty. We value not the right to non-interference in and of itself, but the positive right to the government support and services we require in order to enjoy liberty-enabling 'goods' such as survival, privacy and property.[39]

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[36]Barnett *Restoring the lost constitution: The presumption of liberty* (2004) 75.
[37]*Id* 58. On this dichotomy in classic liberal legal theory and its implications for socio-economic rights adjudication, see Liebenberg (n 5) 59-63.
[38]Barber (n 1) 665.
[39]Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 1.

As Barber argues, in this sense even the right to property 'is essentially a welfare right because the services it requires are tax-supported services that range from defending the nation to funding courts that enforce titles and police that remove trespassers'.[40] The content of the all common civil and political liberties are secured through taxes and the establishment of the criminal and common or customary law regulatory machinery and personnel required to protect these liberties.[41] Thus, for example, in *Law Society of South Africa v The Minister of Transport*,[42] the Constitutional Court acknowledged that a private law delictual remedy served to protect the right to be free from all forms of violence in section 12(1)(c) of the Constitution – in this case the violence occasioned by motor vehicle accidents. The abolition of this common law residual remedy through amendments to legislation designed to establish a comprehensive motor vehicle compensation scheme (the Road Accident Fund Act, 1996) thus fell to be justified in terms of the general limitations clause.[43]

If the protection of rights and liberties are the object of government, the substantive content of the relevant rights or liberties requiring protection should be open to deliberation and contestation.[44] The point is that negative liberty in the form of non-interference in existing entitlements and individuals' freedoms is nonsensical in the absence of a qualitative account of what type of liberties are worthy of retention and protection.[45]

There is nothing self-evidently just or automatically worthy of protection in the existing distribution of property and in existing entitlements. As Barber observes, 'the rights of first possessors are entirely contingent'.[46] To protect these entitlements without examining their impact on the 'losers' in the current system is simply to protect the acquisitions of those, historically, more powerful. This should be particularly evident in the South African context given the systemic inequalities and deprivation created and entrenched by the intersection of colonial, apartheid and capitalist ideologies. The system of racial capitalism in South Africa was at least partially constructed and facilitated by *laissez-faire* common law doctrines of contract[47] and absolutist conceptions of private property

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[40]Barber (n 1) 661.
[41]See generally Sunstein and Holmes *The costs of rights: Why liberty depends on taxes* (1999).
[42]2011 1 SA 400 (CC).
[43]*Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) paras 76-80.
[44]A number of political theorists and philosophers have sought to develop theories of justice regarding the types of liberties which should enjoy fundamental protection in political society. See, eg: Rawls *Theory of justice* (1999) (rev ed), particularly ch IV; Sen *Development as freedom* (2001), particularly ch 1-4.
[45]See Plant 'Social and economic rights revisited' (2003) 14 *The King's College LJ* 1-20 at 5.
[46]Barber (n 1) 661-662.
[47]See in this regard Chanock *The making of South African legal culture: 1902-1936: Fear, favour and prejudice* (2001) 169-184, and the observations of Moseneke DCJ in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 104.

rights.[48] If the rejoinder is that the 'losers' in the current distributive system of wealth and entitlements are better off than in an alternative regime which does not guarantee strong property and contractual rights, this remains an empirical claim, which is open to contestation and contrary empirical evidence in particular contexts.[49]

A presumption in favour of liberty rests on a seductive myth that the existing *status quo* is the result of a natural state of affairs which cannot be attributed to communal responsibility. It obscures the extent to which historical decisions, the design of political, economic and social institutions and the 'unarticulated normative baseline' of private law rules create and perpetuate classes of marginalised and subordinated groups.[50] These existing rules of private and criminal law may operate to 'deprive' people of their access to socio-economic resources. As Barber points out, 'all states are redistributive states':

> The state that protects first possessors must tax latecomers of their natural property in order to do so, for their property in nature includes rights of self-help that the state declares against the criminal law.[51]

In a similar vein, Raymond Plant points out a lack of resources in contemporary societies will restrict one's freedom to do many things in the same way that legislation that restricts one's right to travel or to have access to decent medical care or education does.[52] In the end, it is the power of the law which enforces prohibitions on accessing certain services and institutions if one does not have the income to pay for them. These restrictions may be justifiable. However this is precisely the point: under a constitutional dispensation which is committed to transforming unjust social relations all legal rules are subject to scrutiny and justification in terms of the normative rights and values of the Constitution.

Once we perceive that the State upholds existing distributions of power and resources through a network of legislation, common law and customary law entitlements, the negative and positive rights dichotomy becomes blurred and far more complex to apply in practice. The effect of the entire matrix of rules may be to 'prevent' or 'deprive' people of access to the essential material resources they require to survive and thus, applying the South African model, be subject to the stringent model of review and standard of scrutiny applied to negative deprivations.[53]

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[48]See the discussion by Van der Walt *Constitutional property law* (2005) 410-416 (particularly fn 44 and accompanying text).

[49]See, eg, David Harvey's account of the systemic irrationalities, inequities and destructiveness of capitalist accumulation in *The enigma of capital and the crises of capitalism* (2011) (particularly 215-279).

[50]Scott and Maklem 'Constitutional rights of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *U Pa LR* 1, 34-35.

[51]Barber (n 1) 662.

[52]Plant (n 45) 5-6.

[53]See the discussion of *Jaftha* (n 15-22) above and accompanying text.

Frequently a decision to classify a case as a 'positive duty' case (and thus subject to a much weaker standard of review) is based on the unspoken assumption that the rules upholding existing resource distributions are natural and immune from interrogation.

The real substantive issue should not be whether a challenge to a particular rule should be classified as a negative deprivation or a positive duty, but rather whether the impact of the rule on the claimants is justifiable in terms of the underlying purposes and values of the socio-economic rights provisions in the Constitution. Broadly stated these values and purposes require that all law should facilitate people's access to the relevant goods and services. The question confronting courts in socio-economic rights claims is whether existing rules should be left intact, reformed, or even totally replaced by new rules constructing and enforcing an alternative set of distributional outcomes? A choice not to require the adoption of redistributive or regulatory measures represents a positive decision to abide by the outcomes of the existing regulatory framework. It is neither a neutral nor a cost free decision as the following section seeks to demonstrate.

3.2 Resources, rights and politics

The preference in adjudication for enforcing negative duties of restraint is frequently justified on the basis that such duties do not require the judiciary to order the State to spend scarce resources, as is the case with positive duties, to protect or provide socio-economic rights. In the case of social rights, it is argued that scarce resources must be allocated amongst different priorities and these are typically matters for 'political' deliberation, negotiation and decision-making by the democratically accountable institutions of representative democracy as opposed to the judiciary.

However, there is no human rights obligation, including ostensibly negative obligations, which do not entail extensive positive measures and resource allocations. As Barber observes:

> In order to secure rights against third parties, government needs taxing, spending, and regulatory authority or power – for rights against government protect nothing, not even rights against government. Rights do not protect rights; power protects rights.[54]

Negative duties of forbearance also have resource implications, and the expenditure of resources to enforce such duties entails questions of distributional politics. This occurs in every sphere relevant to the protection of the various rights in the Bill of Rights. The police are charged on a daily basis with enforcing the negative duty that people refrain from assaulting others in order to secure the right of everyone 'to be free from all forms of violence' in section 12(1)(c) of the

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[54]Barber (n 1) 3. Koch (n 3) 92 makes a similar observation:

> Human rights cannot be implemented if there is no one to do it; one cannot conceive of obligations either to respect, protect or fulfill without the necessary institutional machinery.

See also the *First Certification* judgment (n 6).

Constitution. Intensely political decisions must be made regarding which crimes to prioritise and how to allocate scarce policing resources. This requires a combination of political decision-making on 'priority crimes', the allocation of reasonable resources to these crimes, and professional judgment on the part of the Commissioner of Police and station commanders on the expenditure of the resources allocated to them.[55]

A rejoinder to the argument that negative rights are also resource dependent is that resources are, at best, *conditions* for the protection of negative rights', but 'are not part of the internal logical nature of negative rights'.[56] In other words, a distinction must be made between the intrinsic nature of the entitlement and what is required to enforce the entitlement. However, human rights lose much of their relevance and transformative potential if they are simply abstract constructs divorced from the conditions and mechanisms required to guarantee their meaningful enjoyment. The rejoinder exemplifies a highly formal conception of both civil and political and socio-economic rights.

The distributional implications of the right to a fair trial are well illustrated by the South African Constitutional Court's decision in *S v Jaipal.*[57] In this case, the Court was required to consider whether the presence in an office, occupied by the assessors, of the state advocate (prosecutor) on a daily basis the investigating officer from time to time, and a state witness occasionally, where they were seen by members of the public, rendered criminal trial proceedings irregular to the extent that a conviction and sentence of the accused must be set aside.

The question had to be considered against the background of practical difficulties such as case backlogs and insufficient facilities in South African criminal courts. Although the Court held that the sharing of office space between assessors, prosecutors and witnesses was highly undesirable and potentially undermined the right to a fair criminal trial, the particular circumstances of the case were not so egregious that they warranted overturning the conviction of the accused. The Court candidly acknowledged the resource implications of the right to a fair trial, and that a context sensitive value judgment is required regarding whether the facilities and resources provided are adequate to guarantee the right. Van Der Westhuizen J observed:

> For the state to respect, protect, promote and fulfil the rights in the Bill of Rights,resources are required. The same applies to the state's obligation to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The right to a fair trial requires considerable resources in order to provide for buildings with court rooms, offices and libraries, recording facilities and security measures and for adequately trained and salaried judicial officers, prosecutors, interpreters and administrative staff. … Few

[55]See the illustrations provided by Plant (n 45) 12.
[56]Plant (n 45) 10-13.
[57]2005 4 SA 581 (CC).

> countries in the world have unlimited or even sufficient resources to meet all their socio-political and economic needs. In view of South Africa's history and present attempts at transformation and the eradication of poverty, inequality and other social evils, resources would obviously not always be adequate.[58]

The fact that the optimum fulfillment of fair trial rights is resource dependent means that 'all those concerned with and involved in the administration of justice – including administrative officials, judges, magistrates, assessors and prosecutors – must purposefully take *all reasonable steps* to ensure maximum compliance with constitutional obligations, even under difficult circumstances'.[59] The Court went on to observe that the compromising of the right to a fair trial may 'in principle be as dangerous as to cancel or postpone democratic elections because of a lack of facilities or resources'.[60] Given the relevance of these remarks to the administration of justice, the Court ordered a copy of its judgment to be brought to the attention of the relevant authorities responsible for the administration of criminal justice and the training of judicial officers and prosecutors.

The *Jaipal* case illustrates not only the point regarding the cost implications of traditional civil rights, but also the fact that the allocation of resources for their realisation is a matter ofdegree which is assessed in the light of what can reasonably be required given the constitutional commitment to the fundamental right, the particular social and historical context as well as the facts and circumstances of relevant cases. The resources required for the guarantee of various rights will always be a matter for ongoing deliberation and contestation contrary to the frequently encountered assertion that negative rights are cost free and that their content is uncontested. As observed by Raymond Plant:

> Policy and politics will determine the level of resources dedicated to the protection of different sorts of rights and there is no philosopher's stone to determine outside such processes what the level of resource should be.[61]

In the context of socio-economic rights the cost implications of ostensibly resource free negative obligations are well illustrated by the *Jaftha* case. The appellants contended in this case that the availability of resources were not an issue in relation to the negative obligation to refrain from preventing or impairing existing access to adequate housing imposed by section 26(1) of the Constitution.[62] However, the remedy of reading in a requirement of judicial oversight encompassing a nuanced consideration of 'all relevant circumstances'[63] pertaining

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[58] *Id* paras 55-56.
[59] *Id* para 56 (emphasis added).
[60] *Ibid*.
[61] Plant (n 45) 12.
[62] See *Jaftha* para 31.
[63] The considerations deemed 'relevant' in this context are set out in *Jaftha* paras 56-60. They are designed to ensure a proportional balancing of the interests of the judgment creditor and the debtor, taking account of the values and purposes underlying the right of access to adequate housing,

to executions against the immovable property of judgment debtors in terms of section 66(1)(a) of the Magistrates' Courts Act clearly has substantial resource implications. The system of judicial oversight replaces the previous system in which a judgment creditor can automatically revert to a sale-in-execution of immovable property if there is insufficient movable property to satisfy the judgment (ie when the Sheriff of the Court issues a *nulla bona* return). The Clerk of the Court in these circumstances issues a warrant of execution against the immovable property.[64] The new requirement of compulsory judicial oversight has significant resource implications in terms of court time, infrastructure and personnel, particularly when one considers that the process of enforcement of judgment debts is a routine component of judicial debt recovery proceedings.

As Ida Koch points out, 'the conception of non-interference as less demanding than the provision of goods and services' is untenable'.[65] Non-interference in existing rights may have considerable economic implications exceeding those connected with the provision of social benefits. Thus the economic benefit to the State of expropriating certain private property may be so great that it would be more costly to refrain from interfering with the right to property (ie 'to respect' the property) than to expropriate the property, pay compensation and, if necessary, provide alternative accommodation to those affected.[66]

It is true that the realisation of socio-economic rights in many liberal, market-based democracies requires greater resources and positive measures than civil and political rights. However, this is due to the fact that the State has already invested in the institutional infrastructure and mechanisms to realise civil and political rights. In contrast, the public institutional mechanisms for ensuring that socio-economic rights can be adequately accessed and protected are relatively undeveloped. Nancy Fraser has illustrated how the meeting of socio-economic needs has traditionally been depoliticised by relegating them to market and domestic institutions.[67] The fact that socio-economic rights require a greater commitment to institutional reforms and are thus more resource intensive in many

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particularly the interest of the judgment debtor and his family in avoiding complete homelessness. As expressed byMokgoro J:

> The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort (para 59).

[64]See the description of this process and the relevant Magistrates' Courts Rules in *Jaftha* para 16.

[65]Koch (n 3) 102-103.

[66]See the example provided by Koch *id* 92.

[67]Fraser *Unruly practices: Power, Discourse and gender in contemporary social theory* (1989) 168. See also Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2006) 1 *Stell LR* 5-36 at 16; and Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in Van der Walt (ed) *Theories of social and economic justice* (2005) 17-36 at 19-20.

contexts than civil and political rights is due to historical and political choices rather than any intrinsic feature of the rights themselves.

3.3 The indeterminacy objection

As noted above, a further reason for privileging negative duties in adjudication is their alleged clear normative content as well as the unproblematic identification of the relevant duty bearer. The argument is that prohibitions on assault, torture, detention, etc, are clear and universally applicable. In contrast, positive duties to protect and provide socio-economic benefits are described as 'imperfect' in the sense that their content and application cannot be determined in the abstract. Institutional mechanisms such as legislation and government programmes are required in order to give socio-economic rights content and to specify the extent of the obligations resting on various public and private agents. It is argued that only in these circumstances can specific public or private parties be held accountable for a breach of a particular individual's social rights.[68]

However, if this argument is fatal to socio-economic rights, it is also fatal to substantively conceived civil and political rights. The interpretation of civil and political rights has evolved (and continues to evolve) through adjudication, advocacy and political mobilisation. The scope and justifiability of limitations to these rights is continuously debated, contested and (at least provisionally) determined in specific contexts on a daily basis by courts throughout the world. As argued in the previous section, the effective enjoyment of all rights requires resources and institutional mechanisms.

Moreover, as Elizabeth Ashford points out it is not always possible to neatly match up a violation of a negative duty with a particular duty-bearer, especially in the case of systemic human rights violations in which a number of agents directly or indirectly participate in a causal chain which cumulatively results in serious violations of the rights of large numbers of victims. The harm which each perpetrator causes may not be significant in and of itself, but when combined with the actions of other perpetrators it results in significant harm.[69] When such harm is reasonably, predictable and foreseeable, it is morally and politically justifiable to attribute responsibility to those whose actions contribute to the resulting harm. This would apply, for example, in the context of torture where responsibility for systemic patterns of torturing victims may be attributable to a whole chain of actors, including legislators, policy-makers, those responsible for police training and operating procedures, commanding officers as well as lower-ranking officers who are the direct perpetrators. The extensive positive obligations contained in the UN

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[68]See the discussion of O'Neill's arguments (n 8) and accompanying text. See further Ashford 'The inadequacy of our traditional conception of the duties imposed by human rights' (2006) 19 *Canadian J of Law and Jurisprudence* 217-235 at 223.

[69]See Ashford's discussion of 'additive' and 'multiplicative' harms: *Id* 224-228.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) are precisely designed to ensure that preventive and deterrent measures are taken by States parties at all stages of this causal chain.

Another example given by Ashford concerns industrial pollution in which the pollution caused by each individual factory in a particular region may not cause significant harm in and of itself. However, when combined with the pollution caused by other similar factories, the pollution reaches a threshold which is sufficient to cause serious harm to human health and well-being.[70] The development of common law principles of delictual liability in conjunction with environmental pollution legislation are typically required to allocate responsibilities among all those complicit in causing pollution, and to redress the harms caused to the victims of such pollution.

This situation is typical of chronic, structural poverty. Poverty of this nature is caused by complex, interrelated causal chains. It is easy to regard the distributional outcomes as the neutral and unintended outcomes of the operation of 'free' economic markets. However, as Raymond Plant points out, the aggregate outcomes of the operation of unregulated markets are generally foreseeable. As Plant observes:

> If it is reasonably foreseeable that in a market those who enter it with least will in general leave it with least then there is a case for claiming that there is a wrong and an injustice at work here.[71]

The fact that the particular outcomes are not intended or that it is difficult to attribute responsibility to any particular actor participating in the social institution of the market does not detract from the collective social responsibility we have to redress serious human harms resulting from market activity by reforming or transforming the institution (or at least aspects thereof).[72] This collective responsibility is typically met through various redistributive measures such as a progressive tax system and the adoption of social programmes to facilitate access to socio-economic resources and benefits for those who are unable to attain them through market mechanisms. This could include, for example, housing subsidies, social assistance grants, and free education, basic municipal services and health care. A commitment to redressing the deeper structural causes of systemic inequality in access to socio-economic rights, requires far-reaching reforms to the rules governing market transactions through the development of the common law and the adoption of regulatory legislation.

As Ashford observes, the redress of systemic rights violations is generally achieved more efficiently through co-ordinated institutional reforms than attempting

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[70]Ashford (n 68) 227-228.
[71]Plant (n 45) 14.
[72]See Ashford (n 68) 233-234.

to allocate and enforce responsibilities in relation to particular private individuals.[73] This applies to all categories of rights regardless whether the duties required for their effective realisation in particular contexts are primarily negative or positive. It is erroneous to claim that a right does not exist because it is more effectively realised through the establishment of institutional mechanisms specifying detailed duties and duty-bearers. Society recognises certain human interests as important enough to attribute to them the status of fundamental human rights. It is precisely their status as rights which generate the collective responsibility to establish institutional mechanisms to ensure their effective realisation and redress.

Returning to the South African jurisprudence on socio-economic rights, the Court in *Grootboom* held that section 26(1) incorporates 'at the very least, a negative obligation placed upon the State and all other entities and persons to desist from *preventing or impairing* the right of access to adequate housing'[74] (emphasis added). In *Jaftha*, the Court held that it was not necessary in the particular case to delineate all the circumstances in which a measure would constitute a violation of the negative obligations imposed by the Constitution. Nevertheless, the Court went on to hold that, 'at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)'.[75]

Such violations, as we have already noted, must be justified in terms of section 36. Despite the broad ambit of alleged negative violations apparently contemplated in *Grootboom* and *Jaftha*, the question of what constitutes a negative violation of socio-economic rights is in fact immensely complex and has substantial polycentric implications.

Questions arise in the context of the right to housing whether all forms of existing access to housing warrant *prima facie* protection under section 26(1) or only access to housing by those who are socio-economically marginalised and face homelessness if they lose their existing homes. Second, the scope of what constitutes a deprivation of access to rights is also immensely complex, particularly given that people are usually 'deprived' of access to a socio-economic right such as housing by interlocking causal chains of legal rules, public and private institutional policies as well as informal social and cultural practices.[76] Finally, the very question of what constitutes 'a home' for the protection of sections 26(1) and 26(3) is open to contestation.

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[73] *Id* 234.

[74] *Grootboom* para 34. This holding was extended to the socio-economic rights in s 27 in *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 paras 46-47.

[75] *Jaftha* para 34.

[76] For example, in the case of *Bhe v Magistrate of Khayelitsha; Shibi vSithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), the African customary rule of primogeniture as codified in the Black Administration Act 38 of 1927 operated to effectively 'deprive' Mrs Bhe and her minor daughters of their access to the family home in Khayelitsha. The rule was found to be unconstitutional on the basis that it discriminated unfairly on the basis of gender and against younger siblings and children born out of wedlock.

The latter question was considered by the Supreme Court of Appeal in the case of *Barnett v Minister of Land Affairs*.[77] The Minister of Land Affairs had sought to evict the occupiers of sites and holiday cottages on the Transkei Wild Coast within a strip which pre-constitutional legislation in the former Transkei had proclaimed to be a coastal conservation area. The cottages were located in an ecologically sensitive area and the sites had been settled shortly after April 1994 at the stage of transition from the old regime to the new democratic order. Permission to occupy and to build cottages on the relevant sites had been obtained entirely irregularly and the cottages and their occupation were accordingly unlawful.

One of the defences raised by the occupiers was that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)[78] applied to their eviction. Accordingly, in terms of section 4(7) of PIE, an eviction order could only be granted if the court was 'of the opinion that it is just and equitable to do so, after considering all the relevant circumstances'.

The Court confirmed that PIE only applies to the eviction of persons from their homes.[79] The Court conceded that the concept 'home' was not easy to define, and it was possible to have more than one 'home'. However, it held that the term regarding 'an element of regular occupation coupled with some degree of permanence'.[80]The concept of home was confined to the dwelling in which a family habitually resided, and did not extend 'to holiday cottages erected for holiday purposes and visit occasionally over weekends and during vacations, albeit on a regular basis, by persons who have their habitual dwellings elsewhere'.[81] While the circumstances of the occupiers in *Barnett* do not evoke sympathy, it illustrates the complexities inherent in the concept of 'home'. Many poor South Africans regularly migrate between rural and urban areas and maintain 'homes' of different sorts in both areas. If PIE is applicable only to 'habitual' places of residence, it is likely to disadvantage those who maintain more than one 'home' due to migration or other economic, socio-cultural reasons.

The negative duty to respect existing access to socio-economic rights seldom (if ever) has the self-evident, non-contestable character which it is frequently represented to have. Questions of interpretation, reasonable limits, the implications for other rights, and the public interest arise as pertinently as they do in the case of positive duties. The content and ambit of negative duties are clear and categorical only if we unquestioningly assume the legitimacy of the existing *status quo* of acquired possessions and entitlements.

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[77]2007 11 BCLR 1214 (SCA) (hereafter '*Barnett*').
[78]PIE was enacted to give effect to s 26(3) of the Constitution. The leading case on the interpretation of PIE is *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).
[79]*Barnett* para 37.
[80]*Id* para 38.
[81]*Id* para 40. See the criticism by Van der Walt *Juta's quarterly review of South African law* (2007) 4 at 2.3.

The legal protection accorded negative duties also has polycentric implications.[82] The resource and policy implications of the protection of home interests are substantial, particularly when the procedural and substantive protections of section 26(3) and PIE are applicable. In *Jaftha*, the appellants argued that the homes of debtors falling below a particular value should enjoy a blanket protection from execution in a similar manner to which certain assets deemed necessary for survival are protected from execution in terms of section 67 of the Magistrates' Courts Act.[83] However, Mokgoro J was of the view that a blanket prohibition against the sales-in-execution of homes would constitute too blunt an instrument, and could lead to a poverty trap by 'preventing many poor people from improving their station in life because of incapacity to generate capital of any kind'.[84] In addition, such an approach would not take sufficient account of the interests of judgment creditors. For these reasons the Court developed a more nuanced, open-textured set of guidelines to be applied in judicial oversight of sales-in-execution of people's homes. This illustrates a clear awareness on the part of the Court of the far-reaching social and economic ramifications implicit in the enforcement of the negative duty it derived from section 26(1) of the Constitution. *Jaftha* has had significant implications for property law, particularly in relation to legal proceedings governing the sale in execution of mortgaged homes, and the nature of the judicial discretion to be exercised in these circumstances.[85]

4 Adjudicating socio-economic rights claims beyond the negative/positive rights dichotomy

I have attempted to demonstrate the impossibility of maintaining a clear conceptual distinction between negative and positive duties as well as the negative theoretical and practical implications of maintaining the dichotomy. This analysis raises the question of whether the different model of review adopted by the Constitutional Court for the negative and positive duties imposed by socio-economic rights is justifiable under a Constitution with transformative aspirations such as South Africa's.

There seems to be little principled justification for subjecting claims by people who lack access to socio-economic rights to a less stringent review standard than those involving a deprivation of existing access. Moreover, as noted above, socio-economic rights violations often arise as a result of a complex matrix of omissions,

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[82]On polycentric disputes and adjudication, see Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard LR* 353-409. For an exploration of the implications of Fuller's theory for socio-economic rights adjudication, see Liebenberg (n 5) at 71-75.

[83]*Jaftha* para 50.

[84]*Id* para 51.

[85]See the recent Constitutional Court decision in *Gundwana v Steko Development CC* [2011] ZACC 14, particularly paras 53-54.

positive conduct by organs of State and private parties, and background rules of statutory, customary or common law which sanction these acts or omissions. A simple classification of a case as entailing a breach of a negative or a positive obligation and the consequential application of a different standard of review is bound to constitute an unduly narrow perspective on the relevant facts and issues at stake. While it may make for neater jurisprudential conceptual analysis, this perspective is unlikely to lead to transformative remedies which are responsive to the complex structural causes of socio-economic deprivations. Is it not preferable to avoid formalistic distinctions between negative and positive duties and instead seek to develop an approach to socio-economic rights adjudication which is attuned to the substantive values and interests at stake in particular cases?

It would be counterproductive to seek a solution to the disjuncture between the adjudication of negative and positive duties by diminishing the currently robust protection accorded to negative deprivations of socio-economic rights. It is appropriate that the courts intervene strongly to protect the tenuous hold of economically marginalised groups on socio-economic resources and services.[86]

Closing the gap between the review standard applied to negative and positive duties, requires bolstering the review standard applicable when people claim that they lack access to the benefits and services referred to in the socio-economic rights provisions of the Bill of Rights (in other words, claims which would traditionally be classified as falling into the category of positive duties). This implies developing a far more substantive approach to reasonableness review for positive socio-economic rights claims. Courts should be willing to interrogate the reasonableness of the quality and sufficiency of socio-economic rights provisioning, rather than limiting the scope of the inquiry to the failure to provide some minimal forms of relief to those in desperate need, or unreasonable restrictions and exclusions.[87]

One potentially fruitful avenue to explore in infusing substantive dimensions into the review of positive duties is to develop the so-called '4 A's' criteria first pioneered by the former UN Special Rapporteur on the right to education, Katarina Tomasevski.[88] These are:

(1) **availability** (representing the quantitative provision of the infrastructure, facilities and programmes required for accessing the relevant rights);
(2) **accessibility** (encompassing non-discrimination, physical accessibility and economic accessibility or affordability);

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[86]See, eg, the application of the model of review applicable to negative duties to protect poor people against a disconnection of their water supply by a local authority by Budlender AJ in *Residents of Bon Vista Mansions v Southern Metropolitan Local* Council 2002 6 BCLR 625 (W). An analogous decision in the sphere of a disconnection of electricity services to tenants is the recent Constitutional Court judgment of *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

[87]See the discussion of *Mazibuko* in part 2 above.

[88]UN Doc E/CN 4/1999/49 paras 51-74; E/CN 4/2000/6 paras 32- 65; E/CN 44/2001/52 paras 64-77, and E/CN 4/2002/60 paras 22-45.

(3) **acceptability** (representing the qualitative dimensions of enjoyment of the relevant rights); and
(4) **adaptability** (programmes to be flexible and regularly reviewed to meet changing socio-economic needs and contexts).

These criteria have subsequently been adapted by the UN Committee on Economic, Social and Cultural Rights for assessing the adequacy of States parties' measures to realise the rights in the International Covenant on Economic, Social and Cultural Rights (1966).[89] Applied in the context of the South African reasonableness model of review, these broad criteria can assist in developing the normative standards against which the reasonableness of the State's acts or omissions can be evaluated.

The intensity of the scrutiny which is applied to the State or private parties' justificatory arguments should not depend on whether the claim is characterised as entailing the enforcement of a positive or a negative obligation. As noted above, this distinction is largely arbitrary, and frequently serves to obscure systemic deprivations constructed and maintained by the existing network of public and private rules. Instead, the level of scrutiny which is applied and the stringency of the proportionality analysis should depend on the nature of the interests at stake in the particular case. Thus the more serious the impact of the deprivation of a socio-economic right is on a historically disadvantaged group, the greater should be the burden on the State to justify its acts or omissions in relation to the particular right. In this sense, reasonableness review in the context of socio-economic rights adjudication is similar to the inquiry into 'unfair' discrimination under section 9 of the Constitution.[90] O'Regan J noted in *Hugo* that '... the more vulnerable the group adversely affected by the discrimination, the more likely it will be held to be unfair (...)'.[91]

Finally, the fact that redress for systemic violations of socio-economic rights may require a long-range programme of institutional reforms should not deter courts from finding a violation at the first stage of constitutional analysis. The courts have ample remedial flexibility with which to craft realistic and pragmatic remedies to redress the relevant violation through incremental steps over a period

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[89]See, eg, General Comment no 13 (21st session 1999) *The right to education* (art 13 of the Covenant) UN doc E/2000/22 para 6. See also the seven factors identified by the Committee for assessing the 'adequacy' of housing in terms of art 11 of the Covenant: General Comment no 4 (6th session 1991) UN doc E/1992/23 para 8.Similar factors are identified in relation to the right to water (derived from arts 11 and 12 of the Covenant): see General Comment no 15 (n 3) para 12.

[90]The overall approach to the analysis of claims of unfair discrimination is summarised in *Harksen v Lane NO* 1998 1 SA 300 (CC) para 53.

[91]*President of the Republic of South Africa v Hugo* 1997 4 1 (CC) para 112. See also De Vos '*Grootboom,* the right of access to adequate housing and substantive equality as contextual fairness' (2001) 17 *SAJHR* 258-276; Liebenberg and Goldblatt 'The interrelationship between equality rights and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 335-361.

of time. In this regard, participatory structural interdicts are well-suited for redressing violations of this nature.[92]

A transformative understanding of the socio-economic rights in the South Africa Constitution should extend beyond protecting existing access to socio-economic resources. To fulfil their transformative potential, socio-economic rights should facilitate meaningful access to resources and services for those systemically excluded. This requires reforms to the underlying rules and institutions which construct and maintain unequal access to these resources and services. If progress is to be made in this regard, courts need to move beyond limited and formalistic distinctions between negative and positive duties in evaluating socio-economic rights claims, and focus more closely on the underlying substantive issues. These encompass the values and purposes which the socio-economic rights in the Constitution seek to advance; the impact of a lack of access to these rights on the claimant group and their status as equals in society; and the justifiability of public and private acts or omissions which produce or maintain the claimants' exclusion from meaningful access to the relevant rights.

[92]For a discussion of these remedies in the context of socio-economic rights adjudication, see Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009), ch 6; Liebenberg (n 5) ch 8, part 8.6.