This book is an in-depth study of the meaning and enforcement of socio-economic rights in the South African Constitution (the Constitution), drawing on international law. It is aimed at practicing lawyers, activists, academics and others working towards the advancement of these rights.

In South Africa, these rights have been the subject of scholarly writings, especially in the light of the progressive decisions of the South African Constitutional Court (the Court) that have provided important insights into their meaning and enforceability. In light of these decisions, this book, the first to be published by Pretoria University Law Press, is therefore a worthwhile academic effort as it reviews socio-economic rights in South Africa in a comprehensive and critical manner.

The book has eight chapters. The introductory chapter focuses on the role of socio-economic rights as a tool of political struggle, and advocacy in advancing the socio-economic wellbeing of society. The ways in which these rights can and have been translated into enforceable legal entitlements to advance social justice are considered. The chapter identifies the socio-economic rights that could play a critical role in the protection and advancement of basic economic interests.

A debatable issue arising from this chapter is whether a clear distinction can be drawn between negative duty of the state to respect and the positive duties of the state to protect, promote and fulfil in realising socio-economic rights. The Court has made a distinction between these duties arguing, among other things, that the enforcement of positive duties enables courts to interfere in policy choices of the executive or legislature.

Danie Brand disagrees, arguing that a clear distinction of the above duties is not sustainable. He is of the opinion that, in practice, the distinction between negative and positive duties is little more than a semantic distinction between acting and not acting. He puts forward two points to justify his position. Firstly, in some cases, the same conduct of the state can be described as a breach of both the positive and negative duty. Secondly, the enforcement of the negative duty is as likely to have resource implications as the enforcement of positive duties.

Brand’s view is consistent with the opinions of scholars such as Mark Tushnet and Cass Sunstein, who have also shown that enforcing negative rights also has budgetary implications.

Faranaaz Veriava and Fons Coomans, in chapter two, consider the right to education as an important pillar in reinforcing a culture of human rights. The nature of the state’s obligation with regard to certain rights, such as the right to housing, is clearer as the courts have had the opportunity to interpret them. However, they note that the same cannot be said about the scope and content of the right to basic education and the extent and nature of the state’s obligations in respect thereof. What is more, it is disturbing that certain policies of the government do not facilitate the full enjoyment of this right. Accordingly, they recommend that these policies be revised in order to ensure constitutional compliance.

The right to housing, which is one of the topical issues in South Africa at present, is analysed in chapter three. In discussing this right, Pierre de Vos also considers the constitutionality of evictions and the obligations of the state arising therefrom. This chapter is a significant contribution in the light of the recent increase in evictions in South Africa and the growing concerns about the procedure through which they are carried out and their impact on poor people.

On rights concerning health, examined in chapter four, Charles Ngwena and Rebecca Cook critique the approach of the Court in Soobramoney v Minister of Health, KwaZulu-Natal 1997 12 BCLR 1696 (CC), 1998 (1) SA 765 (CC), where it held that the state could not be said to have failed in discharging its obligations when it declined to provide renal dialysis due to scarcity of resources, even if chronic renal failure constituted an emergency. The criticisms are levelled at the judicial reasoning and not the outcome of the case. The main critique is on the restrictive way in which the Court interpreted section 27(3), prohibiting the refusal of emergency treatment for anyone. They further make some
suggestions towards enhancing equality of opportunity and choice in healthcare, which include the need for South Africa to move towards horizontal equity in the provision of healthcare services that are accessible, affordable, available and effective; to secure a minimum content of health services for everyone; to give priority to disadvantaged and vulnerable groups; and to reduce the cost of medicine. They conclude by reiterating the duty of the state to rectify disparities in respect of access to health care and health status.

Chapter five focuses on the right to food. Danie Brand considers, against the backdrop of current nutritional conditions in South Africa, the extent to which the South African government’s existing responses to the country’s food security problems meet its constitutional duties in relation to this right. Although the government has instituted a range of measures to ensure access to food, he notes a significant gap in the current national strategy on the right to food. It fails to make any sustainable provision for the food needs of a substantial number of desperate people, as the current programmes available to such people provide only temporary relief. This fails short of the Court’s “reasonableness test” that requires government policies to cater for those in desperate need.

Anton Kok and Malcolm Langford provide an international and comparative perspective on the right to water in chapter six. This chapter is important, as courts in South Africa are entitled to have regard to international law and comparative foreign case law when interpreting the provisions of the Constitution. It demonstrates that international human rights law is increasingly recognising this right as a self-standing right. Among other things, this chapter argues that the state would be in violation of the right of access to water if its water policy leads to a deliberate decline in the provision of water to South Africans.

The right to social security and assistance is analysed in chapter seven. Linda Jansen van Rensburg and Lucie Lamarche argue that the requirement of progressive realisation will not be met if the state fails in the future to develop (and implement) a more comprehensive and less categorised system of social security that caters for indigent people without disabilities between the ages of 15 and 60 or 65. In addition, although the Court has been reluctant to follow the minimum core obligations concept Van Rensburg and Lamarche suggest, with specific reference to the right to security and assistance, that it is essential for the government to identify minimum core content obligations having regard to the unique South African socio-economic circumstances.

Environmental rights are examined in the final chapter. The formulation of these rights, including whether they are group or individual rights, is a debatable issue at the international level and has been so for decades. However, the Constitution clearly formulates this right as an individual rather than a collective right. Although this is open to criticism, with regard to infringements of a collective nature, this chapter also addresses the question of whether the provision in the Constitution actually grants rights to groups. The observation made by Loretta Feris and Dire Tladi is that it can, directly or indirectly, depending on one’s interpretation.

The authors are united in making a number of points, two of which should be highlighted. Firstly, most underscore the need for government policies to cater for those in desperate need, as this will accord with the requirement of reasonableness developed by the Court.

Secondly, all the authors surprisingly agree on the important role that international law has played in interpreting socio-economic rights in the Constitution. De Vos rightly contends that courts cannot completely disregard international law, except where they provide rational reasons for doing so.

Feris and Tladi go a step further by acknowledging the existence of the capacity for South Africa to develop strong environmental rights jurisprudence that could benefit the international community. This is, of course, correct. Other countries have and will definitely benefit from its progressive decisions on socio-economic rights and human rights in general. In fact, the jurisprudence of South African courts has become a source of inspiration for many African and other courts.

Overall, the book will no doubt be useful for all those involved in the promotion, protection, implementation and advancement of socio-economic rights internationally, since, as mentioned above, it examines critically the meaning of socio-economic rights and their implications for the state not only in the South African context but also internationally, drawing on both domestic and international expertise.

Lilian Chenwi is a researcher in the Socio-Economic Rights Project, Community Law Centre, UWC.