References

Book summary
This book provides an analytical framework for determining the content of socio-economic rights. It transcends several disciplines including philosophy, jurisprudence, human rights and public policy.

The first part of the book considers the normative foundations of socio-economic rights. A philosophical theory of rights is developed that provides a common foundation for both civil-political rights and socio-economic rights. It argues that fundamental rights are grounded in the principle of equal importance, which requires protection for certain significant interests that creatures have. Among these central interests of individuals are two thresholds of urgency.

The first threshold is the interest that people have to be free from general threats to survival. The second is the interest that people have to live in an environment where they can fulfil their purposes and live well.

The book draws an important distinction between conditional rights rooted in the principle of equal importance and unconditional obligations that require an engagement with competing normative and pragmatic considerations. Determining the unconditional obligations of a society requires an “all-things-considered judgment” concerning the state of affairs that would best guarantee the equal importance of individuals. It thus becomes important to consider who makes these final, complex judgments. Though not the focus of the book, an argument is made as to why in certain circumstances it is justifiable in a democracy for the judiciary to make such decisions.

The second part of the book moves from a philosophical discussion to approaches to interpreting socio-economic rights. It identifies two current ways in which courts have approached these rights: the “reasonableness approach” and the “equality” approach.

The “reasonableness approach” was developed by the South African Constitutional Court. It requires the government to justify its actions according to the standard of “reasonableness”. The book argues that this standard is defective for two reasons. Firstly, it limits the scope for the normative development of socio-economic rights. The distinctive role of rights is not simply to draw attention to the lack of a justification for government policy but to expose a particular type of failure: the failure to address adequately certain vital interests that people have. The focus on the abstract and procedural notion of “reasonableness” tends to obscure the vulnerabilities of individuals in particular cases and enables courts to abdicate their responsibility to give substantive meaning to socio-economic rights.

Secondly, the author argues that the reasonableness approach is in fact incoherent. It depends on evaluating the justifiability of the link between policies that are adopted and ends that are constitutionally endorsed. In so doing, it enables courts to test the constitutionality of state policies against broad and constitu-

thresholds of urgency. As noted earlier, the author draws a distinction between the first threshold of provision, dealing with the survival interests of individuals, and the second threshold, dealing with a more extensive interest in the general conditions individuals need to be able to live well.

The minimum core approach imposes a “minimum core obligation” on states to realise the minimal needs of individuals as a matter of priority. It also requires the state to improve the quality and quantity of the right so as to meet the more extensive obligations implicit in the right.

The distinction between a minimal interest and a more extensive interest in socio-economic rights thus allows us to recognise that the former has urgent interest, which must be satisfied as a matter of priority. However, the implications of this recognition cannot be appreciated fully unless the notion of “priority” is clarified.

The author argues that socio-economic rights must be interpreted as imposing an obligation on the state to accord “weighted priority” to the satisfaction of minimum core needs. “Weighted priority” requires that priority should be given to the most valuable interests, which require strong countervailing considerations to outweigh them. It also requires that priority should be given to satisfying the needs of the people that are worst off in society. This view of priority does not accord absolute priority to the interests of the worst off but requires that their interests be given special consideration.

Thus this book means that socio-economic rights require the state to display special concern for the minimal interests of individuals. Whilst there could be valid reasons for not realising the minimum core, such reasons have to be of sufficient weight to override an individual’s minimal interests. Where the government fails to meet these minimal interests, courts would be justified in requiring it to demonstrate how it aims to rectify the situation. States also have an obligation to adopt programmes to meet the more extensive interests of individuals and to explain their failure to meet these interests.

The modified minimum core approach has several attractions. First, it is rooted in a normative theory of rights that takes account of the relative urgency and priority that certain fundamental interests have. Secondly, it requires the state to demonstrate how it seeks or has sought to realise these needs. It requires a particularly strong justification for failure to meet the core obligations.

The minimum core approach proposed in this book is of great benefit to the poor. It also provides a theory of judicial review which strikes a proper balance between judicial abdication (the vague reasonableness approach tends towards this extreme) and judicial overreach (an approach that would have judges determine socio-economic policies and budgets) in relation to socio-economic rights.

Finally, the minimum core is rooted in a conception of rights that rejects the primacy of civil and political rights over socio-economic rights. The underlying objective of socio-economic rights is that no person must be left out in the cold or left to die on the streets due to hunger, lack of shelter or poverty.