

Poverty and Fundamental Rights – the Justification and Enforcement of Socio-Economic Rights
by Dr David Bilchitz

LAUNCH

Tuesday 31 July 2007 17h30 for 18h00-19h30
Constitutional Court Foyer

Remarks by Edwin Cameron, Supreme Court of Appeal

1. It is a tremendous pleasure to be able to speak tonight at the launch of David Bilchitz's book.
2. I met him about seven years ago, when I was an acting judge in the Constitutional Court, and he was clerking for Justice Pius Langa (whose warm-hearted foreword graces the book).
3. David impressed me as a personable and extremely industrious young researcher – and when I heard that he had started a group of young gays and lesbians challenging exclusionary attitudes in the Jewish community, I decided to invite him to lunch with another openly gay law clerk.
4. I thought that the three of us would do more or less what three gay men do over lunch – gossip lightly (and kindly) about other gay and lesbian people (and non-gay and lesbian people), and refresh

our minds from the intensities of the court with a good, fashionable meal in a good, fashionable restaurant.

5. My expectations were completely amiss. There was no gossip, no banter, no chit-chat – and no levity. David's fellow clerk and I returned to the Constitutional Court three hours later, much better and more soundly informed about how the constitutional framework could be used secure social justice in South Africa.
6. David had proved himself an intense but loveable lunch companion for whom flippancy was quite alien and for whom engagement with serious issues was the natural mode of connection.
7. This wonderful book, whose launch we are celebrating tonight, exhibits these same virtues. It has the same intensity and earnestness, and it displays David's continuing single-minded commitment to social justice.
8. Yet anyone who conceives that David Bilchitz is devoted only to the realm of the abstract will have to take into account the acknowledgements at the start of his book. These include, after his parents, grandparents and home helper, 'Our beloved pet, Simcha', who David says, 'also has a special place in my life'.

9. This provides perhaps the most touching moment in David's book – as much for what it doesn't say as for what it does. What David doesn't say is whether Simcha is a cat, dog, duck or goldfish – or even a slithery member of the herpetological family.
10. What it does reveal about David is his deep concern for the welfare of all sentient beings. And indeed the first part of his book is a passionate argument that rejects purely humanocentric postulates in ethics or social theory.
11. He contends that a true account of the sources of value in our lives should reflect not only the fact that humans have the ability to reason or speak, but more broadly our capacity to have conscious experiences, and our ability to will the fulfilment of purposes – and that many non-human animals to a greater or lesser extent share these features with all humans, including severely disabled or only partly conscious humans.
12. After a meticulous critique of the ethical systems of the foremost current theorists, David's offers a theory of value that includes all beings with subjective experiences of the world. His argument is that in its background rules, at least, society should recognise the equal value of each sentient being's life – and not only of humans.

13. His contention is that society should not seek to ensure the equal fulfilment of individuals whether in relation to their purposes or their experiences – a task both ethically impossible and practically unmanageable – but should rather to focus on what lies within its power: namely, to create the enabling conditions for beings affected by its rules to live a good life by their own lights. ‘To do so’, David says (p 64), society ‘must guarantee each being the necessary prerequisites for realising a life of value’.
14. This provides the basis for the main burden of the book, which consists in David’s argument about the judicial enforcement of socio-economic rights, which consist principally in the right to material provision for basic subsistence (p 133n).
15. David’s focus is naturally the socio-economic rights provisions in our Constitution (Bill of Rights ss 26 (housing), 27 (health care, food, water and social security, 28 (children’s rights to basic nutrition, shelter, basic health care and social services) and 29 (education)).
16. And the greatest intensity of his intellectual scrutiny falls on the Constitutional Court’s three decisions in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC),

Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC) and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC). In those cases, as is well known, the court, while granting the applicants relief, declined to endorse the approach of the United Nations Committee on Economic, Social and Cultural Rights, which since 1990 has determined that the International Covenant on Economic, Social and Cultural Rights requires states party to it to fulfil a 'minimum core' in relation to socio-economic rights. This imposes on states (in the Committee's formulation) a 'minimum core obligation to ensure the satisfaction of, at the very least, minimum levels of each of the rights' in question.

17. This obligation is subject to the qualification that failure to meet the minimum core can be excused by demonstrating 'that every effort has been made to use all resources that are at [a state's] disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.
18. For reasons advanced in its judgments, the CC has declined to accept that the South African Constitution's socio-economic rights provisions entail a minimum core obligation on government.

19. David presents searching criticism of the CC's reasoning and rhetoric. On the one hand, he offers an intricate and cogent logical argument that the minimum core concept is necessarily entailed by the Constitution's socio-economic rights provisions. On the other, he argues powerfully that the approach the CC has chosen to endorse – namely, to test government action challenged against the socio-economic rights provisions for its 'reasonableness' – is incoherent in the absence of some minimum concept of what the rights in question in fact entail.
20. In other words, David contends, you cannot purport to apply a reasonableness standard in a vacuum. To be able to judge the government's actual social policies you must first give the right at issue some basic content.
21. David claims that the CC's approach is neither perspicuous nor principled (p 162). The Court's key failing, he contends, is 'its failure to place the fundamental interests of individuals at the centre of its inquiry' in the socio-economic rights cases (p 160). For this, he argues, the court substitutes a logically insufficient 'reasonableness' approach, together with strong-sounding, but unconvincing, rhetorical flourishes about dignity.

22. This is tough talk, particularly if one considers that most commentators on the CC in its first thirteen years have tended to be lenient in their criticisms, and have instead preferred to garnish the Court's judgments with praise. To this prevailing discourse David's passionate and incisive criticisms provide an astringent antidote, one that perhaps foretells a period of greater critical reflection on the achievements and shortcomings of the Court's judgments and jurisprudence.
23. David's book proceeds from a social judgment and a moral vision. The social judgment (p 133) is that the most pressing problem of our time lies in widespread socio-economic deprivation at a time of relative plenty in the world, including middle-income countries like South Africa. That is not a hard judgment for those of us who live in relative plenty amidst the continuing disparities and dispossession that characterises our society to endorse.
24. The moral vision David propounds is our capacity to use the law, and in particular the provisions of our Constitution, to change this. He criticises the CC for its 'willingness to make vague and general statements about the capacity of the government to meet minimum core obligations'. He argues:

'The Court provides no evidence to show that the government could not provide basic shelter, food, water, and much life-saving health care to everyone within a very short space of time. In the absence of evidence to show that the fulfilment of a minimum core obligation would indeed be impossible, the Court's statement that it is impossible merely strikes one as a pessimistic expression of despair at the severity of the problems facing South Africa. Indeed, it is arguable that the contrary position is true – that with sufficient will and organisation, the government in South Africa could ensure within a very short space of time that everyone has access to minimum core goods. That would not involve very extensive provision for people, but require at least, for instance, that everyone has access to basic shelter, food, water and much life-saving health care.' (p 214)

25. What this passage shows is David's elemental optimism – his belief that our society and its instruments of social ordering – in particular, our Constitution – can be used to eliminate the intolerable by creating the minimal conditions for the fulfilment of human purposes.
26. The importance of David's book lies first in its direct challenge to the law's role in a time both of relative plenty and of continuing deprivation. Second, it lies in the book's conjunction of a profound exploration of theory with a deep practical commitment.
27. To both, David brings passion and clarity of thought.
28. He has provided us with a morally challenging and deeply stimulating book – for, just as we may well come to understand that our current treatment of animals, particularly those raised for

human consumption, is brutal, callous and cruel, so we may come to understand that the disparities that wrack our society are deeply inhumane and incompatible with any ethical system that recognises our shared capacities.

29. In all of these insights, David is ahead of his time, but also deeply engaged with his time, for this is a book that aims to influence attitudes and judgment-writing now.

30. In all of this, David's love for humans and non-humans, including Simcha, shines through. It is an instructive and inspiring lesson for lawyers and policy-makers.