

■ BOOK REVIEW

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**David Bilchitz, Poverty and Fundamental Rights:
The Justification and Enforcement of Socio-Economic
Rights, Oxford University Press, 2007,
ISBN 978-0-19-920491-5, 279 pp.**

This publication deals with the theoretical justification of the contemporary issue of social and economic rights. In the introduction, the author points out that civil and political rights are commonly accepted and given a higher priority than those dealing with "the most basic needs of individuals". (p. 2) To highlight the importance of social and economic rights, statistics on hunger, malnutrition and lack of adequate housing are provided. The author argues that since these rights have the similar philosophical base as civil and political rights they should be legally enforceable as well.

Therefore, the justification of fundamental rights in general is assessed in the first two chapters by presenting theories of distinguished philosophers such as the capabilities approach of *Sen* and *Nussbaum*, *Rawl's* Concept of the Person, as well as further theories of *Gewirth*, *Nagel* and *Kant*. Each theory is commented and assessed thoroughly by the author whose argumentation is based on the principle "that a society should treat the lives of individuals as having equal importance". (p. 74)

At the outset of chapter 3, the distinction between conditional and unconditional obligations is assessed. Subsequently, the author proceeds to a description of positive and negative obligations. It is argued that the borderline between them is ambiguous because "in the relation of a traditionally positive right such as the right to food, non-interference may also be sufficient in many cases, simply allowing each being to provide their own food for themselves". (p. 90) Regarding the limits of responsibility the theory of *Dworkin* that "people should bear the consequences of any action for which they can be praised or blamed" (p. 94), is criticised. It might be (in the author's view) an individual's own fault if he or she is infected by HIV. Nevertheless the state cannot assume no responsibility because of how expensive HIV drugs are. (p. 95)

Chapter 4 deals with the justification of judicial review of fundamental rights. The author defends a rights-based theory according to which fundamental rights must be guaranteed to all individuals in any society, whether or not the majority agrees or wishes to recognise these rights. *Waldron's* doubts that i.a. the protection of human rights through judicial review is self-defeating, are disproved by claiming the need of some tools to justify the reasons for assigning decisions in a society to certain institutions. *Waldron's* theory would deprive us of any such tools. (p. 115)

After the extensive theoretical background of fundamental rights, the "reasonable approach" as applied by selected case law of the Constitutional Court

of South Africa is discussed in chapter 5. Art. 26 para. 2 of the South African Constitution requires the state to take reasonable legislation and other measures within its available resources, to achieve the progressive realisation of the right to have access to adequate housing. According to that, in the view of the Court in its *Grootboom*-decision, reasonable measures involve the establishment and implementation of a coherent, well-coordinated and comprehensive programme towards a progressive realisation of the guaranteed right. The Court therefore holds that a programme excluding a significant segment of the society cannot be regarded as reasonable and is therefore a breach of the Constitution. (p. 141) It furthermore released an order to the state to adopt reasonable measures to provide relief for people in desperate need. (p. 150) The "reasonable approach" is subsequently criticised by the author as being "theoretically deficient" and having further negative effects. By the same token, the order lacks specific guidance of what should be done. Therefore the "minimum core approach" proposed by the United Nations Committee on Economic, Social and Cultural Rights in several General Comments to the International Covenant of Economic, Social and Cultural Rights would have provided the state with a more definite standard to apply.

The issue of unspecific regulations due to the reasonable approach was also at stake in the *Rudolf*-case, which concerned the attempted eviction of approximately 50 homeless people from a park. The Court required the state to implement an emergency programme to assist people living in intolerant conditions or crisis situations, such as living in cars, in the streets, under the stairs at school or in the bushes. After presenting and assessing further relevant case-law the author points out that the applied approach faces several problems and inadequacies. Such problems are e.g. the lack of content necessary to make determinations leading to inadequately justified decisions. Furthermore, a standard of principles is required, but the guidelines of the Court are insufficiently transparent.

Therefore, chapter 6 deals extensively with the minimum core approach developed by the United Nations Committee on Economic, Social and Cultural Rights. The state is obliged to realise "minimum essential levels" of a right. (p. 185) This approach is subsequently applied to the guaranteed socio-economic rights in South Africa. The preamble of the Constitution claims that a protection of the general conditions necessary for the fulfilment of a wide range of purposes is needed. Having that in mind, Art. 26 of the South African Constitution (right to access to adequate housing) suggests that "people at all times (must) have a place to which they can gain entry". (p. 191) Also the notion of "adequate" is discussed intensively by referring to *Adam Smith*. The issue of progressive realisation of the fundamental rights in the view of the minimum core approach means that "the state has the duty to take steps towards a full realisation of the right, but is at the same time under the obligation to ensure that each is guaranteed the essential levels of the provision required by the minimum core". (p. 194) The concept of minimum core is furthermore assessed in the light of the notion of priority, which means that a government programme must address those in a condition where their minimal interests cannot be satisfied. (p. 208) The issue of availability of resources requires the State according to the Court ruling in the *Soobramoney*-case "to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society". (p. 227)

Chapter 7 compares the demographic situation and the realisation of the right to food between India, the United States of America and South Africa. The same comparison is drawn regarding the right to adequate housing between the United Kingdom, India and South Africa. This leads the author to the conclusion that in case of governments having "to adopt policies in line with their obligations in terms of the minimum core approach, radical improvements would occur in the economic position of the worst-off in society within a short period of time".

The publication deals intensively with theoretical background of fundamental rights in general, but is short on specific justifications for economic, social and cultural rights. Regarding these fundamental rights in South Africa, merely the right to food and adequate housing are presented. A short overview on several implemented economic, social and cultural rights would have been desirable.

Generally the book includes a well written and extensive theoretical discussion of plenty theories justifying human rights, backed up with comprehensive and well argued personal proposals by the author.

The Chief Justice of South Africa, *Pius Langa*, claims in the foreword, that his publication "will undoubtedly force all this country's judges, lawyers and academics to think long and hard and to talk frankly about whether the path that we are currently on is indeed the best route to the destination we all wish to reach". The book cannot be described more accurately.

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