Is This Seat Taken?

Conversations at the Bar, the Bench and the Academy about the South African Constitution

Stu Woolman & David Bilchitz (eds)

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TABLE OF CONTENTS

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CHAPTER 8

ANIMAL RIGHTS AND THE INTERPRETATION OF THE SOUTH AFRICAN CONSTITUTION

Thaddeus Metz*

1 Introduction

In a recent work, Bilchitz advances two important claims about South African constitutional law.[1] One claim is that, because animals have a dignity that demands respect, the Constitution ought to be amended so that animals are explicitly deemed to be 'persons' and hence entitled to protection under the Bill of Rights. Of course, not all the rights in the Constitution's second chapter would apply to animals; clearly, if animals have dignity, respect for it would not require according them a right to vote. However, according to Bilchitz, it would be apt to consider animals expressly to have rights of bodily integrity and freedom of movement, among others.

Bilchitz's second claim is that, in the absence of a constitutional amendment that would ground animal rights in a plain reading of the text, the Constitution is best interpreted as already including them. In his view, a proper reading of the text would extend legal personhood (whether natural or juristic) to animals since they have an inherent dignity. However, Bilchitz maintains that the constitutional rights of animals should be systematically limited by the doctrine of progressive realisation. That is, since it is currently impossible to enforce animal rights fully, which would in principle prohibit eating animals merely for the taste, a minimum core of protection from more glaring and easily avoidable forms of cruelty, such as castration without anesthetic, should be enforced, with additional rights being enforced over time as it becomes more feasible.

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1 D Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 *SAJHR* 38; D Bilchitz 'Does transformative constitutionalism require the recognition of animal rights?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the bench and the academy about the South African Constitution* (2012) 173.

I find the broad outlines of the arguments put forward by Bilchitz quite convincing. Many moral philosophers and professional ethicists believe that the establishment of certain duties toward animals is one of the easiest practical disputes to resolve. Virtually no one believes it is permissible to set a cat on fire merely for the thrill, and nearly everyone believes that the best explanation of why this is wrong has something to do with the effect on the cat. At least some animals have a worth in their own right that merits moral treatment, and it is not an enormous leap from this claim to the idea that certain forms of wrongdoing with regard to animals should be legally prohibited. Bilchitz's suggestions about precisely how constitutional principles and rights might be understood to apply to animals are revealing, fascinating and worth taking seriously.

I do, however, question some of the specifics of Bilchitz's view about the way the law ought to accord rights to animals. In this article, I focus on Bilchitz's claim that, in the absence of an amendment expressly recognising animal rights, the South African Constitution is best read as already including them, albeit limited by the principle of progressive realisation. Whereas Bilchitz maintains that constitutional justices should not fully enforce animal rights at present because it is *impossible*, I provide two reasons to believe that they should not fully enforce, and perhaps not even recognise, animal rights at present because it would be all things considered *unjust*. I am not sure whether these two arguments are sound. I am, however, certain that they need to be addressed before having conclusive reason to favour a reading of the Constitution, as it stands, as embodying animal rights.

2 The argumentative strategy

Bilchitz claims that the Bill of Rights is best read as applying to many animals, although many of these rights are properly limited by the doctrine of progressive realisation. In his view, constitutional justices would be correct to deem animals to be legal persons that have a minimum core of rights that may not be infringed, for instance, rights not to be subjected to cruelty when it would impose trivial costs on human beings, such as the right of an animal not to have its genitals removed without a painkiller. However, many other animal rights are incapable of being enforced, given current sensibilities in South Africa, for example, the right of an animal not to be eaten merely because it tastes delicious. These currently unenforceable rights, Bilchitz maintains, should instead be realised over time as the culture changes and, more specifically, as the government promotes changes in culture so as to enable more animal rights to be enforced.

I agree with Bilchitz that animals have a moral worth that merits respect not merely at the private, individual level, but also at the public, legal one, at least under certain conditions. However, it is not clear to me that the moral status of animals is such as to merit interpreting the Constitution *as it stands* to

grant legal personhood to animals and, hence, protection by the Bill of Rights. My reasons for suspecting that it is impermissible to interpret the Constitution in this way do not rest, as one might think, on a 'conservative', 'originalist' or otherwise 'passive' theory of constitutional interpretation. In fact, I share the broadly purposive or natural law approach to reading legal texts that Bilchitz invokes. However, I find attractive a particular version of naturalism that apparently entails that it would be wrong for constitutional justices to apply the Bill of Rights to animals in the absence of a constitutional amendment; or, at least, my value-laden interpretive philosophy, which accords with the moral judgments of many jurists and philosophers of law, appears to entail that the reason not to fully enforce the Bill of Rights with regard to animals in the absence of an amendment is not (merely) that it would be impossible, but that it would be a *greater defect of political morality* to fully enforce such rights than not to enforce them. Again, my strategy is to grant Bilchitz that, given the moral worth of animals, there would be *some* injustice in failing to read the South African Constitution in a way that accords them protection from cruelty and other mistreatment, but to consider whether a *more weighty* injustice would be done if it were so read.

Note a few limitations of the argumentative strategy that I will explore. First, I grant throughout that many animals have a moral status, and, indeed, even a dignity of a sort. The arguments I discuss are strongest, though, if animals generally have a moral status that is less than what persons have, a position that I shall argue for in what follows, but that I lack the space to defend with philosophical conclusiveness. Second, while the principles of justice that I appeal to are meant to be universally applicable, they have particular implications in light of South Africa's history, and could have different implications in other social contexts. Third, I set aside the issue of whether a constitutional amendment to accord rights to animals would be permissible or not. The reasons I discuss for not interpreting the Constitution as already including animal rights probably provide *some* ground not to amend the Constitution to include them; however, I am unsure of whether it is definitive or not. I suspect not, at least in the case where parliamentary ratification of an amendment is consequent to the development of a substantial, favourable public view on the matter. However, I say no more about the bearing the arguments I make for how to interpret South African law might have on how to make law in this country.

3 Formal justice

Considerations of what is sometimes called 'formal justice' provide reason to think that the best interpretation of the Constitution as it stands entails that it would be wrong to fully enforce animal rights, and perhaps even to recognise them at all. Formal justice is, roughly, a matter of an agent consistently applying principles that it believes to be just, where substantive justice, in contrast, is a function of the content of the principles applied. In a

criminal trial, it would be substantively unjust to impose a severe penalty on someone guilty of a trivial crime, and it would be an additional, formal injustice to impose such a principle selectively, say, only on those who committed crimes on a Tuesday.

Although Dworkin does not use the language of 'formal justice' (that I recall), his naturalist theory of interpretation essentially appeals to it, and I will use his theory to ground my objection to Bilchitz.[2] According to Dworkin, constitutional justices ought to read the text in light of the most justified principles of political morality that make sense of the recent history of their legal system as a whole. They are to appeal to defensible principles of substantive justice, but not necessarily the *most* defensible *considered on their own from a philosophical point of view*. Instead, judges are to find the most defensible principles of substantive justice that 'fit' the legal system in which they operate, that is, that adequately entail and explain a wide array of judgments, norms and practices of contemporary law as a whole. For example, Dworkin has us imagine that a judge ascertains that the philosophically most defensible distribution of economic wealth is socialist, but that she lives in a legal system that is thoroughly capitalist.[3] Dworkin maintains that such a judge would have *some* reason of substantive justice to render socialist verdicts, but *more* reason not to, as the principles of justice to which she appeals must not be overly discontinuous with her legal context.

Dworkin provides several reasons for the 'fit' criterion of legal interpretation,[4] with the most interesting and powerful ones able to be placed under the heading of 'formal justice'. The basic idea is that a judge in a thoroughly capitalist system who ruled socialistically would be failing to uphold her duty to assist the legal system in consistently applying principles that it maintains are just. If one does not see any immorality in 'formal injustice', consider two arguments Dworkin advances for finding it so, one self-regarding and one other-regarding.

In terms of other-regarding considerations, Dworkin maintains that a judge would fail to treat as equals those subjected to her idiosyncratic, but perhaps substantively just, decision. When there are great ruptures in judicial interpretation, the government fails to speak with one voice and thereby unfairly treats one group of citizens according to one standard, and another group according to another one.

With respect to self-regarding matters, Dworkin believes that the consistent application by government of principles that it deems just is necessary in order for it to exhibit the political virtue of integrity. If judges appealed to whatever principles of justice they found most substantively

2 R Dworkin '"Natural" law revisited' (1982) 34 *Univ Florida LR* 165; R Dworkin *Law's empire* (1986); R Dworkin *Freedom's law* (1996).
3 Dworkin *Freedom's law* (n 2 above) 11.
4 See especially Dworkin *Law's empire* (n 2 above).

justified, without consideration as to whether the principles cohere with recent legal practice, then the state (as a moral agent distinct from the individuals who compose it) would fail to be principled, would act haphazardly, and would probably even count as hypocritical. If we want political institutions to manifest the virtues of honesty, gratitude and remorse, then it seems apt to want them to exhibit integrity as well.

The implications of Dworkin's attractive theory of interpretation for Bilchitz's argument should be clear. Even if Bilchitz were correct that ideal principles of substantive justice require applying the Bill of Rights to animals, it would not necessarily follow that judges, all things considered, have reason to interpret the Constitution in that manner. They would need to factor in considerations of formal justice, and there is of course strong reason in the case of animal rights to think that recognising them at the constitutional level would be seriously discordant with South Africa's recent legal history. After all, if legal personhood at the constitutional level were not such a radical break, Bilchitz's claims would be of less jurisprudential and academic interest.

Of course, Bilchitz does not recommend the full enforcement of animal rights, claiming only that a minimal core of protection should be enforced, with other protections being increasingly adopted over time as they become feasible. But I suggest that Bilchitz has provided the wrong reason for limiting animal rights, or at least not all the relevant reasons. Bilchitz rejects the full enforcement of animal rights because it cannot be accomplished. The doctrine of progressive realisation, as Bilchitz says of it, 'recognises that the full realisation of these rights may not be possible at a particular point in time'.[5] Of course, if an action is not possible, then it follows that an agent lacks any reason either to do it or not to do it. Whereas Bilchitz is saying, in effect, that there is not reason to fully enforce animal rights, the view I am considering is that there is reason not to fully enforce them: Even if it were possible to fully enforce animal rights, a justice might be wrong to read the Constitution in a way requiring that, as doing so would violate principles of formal justice.

The natural reply for Bilchitz to make at this point is to contend that his interpretation of the Constitution would not infringe Dworkin's invocation of formal justice, as it would bring out deep principles of justice that, with respect to South Africa, 'show the history of judicial practice in a better light'.[6] Specifically, Bilchitz maintains that just as the Constitution clearly forbids racism because of its arbitrariness, so the Constitution should be read as forbidding speciesism for the same reason. However, the burden of Dworkin's hermeneutical approach is that those reading the Constitution need a construal of the requirement to avoid arbitrariness

5 Bilchitz 'Moving beyond arbitrariness' (n 1 above) 70.
6 Dworkin '"Natural" law revisited' (n 2 above) 169.

that adequately coheres with recent judicial history, something Bilchitz's construal probably does not. For a judge in today's South Africa to apply the Bill of Rights to animals and to treat speciesism as on a par with racism would be akin to a judge rendering socialist verdicts in a capitalist society.

4 Compensatory justice

Whereas the previous argument maintained that deciding whether to constitutionally recognise the legal personhood of animals involves a trade-off between *substantive* justice and *formal* justice, the present one maintains that *distributive* justice for animals in South Africa might come at the cost of *compensatory* justice for people and, in particular, for Africans. Bilchitz appeals to principles of distributive justice, contending that an ideal distribution of liberties, resources, restrictions and burdens entails that the Constitution is properly interpreted as according rights such as bodily integrity and freedom of movement to at least some animals. The other sort of justice that I invoke is compensatory, a subset of non-ideal principles indicating how to respond to past violations of ideal principles of justice.[7] Principles of compensatory justice tell us how rightly to deal with wrongful behaviour, and, specifically, to do so by effecting restitution in some way. A requirement to make up for wrongful damage done is widely recognised as being a suitable aim for political institutions, particularly when they themselves have done the wrongful damage – hence, to give just one example, the TRC's call for state reparations to victims of apartheid-era political crimes.

If the Constitutional Court were to adopt Bilchitz's recommendations about how to read the Constitution as it stands, it would not merely fail to help effect restitution among the previously most wronged people in South Africa, but would likely retard achievement of that aim. One of the major injustices of apartheid took the form of the forcible eclipse and denigration of African cultures. There is debate among political philosophers about the precise respect in which this was an injustice – for instance, some would say that culture itself is a good of which Africans were robbed, while others would contend that the problem is the self-esteem that was foreseeably reduced via the destruction of culture. One need not settle that debate in order to recognise that a plausible way for the state to repay those whose cultures it destroyed would be for it to foster their cultures. Concretely, this could take the form of: supporting the study of traditional African societies at public universities, funding local museums that would protect and showcase physical artifacts, paying people to discover and interpret intangible heritage such as ideas associated with talk of '*ubuntu*', digitising the narratives of oral peoples, employing African

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7 For a classic source of the distinction between ideal and non-ideal principles of justice, see J Rawls *A theory of justice* (1971).

languages in publicly sponsored discourse, and so on. Akin to these policies would be the practice of giving *some* (not necessarily conclusive) weight to characteristic African values when making legal decisions.

Now, it is typical of (Southern) African culture not to accord animals a dignity, that is, a superlative intrinsic value, or at least not one that would approximate that of human beings and warrant legal enforcement. In the Southern African (and more generally sub-Saharan) region, the maxim taken to summarise morality is usually translated as 'A person is a person through other persons'. This is *Motho ke motho ka batho babang* in Sotho-Tswana, and *Umuntu ngumuntu ngabantu* in the Nguni languages of the Zulu, Xhosa and Ndebele. The basic idea of the maxim is that one becomes a moral person or lives a genuinely human way of life, manifesting '*botho*' or *ubuntu*, just to the extent that one lives in community with other people.[8] One need not delve any deeper into the essentials of this ethical worldview to see that the relevant beings with which to relate communally are solely persons, a group that is usually held to include ancestors (and, in some traditional societies, spirits who are not yet born), but does not include animals.

Of course, it does not follow that, for a southern African morality, one may treat animals or the rest of nature any way that one pleases. Instead, *person- centred* reasons are usually given for thinking that it would be wrong to be cruel or otherwise treat animals in intuitively immoral ways.[9] For example, one routinely finds the rationale that, since everything in the world is interdependent, treating persons well requires not exploiting the natural world. For another example, to live communally with ancestors can require protecting land that they are deemed ultimately to own, or respecting animals that are considered totems.

However, none of these recurrent rationales for not interfering with animals appeals to the dignity or even moral worth of the animal.[10] In a large majority of Southern African cultures animals are routinely eaten for the taste, slaughtered to pay tribute to ancestors, and worn for ornamentation. To interpret the Constitution in a way that forbids these practices, even if subject to progressive realisation, is therefore not merely to fail to uphold African cultural practices, but also to judge them negatively

8 For a philosophical reconstruction of the essentials of *ubuntu*, see T Metz & J Gaie 'The African ethic of *ubuntu*/*botho*: Implications for research on morality' (2010) 39 *Journal of Moral Education* 273.

9 Many of the following rationales can be found in the sixth part of MF Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009).

10 As one would expect given the diversity of views in the sub-Saharan region, one can find some grounds for according moral status to animals. There is a strain of African thinking that can be read as maintaining that community is to be fostered not merely with persons, but also with some other beings in nature, on which see K Behrens 'Exploring African holism with respect to the environment' (2010) 19 *Environmental Values* 465. Even here, though, few Africans would deem such a perspective to forbid eating or wearing animals, let alone to warrant the legal prohibition of these practices.

and to suppress them even more. Indeed, this is the way that the African National Congress (ANC) judged recent attempts by Animal Rights Africa (ARA) to use the law to prohibit *ukweshwama*, a Zulu practice in which adolescent men bare-handedly kill a bull in order to signal the time to harvest, to honour the strength of their king, and to express gratitude to ancestors.

> For hundreds of years, the apartheid and colonial systems sought to relegate the cultural and traditional practices of the majority of South Africans to the humiliating levels of lowliness. Millions of black people, Africans in particular, were dictated to on how to conduct their cultures and a foreign way of living was imposed on them ... (W)hile there is no question about the paramount role the courts play in our constitutional democracy, they might not be the appropriate platform for resolving complex and sensitive matters such as *ukweshwama*. The ARA's decision in this regard sets a worrying precedent in that those with huge financial resources can dictate to others how their age-old traditional customs should be conducted, as was the case during the apartheid and colonial eras.[11]

Since there is a weighty duty on the state to make up for the losses of culture it has been responsible for, justices might have, all things considered, reason not to add to more legal prohibition of the culture with which many Africans identify.

As it turns out, this reasoning is not far from some of the principles invoked in the High Court's decision with regard to the bid on the part of animal rights activists to stop *ukweshwama.*[12] Although this Court did not refuse outright to hear the petition, as the quotation above suggests the ANC would have preferred, it did find in favour of representatives of the Zulu people, and did so in part on the grounds of historical discrimination.[13] The High Court says:

> From a historical perspective applications of the present are nothing new and are symptomatic of an intolerance of religious and cultural diversity ... The traditional African form of culture, religion and religious practices ... were historically often discriminated against and in some instances its followers were persecuted and punished ... [The applicants have] called into question the legitimacy of the religious and cultural practice and offended the members of the Zulu nation who are now called upon to justify their beliefs and

11 M Motshekga 'Courts can't decide on old traditions' *Sowetan* 4 December 2009 http://www.sowetan.co.za/News/Article.aspx?id=1094191 (accessed 14 October 2010). Cf Ramose, who characterises South Africa's Constitution as an expression of the 'conqueror's will' in 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy*, http://them.polylog.org/3/frm-en.htm (accessed 14 October 2010).

12 *Stephanus Smit v His Majesty King Goodwill Zwelithini Kabhekuzulu* 2009 (10237/2009) ZAKZPHC 75, http://www.safli.org/za/cases/ZAKZPHC/2009/75.html (accessed 14 October 2010).

13 Additional reasons from the High Court include the absence of evidence that the killing of the bull is consequent to great suffering, and a concern about violence erupting if the killing were legally prohibited.

> cultural practices. This is particularly harmful to the development of a democracy based upon tolerance and promoting diversity.[14]

The reference to past injustice suggests that the Court's reasoning is not merely that the Zulu nation's right to culture outweighs the ARA's right to conscience, an argument based on distributive justice that is worth considering, but that I do not focus on here. What I instead highlight here is that one apparent aspect of the Court's reasoning is the idea that prior discrimination against the Zulu people's culture provides some reason to protect it now, or at least for the law not to interfere with it.

In response, Bilchitz would no doubt suggest that not all elements of a culture are worth retaining, which is, of course, true. It is right, for example, to forbid *muti* killing on constitutional grounds, despite being a part of some indigenous cultures. If culture is not sufficient to justify the killing of an innocent child for the purpose of obtaining dubious medicinal elements, then, so the response would go, culture is not sufficient to justify the killing of an innocent animal for the purpose of taste, decoration or religion, even if there are reasons of compensatory justice to foster the culture of those who have been robbed of it.

Implicit in this response, most likely, is the assumption that the killing of an innocent person and the killing of an innocent animal are morally on a par. Indeed, Bilchitz explicitly maintains that the dignity of an animal has an 'equal moral weight' to that of a person.[15] While I accept that animals matter morally in their own right, so that it is a grave wrong to inflict unnecessary cruelty on them, I find it implausible to think that they have as much moral status as characteristic persons. A variety of uncontroversial judgments are evidence for this view. For example, if the reader and I were starving along with a pig, and if I had a gun, it would be permissible for me to shoot the pig to feed us, but impermissible for me to shoot the reader to feed myself and the pig. The best explanation of such a judgment, I submit, is that pigs have a lower moral status than persons.[16] Similar cases abound. Imagine you are driving a bus and must choose between running over a person and a cat; *ceteris paribus*, you must strike the cat, the most plausible explanation of which is that the cat is not as morally important as the person. Or consider a case in which you must choose between killing a pit bull terrier or letting it bite a child. Such forced trade-offs are rare, to be sure. But thinking about what it would be right to do in such cases, and why, reveals much about our basic views of moral standing between animals and persons as unequal.

Differential moral status also accounts best for uncontroversial judgments about how to treat beings that have already been killed. If an

14 *Smit v Zwelithini Kabhekuzulu* (n 12 above) 13.

15 Bilchitz 'Does transformative constitutionalism require the recognition of animal rights?' in Woolman & Bilchitz (n 1 above) 196.

16 It does not follow that it would be permissible to eat the pig in the situation where sufficiently-nourishing, pleasant-tasting, vegetarian food were readily available.

animal has been killed for whatever reason, many find it permissible not to let it go to waste; even many vegetarians would find something respectful in the stereotypical native American practice of using every part of a buffalo, once it has been brought down. In stark contrast, such a practice applied to human persons would be horrific. Consider a Nazi thinking, 'Well, we have already killed this Jew, and so may as well make the best of it by using his hair to stuff pillows, fat to make soap and bones to fashion buttons'. If animals and persons had the same moral status, our reactions to the native American and Nazi cases of posthumous treatment would be the same, but they are not.

I have not provided a theoretical specification of the property in virtue of which persons have a higher moral status than animals, something I lack the space to do here,[17] and something I need not do in order to mount a serious challenge to Bilchitz.

I have provided strong reason to think *that* persons and animals have a differential moral standing, even if I have not said *why*, and if indeed animals have a lower moral status than persons, then it is likely that the state should prioritise the latter's interest in compensatory justice with regard to cultural wrongs.

Bilchitz can reasonably reply, at this point, that even supposing there is unequal moral status between persons and animals, the moderate interest of a human being in culture is outweighed by the urgent interest of an animal in its life. Instead of seeking to rebut this point, I note that Bilchitz's approach to constitutional interpretation would, in fact, unreasonably require trading off the urgent human interest in human life for the sake of animal lives. Progressive realisation of animal rights would mean that the state would have to spend resources to move society closer to the end in which they are fully recognised. Furthermore, constitutional recognition of so-called 'negative' rights against cruelty and the like often requires substantial amounts of time and money, not merely from the state, but also from the rest of South African society to whom such rights would horizontally apply. Now, these are *scarce* resources that, in principle, could go toward paying Africans back in other, more material ways for past injustices. When literally many hundreds of thousands of Africans die each year in this country from diseases and injuries that a dysfunctional healthcare system cannot treat, and when a poorly developed educational system leaves millions of Africans to meaningless, undignified and unhappy lives of unemployment and severe poverty, it would express disrespect for them if the state and others in society were

17 For the theory I think is most promising, see T Metz 'Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights' (2010) 9 *Journal of Human Rights* 81; T Metz 'African and Western moral theories in a bioethical context' (2010) 10 *Developing World Bioethics* 49; T Metz 'For the sake of the friendship: Relationality and relationship as grounds of beneficence' (2010) 125 *Theoria* 54.

to expend severely limited resources on the urgent interests of animals. Or, at the very least, it might reasonably be perceived to express such disrespect, akin to sacrificing an African's life for the sake of saving a pig.

5 Conclusion

I have argued that, even supposing that Bilchitz is correct that substantive principles of distributive justice entail that animals warrant constitutional protection, there are other, potentially weightier forms of injustice that would probably be done by interpreting the Bill of Rights as already applying to animals, namely, formal injustice and compensatory injustice. Formal injustice would apparently result from such a reading of the Constitution in that the South African state would fail to speak with one voice upon according legal rights to animals. Compensatory injustice would likely result from such a reading in that the law would not only suppress facets of culture that many Africans deem important to their self-conception, but also require spending scarce resources on animals that could have gone toward saving African lives and livelihoods. Human rights not to be denied life-saving healthcare and not to suffer from poverty continue to be violated as a result of apartheid era policies. If the state must choose between acting for the sake of the urgent interests of animals and those of humans, humans must take priority, even assuming that animals have a kind of dignity that morally forbids harming them in our private lives.

I am not certain that interpreting the Constitution as already according rights to animals would violate principles of formal and compensatory justice. Perhaps doing so would justifiably infringe them, or, less plausibly, maybe doing so would be consistent with them. My aim has been to indicate some moral and legal issues that need to be thought through before making a conclusive judgment about whether to read the Constitution in the ways Bilchitz proposes. Even if he is correct that principles of distributive justice entail interpreting the Constitution's Bill of Rights as it stands as applying to animals, this consideration must be weighed up against principles of formal and compensatory justice that appear to conflict with such an interpretation.[18]

[18] For helpful comments on an earlier draft of this article, I thank David Bilchitz, an anonymous referee for *SA Public Law*, and participants in a seminar sponsored by SAIFAC.