

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

LAUNCH

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Constitutional Court Foyer

Remarks by Theunis Roux, South African Institute for Advanced Constitutional, Public, Human Rights and International Law

David has written a good book. In an era when simple words meant something, I might have left it at that. But we do not live in such an era, and thus I am going to have to say a little more.

David has written a good book for three main reasons. It is a good book because it is philosophically rigorous. It is a good book because its intentions are good. And it is a good book because it will inspire others to write good books. I hope that I can try your patience for a moment in order to expand briefly on what I mean by these three statements.

First, the philosophical rigour. David, as you may know, recently went to the United Kingdom on a whistle-stop tour to speak about his book. In preparation for this visit, he drafted a short paper outlining the main themes of his book and then test-drove the reading of this paper at SAIFAC. From this experience, I know that David finds it extremely difficult to summarise what is a fairly long and complicated argument. I do not presume to be able to do this any better than David. Nevertheless, there are two reasons why attempting to say something about David's argument may be a good idea:

- (1) It is sometimes easier for the reader than for the author of a book to see what is most important about a particular line of argument. And even if what the reader thinks is important is not what the author intended to be important, there is still some value for the author in getting a second opinion.

(2) At many book launches the author is personally lauded but the ideas in the book are not spoken about. The best compliment we can pay to David is to read his book and respond to it.

What I want to do, therefore, is to say just enough about David's book to make you want to read it.

For a mostly legal audience, the first thing to say about David's book is that it is a fairly rare combination of philosophy and constitutional law. Constitutional law, especially in a young system such as ours, requires judges to derive concrete rules from abstract articulations of fundamental rights. Having a philosophical background undoubtedly helps in this endeavour. As we have just heard, David trained as a philosopher at Wits before moving on to law. He is thus in a better position than most to combine these two disciplines.

But how exactly do philosophy and constitutional law relate to each other? I have just come back from a conference in Cape Town devoted to interrogating Laurie Ackermann's constitutional jurisprudence. Laurie, as we know, was one of the more philosophically minded of the judges during his time on the Constitutional Court. But even Laurie did not pretend to be a philosopher, or that the modes of philosophical reasoning are the same as legal reasoning. At the conference, Laurie spoke of PPs and PLs (principally philosophers and principally lawyers) and suggested that philosophy and law occupy overlapping domains rather than a single logical space.

I think this conception of the relationship between philosophy and law is broadly right, although one could of course complicate it further by following Dworkin's route of suggesting that philosophy can underpin and give normative weight to competing legal principles. In Dworkin's famous metaphor, the ideal role of the judge, not just in constitutional cases, but in all cases, is that of a Hercules, closing the gaps in the system of legal rules by recourse to the political theory that best interprets the moral convictions and institutions of the community in which the judge is working.

If I had to summarise David's project in this book I would say that he has attempted a Herculean reading of the socio-economic rights provisions in the 1996 Constitution, both in the ordinary sense of this term, and also in the specific sense employed by Dworkin. Using the three years at his disposal during his time at Cambridge, and his philosophical training, David has worked out a political theory that he believes best grounds the interpretation of socio-economic rights in South Africa and, indeed, elsewhere in the world. The essence of that theory, which David, following John Rawls, calls 'a thin theory of the good', is that beings are entitled as of right to the prerequisites for living a life of value.

As I understand David's first chapter, his difficulty with Sen, Nussbaum, Rawls and other liberal political philosophers is that they tend to assume that the human species is the fundamental parameter within which a theory of the good must be worked out. This is a fatal flaw, David thinks, not because consideration of other species is necessary for any kind of *a priori* reason, but because situating one's account of human survival and flourishing within a broader account of other species' survival and flourishing helps to prevent subjective bias in the specification of what it is that beings value. All beings that can have experiences or purposes, David argues, value certain types of experience, and certain types of purpose-fulfilment, more than others. Grounding value in these objective characteristics is the best way of making a theory of the good independent of the need for agreement, and thus helps to resolve some of the difficulties in Rawls' work in particular.

Chapter 2 is devoted to an argument for fundamental rights. The main gap in existing theories, David asserts, is their inability to generate a fundamental principle of equality, which, when coupled with the necessary conditions for lives of value, would generate what he calls 'the equality premise', i.e. the idea that each being is entitled to the equal provision of the necessary conditions required to live a life of value. The equality premise follows from the impersonal perspective David adopts in the book as a whole. It can also be reached by other routes, such as those followed by Dworkin, Sen and possibly even Immanuel Kant. Whichever route is followed, the equality

premise, once accepted, leads logically to the conclusion that each society must guarantee to its citizens not an equality of outcomes, but equal rights to the prerequisites for realizing a life of value, satisfying first the threshold level of survival, and thereafter the preconditions necessary for the fulfilment of a wider range of purposes.

Had the argument been left there, David's book would have constituted an original contribution to political philosophy, in particular, to that part of political philosophy that has to do with reasoning from a theory of the good to a theory of fundamental rights. But David's project is more ambitious than that. After discussing the content of the duties arising from fundamental rights in chapter 3, David turns his attention in chapter 4 to constitutional law, and proceeds to explain the implications of his theoretical approach for the judicial review of socio-economic rights in general, and also for the South African Constitutional Court's socio-economic rights jurisprudence in particular. Dismissing the objection that socio-economic rights necessarily require courts to involve themselves in matters of resource allocation, David argues that it is precisely in this respect that judicial review matters most. If fundamental rights are to mean anything at all, they must guarantee to individuals the prerequisites for living a life of value. When socio-economic rights are included in a Constitution, therefore, judges cannot escape their constitutional duty to enforce such rights. To those who would argue that maximum deference is required, David's response is to remind us that judges are simply reviewing decisions already taken by the political branches, and therefore not usurping the political branches' primary rights-defining and rights-fulfilling function.

Chapter 5 contains David's by now well-known critique of the Constitutional Court's reasonableness approach, and his argument that it was possible for the Court, within the constraints of the separation of powers, to have given a minimum core content to the socio-economic rights in sections 25, 26 and 27 of the Constitution. The most powerful aspect of this chapter and the next is that they explain why the Constitutional Court's decisions in *Grootboom* and *TAC* were unnecessarily deferential. Although David and I disagree a little over the influence on these decisions of the political context in which the

Court was working, I am convinced by David's central claim that the Court could have developed a stricter, more content-based standard. It is one thing to prescribe to the state the exact dimensions of an RDP house or the exact treatment protocol to be followed in a primary healthcare programme, another to develop judicially a content-based standard according to which the constitutional adequacy of such programmes may be assessed. Is it really too much to ask of a court that it stipulate that the national housing programme must, at the very least, provide its beneficiaries with houses that protect them from the elements? Does it amount to impermissible trespassing on the political branches' terrain for a court to hold that government should prioritise meeting basic needs? As David rightly argues, the separation of powers should not be used to support straw-man arguments about the limits of judicial review. It is as much a failure of constitutional justice for courts to stop short of giving full effect to rights as it is for courts to over-reach themselves.

In the first draft of this talk I had wanted to offer a mild critique of David's book to the effect that he could have grounded his argument more in the moral convictions and institutions of the South African political community. A South African legal academic writing a book for an international audience always faces the dilemma of needing to generalize his or her argument so that it has relevance for academics working elsewhere. I thought on my first reading of David's book that he had perhaps erred on the side of generality by beginning his argument with a context-independent engagement with liberal political philosophy, and only moving on to the jurisprudence of the South African Constitutional Court in the middle. On re-reading David's book for this presentation, however, I see that David has included sections in both chapters 5 and 6 in which he explains how his 'thin theory of the good' can be grounded in a distinctly South African, value-based approach to the interpretation of socio-economic rights. Through this device I think David has done what I would have thought, before reading his book, to have been impossible, namely, writing a book that satisfies at once a non-South African audience's interest in a philosophically rigorous general theory of socio-economic rights, and a South African audience's interest in a philosophically

well-grounded moral reading of the socio-economic rights in our Constitution. As a fellow academic I can only say that I am in awe of this achievement.

So much for the philosophical rigour. I said at the beginning that there were two other reasons why it may be said that David has written a good book: the fact that its intentions are good and the fact that it will inspire others to write good books. I am not going to address these issues in any detail, but permit me to conclude by saying the following. First, the books intentions: Getting to know David as I have over the last six months, I can say that I see in him a passion for justice, and a compassion for his fellow beings, both human and non-human, that I, in my cynicism, have long since given up on. Cynics, of course, are disillusioned idealists, and there is therefore not that much that separates us. But David has retained a faith that I have lost, a faith not so much in the capacity of human beings for good, or a faith that history, in its grand march, will somehow work for the good, but a faith in the capacity of reasoned argument to distinguish good from bad, and in this way contribute to the sum total of good in society. Most South African academics would, I imagine, have been happy enough (ecstatically happy even) to have written a book like David's at the culmination of their careers. That David has written this book at the beginning of his career is a tribute both to his intellectual abilities, but also to what motivates his intellect. David is not interested in a research career, or a career as a political activist or advocate, for the fame it will bring him, but for the difference such a career will allow him to make in the world. This is a wholly benign ambition, and one that is all the more dangerous for that. Dangerous to academics who put their egos before analytical accuracy. And dangerous to judges who fail to insulate their judgments from the sort of withering critique of which David is capable.

Lastly, David has written a good book because it will inspire others to write good books. One of the most frustrating things about being a legal academic in South Africa today is that one has the sense that one is living through the most fascinating of times, with profound implications for legal theory, without having the opportunity to reflect critically on the judgments of the courts or law-governed social transformation generally. Part of what de-motivates me

when considering this situation is the thought that there are probably less than a hundred people in the country who would take the trouble to read a book as carefully reasoned and as well written as David's. So why write one? The answer, David's book compellingly demonstrates, is that it is possible to write a book that makes an incisive contribution to South African debates whilst at the same time contributing to the international literature on law and social justice. I can pay David no greater tribute than to say that he has inspired me to re-dedicate myself to the work of legal scholarship and to rediscover some of the youthful ambition that a decade of working in Johannesburg had all but destroyed. Thank you David.