

Don't shy away from the elitist implications of your argument: Response to de Roubaix

To the Editor: I thank de Roubaix for taking the time to reply^[1] to my response^[2] to his article.^[3] In his reply, he suggests that my response is a cherry-picking and selective reading of his arguments. In fact, he suggests that I might be 'slightly mischievous in creating a "straw person (argument)" that I proceed 'to shoot down'. De Roubaix is, in essence, claiming that I am mischaracterising his argument as being elitist.

The reason I characterised de Roubaix's argument as elitist is because he makes claims such as that reproductive 'choice is a natural and liberal right, but it must be tempered with responsibility to produce only those children that we can care for', in conjunction with claims such as that the rights listed in section 28 of the Bill of Rights 'limit parents' rights to reproduce'. On the surface, this may seem like a reasonable position on reproductive rights, but, I argue, there is more that we need to take into account when thinking about the ethics of reproductive choices than that which de Roubaix enumerates.

De Roubaix observes that 'We do seem to disagree on the actionable significance of the Constitutional rights embedded in section 28 of the Bill of Rights.' This is true: I do believe that section 28 does have actionable significance, but what I emphasise in my response to him is that the actionable significance of section 28 of the Bill of Rights, particularly in terms of how it is to be fulfilled, does not lie solely at the feet of individual parents or at the level of the family unit. Let us go through what section 28 states to illustrate what I mean.

Section 28 opens by stating that '1. Every child has the right (a) to a name and a nationality from birth.'^[4] Here the responsibility assumed for parents (or the relevant responsible party) is that of giving the child a name. But each parent (or relevant responsible party) requires the aid of the state to be able to ensure that their child is registered and has a nationality. This means that the government must provide adequate services for the registration of births so that the child's right to a name and nationality from birth can be met. The very first right of the child named in section 28 of the Bill of Rights is not one that any parent can fulfil on their own, as they need the sanction of the state to give children a nationality. This requires a competent state with adequate service delivery in this regard, along with responsible parties such as parents to take their children to the relevant authorities to register their births. Many people in South Africa (SA) are born without their births being properly registered, leading to them being stateless and without a nationality from birth. There are several reasons for how we end up with stateless children who grow up to be marginalised adults. Some of these reasons have to do with systemic failures to accommodate structurally disadvantaged people, or simple bureaucratic inefficiencies, rather than the failure of parents to do right by their children.^[5,6] These problems face the poor and immigrants to SA who have difficulty accessing or being accommodated in the system.

It is for these reasons that a parent who is not able to meet this first right listed in section 28 of the Bill of Rights cannot be automatically judged to be an irresponsible parent. To state this in no way disregards the agency that individuals have in making reproductive

choices, and neither does it provide excuses for individuals who do not want to be held accountable or want to avoid whatever duty they may have towards their children. What it does make clear is that what duties there are and what accountability is to be had when discussing reproductive rights go beyond only the decision of the parents to procreate, and are rather couched in a broader social contract with the parents and others as parties, as suggested by the Bill of Rights and the Constitution of which it is a part.

In recounting the case I make against him, de Roubaix claims that 'Msimang argues that [the rights listed in section 28 of the Bill of Rights] are (purely) aspirational. I disagree. These rights limit parents' rights to reproduce.' We certainly do disagree on how or if these rights supposedly limit individuals' rights to become parents, as I do not believe, for one, that the inability of a parent to provide their child with a nationality should limit their right to reproduce, and I do not believe that their inability to fulfil section 28 1a of the Bill of Rights necessarily makes such a parent irresponsible. De Roubaix focuses his case on the ability to provide financially for children, so more relevant may be the following two rights stipulated in the Bill of Rights that state that every child has the right to:

- (i) family care or parental care, or to appropriate alternative care when removed from the family environment
- (ii) basic nutrition, shelter, basic healthcare services and social services.^[4]

I agree with de Roubaix that 'every child has a right to family or alternative care, nutrition, shelter, protection, to have [their] well-being considered, as specifically listed'. But I disagree with his moralisation of the issue. Sometimes terrible things happen, and children find themselves in bad situations. These bad situations need not be anyone's fault – there does not have to be an irresponsible party for children to be in unideal circumstances where their rights at that time could be compromised. What I am arguing is that we can and should intervene in such situations without de Roubaix's moralised judgement of parents, as these situations need not be created by irresponsibility. Furthermore, it is not always practical to look to the parents if we want to protect children's rights, such as when parents have been incapacitated and are thus unable to fulfil this role.

The COVID-19 pandemic and its economic consequences teach us a recurring lesson in this regard. Many parents lost their jobs because of the pandemic, making them unable to provide 'basic nutrition, shelter, [and] basic healthcare services' for their children. If we were to follow the logic of de Roubaix's argument, we would have to say that such parents have acted irresponsibly in having these children that they cannot provide for. For all the nuance de Roubaix claims for his position, it does not consider that our abilities to provide for our families can be tenuous and out of our direct control: those who can provide for their families today might not be able to provide for their families tomorrow, irrespective of their commitment and present means. The moralisation of this situation is a mistake. We cannot judge

whether a parent has been responsible or not by only considering whether they have provided or can provide a life commensurate to section 28, because it may be the case that they cannot provide such a life through no moral failing of their own. Fortunes may change no matter how 'responsible' one might be towards one's children. This is where we find the deeper ethical conundrum of how far and to what extent society is meant to intervene in such situations – it is overly simplistic to propose that the answer to this is simply that parents have acted irresponsibly and should have not had these children that they cannot provide for. This argument can be extended to parents who are poor. In no way does this deny the agency of people who are poor; it only situates their agency in an unideal reality in which there has to be a balance between the rights we claim they have and the responsibilities that come with them.

Although I did say that section 28 is aspirational, it is de Roubaix's own hyperbolic emphasis to claim that I think it is 'purely' aspirational. As is made clear above, I do believe that these rights have 'actionable significance'. Although I do think some claims in the Bill of Rights are aspirational, it does not mean that I do not think that they should be enforced, or that legal remedies may not be appropriate in order that children's rights are protected. What I do disagree with de Roubaix on is what he thinks actionable significance means, particularly in our ethical considerations about the rights of children in connection with individuals' rights to reproduce. I am claiming that to protect children's rights in this regard, we do not necessarily need to restrict parental reproductive rights, but we should rather ensure that all parties fulfil their obligations to the child. Some of these obligations, such as granting citizenship to children or the provision of basic healthcare, are not completely in the hands of parents, so that when these obligations are not reliably fulfilled, it is not necessarily because parents have acted irresponsibly. We cannot use section 28 as a measure of whether *parents* have acted irresponsibly but, rather, what it shows is that we have not met the rights of the child, which could be the result of a parental failure or the failure of tax-funded service delivery such as publicly funded healthcare.

In summary, my criticism of de Roubaix is that he does not take into account the broader social context in which reproductive choices are made. To protect the rights of children, as de Roubaix argues, people making reproductive choices must consider what provisions can be made for the child coming into the world. But, conversely, to protect the reproductive rights of every person, we must not discount what services are afforded or should be afforded to parents, so that even if they are poor or become poor, they

can still exercise their reproductive rights without being deemed irresponsible for doing so. Not only is de Roubaix's argument elitist, this argument in which poor people are discouraged from reproducing and the elite are considered the responsible parties in reproduction can also be considered to be eugenic, even if the judgement about who should reproduce is made using the metric of parents' abilities to make material or financial provisions.^[7]

I urge de Roubaix not to shy away from the elitist and somewhat eugenic implications of his argument but rather to deal with these implications, be they good or bad. I think that if he did, he may have not been so quick to endorse the view that parents who cannot provide a life commensurate to section 28 of the Bill of Rights are irresponsible. We agree that children should have a life commensurable to section 28 of the Bill of Rights, but it does not seem like we are on the same page in respect to what that implies. I believe that dealing with these implications and taking my challenge more seriously would aid his investigations into reproductive rights in SA.

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