

CHRISTOPHER G. OECHSLI

## Constitutional Rights and the Transition to Democracy: Twenty Years of South African Constitutionalism

60 N.Y.L. SCH. L. REV. 17 (2015–2016)

ABOUT THE AUTHOR: Christopher G. Oechsli is President and Chief Executive Officer of The Atlantic Philanthropies, a limited life foundation that will complete grantmaking in 2016. Mr. Oechsli has over thirty years of experience in international business, law, philanthropy, and policy development in the United States, Latin America, Asia, Africa, and Europe.

This article was originally presented as a keynote address at the *New York Law School Law Review* symposium titled *Constitutional Rights, Judicial Independence, and the Transition to Democracy: Twenty Years of South African Constitutionalism*, on November 14, 2014. The full text of the speech is available at <http://www.atlanticphilanthropies.org/learning/speech-twenty-years-south-african-constitutionalism>.

## CONSTITUTIONAL RIGHTS AND THE TRANSITION TO DEMOCRACY

The Atlantic Philanthropies, the international grantmaking foundation of which I am President and Chief Executive Officer, was privileged to be one of the sponsors of the *New York Law School Law Review's* symposium, *Constitutional Rights, Judicial Independence, and the Transition to Democracy: Twenty Years of South African Constitutionalism*. Atlantic has been invested in important work in South Africa for over twenty years. It means a lot to us and our grantees. The early promoters of that work were my predecessors, Harvey Dale<sup>1</sup> and John R. Healy,<sup>2</sup> and they both deserve special recognition for their initiative and support.

Established in 1982, Atlantic is a limited life foundation, which means we are deliberately investing our entire endowment in a limited period of time. Driven by the Giving While Living philosophy of our founder, Chuck Feeney,<sup>3</sup> Atlantic will complete all of its grantmaking by the end of 2016 and end all operations shortly after that. Atlantic believes that the problems and challenges currently facing our world require immediate attention and that those with the means and resources to support progress have a responsibility to act. Throughout our three decades of grantmaking, our underlying goal has been to build opportunity for those who have had limited access to it, who have been unfairly denied it, or whose contributions have been undervalued—in short, to make lasting, transformative changes in the lives of disadvantaged and vulnerable people by promoting opportunity, equity, and dignity.

In South Africa, as in a number of other nations and jurisdictions around the world, we have sought to increase opportunities to and the quality of education and biomedical research; to reduce inequalities and increase access to rights and services, especially health care; and to help support realization of the aspirations of constitutional democracies.

Through 2014, Atlantic has invested, globally, over \$7 billion, and we expect to commit another billion by the end of 2016.

Atlantic was drawn to South Africa in 1991 as apartheid was ending, seeing an opportunity to protect rights and promote reconciliation in the emerging democracy. Our grantmaking there drew on our experience of supporting higher education in the United States through capital giving, investing in the development of a knowledge economy and human rights advocacy in the Republic of Ireland, and the undeniably relevant work of cementing peace and reconciliation in a deeply divided and historically troubled society like Northern Ireland. Since then, Atlantic has invested more than \$350 million in South Africa to advance and uphold justice, promote better health care and improve health, and deliver services that support transformative

- 
1. Harvey Dale was the first President of The Atlantic Philanthropies, serving the organization for its first twenty years.
  2. John R. Healy was The Atlantic Philanthropies' Chief Executive Officer from September 2001 to September 2007.
  3. Chuck Feeney co-founded Duty Free Shoppers, the world's largest luxury goods retailer. He was motivated to start The Atlantic Philanthropies by his belief that those with means are obligated to help the less fortunate. *History and Founder, THE ATLANTIC PHILANTHROPIES*, <http://www.atlanticphilanthropies.org/history-and-founder> (last visited Feb. 15, 2016).

social change, improve human rights and dignity, and ultimately fulfill the promise of the Constitution.

Our goals are to illuminate the promise and challenges of South African democracy and marshal continued application of best thinking and resources to the delivery of that promise. We want to provide a platform for colleagues and scholars from around the world to speak to one another, to spur interest in the experiment that is the South African Constitution, and to re-energize a vision that Nelson Mandela personified when he assumed the presidency of South Africa more than twenty years ago. That vision speaks not only to us who care about South Africa but also to the global community, and we desire to keep that vision alive and thriving.

I confess that I am a lapsed lawyer and that my favorite class in law school was Constitutional Law. I am not an expert on the South African Constitution, but I cannot think of a richer confluence of history, culture, rule of law, ethics, human rights, and the themes of democracy than the crossroads of these themes reflected in a constitution. If there is a single embodiment of what individuals, communities, and nations aspire to, it is a constitution. If there is a single embodiment of the social contract we establish to live together as a people, it is a constitution. If there is a bulwark to protect us as individuals and society from authoritarian whims run amok, it is a constitution.

The South African Constitution, then, is a terrific entry point into the promise of South Africa and the aspirations of humanity. “Constitution”—the word alone—denotes deep and strong meanings. It denotes a composite, a collection of things that stand for a holistic identity. It is a fabric, an interwoven durable amalgam that exhibits itself as a whole. It denotes something basic, fundamental, foundational—something on which one can confidently build and rely for an extended time. It denotes strength, durability, and solidness. On these implicit meanings we develop aspirations and hope—a vision for what we are and wish to be as a people—in our communities, in our nations, and among our nations.

The South African Constitution has been called, and is regarded by many, the most progressive constitution in the history of the world. U.S. Supreme Court Justice Ruth Bader Ginsburg has called it “a great piece of work” and a more appropriate model for new or future constitutions than ours here in the United States.<sup>4</sup> This is because of the breadth of its aspirations in a contemporary world. It contains not only broad personal rights that constrain the state from imposing itself on independent acts and thought but also prescriptions for socioeconomic rights. It establishes affirmative broader duties of government to reduce inequity, reflecting, perhaps, some spirit of *Ubuntu*,<sup>5</sup> the belief that we are what we are because of others and that we owe others certain rights to sustain the fabric of which we are all a part. It guarantees citizens the

---

4. Ariane de Vogue, *Ginsburg Likes S. Africa as Model for Egypt*, ABC News (Feb. 3, 2012), <http://abcnews.go.com/blogs/politics/2012/02/ginsburg-likes-s-africa-as-model-for-egypt/>.

5. “*Ubuntu*” refers to “[a] quality that includes the essential human virtues; compassion and humanity.” *Ubuntu Definition*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/ubuntu](http://www.oxforddictionaries.com/us/definition/american_english/ubuntu) (last visited Feb. 15, 2016).

## CONSTITUTIONAL RIGHTS AND THE TRANSITION TO DEMOCRACY

rights to receive health care and housing, to make their own choices regarding reproduction, and to form and join political parties and trade unions.

These are, indeed, glorious and admirable aspirations that elevate our vision and give us a north star toward which to navigate. In the interview in which Justice Ginsburg held up the South African Constitution as a model for humanity, she also went on to say, “[A] Constitution, as important as it is, will mean nothing unless the people are yearning for liberty and freedom. If the people don’t care, then the best Constitution in the world won’t make any difference. So the spirit of liberty has to be in the population . . . .”<sup>6</sup>

Indeed, constitutions are—or certainly should be—by and for the people. The state is—or certainly should be—a reflection of the people. If people cannot put the constitution into effect to realize the aspirations of a fundamental document, an impersonal state cannot be counted on to do it for them. People—how we personally engage and what we each do—matter immensely to the meaning, import, and effects of a constitution. As Frederick Douglass famously noted nearly 160 years ago, “Power concedes nothing without a demand.”<sup>7</sup>

Furthermore, articulated aspirations are important, but without the very real prospect of people benefitting tangibly from our vision, hope can become cynicism and unrealized aspiration can spiral into despair. Too often, those who stand to benefit the most from the rights outlined in constitutions are the least able to avail themselves of those rights. The disconnect between aspiration and delivery on a promise is an invitation to deep mistrust and dissolution of the bonds among people, communities, and their collective representatives. Aspirations, then, present profound challenges. In 1996, South Africa’s Constitution presented grand aspirations. Today, those aspirations continue to present profound challenges, particularly with respect to the promise of social and economic rights, a distinct feature of South Africa’s Constitution.

Let me offer two specific areas of challenge, principally from the perspective of Atlantic’s twenty years of engagement:

First, the South African Constitution’s Bill of Rights establishes that everyone has the “right to have access to . . . health care services” and that “[t]he state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realization of . . . these rights.”<sup>8</sup>

For years, the South African government denied the high prevalence of HIV/AIDS in South Africa and did not support access to anti-retrovirals.<sup>9</sup> Currently, the government is considering how to design and roll out a national health insurance

---

6. de Vogue, *supra* note 4.

7. Frederick Douglass, Speech at Canandaigua, New York (Aug. 3, 1857), <http://www.blackpast.org/1857-frederick-douglass-if-there-no-struggle-there-no-progress>.

8. S. AFR. CONST., 1996, § 27(1)–(2) (emphasis added).

9. See Laura Lopez Gonzalez, *South Africa Celebrates 10 Years of Free HIV Treatment*, HEALTH-E NEWS (Apr. 4, 2014), <http://www.health-e.org.za/2014/04/04/south-africa-celebrates-ten-years-free-hiv-treatment/>.

scheme.<sup>10</sup> Both these challenges are fueled by what government can and is prepared to do with “available resources.” What is reasonable access to health care services? What do people expect? If health resources are insufficient to provide reasonable access to health care, does the state have an obligation to enhance those resources? Does it, for example, have an obligation to increase the number of qualified nurses and to find ways to retain them in areas where access to health services is limited? Who will speak for the people in this regard? How will their voices be heard? What if the state has insufficient financial resources to meet what is perceived to be reasonable access to health care?

Second, with respect to education, the Constitution states that “Everyone has the right . . . to a basic education” and “to further education, which the state, through reasonable measures, must make progressively available and accessible.”<sup>11</sup>

Constitutions speak in broad terms, yet constitutional rights must be translated into deliverables in order for their promise to be realized. What is a “basic education”? What are “reasonable measures”? At what speed is government obligated to make basic and further education “available and accessible”?

What can we do about the profound challenges to the promise of the South African Constitution and its panoply of enabling laws—the laws that will underpin the delivery of tangible benefits to real people? Government will not simply make these things happen on its own. An activated citizenry, to whom government is ultimately accountable, must be engaged to make these things happen. We, ourselves, need to be challenged. Is it fair to articulate these rights and not deliver on them? Is “the best constitution” of any use if there is no engaged citizenry to demand and realize its promise?

Atlantic has been proud to work closely with those who are dedicated to these propositions, such as the Treatment Action Campaign<sup>12</sup> and AIDS Law Project,<sup>13</sup> to overcome official denialism of the epidemic and catalyze government to respond effectively to the urgency of the HIV/AIDS crisis. As a result of their coalition-building, peaceful protest and civil disobedience political advocacy, and successful strategic public interest litigation before the Constitutional Court, the government now provides universal treatment for everyone living with HIV in South Africa.<sup>14</sup> More than 2.5 million South Africans now receive government-subsidized, anti-

---

10. *Report: South Africa's National Health Insurance*, HEALTH-E NEWS (July 17, 2014), <http://www.health-e.org.za/2014/07/17/report-south-africas-national-health-insurance/>.

11. S. AFR. CONST., 1996, § 29(1).

12. The Treatment Action Campaign (TAC) advocates for greater access to AIDS treatment in South Africa. Among TAC's most prominent achievements was a 2002 ruling by the South African Constitutional Court that required the government to provide anti-retroviral medication to women to prevent the transmission of AIDS at childbirth. *About Us*, TREATMENT ACTION CAMPAIGN, [http://www.tac.org.za/about\\_us](http://www.tac.org.za/about_us) (last visited Feb. 15, 2016) [hereinafter TREATMENT ACTION CAMPAIGN].

13. The AIDS Law Project is an organization that assists those afflicted with HIV/AIDS to assert their rights and obtain treatment. *About AIDS Law Project*, AIDS L. PROJECT, <http://www.aidslawproject.org/about-aids-law-project> (last visited Feb. 15, 2016).

14. See TREATMENT ACTION CAMPAIGN, *supra* note 12.

## CONSTITUTIONAL RIGHTS AND THE TRANSITION TO DEMOCRACY

retroviral medication,<sup>15</sup> the largest publicly provided AIDS-related treatment program on the planet.<sup>16</sup> We are also honored to have supported efforts to strengthen the legal advice sector and expand centers throughout the country to ensure that those who are most marginalized—immigrants, LGBTI,<sup>17</sup> rural farm workers, and those from the most disadvantaged communities—can understand and exercise their rights and enhance their contributions to and benefits from a more equitable South Africa.

We believe organizations like Equal Education,<sup>18</sup> the Social Justice Coalition,<sup>19</sup> and SECTION27,<sup>20</sup> which work to ensure delivery of basic services and opportunities enshrined in the Constitution, give voice and a vehicle for catalyzing implementation and delivery of constitutional rights.

We have been privileged to partner with superb organizations and advocates to expose the truth about apartheid and promote reconciliation in its aftermath. We supported the reintegration of ex-combatants and institutions like the District Six Museum,<sup>21</sup> the South African History Archive,<sup>22</sup> Constitution Hill,<sup>23</sup> the gateway to Robben Island, and the work of the South African Truth and Reconciliation Commission to document the history, preserve the past, and promote a peaceful and just future.

Consistent with our broader international focus on increasing equitable access to quality health care, we have sought to strengthen human resources in health systems with an emphasis on enhancing primary care, improving nursing, strengthening

- 
15. See *HIV Statistics South Africa: Antiretrovirals, Prevalence, Deaths*, TBFACTS.ORG, <http://www.tbfacts.org/hiv-statistics-south-africa/> (last visited Feb. 15, 2016).
  16. *HIV and AIDS in South Africa*, AVERT, <http://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> (last reviewed May 1, 2015).
  17. LGBTI refers to lesbian, gay, bisexual, transgender, and intersex individuals.
  18. Equal Education is a group consisting of students, parents, and teachers looking to improve South African education through activism. EQUAL EDUC., <https://www.equaleducation.org.za> (last visited Feb. 15, 2016).
  19. The Social Justice Coalition is a social movement created to encourage the government to provide services to underserved segments of the population and to prevent hate crimes. *About Us*, SOC. JUST. COALITION, <http://www.sjc.org.za/about-us> (last visited Feb. 15, 2016).
  20. SECTION27 is a South African human rights organization named after the section of the South African Constitution that guarantees a right to health care, food, water, and social security. SECTION27, <http://section27.org.za> (last visited Feb. 15, 2016).
  21. The District Six Museum memorializes the Sixth Municipal District of Cape Town, a once-vibrant community that was destroyed by the forced removal of 60,000 people during apartheid. *About the District Six Museum*, DISTRICT SIX MUSEUM, <http://www.districtsix.co.za/Content/Museum/About/Info/index.php> (last visited Feb. 15, 2016).
  22. The South African History Archive documents the history of the struggle for justice in South Africa through recording developments in South African democracy, raising awareness of human rights issues, and collecting records. *About the South African History Archive*, SAHA, [http://www.saha.org.za/about\\_saha.htm](http://www.saha.org.za/about_saha.htm) (last visited Feb. 15, 2016).
  23. Constitution Hill, formerly a prison, is now the site of South Africa's Constitutional Court and a venue for exhibitions on history and human rights. *Our History*, CONSTITUTION HILL, <https://www.constitutionhill.org.za/site/our-history/> (last visited Feb. 15, 2016).

schools of public health, and training and placement of health professionals in rural and underserved regions of the country.

Why does all of this matter to others, to Africa, to those of us here in the United States? I think the answer is rather simple: South Africa embodies the hopes and challenges of global humanity in this century. South Africa's aspirations and problems are humanity's. And South Africa's Constitution is the most progressive effort to address those aspirations and problems.

In the countries in which Atlantic has been engaged, we recognize echoes of these same challenges and aspirations. Here in the United States, we face the challenges of unfair obstacles to opportunity and dignity: inequitable access to quality health care, underperforming public education, and economic and racial inequality. In Northern Ireland, centuries of discriminatory traditions and culture have marginalized large segments of the population. In Vietnam, our Atlantic program colleagues inherited decades of devastating war and sought to increase access to higher education and build an equitable health system from that torn national fabric. These are just a few of Atlantic's examples about why the promise of South Africa's Constitution matters.

More recently, we have once again been made aware through the emergence of regional and global health threats like Ebola that societal and health challenges, like people, migrate. We are increasingly interconnected. As a result, resilient and equitable national, regional, and international systems are needed to address challenges we face both as individual nations and as a collective world body. The fundamental building blocks for these systems are already represented in the foundational frameworks of each of our communities and countries. For that reason, we can be sure the world is paying close attention to see how South Africa deals with its large immigrant communities, how the health work force evolves to handle communicable and non-communicable diseases at their source within communities, and how basic education is made better and more accessible to build an informed citizenry.

By succeeding at addressing these challenges, not only will South Africa demonstrate to its citizens that they are right to put their trust and hope in the foundational framework embodied in their country's Constitution, but it will also signal to all who are watching that seemingly intractable problems can be met head on and sometimes even resolved in ways that benefit us all.