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THE NECESSITY OF CIVIC EDUCATION TO FULFILL THE CONSTITUTIONAL
PROMISE OF SOUTH AFRICA

April G. Dawson
Associate Professor of Law
North Carolina Central University School of Law
adawson@ncu.edu

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INTRODUCTION

During a visit earlier this year to Johannesburg, South Africa, with faculty and students from my law school, we met with legal attorneys and advocates from Section27, a public interest law centre that engages in, *inter alia*, constitutional litigation to secure constitutional rights for South Africans. During our meeting, we discussed the lack of progress being made in the fulfillment of South African citizens' constitutional rights, such as the right to education and the right to health care. During the discussion, I asked whether South Africans generally, and South African school children in particular, were aware of and appreciated their constitutional rights (in a way that U.S. citizens are aware of their constitutional rights), and if not, whether that lack of knowledge and appreciation hurt advocacy efforts to ensure that the South African government fulfills its constitutional obligations. The response to my question was that there was in fact a lack of knowledge and appreciation due to little emphasis on civics education in the schools. The Section27 advocate went on to confirm that the lack of full appreciation of the power of the South African Constitution has had an adverse impact on the South African peoples' ability to effectively advocate on their own behalf for the fulfillment of the rights mandated by the South African Constitution. That discussion and my conversations with South Africans some South African parents and school children during my visit motivated me to write this article discussing the need for greater civic education in South Africa.

Part I of this article demonstrates that citizen-centered social activism is necessary for full realization of constitutional rights. In Part II, I argue that citizen-centered activism must be constitutionally grounded to be most effective. Part III provides a discussion of the current constitutional culture in South Africa. In Part IV, I argue that

increased civic education will give rise to constitutionally grounded social activism that will be more likely to result in meaningful and sustained constitutional change. Finally, in Part V, I offer a few suggestions on ways to increase civic education and thereby increase knowledge and understanding of the South African Constitution, which should in turn improve citizen-centered constitutional advocacy efforts.

I. THE NEED FOR CITIZEN-CENTERED SOCIAL ACTIVISM TO AFFECT MEANINGFUL CHANGE IN SOUTH AFRICA

South Africa's constitution is recognized as one of the most progressive constitutions in the world, providing a constitutional right to privacy,¹ housing,² healthcare,³ and education.⁴ The Constitution also prohibits governmental discrimination on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."⁵ However, the expression of a right, even if memorialized in a written constitution, does not ensure fulfillment of that right. "To be sustainable and compelling, the declaration of rights needs to be connected to remedies[.]"⁶ And that connection often needs to be bridged with advocacy efforts.

That rights are not self-enforcing is underscored when considering the civil rights movement in the United States, where there were many instances of blatant disregard of the rule of law. The U.S. civil rights movement also serves as an example of how rights, even constitutional rights, require effective advocacy efforts to ensure that the rights have

¹ S. AFR. CONST. 1996 § 14.

² *Id.* at § 26.

³ *Id.* at § 27.

⁴ *Id.* at § 29.

⁵ *Id.* at § 9(3).

⁶ Lani Guinier, Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2759 (2014).

remedies, i.e., are given full effect and are fulfilled. And while the lack of the fulfillment of constitutional rights in South Africa may not today be attributable to insidious attitudes like those confronting civil rights activists in the U.S. in the 1950s and 1960s, the effect is still the same – the violation of citizens’ constitutional rights.

What then is the best method for ensuring that the guarantees set forth in a constitution are fulfilled? Litigation is often the first strategy considered and employed when rights are being violated.⁷ However, there have been frequent debates over whether lawyers instituting rights litigation are the best actors to lead the movement towards fulfillment of constitutional rights.⁸ There are those that believe that “the most efficient way of achieving social change ... is through litigation.”⁹ Those who are proponents “contend that rights litigation can change social meanings and understandings, providing individuals with symbolic recognition and personal dignity.”¹⁰ They further argue that “[l]itigation can also create issues around which to organize a movement; attract media attention, financial resources, and participants to a movement; provide leverage in informal negotiations; and publically embarrass a movement’s opponents into capitulation.”¹¹

On the other hand, there are also a number of scholars who argue that litigation is not the most effective way to secure entitled rights.¹² Some have suggested that litigation, as well meaning as it may be, has had the unintended consequence of impeded progress.

⁷ Catherine Albiston, *The Dark Side of Litigation As A Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 62-63 (2011)

⁸ *Id.*

⁹ Lani Guinier, Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740, 2744-45 (2014).

¹⁰ Catherine Albiston, *The Dark Side of Litigation As A Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 62-63 (2011).

¹¹ *Id.*

¹² *Id.*

One author argues that “[b]ecause litigation serves to correct an individual wrong, it is mostly ‘backward looking’ and fails to bring about long-term benefits.”¹³ He further notes that “false optimism about the power of litigation outcomes is dangerous as it instills a false sense of security.”¹⁴

And although the Constitutional Court generated a number of landmark rulings during its first couple of years in existence, its social transformation progress has slowed.¹⁵ Moreover, some of the Court’s decisions did not result in sustained change.¹⁶ And it is possible that litigation efforts and the Constitutional Court’s early “advocacy” lulled those who were waiting for constitutional rights fulfillment into allowing lawyers and the courts to take the lead in the movement for realized social change in South Africa.¹⁷

While lawyers and judges play vital roles in the fulfillment of constitutional rights, lawyers and judges cannot be the primary lead agents of social change if comprehensive and sustainable change is desired. Rather, litigation and the courts are tools that should be utilized by ordinary citizens as they lead the charge to ensure fulfillment of their constitutional rights.¹⁸ Social movements initiated, maintained and sustained by those in need of rights fulfillment are the only way that durable social and

¹³ Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 827 (2013).

¹⁴ *Id.*

¹⁵ See Drew F. Cohen, *A Constitution at A Crossroads: A Conversation with the Chief Justice of the Constitutional Court of South Africa*, 12 NW. U. J. INT’L HUM. RTS. 132 (2014).

¹⁶ *Id.* at 6.

¹⁷ Lani Guinier, Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014) (citing Gerald N. Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)); see also Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 827 (2013) (“The complacency from symbolic victories⁵² might reduce mobilization and shift focus away from obtaining further and more substantial political reform.”).

¹⁸ See Jaime Alison Lee, “Can You Hear Me Now?”: *Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL’Y REV. 405, 406 (2013) (“Participatory governance engages people who are affected by a problem in the process of solving it.”).

legal change can be accomplished.¹⁹ “[P]olitical, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems. Rather than turning over their agency to lawyers, they must find a way to integrate lawyers not as leaders but as fellow advocates. . . . [P]roponents of progressive social change must be advocates in themselves and for themselves and others.”²⁰

II. THE NEED FOR CONSTITUTIONALLY GROUNDED CITIZEN-CENTERED SOCIAL ACTIVISM

South Africa has been labeled by some as the “protest capitol of the world.”²¹ This would seem to suggest that South African citizens are making significant strides in having their rights fulfilled. However, having frequent protests does not necessarily translate into effective advocacy. In fact, that South African citizens have to constantly protest because of the government’s failure in rights fulfillment suggests that the citizen protests are not as effective as they might be.

To be most effective, citizen-centered advocacy must be grounded in constitutional understanding and authority. Such grounding better enables the citizenry to hold the government accountable for the fulfillment of its constitutional responsibilities. Such grounding will allow citizens to advocate not just for how the constitution should be enforced, but also how the constitution should be interpreted.²² However, before the South African people can fully harness the power of the South African Constitution, they

¹⁹ Lani Guinier, Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014).

²⁰ *Id.*

²¹ See Peter Alexander, The South African Police Service's crowd management statistics show that South Africa really is the protest capital of the world, Mail & Guardian, Apr. 13, 2012, <http://mg.co.za/article/2012-04-13-a-massive-rebellion-of-the-poor>.

²² See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era 2005-06 Brennan Center Symposium Lecture*, 94 CAL. L. REV. 1323 (2006) (Discussing how social movements can facilitate change in constitutional interpretation).

must first have a thorough understanding and appreciation of the Constitution and the structure and nature of the South African government.

III. THE CURRENT CONSTITUTIONAL CULTURE AMONG SOUTH AFRICAN CITIZENS

There was much excitement and public engagement with the creation of the new South African democracy particularly among those South Africans who had been marginalized by the apartheid governmental regime. Following the release of Nelson Mandela in 1990; the adoption of the interim constitution in 1993;²³ democratic elections in 1994, which resulted in the election of Mandela as the first democratically elected president;²⁴ and the adoption of the permanent South African Constitution in December 1996,²⁵ South Africa's Black majority began to feel a sense of hope and optimism about the future of their country and the role they would play in its governance. And the inclusive constitution-making process²⁶ generated a tremendous amount of pride in the new democracy and the progressive and transformative constitution. For example, following the adoption of the permanent constitution, then National Assembly Speaker Dr. Frene Ginwala told a group of school children "You have a right to go to school and

²³ See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 79 (1997).

²⁴ See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 79 (1997); Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 758 (1998).

²⁵ See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 88 (1997).

²⁶ See John Mukum Mbaku, *What Should Africans Expect from Their Constitutions?*, 41 DENV. J. INT'L L. & POL'Y 149, 183 n.49 (2013) ("[P]ost-apartheid South Africa has one of the most progressive constitutions in the world, a constitution that was compacted through a bottom-up, participatory, inclusive, and people-driven process."); see also David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 964 (2013) (noting that the constitution making process of South Africa "encouraged consensus and yet also involved a very high degree of participation.") (citing Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 REV. CONST. STUD. 18 (1996) (arguing that the South African process enjoyed a high degree of legitimacy because it arose out of a very participatory process)).

government must help to achieve that[.]”²⁷ Jannie Momberg, the then African National Congress Whip, gave the students school a new South African flag and urged the students to “jealously protect it and the Constitution.”²⁸

However, despite the promise of constitutional protection, many have not been afforded remedies. While protests and agitation led to the ultimate fall of apartheid and escorted in a new democratic government, what may not have been fully realized initially is that even democracies, indeed especially democracies, require constant “popular mobilization, contentious politics, collective action,”²⁹ on the part of the people to ensure that the government created to serve the people does just that. And while there has been recent recognition that citizen agitation is needed and increased protests, this citizen centered-activism must be coupled with constitutional knowledge and understanding.

IV. NEED FOR CIVIC EDUCATION IN SOUTH AFRICA

South Africa is at a point where more must be done to educate the people about their constitution so that constitutional power can be joined with citizen action to bring about more meaningful and sustained constitutionally mandated change. Deputy Chief Justice Dikgang Moseneke has stated that citizen must be empowered through greater constitutional education, and that greater “awareness of rights and available remedies would also enhance people’s ability to vindicate rights, to utilize state organs set up to protect democracy, and to hold public office bearers accountable.”³⁰ He further notes that “[i]n the end, it is the citizenry that must enjoy the protection and defend the integrity of

²⁷ http://pangaea.org/street_children/africa/safrica3.htm.

²⁸ http://pangaea.org/street_children/africa/safrica3.htm.

²⁹ Lani Guinier, Gerald Torres, *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2744-45 (2014).

³⁰ Dikgang Moseneke, *Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards A Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa*, 101 GEO. L.J. 749, 771 (2013).

the Constitution.”³¹ One key way to increase constitutional education so that citizens can “defend the integrity of the Constitution,” is to improve civic education in the South African schools and community.

Civic education is a broad concept that incorporates a wide range of subject matters.³² For purposes of this article, I am defining civic education as instruction that focuses on the structure of government and political knowledge. More specifically, I maintain that the civic education needed in South Africa must teach (1) the rights afforded under the South African Constitution, (2) that governmental officials serve the people and have constitutionally mandated obligations, and (3) that the people have an affirmative obligation to hold governmental officials accountable.

Many legal and educational leaders in the United States have expressed the importance of civic education to maintain a strong democracy.³³ United States Supreme Court Justice Breyer has stated that “[o]ur democratic Constitution assumes a public that participates in the government that it creates [and it] also assumes a public that understands how government works.”³⁴ Likewise, former Supreme Court Justice Sandra Day O’Connor, advocating for civic education has stated: “[The U.S.] faces daunting economic and policy challenges How best can we equip our children and our children’s children to tackle the challenges that they will inherit? We must equip them by teaching

³¹ *Id.*

³² See William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 219 (2001) (“All education is civic education in the sense that individuals’ level of general educational attainment significantly affects their level of political knowledge as well as the quantity and character of their political participation.”).

³³ See Bridgette Dunlap, *Anyone Can “Think Like A Lawyer”*: How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States, 82 FORDHAM L. REV. 2817, 2831 (2014); Dawinder S. Sidhu, *Civic Education As an Instrument of Social Mobility*, 90 DENV. U. L. REV. 977, 981-82 (2013).

³⁴ Stephen Breyer, MAKING OUR DEMOCRACY WORK 219-220 (2010).

them the knowledge and skills of informed and engaged citizenship.”³⁵ Former Supreme Court Justice Souter has also expressed his concern about the importance of civic education and has stated “I don’t believe there is any problem of American politics in American public life which is more significant today than the pervasive civic ignorance of the Constitution of the United States and the structure of government.”³⁶ What these Supreme Court Justices and other commentators recognize is that civic education is a necessary precursor to effective civic engagement and that a strong democracy in which the government fulfills its constitutional obligations requires effective civic engagement.

The South African government has recognized the importance of civic education.³⁷ However, civic education appears to have taken a back seat to the more traditional academic courses.³⁸ Moreover, the lack of resources and lack of teachers available to teach civics are significant obstacles standing in the way of improving civics instructions in the public schools.³⁹ While the lack of resources is a very real problem and not easily fixed, the delay in educating South African citizens, especially the children, can have a devastating effect on the future of the country. For example, the lack of a firm

³⁵ Sandra Day O’Connor, *Time to Restore Civic Learning*, SAN FRANCISCO CHRONICLE, October 18, 2013, available at <http://www.sfgate.com/opinion/openforum/article/Time-to-restore-civic-learning-3962143.php#ixzz29mRrKSPf>, (last visited November 7, 2014).

³⁶ Ryan Lessard, *Former Justice Souter Warns About The State Of Civics Education*, New Hampshire Public Radio New Hampshire News, September 14, 2012 available at <http://nhpr.org/post/former-justice-souter-warns-about-state-civics-education> (last visited November 7, 2014).

³⁷ The South African National Department of Education stated in 2001 that, “education for democratic citizenship entails the explicit and continuing study of the basic concepts and values underlying . . . democratic political community and constitutional order and consists of learning activities, curriculum, and/or education programmes . . . concerned with rights and responsibilities of citizenship. The purpose is to promote knowledge, skills and attitudes conducive to effective participation in civic life.” Schoeman, Sonja. South African Journal of Education. *A Blueprint for Democratic Citizenship Education in South African Public School: African Teachers’ Perceptions of Good Citizenship* 131.

³⁸ World Movement for Democracy Interview with David McQuoid-Mason, Centre for Socio-Legal Studies’ Street Law and Democracy Education Program at the University of Natal in South Africa, available at <http://www.wmd.org/resources/whats-being-done/civic-education-democracy/interview-david-mcquoid-mason#sthash.6D3ABOiS.dpuf> (last visited November 7, 2014).

³⁹ *Id.*

constitutional and civic foundation may explain the decision of many South African voting age youth to refuse to vote in elections.⁴⁰ Not fully appreciating the power of the constitution, these young people, who are the future of the country, have decided that their best course of conduct in response to the government's failure is to boycott elections.

V. SUGGESTIONS FOR INCREASING CIVIC EDUCATION IN SOUTH AFRICA

As noted, the resource issue in South Africa is very real. However, there are other avenues available for increasing civic education. For example, in the U.S., Americans celebrate the country's independence from Great Britain every July 4, which has been a national holiday for more than a century.⁴¹ Notwithstanding the nation's collective pride in the creation of the United States, there was concern that Americans generally did not have a sufficient level of understanding and appreciation of the Constitution. This concern led to the creation of Constitution Day. Created in 2004 and celebrated every September 17, Constitution Day commemorates the signing of the U.S. Constitution.⁴² On that day, federal agencies are required to provide their employees with "educational and training materials" about the Constitution, and educational institutions receiving federal funds are likewise required to hold Constitution-related programs for their students.⁴³

⁴⁰ See Azad Essa, Why Aren't South Africa's Born Free's Voting, Aljazeera, May 7, 2014, <http://www.aljazeera.com/indepth/features/2014/05/why-aren-south-africa-born-frees-voting-20145617536762389.html>.

⁴¹ See Act of June 28, 1894, ch. 118, 28 Stat. 96 (legislation making Labor Day a holiday and making the holidays of Christmas, New Year's Day, and Independence Day permanent) (codified at 5 U.S.C. s 6103(a) (1994)).

⁴² Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005); 36 U.S.C. § 106 (2004 & Supp. 2005).

⁴³ *Id.*

Freedom Day, celebrated on April 27 each year in South Africa, commemorates South Africa's first democratic post-Apartheid elections, which took place on April 27, 1994. Freedom Day rightly focuses on how South Africa overcame over three hundred years of segregation, colonialism, and government sponsored racism. One way to incorporate civics into the national conversation is to add to the Freedom Day celebrations robust discussions of Constitutional rights and government accountability.

Another example taken from the U.S. is the support of civic education by lawyers and judges. In recent years national and state legal organizations have begun to rise to the challenge to increase civic education, recognizing that lawyers and judges have a civic responsibility to assist in the education of the public, particularly where the rule of law and legal and political institutions are involved. The American Bar Association has formed the Commission on Civic Education in the Nation's Schools.⁴⁴ The Commission acts as an advocate for civic education in American schools and also provides and supports national and local civic education programs.⁴⁵ Many state bar associations have also created civic education programs designed to supplement formal school civic education. In South Africa, the Law Society of South Africa (LSSA), the organization that regulates attorneys at a national level, and provincial law societies, organizations that regulate attorneys at a regional level, can like their U.S. counterparts, engage in efforts to promote civics education.

⁴⁴ See Am. Bar Ass'n Comm'n on Civic Educ. in the Nation's Sch., Final Report 2010-2013, available at http://www.americanbar.org/content/dam/aba/images/public_education/aba-civ-ns-final-report-2010-2013.pdf (last visited November 7, 2014).

⁴⁵ *Id.*

CONCLUSION

South Africa has an amazing constitution that serves as a model for the rest of the world. However, the promise of all that the South African constitution has to offer, particularly to those most in need of its protection, has not been fulfilled. One way to provide the South African people with the ammunition needed to ensure that the government fully complies with its constitutional responsibilities is to educate them about the true power of their constitution. This can be best accomplished by increasing civic education and teaching children and adults alike about the specific rights afforded under the South African Constitution, that governmental officials serve the people and have constitutionally mandated obligations, and that the people have an affirmative obligation to hold governmental officials accountable.