

New York Law School
“Constitutional Rights, Judicial Independence and the Transition to
Democracy:
Twenty Years of South African Constitutionalism”
Friday, November 14, 2014

Thank you, Steve. Thank you, Ambassador Gaspard and Dean Crowell. Thank you and welcome to those of you who have come so far in time and distance to this event. It means a lot for all of us gathered here today.

I want to set the stage for my remarks with a few disclosures and some context.

First, Atlantic Philanthropies, of which I am the CEO, is one of the proud sponsors of this event. I am speaking here, not because we contributed to this event but because Atlantic has been invested in this important work in South Africa for over 20 years. It means a lot to us and our grantees. The early promoters of that work were my predecessors, Harvey Dale and John R. Healy, and they both deserve special recognition for their initiative and the support they invested in this effort.

Atlantic is a limited life foundation, founded by Chuck Feeney in 1982, and we will complete our grant making by the end of 2016 after having made more than \$350 million in grants to South Africa, much of that around the issues of Constitutionalism and delivering on the promise of South Africa’s democracy. These several days of meetings present an opportunity to hold up the promise and challenges of South Africa and marshal continued application of best thinking and resources to the delivery of this promise. It provides all of you with a platform to speak to colleagues from the US and other nations; to spur interest in the experiment that is the South Africa constitution; and to re-energize a vision that Nelson Mandela personified

when he assumed the presidency of South Africa 20 years ago. That vision speaks not only to us who care about South Africa. It speaks to the global community – and we desire to keep that vision alive and thriving.

Second, I have to disclose that I am a lapsed lawyer and that my favorite class in law school was constitutional law. I am not the expert on the South Africa Constitution that many of you are but you will forgive me if I can't 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 Constitution, then, is a terrific entry point into the promise of South Africa and the aspirations of humanity.

“Constitution” - the word alone – connotes 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 on for an extended time.
- It denotes strength, durability, solidness.

And 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.

You here are aware that the South Africa Constitution has been called, and is regarded by many, including US Supreme Court Justice Ruth Bader Ginsburg, as the most admirable constitution in the history of the world. And that is because of the breadth of its aspirations in a contemporary world. It contains, for example, not just broad personal rights that constrain the state from imposing itself on independent acts and thought, it provides proscriptions for socio-economic rights. It establishes affirmative broader duties of government, reflecting, perhaps, some spirit of Ubuntu, 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.

These are, indeed, glorious and admirable aspirations – ones that elevate our vision and give us a north star towards 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. The spirit of liberty has to be in the population.

A couple of things to take away from this statement:

First, Constitutions are – and certainly should be - by and for the people. The state is – or certainly should be - a reflection of the people. If people can't 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.

Second, articulated aspirations are important, but without the very real prospect of people benefitting tangibly from this vision, hope can become cynicism, and unrealized aspiration can spiral into despair. Often, those who stand to most benefit 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. In 2014, 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 20 years of engagement:

The South Africa Constitution Bill of Rights establishes that everyone has the right to access to health care services and that the state must take reasonable legislative and other measures, *within its available resources* (italics/emphasis added) to achieve the progressive realization of . . . these rights.

We know that South Africa has among the highest prevalence of HIV/AIDS and yet for years the government denied this health issue and support for access to anti-retrovirals. Currently, the government is considering how to design and roll out a national health insurance scheme. Both these challenges are fueled by what government can and is prepared to do with

“available resources” – and panels will address these challenges of resource allocation. 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 popular expectations of what is perceived to be reasonable access to health care?

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.

Constitutions speak in broad terms. Yet to realize the promise of these Constitutional rights they must be translated into deliverables. What is a “basic education”? What are “reasonable measures”? At what speed is government obligated to make basic and further education “available and accessible”?

These are just two fundamental examples of the challenges of South Africa today: how to deliver on the promise of South Africa’s Constitution.

What can we do about this profound challenge 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. An engaged citizenry, the ultimate members of government, must engage 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 realize its promise?

Many of you here today are dedicated to these propositions and we at Atlantic have been proud to work closely with some of you. Atlantic has also been proud to work with the Treatment Action Campaign and AIDS Law Project to catalyze government to respond effectively to the urgency of the HIV/AIDS crisis. We have been energized and motivated by the work of organizations like the Legal Resources Center and the Black Sash and Probono. We are 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, 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, the Social Justice Coalition and Section 27, who 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.

So why are we here in New York having these discussions? Why does this all matter to others, to Africa, to those of us here in the US? 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 aspirations and problems. And South Africa’s Constitution is the most progressive effort to address those aspirations and promises.

Certainly in the countries in which Atlantic has been engaged we recognize echoes of these same challenges and aspirations. Here in the US 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, where my colleague, Martin O'Brien is based, we faced centuries of discriminatory traditions and culture that marginalized large segments of the population. In Viet Nam, our Atlantic program colleagues inherited decades of devastating civil and other wars 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 Ebola that societal and health challenges, like people, migrate. We are increasingly interconnected. Resilient and equitable national, regional and international systems are needed to address these challenges. And the fundamental building blocks for these systems are reflected in the foundational frameworks of each of our communities and countries. How South Africa deals with its large immigration communities; how the health work force evolves to handle communicable and non-communicable diseases at their source within communities; how basic education is made better and more accessible to build an informed citizenry – these all will impact the region not only in practice and outcomes, but by example. And the success in delivering improvements to these challenges will in turn affect the trust and hope placed in the foundational framework of South Africa that is embodied in the Constitution.

Before finishing I want to note a significant caveat. We are mindful that to sustain and fuel the delivery of these Constitutional rights and expectations, government relies on revenues generated from a healthy economy with sustained gains. The challenge of sustaining the

Constitution and its promise, then, is not only the challenge of understanding how to deliver on these rights and aspirations, it is conditional on having the resources to do it. The issue of “available resources” – which will be discussed in a number of panels at this convening – is critical. Resources are and will be finite and the challenge of all governments - especially those who espouse affirmative rights such as the socio-economic rights embodied in South Africa’s Constitution – is to deliver effective outcomes with those limited resources. Sustainable economic development, then, is a major factor in addressing the expectations of a citizenry that is awakening to the rights articulated in the Constitution. Yet it is the reliability and the integrity of the Constitution and the sustained adherence to the Constitution and the rule of law that provides the base from which economic development can proceed. This reinforcing loop of economic health, then, also requires the existence of a living and applied Constitution.

Your presence here today is testimony to the promise of South Africa’s Constitution. You are the vehicles that will help realize that promise. Your dedication to the propositions to be discussed is a major contribution to what we all aspire to. Thank you for investing yourselves in this endeavor.