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Towards Republican Citizenship: A Reflection on the Jurisprudence of Former Chief Justice Sandile Ngcobo

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ABSTRACT

In modern scholarship, the analysis and use of the term 'citizenship' takes many forms and engages many disciplines and intellectual traditions. Ngcobo CJ has been at the centre of a fundamental debate over the meaning of citizenship that has developed in South Africa's post-apartheid constitutional democracy. Drawing on previous research, the article briefly sketches what might be termed the republican tradition of democratic thought. It then provides an analysis of several significant cases in which Ngcobo CJ participated and the resolution of which he influenced. The article argues that consistent with and indeed constructive of an emerging republican tradition of democratic constitutionalism in South Africa, Ngcobo's jurisprudential contributions recognise and articulate the public-spiritedness that the Republic of South Africa demands of each of its citizens.

Keywords: citizenship; republican tradition; economic and political participation; permanent residents; socio-economic rights

Introduction

It is an honour to be invited to offer some reflections on the jurisprudence of former Chief Justice Sandile Ngcobo. Justice Ngcobo has a well-deserved reputation for scholarship, judgment, and insight—qualities which were often simultaneously on display in the numerous judgments he penned during his years at the Constitutional Court. Moreover, Justice Ngcobo's achievements prior to his elevation to the Braamfontein Bench are as impressive as his achievement after his Court service. Among other accomplishments before his judicial service, during an intensive stint in the United States in the late 1980s, he worked as a law clerk in the chambers of the late former Chief Judge, the

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Honourable A Leon Higginbotham, on the United States Court of Appeal for the Third Circuit. In addition, he researched and taught on the role of law in perpetuating (and eradicating) racial and social prejudice in American and South African societies at American law schools, including Harvard, Stanford and the University of Pennsylvania. During this period of his career, Ngcobo practised law in Philadelphia with one of that city's foremost corporate law firms, Pepper, Hamilton and Scheetz. After his service on the Bench, Justice Ngcobo has continued to play an influential and pivotal role in public affairs. Most prominent in this regard, perhaps, is his work on the inquiry into competition in the private health services sector. Justice Ngcobo's career has been one characterised throughout by public-spiritedness and citizenship.

It is the content and character of Justice Ngcobo's jurisprudence on that very public-spirited concept of citizenship that I wish to take as a starting point in this article of reflections. Justice Ngcobo has been at the centre of a fundamental debate over the meaning of citizenship that has developed in South Africa's post-apartheid constitutional democracy. I argue here that consistent with and indeed constructive of an emerging republican tradition of democratic constitutionalism in South Africa, Ngcobo J's jurisprudential contributions recognise and articulate the public-spiritedness that the Republic of South Africa demands of each of its citizens.

To make this argument, the following section provides some context for this article's use and analysis of the South African constitutional concept of citizenship. In modern scholarship, the analysis and use of the term 'citizenship' takes many forms and engages many disciplines and intellectual traditions. Drawing on the work of Firoz Cachalia, the article also briefly sketches what might be termed the republican tradition of democratic thought. The third section then provides an analysis of several significant cases in which Ngcobo participated and the resolution of which he influenced, including those of *Khosa*,[1] *Kaunda*,[2] *Bato Star*,[3] *Doctors for Life*[4] and *Matatiele*.[5] Drawing on the article's earlier analysis, this section also argues that Ngcobo J's participation in these cases can best be characterised as adhering to a republican notion of citizenship. It further provides some legal context around the particularly relevant issues of acquisition of citizenship and the rights of permanent residents in the first of these cases.

The Constitutional Context of Citizenship and Equality/ Inequality

1 *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) SA 505 (CC).

2 *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

3 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

4 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

5 *Matatiele Municipality & Others v President of the Republic of South Africa & Others (2)* 2007 (1) BCLR 47 (CC).

Citizenship in South African constitutionalism has been changed by the move away from apartheid towards constitutional democracy. This move was signalled in the 1993 Constitution and in the 1994 non-racial elections held in terms of that Constitution. That transition and those changes consolidated in the 1996 Constitution expunged the conceptual principle of structural inequality that had previously been central to the South African formal national conception of its self-image. No longer could a citizen of South Africa be restricted from full and equal political participation in the life of the nation without justification.

While there were some significant elements of continuity (including nationality), the substance of South African citizenship was thus restructured by the advent of constitutional democracy. This restructuring grafted upon the pre-1994 understanding of citizenship a strong, or at least a stronger, version of the doctrine of equality.[6] Equality is textually prominent in the Constitutional guarantee of citizenship. Mentioning equality explicitly twice and implicitly once, section 3 of the 1996 Constitution (South Africa) provides in part:

> There is a common South African citizenship. All citizens are (*a*) equally entitled to the right, privileges and benefits of citizenship; and (*b*) equally subject to the duties and responsibilities of citizenship.

The two decades since 1994 have witnessed the embedding—albeit imperfectly and incompletely—of the concept of equality and equal rights for all citizens within the official mind of South Africa.

Drawing in part upon this new promise, a number of rights campaigns have in the post-apartheid era begun to strive for the fulfilment of various dimensions of citizenship, including its economic and political participation aspects. While equality has by no means been achieved, the vibrancy of these keenly fought struggles for equality currently underway is indeed remarkable.[7] In the main, these struggles draw upon the language of human rights and specifically upon the Bill of Rights to conduct their campaigns. Poor and African persons are battling for the fulfilment of their socio-economic rights of housing, social security, and education. Gay and lesbian persons as well as heterosexual persons are forcing the reconsideration of long-accepted and dominant legal and cultural

6 Together with the individual right to equality entrenched in the Bill of Rights' first substantive section, s 9, this text legally precludes a reading of the Constitution that would see any political form of structural inequality (such as the most benign understanding of apartheid or even 1937-style segregation) as constitutionally permissible. Further, this rights-based concept of equality is accepted within the contemporary South African political community.

7 Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics, and Lessons* (2 edn, Atlantic Philanthropies 2014) <http://www.atlanticphilanthropies.org/sites/default/files/uploads/Public-interest-litigation-and-social-change-in-South-Africa.pdf>; Richard Ballard, Adam Habib and Imraan Valodia, *Voices of Protest: Social Movements in Post-apartheid South Africa* (University of KwaZulu-Natal Press 2006).

structures such as marriage and the family.[8] Those participating and leading these and other campaigns have taken up the challenge of fulfilling their citizenship with drive and determined effort. This is the rainbow side of South Africa's contemporary public culture of citizenship.

There is, of course, another side—that of inequality in South Africa. Just to focus on the gap between rich and poor, recent statistics have once again demonstrated that South Africa is one of the most unequal societies in the world. According to a 2017 report from Oxfam, the total net wealth of just three South African billionaires is equivalent to that of the bottom half of the country's population. Inequality shapes the life chances of those within South Africa in a number of areas, such as education, health, spatial geography, food security and the economy.

Overall, this picture of constitutional South African citizenship is best understood as drawing on national and African traditions in addition to demonstrating a firm grounding in international law. Diverse in its sources, South African citizenship now stands at the intersection of a democratically enabled national order and a democratically challenged international one. As drafted, the South African concept crystallises the potential to ground national citizenship within a global order.[9] And the Constitutional Court appears to be taking up this challenge. For instance, in a series of right-to-vote cases, the Court appears to be cautiously pulling ahead of global citizenship practices.[10] Both in its narrow sense (evidenced in the July 2017 publication of a White Paper on International Migration[11]) and its broader sense, concepts of citizenship are gaining traction in South Africa.

Before turning to Justice Ngcobo's opinions, we should briefly examine the republican tradition of democratic thought. Firoz Cachalia has recently discussed its character and meaning in an essay entitled 'The Puzzling Neglect of Process Theory in South African Constitutional Jurisprudence.'[12] Here, Cachalia identifies and discusses a republican paradigm of philosophical and legal reasoning about the democratic process. While this article does not explore that paradigm or that discussion in depth, suffice to say that Cachalia identifies at least three important characteristics of this republican paradigm that are useful for present purposes. First, distinguishing the republican line of thought from liberalism, he recognises that each tradition is heterogeneous and complementary. The republican tradition thus both draws from different sources and overlaps with that

8 Jacklyn Cock, 'Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution' (2003) 26 Women's Studies International Forum 135.

9 Jonathan Klaaren, 'Constitutional Citizenship in South Africa' (2010) 8 International Journal of Constitutional Law 94.

10 ibid.

11 Department of Home Affairs, *White Paper on International Migration for South Africa* (July 2017) <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf> accessed 16 November 2016.

12 Firoz Cachalia, 'The Puzzling Neglect of Process Theory in South African Constitutional Jurisprudence' unpublished (2017) (on file with the author).

of democratic liberalism. Second, Cachalia's discussion distinguishes process values from substantive ones and holds tightly to the importance of that distinction. He argues that if this were not the case, the

> assimilation of all the values of constitutionalism into the idea of democracy, is … for the idea of self-government and of democratic process to lose its specific normative weight. What we [are] left with paradoxically by this kind of normative inflation, is a reductive idea of democracy as equivalent to constitutionalism.[13]

Third, drawing upon Habermas, Cachalia argues that the relevance of republicanism for constitutional law and theory lies in its conception of the political process beyond individuals. As he puts it,

> [t]he political process does not merely mirror the exogenously generated preferences of atomized private individuals. It is potentially a creative process in which pre-existing references are shaped communicatively and from which the common good can be identified.[14]

In this version, the republican view is a relatively positive one of the political process, distinct from the decidedly more sceptical take of liberalism. There are several important consequences for the architecture and normative content of constitutional democracies here. Among these is the significance to be assigned to interpretive theories of constitutional citizenship. Aligning himself with Jeremy Waldron, Cachalia observes that '[r]epublican political and Constitutional thought attributes specific normative weight to the intrinsic and instrumental value of citizenship and political participation.' In Cachalia's view, we must explore ways that have the potential to contribute to a deepening non-racialism as an egalitarian political project in a constitutional democracy.[15] Both in its narrow sense as a constitutional status and in its broader sense as animating the constitutional vision, citizenship and its understanding within a constitutional democracy is key to the success of that project and to the welfare of a democracy's people. With this brief understanding of a republican tradition and the place of citizenship within it, we may turn to several sites of Justice Ngcobo's republican jurisprudence: the areas of citizenship as a constitutional status, of economic equality, and of political involvement.

Justice Ngcobo's Republican Jurisprudence

Justice Ngcobo has engaged with the republican tradition of democratic constitutionalism in a number of his decisions, only five of which are touched on in this section. To begin with, two Constitutional Court cases decided within five months of each other in 2004 show Justice Ngcobo engaging in a debate with another respected former Justice of

13 ibid.
14 ibid.
15 Firoz Cachalia, 'Revisiting the National Question and Identity' (2012) 39 Politikon 53.

the Court, Justice Yvonne Mokgoro.[16] In the former case, *Khosa v Minister of Social Development*,[17] the Court upheld the rights of permanent residents to social security. In the latter case, *Kaunda v President of the Republic of South Africa*,[18] the Court refused to order protection for citizens outside South African borders potentially although not imminently faced with violations of human rights, including arguably the imposition of the death penalty.

The *Khosa* case concerned Mozambican nationals with South African permanent residence who were applying for social welfare benefits from the South African state. These foreign nationals had been granted South African permanent residence in December 1996 after having fled civil war in Mozambique during the previous years. Some of the applicants in *Khosa* were destitute and would have qualified for old-age grants but for their Mozambican nationality. The applicants had also applied for child-support and care-dependency grants. The *Khosa* applicants wanted to have declared unconstitutional the Social Assistance Act, 1992, the statute disqualifying persons who are not South African citizens from receiving welfare grants.[19] The applicants were indigent residents living in the poor Limpopo province, the present-day South African province bordering on Mozambique and Zimbabwe. This area has long been one where persons with links to both Mozambique and South Africa have lived.[20] The applicants asserted their constitutional right of social security, a socio-economic right found in section 27(1) of the South African Constitution and guaranteed to 'everyone', unlike a smaller set of rights such as the right to vote.[21] On 4 March 2004, the Constitutional Court granted the application and struck down the statutory provisions excluding permanent residents from the socio-economic right of social assistance.[22]

Judge Yvonne Mokgoro's majority judgment in *Khosa* argued that the proper legal doctrine to frame this case was the socio-economic right to social security rather than the right to equality.[23] In two paragraphs that contrasted everyone's right to social security with the right of access to land granted in section 25(5) only to citizens, Mokgoro J confirmed that 'everyone' in the context of section 27 (and seemingly section 26)

16 Jonathan Klaaren, *From Prohibited Immigrants to Citizens: The Origins of Citizenship and Nationality in South Africa* (UCT Press 2017).

17 *Khosa* (n 1).

18 *Kaunda* (n 2).

19 The Social Assistance Act 59 of 1992.

20 *Khosa* (n 1) para 2.

21 Section 27 of the Constitution of the Republic of South Africa, 1996 states: 'Everyone has the right to… social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

22 Klaaren (n 9).

23 Mokgoro J (Chaskalson, Langa, Goldstone, Moseneke, O'Regan, and Yacoob JJ concurring). Mokgoro J was also the author of an earlier Constitutional Court judgment, finding that the right to equality protected against discrimination on the grounds of nationality. See also Jonathan Klaaren, 'Non-citizens and Constitutional Equality – *Larbi-Odam v The Member of the Executive Council for Education (North-West Province)* 1998' (1998) 14 SA Journal on Human Rights 286.

would apply to non-citizens.[24] The textual interpretation of the socio-economic right to appropriate social assistance did not end the enquiry. In addition to life and dignity, the social security scheme put in place by the state raised an equality issue. In restricting the availability of social assistance to otherwise eligible South African permanent residents on the basis of their foreign nationality, the scheme arguably violated the Constitution's prohibition in section 9 (the right to equality) against unfair discrimination.[25] Mokgoro J thus delved back into equality jurisprudence and considered the reasonableness of citizenship as a criterion of differentiation in this context.[26] She concluded that there was indeed a potential violation of the equality right:

> [E]ven when the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria on which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole.[27]

At the time of this case, permanent residents could apply for naturalisation after five years of status. However, Mokgoro reasoned that this was not within the control of the applicant and, moreover, no justification was offered for the bar to social security benefits during this period.[28] The State did not argue that the limitation was either a temporary measure or one designed as part of a strategy to realise rights progressively.[29] Mokgoro J also rejected American jurisprudence that found discrimination against legal permanent residents to be justified constitutionally, even against a challenge based on the right of equality. This equality finding allowed Mokgoro J to decide the case on her initial argument, namely that the case was a socio-economic rights case set firmly with the Bill of Rights protecting the residents of South Africa.

I have discussed Mokgoro J's opinion in order to place in context Justice Ngcobo's cogently argued minority judgment in *Khosa*.[30] He accepted for the purposes of argument that the right of social security was available to everyone and that the case could be decided in that light.[31] However, differing significantly from the majority, Ngcobo J focused on the government's claim to be justifiably restricting this right through the limitations clause, section 36 of the Bill of Rights. In his view, the applicants' lack of South African citizenship was a temporary condition. Citing statutory authority, he noted this lack of citizenship would persist for a five-year waiting period only, should the applicants choose to apply for citizenship. Further, legislative provisions existed to

24 *Khosa* (n 1) paras 46–47.
25 ibid para 44.
26 ibid paras 53–57.
27 ibid para 45.
28 ibid paras 56–57. Mokgoro J rejected the argument that the scheme provided an incentive to naturalise, reasoning in part from the provision of equality within the Immigration Act, 2002.
29 *Khosa* (n 1) para 50.
30 ibid paras 99–140. Madala J concurred in the judgment of Ngcobo J.
31 *Khosa* (n 1) para 111.

grant social grants in exceptional circumstances and existed even to extend the definition of 'citizen'.[32] Given the individuals' failure to naturalise and the State's catering for individual circumstances, Ngcobo J judged successful the State's arguments in favour of limiting social assistance in these instances to South African citizens and not permanent residents. The State had raised justification arguments that included controlling the rising costs of the social assistance system, reducing the incentive for foreign nationals to immigrate to South Africa and promoting the need for resident immigrants to be self-sufficient.[33] The social assistance limitation effectively provided an incentive for such permanent residents to naturalise (to perfect their permanent residence into citizenship)—a powerful motive in the reasoning of Ngcobo J.[34] In his words,

> [t]he unequivocal declaration of loyalty and commitment that an alien can give to a country is through naturalization and taking the oath of allegiance. After this a permanent resident becomes a citizen and thus qualifies for social security benefits.[35]

Ngcobo J would therefore have found the limitation on the section 27 right to be reasonable and would have decided the case differently from the majority.[36] The animating spirit for Ngcobo J's *Khosa* opinion was that of citizenship as a membership community envisaging full political participation in a republic.

Ngcobo's focus on the political community integral to South African democracy may also be seen in the later Constitutional Court case of *Kaunda*. This matter concerned South African citizens engaging in reprehensible mercenary activity but being left stranded in Equatorial Guinea. The majority judgment delivered on 4 August 2004 and penned by Chaskalson CJ arguably broke new ground in international law and articulated an extra-territorial state duty of diplomatic protection of nationals. This duty was both based in and contrasted with the duty that the State owed to its residents within the territory.[37] Chaskalson CJ noted that the foreigners had lost their rights to protection by the South African government of the right to life and dignity and ought not to be punished in a cruel and unusual way when they were outside the territory of South Africa. His question was whether section 7(2) gave citizens such rights when travelling abroad.[38] The *Kaunda* majority contrasts with a concurrence by Ngcobo J as well as a dissent by O'Regan J. Ngcobo J noted the positive duty of the state to protect its citizens within its borders and wished the right of citizenship to be construed purposively 'so

32 ibid paras 116–118.
33 ibid para 126.
34 ibid para 130.
35 ibid para 130.
36 ibid paras 134–135. Ngcobo J's reasoning was limited in this respect and did not extend to the claims for dependency and child support grants, where he noted that the discrimination hits the dependent through the primary care-giver.
37 *Kaunda* (n 2) paras 1–145. Five other judges joined in this judgment: Langa DCJ and Moseneke, Yacoob, Van der Westhuizen and Skweyiya JJ.
38 *Khosa* (n 1) para 36.

as to give it content and meaning'. He decided that diplomatic protection is at least a benefit, if not a right, of citizenship.[39]

The emphasis on citizenship as meaning membership in a political community—as evidenced by Justice Ngcobo in *Khosa*—and the emphasis on a purposive interpretation of citizenship—as a status more than a formal right to have rights—as evidenced by Justice Ngcobo in *Kaunda* are both hallmarks of the republican tradition of democratic thought. Both hold up the self-government side of the overlapping and complementary principles of constitutional democracy.

Moving from citizenship status to the economy, a later case where Justice Ngcobo engaged directly with equality is significant for revealing an economic dimension of republican democratic thought in South Africa. Given the extent of the economic inequality in the country, one would expect this dimension to be accepted into the republican tradition just as, for instance, socio-economic rights are accepted in the liberal tradition. In the 2003 case of *Bato Star*, Ngcobo J recognised the value of economic equality and entrepreneurial values in building the political community in South Africa.[40] The case is often used in law schools to teach reasonableness, the importance of resorting to the administrative justice statute in administrative-law cases and the doctrine of reasonableness with reference to the unanimous main judgment authored by O'Regan J. What is not remembered as often is the other, equally unanimous concurring judgment. Indeed, the case may well be unique for having two such opinions in one matter. In his judgment, Justice Ngcobo issued a powerful call—recasting the transition associated with the Constitution from a democratic one to an economic one. As he wrote:

> South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed 'to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'.[41] This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.[42]

39 *Kaunda* (n 2) para 180.

40 He famously mentioned the entrepreneurial aspect of his own career in a self-deprecating and winning manner during his Judicial Service Commission interview for the Constitutional Court. The interviews for both the Constitutional Court and the Chief Justice positions can be accessed from the Constitutional Court website: <http://www.constitutionalcourt.org.za/site/judges/transcripts/ngokobo.html>; and <http://www.constitutionalcourt.org.za/site/judges/transcripts/ngokobo2.html> accessed 16 November 2017.

41 *Bato Star* (n 3).

42 ibid para 73.

Finally, any discussion of Justice Ngcobo's jurisprudence and its relationship with the republican tradition of democracy must cover the political process itself. The most prominent place where the avowedly political character of Justice Ngcobo's jurisprudence emerged has been in the series of political participation cases.[43] In this area, the Constitutional Court has been celebrated for 'articulating a new doctrine under which legislation is constitutionally invalid if the legislatures concerned did not do enough to facilitate public involvement in the legislative process.'[44] The doctrine was announced in the cases of *Doctors for Life International v Speaker of the National Assembly* and *Matatiele Municipality v President of the Republic of South Africa.* Justice Ngcobo authored the majority opinion in both cases.

This doctrine of political involvement came with an initial invalidation of some of the statutes involved. Moreover, the subject-matter of these statutes included the deeply felt matters of relocating local areas within provinces—essentially long-standing demarcation and boundary disputes. In a very direct way, this subject-matter was about the form and substance of the political units of the republic. The doctrine lies at the precise law–politics interface. While this aspect has not attracted the scholarly attention it deserves, the doctrine might well be supported and justified on the basis of process theory, as the protection of politics.[45] In the initial cases, it was several provincial legislatures that had let down the political side. In these cases,

> [s]ome provincial legislatures effectively engaged with the public; others made clear their intentions to do so but then made blatantly inadequate arrangements, such as announcing a public hearing with one day's notice or not getting around to doing anything at all, and it is these exercises that the Court invalidated.[46]

After its initial impact, the doctrine appeared to wane. It was argued before but not employed by the Court in a number of cases from 2008 to 2011.[47] For instance, in a thoughtful contribution surveying political rights since 1994, Ngwako Raboshakga expressed disappointment at the Court's application of the doctrine.[48]

The appearance of weakening vitality notwithstanding, any thought that the doctrine lies in the Court's past was recently disproved. In a significant 2016 case involving the land redistribution process, the Constitutional Court held that parliament had failed to satisfy its obligation to facilitate public involvement in accordance with section 72(1)(*a*) of the Constitution.[49]

43 *Doctors for Life* (n 4); *Matatiele* (n 5).
44 James Fowkes, *Building the Constitution* (Cambridge University Press 2016) 283.
45 Cachalia (n 12) 20.
46 Fowkes (n 44) 286.
47 ibid 284.
48 Ngwako Raboshakga, 'Towards Participatory Democracy, or Not: The Reasonableness Approach in Public Involvement Case' (2015) 31 SA Journal on Human Rights 4.
49 *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others* 2016 (5) SA 635 (CC).

In the light of these political involvement cases, Justice Ngcobo must be recognised as—perhaps 'the'—early proponent of a South African republican tradition. As noted above, Justice Ngcobo wrote the majority judgment in both the foundational cases of the political involvement doctrine. It is thus worth exploring further the character of this doctrine. In my view, the degree to which Justice Ngcobo was writing here as a democrat who was upholding and extending a tradition that respects and ensures genuine democratic dialogue should not fail to be appreciated. This democratic concern comes through, for instance, where he writes:

> I agree with the Gauteng MEC that the NCOP and the provincial legislatures have a duty to bring the voices of the people, as residents of the province, to the national level. This duty was of particular importance in relation to the [Bill at issue], a new piece of legislation that would have a substantial impact on the provinces and the people who live within them.

Here, Ngcobo the Constitutional Court judge is making common ground with a provincial legislator in safeguarding the institution of participatory democracy. And, ever the careful lawyer, Justice Ngcobo was sure, in articulating this doctrine, to place real limits on it, lest it lead to the undue judicialisation of politics:

> The Court has to find a balance between on the one hand, avoiding improper intrusions into the domain of Parliament, and, on the other, ensuring that a constitutional provision which requires Parliament to facilitate public involvement in the law-making process is sufficiently justiciable to ensure that the commitment to facilitating public involvement that it represents is not rendered nugatory. In my view, only those applicants who have made diligent and proper attempts to be heard by the NCOP should be entitled to rely on any failure to observe section 72 of the Constitution. Similarly applicants who have not pursued their cause timeously in this Court may well be denied relief.[50]

This demarcation of the doctrine is equally a sign of a genuine democratic concern for a well-functioning republic—judges should go so far and no further. Indeed, it is possible to read these cases as supporting a distinctively African idea of the political process, as one emphasising listening and consulting even if at the same time de-emphasising the narrowly majoritarian politics of fifty per cent plus one.[51]

Conclusion

In his pre-Bench career, former Chief Justice Ngcobo co-authored an article investigating and comparing housing segregation in South Africa and America.[52] Published in 1990 and written with the American judge A Leon Higginbotham, Jr, that piece in part argued

50 *Doctors for Life* (n 4) para 218.

51 Fowkes (n 44) 288.

52 F Higginbotham, A Higginbotham and S Ngcobo, '*De Jure* housing segregation in the United States and South Africa: The difficult pursuit for racial justice' (1990) University of Illinois Law Review 763.

that a new South African Constitution, authorising the power of judicial review and containing a prohibition against housing discrimination similar to the provision in the US Constitution, would help to ensure equality of opportunity in housing for all South Africans. Furthermore, it argued that it was essential that the new South African Constitution be enforced by a racially pluralist judiciary that was careful to avoid the rationale of prior jurisprudence which assumed that blacks could be treated differently from and unequally to whites.

One oft-cited overlap of the political and the economic aspects of the fight for equality in South Africa is the achievement of socio-economic rights in the Bill of Rights of post-apartheid South Africa. Former Chief Justice Ngcobo certainly participated in and contributed to that overlap. But he has equally, and more distinctively perhaps, explored the overlap of economic and political participation through his influence and voice in his more explicitly democratic jurisprudence, including his participation in a fundamental post-apartheid debate over citizenship. As argued in the text above, Justice Ngcobo has fused economic and political aspects of citizenship in a number of his judgments, participating in the creation of a powerful strand of a newly born republican tradition of South African constitutional law and theory.

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