

Brexit, the Election of Donald Trump and Activism in South Africa—Lessons for Democracy: The Contribution of Justice Sandile Ngcobo

Ziyad Motala

Professor of Law, Howard Law School, Washington DC

Email: zmotala@law.howard.edu

ABSTRACT

Ngcobo J's conception of democracy is more in keeping with the ancient understanding, found in the Athenian city-state, traditional African societies and the writings of Karl Marx. The traditional conception, affirmed by Rousseau, requires the direct participation of the population in the decision-making processes that affect their lives. The Athenian notion of the participation of the population in a town hall meeting is not practical in a large nation state. Ngcobo J developed a hybrid model that combines elected representatives and participatory democracy. Under this model, the lawmaker is required to provide for meaningful modes of participation by bringing the opportunity for participation to the people through provincial participation. In the annals of comparative constitutional law, Ngcobo J's opinion is an outlier that represents a unique and fresh perspective on democracy, much like the Constitutional Court's development of socio-economic rights and the use of the reasonableness standard to determine the legality of government conduct. Ngcobo J does not equate political equality with equality of opportunity. Apart from requiring the government to provide for citizen participation in the polity, he imposes a further duty on the government to take affirmative steps such as educational programmes, road shows, workshops, media programmes and publications to make citizen participation a reality for the historically disadvantaged and those with unequal education. His perspective offers a cogent instruction to the rest of the world in this period when democracy is under serious strain.

Keywords: democracy; public participation; political participation; meaningful participation; economic justice; Karl Marx



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Introduction

It is extremely gratifying to contribute to this *festschrift* in tribute to former Chief Justice Sandile Ngcobo. In political discourse, the term ‘democracy’ arouses a great deal of passion and controversy. This passion and controversy is in full display in the Brexit vote in the United Kingdom and the election of Donald Trump in the United States. It plays itself out daily in the political turbulence in South Africa. Under constitutionalism, we are schooled to resolve problems through democracy. But what does democracy mean? There is no universal conception of democracy:¹ it can be approached as an idealised notion versus what others might characterise as a practical or realistic system of government.² In this respect, Chief Justice Ngcobo’s opinion in *Doctors for Life*, ranks among his most important decisions.³ His majority opinion provides a vision for citizen participation, which the Court correctly framed as an issue that ‘lies at the heart of our constitutional democracy’.⁴ In so pronouncing, it established a participatory conception of democracy that has been affirmed and applied in a litany of subsequent cases.⁵

In *Doctors for Life*, the Court considered the competing visions of democracy and formulated an understanding that best represented the ethos of the South African Constitution.⁶ In his majority opinion, Ngcobo J conceives democracy as a social idea that requires the participation of the electorate in matters that are of crucial concern to them. In contrast, the dominant contemporary interpretation of democracy has moved away from conceiving democracy as a social idea, and adopts an empirical approach by assuming that those countries which are called democracies are indeed democratic as

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- 1 William Nelson, *On Justifying Democracy* (Routledge 1980) 2–3; Crawford Macpherson, *The Real World of Democracy* (Oxford University Press 1965) 1; Keith Graham, *The Battle of Democracy: Conflict, Consensus and the Individual* (Wheatshaf Books 1986) 1.
 - 2 J Dewey, ‘Search for the Great Community’ in L Earl Shaw, *Modern Competing Ideologies* (Heath 1973) 297.
 - 3 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).
 - 4 *ibid* para 1.
 - 5 *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC); *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children* 2015 (10) BCLR 1129 (CC); *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC); *Matatiele Municipality v President of the Republic of South Africa* (2) 2007 (1) BCLR 47 (CC); *Minister of Transport v Mvumvu* 2012 (12) BCLR 1340 (CC); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC); *South African National Defence Union v Minister of Defence* 2007 (5) SA 400; 2007 (8) BCLR 863 (CC); *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC); *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).
 - 6 The majority opinion of Ngcobo J and the dissenting opinion of Yacoob J illustrate the divergent views with respect to what democracy and public participation entail. For a discussion on the different theories on democracy, see Robert A Dahl, *A Preface to Democratic Theory* (The University of Chicago Press 1956) 1.

long as they observe free and fair elections periodically⁷ and the public's participation is expressed through the elected representatives. Justice Ngcobo offers a perspective that 'meaning determines application' and not that 'application determines meaning'.⁸ Central to his interpretation, decision-making in the polity cannot be the confine of elected political elites, to be exercised behind the backs of the population—elite decision-making and a lack of citizen participation only contribute to citizen alienation, cynicism and lack of social cohesion.

The United Kingdom and the United States have recently experienced political seizures, as reflected in the Brexit referendum and the election of Donald Trump as US president. A major contributing factor in the electorates' voting choices is a feeling of alienation arising from a deep-seated fear of and anxiety about globalisation and the rigging of economic choices, such as free trade for the benefit of elites. Similarly, South Africa is in the midst of severe economic, educational and political challenges with nationwide protests. As in developed countries, decision-makers in South Africa adopted free-trade policies that have wrecked large sectors of the economy without any consultation of the people affected by these decisions. The free-trade policies adopted under the leadership of former Finance Minister Trevor Manuel, for instance, have served the interests of economic elites to the detriment of the poor.⁹ The political convulsions reflected in Brexit, the election of Donald Trump and the economic and political challenges in South Africa reinforce the vitality, cogency and depth of reasoning inherent in Ngcobo J's approach to democracy. It makes a compelling case that citizen participation should not be limited to the right to vote but should be ongoing with respect to matters of critical concern to the citizenry.

This article argues that Brexit, the election of Donald Trump and the economic alienation of the majority in South Africa instruct us that participatory democracy needs to be extended to economic choices.¹⁰ This article further argues that these convulsions exemplify and reinforce what the traditional thinkers of democracy instructed us to avoid—widespread poverty and extreme disparities in wealth are inimical to democracy.¹¹

Ngcobo's conception of democracy is more in keeping with the ancient understanding found in the Athenian city-state, traditional African societies and the writings of Karl Marx. The traditional conception, affirmed by Rousseau, requires the population to participate directly in the decision-making processes that affect their lives.¹² The Athenian

7 *ibid* 84.

8 For these contrasting approaches, see Barry Holden, *The Nature of Democracy* (Barnes and Noble 1974) 7.

9 Ziyad Motala, 'Free Trade, the Washington Consensus, and Bilateral Investment Treaties the South African Journey: A Rethink on the Rules on Foreign Investment by Developing Countries' (2016) 6 (1) *American Univ Business LR* 31 at 37–38 (hereinafter Motala Free Trade, the Washington Consensus).

10 Discussed in section 5.

11 Discussed in section 6.

12 See Jean-Jacques Rousseau, *The Social Contract* (Marc Michel Rey 1762). For a copy and translation,

notion of the populace's participation in a town hall meeting is, of course, not practical in a large nation state. But Ngcobo J developed a hybrid model that combines elected representatives and participatory democracy. Under this model, the lawmaker is required to provide for meaningful modes of participation by bringing the opportunity for participation to the people through provincial participation.¹³ In the annals of comparative constitutional law, Ngcobo's opinion is an outlier,¹⁴ which represents a unique and fresh perspective of democracy much like the Constitutional Court's development of socio-economic rights and the use of the reasonableness standard to determine the legality of government conduct.¹⁵ Ngcobo J does not equate political equality with equality of opportunity: apart from requiring the government to provide for citizen participation in the polity, he imposes a further duty on the government to take affirmative steps such as educational programmes road shows, workshops, media programmes and publications to make citizen participation a reality for the historically disadvantaged and those with unequal education.¹⁶ Equality and citizen participation contribute to an enlightened citizenry and informed decision-making, which nourish democracy in the interests of a society. His perspective offers a cogent instruction to the rest of the world in this period when democracy is under serious strain.

The Question in *Doctors for Life*

Political events in South Africa in the latter half of 2017 and early 2018 might suggest that South Africa's democracy is blighted and in a tailspin. Many are appalled by the political leaders who stagger from one nadir to the next and those in power signify a sad object lesson of corruption, patronage and abuse of state institutions. Into our vocabulary has entered the phrase 'state capture' to signify the abuse of political and economic power on the part of political and economic elites.¹⁷ The idea of a total state capture is a misnomer, however: we witness the functioning of a vibrant and engaged press, independent political institutions such as the Public Protector and the operation of

see Ernest Barker, *Social Contract: Essays by Locke, Hume, and Rousseau* (Oxford University Press 1960).

13 *Doctors for Life* (n 3) para 159.

14 Switzerland would come the closest to a direct democracy in terms of the forms of direct participation provided to the population. But the veto of legislation in Switzerland occurs after the law is passed. Available at <<http://debatewise.org/debates/251-representative-democracy-is-a-better-form-of-government-than-direct-democracy/>>.

15 See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

16 *Doctors for Life* (n 3) para 132.

17 See Lynsey Chutel and Lily Kuo, 'What the "State Capture" Report Tells us About Zuma, the Guptas, and Corruption in South Africa' *Quartz Africa* (New York, 3 November 2016) <<http://qz.com/825789/state-capture-jacob-zuma-the-guptas-and-corruption-in-south-africa/>>; and Conor Gaffey, 'South Africa: Five Things Thuli Madonsela's State Capture Report Told Us' *Newsweek* (New York, 3 November 2016) <<http://www.newsweek.com/south-africa-five-thuli-madonsela-state-capture-report-516630>> accessed 14 November 2017.

the rule of law by an ever-vigilant Judiciary, particularly the Constitutional Court. This Court has repeatedly shown itself as a shining pillar in the reinforcement of democracy, no less in *Doctors for Life*. In *Doctors for Life*, the Court was confronted with the question of how much citizen participation is required in the exercise of law-making and what the forms of participation should be. The substantive question involved ‘the nature and the scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in its legislative processes and those of its committees.’¹⁸ This issue arose as a result of a complaint made by the applicant that the National Council of Provinces (NCOP), in passing certain Bills relating to health, unlike the National Assembly (NA), failed to solicit public opinion through the conduct public hearings. Justice Ngcobo, for the majority, concluded that the Court could grant relief in respect of the proceedings of the legislature after a Bill has been enacted into law and before it has been brought into force,¹⁹ if the necessary public involvement was not complied with. An intervention by the Court would not constitute a violation of separation of powers; instead, it would serve to prevent a violation of the Constitution.²⁰ The applicant argued that the necessary public involvement in the legislative process as required under the Constitution was not complied with.²¹ Section 72(1)(a) of the Constitution provides that the NCOP ‘must facilitate public involvement in the legislative and other processes of the Council and its committees.’ Section 59(1)(a) contains the same requirement for the NA, whereas section 118(1) contains an analogous requirement for the provincial legislatures. The argument of the government and the provincial legislatures was that the public participation process was fulfilled so long as the public had an opportunity to make submissions, be it written or oral, at some juncture in the legislative process.²² In effect, the government’s argument was that the right to participate was fulfilled through notice and an opportunity to comment. All the parties agreed that public participation was a requirement in the legislative process; they disagreed about the nature and scope of what public participation required.

In giving meaning and content to the right to political participation, Ngcobo J surveyed international human rights instruments, including the International Covenant on Civil and Political Rights.²³ Article 25(a) of the Covenant proclaims a right to take part in the conduct of public affairs, either directly or through freely chosen representatives. Article 25(b) guarantees the right to vote and to be elected to office by secret ballot. Ngcobo interpreted article 25(a) as containing an obligation on the part of the State to

18 *Doctors for Life* (n 3) para 1.

19 *ibid* para 64.

20 *ibid* para 68.

21 The Constitution of the Republic of South Africa Act 108 of 1996; *Doctors for Life* (n 3) para 3.

22 *Doctors for Life* (n 3) paras 7 and 76.

23 Article 25(a) of the Covenant proclaims a right to take part in the conduct of public affairs, directly or through freely chosen representatives. Article 25(b) guarantees the right to vote and be elected to office by secret ballot. International Covenant on Civil and Political Rights adopted 16 December 1966, 999 UNTS 171; *Doctors for Life* (n 3) para 90.

provide an opportunity to citizens ‘to take part in the conduct of public affairs’²⁴ and simultaneously to impose an obligation on states to facilitate public participation in the conduct of public affairs.²⁵ The jurist also referred to regional instruments such as the African Charter on Human and Peoples Rights (African Charter).²⁶ Article 13(1) of the African Charter provides for citizens a right to participate in the affairs of government, ‘either directly or through freely chosen representatives.’²⁷ An analogous provision is contained in the American Convention on Human Rights, in article 23, which provides a right to citizens ‘to take part in the conduct of public affairs, directly or through freely chosen representatives.’²⁸

Ngcobo J and the Court majority could have accepted the argument of the national government and the provincial legislatures that the public participation requirement is fulfilled if the public is notified about the Bills and provided an opportunity to offer submissions at some stage during the law-making process.²⁹ The learned Justice could have also adopted the position that none of the international human rights instruments cited mandate direct or participatory democracy. Instead, the wordings of the instruments speak about participation either directly or through chosen representatives. The constitutions of some countries enshrine the right of citizens to participate in matters that affect them.³⁰ As correctly noted by Justice Yacoob in his dissenting opinion, no Court in other jurisdictions has invalidated legislation on the basis of the legislation having been adopted without public involvement.³¹ While recognising that the nature and scope of the international law right to participate in the conduct of public affairs is a matter of individual state discretion,³² as in other areas of the Constitutional Court’s jurisprudence,³³ Ngcobo J pushes the envelope to argue that the right to participation needs to evolve and expand to give it a new texture and meaning.³⁴ In so doing, he

24 *Doctors for Life* (n 3) para 91.

25 Ngcobo bolsters his conclusion by also relying on article 19 of the Civil and Political Covenant, which guarantees freedom of expression: *Doctors for Life* (n 3) para 92.

26 *Doctors for Life* (n 3) para 93.

27 African Charter on Human and Peoples’ Rights adopted 27 June 1981, OAU Doc CAB/LEG/67/3/REV.5 para 13(1).

28 American Convention on Human Rights adopted 22 November 1969 (entered into force 18 July 1976) para 23(1)(a).

29 *Doctors for Life* (n 3) paras 7 and 76.

30 *ibid* paras 103 and 104 (mentioning direct participation in Tanzania, Portugal and Colombia).

31 *ibid* para 329.

32 *ibid* para 95.

33 Such as the Court’s development of socio-economic rights, which is another example of a trail-blazing jurisprudence. Also, the Court’s use of the reasonableness standard as a basis for determining the validity of government action is another significant jurisprudential innovation. For a discussion of both socio-economic rights and the application of the reasonableness standard, see *Government of the Republic of South Africa v Grootboom* (n 15). See also *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765(CC).

34 *Doctors for Life* (n 3) para 97.

harvested new jurisprudential ground, which goes beyond requiring a notice by the law-makers and inviting comments from the citizenry.³⁵ Ngcobo's approach is unique in the annals of comparative constitutional law in that it provides a dynamic and invigorating interpretation of the constitutional requirement of public participation. His perspectives depart dramatically from the popular strain of democratic theory which underpins the way democracy has come to be conceived of in liberal societies:³⁶ his conception of democracy mirrors the understanding of traditional ideas of democracy found in the Athenian city-state and traditional African society.³⁷

Democratic Theory in the Modern Era

Ngcobo J's approach goes against the grain of the overwhelming corpus of modern thinkers who reject any meaningful participation by the electorate in the polity.³⁸ Modern theorists, also referred to as 'revisionist' or 'realists', assert that political institutions that permit the free election and alternation of elites distinguish a democratic from a non-democratic system.³⁹ For them, direct democracy is an ideal or theoretical system beyond the limit of human possibilities;⁴⁰ and democratic theory should be empirical and grounded in the facts of life.⁴¹ The mass of the people cannot decide complex

35 Many jurisdictions require notice of legal changes and inviting the public to comment on the proposed changes referred to as notice and comments. See <<http://www.foreffectivegov.org/node/2578>>. See also <http://www.americanbar.org/content/dam/aba/events/administrative_law/2011/11/2011_fall_administrativelawconference/rulemaking_chapter_2011.authcheckdam.pdf>.

36 Discussed in section 2.

37 Discussed in section 3.

38 See generally, Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Harper 1947). Schumpeter is widely perceived to have laid the framework for the modern or revisionist theory of democracy. Since direct democracy is impossible, the modern thinkers argue that it is time for a revision in the thinking on democracy. There is no specific school of modern or revisionist theory of democracy, but there are several writers who share similar perspectives on the proper role and definition of democracy in modern society so that one can group them together for our purpose. For the merits of this approach, see Lee Ann Osbun, *The Problem of Participation: A Radical Critique of Contemporary Democratic Theory* (University Press of America 1985) 1. See also Holden (n 8). Holden also adopts the dichotomy of traditional democratic theory and modern democratic theory.

39 The labels modern, revisionist or realists are used to describe the present-day theorists: see Ziyad Motala, *Constitutional Options for a Democratic South Africa* (Howard University Press 1994) 21–22.

40 Robert Dahl, *Dilemmas of Pluralist Democracy: Autonomy vs Control* (Yale University Press 1982) 6. The modern thinkers argue that democracy must be conceptualised correctly, taking into account the irrevocable reality under which modern societies exist. See, for example, Louis Hartz, 'Democracy: Image and Reality' in William Chambers and Robert Salisbury (eds), *Democracy in the Mid-Twentieth Century: Problems and Prospects* (Washington University Press 1960). According to Giovanni Sartori, *Democratic Theory* (Wayne State University Press 1962), there is an unbridgeable gap between traditional theory and reality. Since traditional theory is no longer adequate, the modern theorists set out to provide a theory of democracy more fitting to reality.

41 Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press 1970) 3.

political matters and this necessitates representation.⁴² They describe the formation of oligarchical and bureaucratic party organisations as inevitable because it is impossible for the masses to decide political issues on their own.⁴³

According to the modern theorists, voters do not display the level of interest in politics that the traditional theorists credit them with.⁴⁴ They paint a general picture of a citizenry uninterested in politics and civic affairs.⁴⁵ They argue that it is impossible to talk about arriving at a ‘common will’ that will benefit the broader society through direct participation. If one is going to argue about a ‘common will’, then one must first demonstrate the rationality of each voter with respect to the voter’s powers of observation and interpretation and their ability to make decisions.⁴⁶ Apart from being uninterested in politics, when they do show interest, voters do not display the level of rationality needed to make wise choices.⁴⁷ Commenting on the election of Donald Trump, a prominent journalist wrote ‘[w]hat happens to democracy when an uninformed, misinformed or disinformed populace tries to make sound decisions? The simple and terrible answer is, democracy fails.’⁴⁸ Hence, apart from regarding them as being uninterested, modern theorists assert that the voters are ignorant with regard to the issues and policies. Consequently, the voters’ decision-making tends to be irrational.⁴⁹ The revisionist theorists assert that such apathy is good for the system because the mass of the people are not in a position to decide complex political questions. An increase in citizen participation is a danger to the stability of the political order.⁵⁰ If all the voters were to show rationality, interest and knowledge, the end result would be detrimental to democracy.⁵¹ For the system to hold together, the type of population required is heterogeneous with a pluralistic social organisation:⁵² some members of society must be

42 Holden (n 8) 29.

43 Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (The Free Press 1962) 65, 72.

44 Mark Abrams and Richard Rose, *Must Labour Lose* (Penguin Books 1960) 73.

45 *ibid*; Bernard Berelson, Paul Lazarsfeld and William McPhee, *Voting: A Study of Opinion Formation in a Presidential Campaign* (The University of Chicago Press 1954) 310; K Graham, *The Battle of Democracy: Conflict, Consensus and the Individual* (n 1) 131; Hartz (n 40) 13–29.

46 Schumpeter (n 38) 256.

47 They assert that the idea of a rational voter is a fiction: see Berelson (n 45) 310. With this reduced sense of reality, political groups are able to manipulate the irrational or illogical voter in a manner similar to commercial advertising. See Schumpeter (n 38) 263.

48 Kathleen Parker, ‘The Biggest Loser’ *The Washington Post* (Washington DC, 18 November 2016) <https://www.washingtonpost.com/opinions/2016s-biggest-loser/2016/11/18/dfeb4ac2-adda-11e6-a31b-4b6397e625d0_story.html?utm_term=.af2e226f85cf> accessed 14 November 2017.

49 Holden (n 8) 143.

50 Pateman (n 41) 10.

51 Berelson (n 45).

52 The argument goes that it is better to have multiple centers of power in society to ensure a modicum of liberty and social harmony. See Shaw (n 2) 281.

well informed and others less informed, some conservative and others liberal, and some interested and others uninterested.⁵³

For the revisionist, then, democracy represents an ‘institutional arrangement for arriving at political decisions in which elected elites acquire the power to decide by means of a competitive struggle for the people’s vote.’⁵⁴ Democracy does not mean that the people contribute to the framing of issues or the outcome of decisions: elected representatives have greater knowledge of political affairs and are in a better position to make choices.⁵⁵ Given that the electoral mass is incapable of rational action, the elected representatives must have autonomy in exercising choices on policies and programmes.⁵⁶ The people must react to the initiatives of the leaders as opposed to taking the initiative on their own.⁵⁷ In this way, the democratic component is realised through competition between contending elites for the support of the people.⁵⁸ The political elite campaign on the issues and the public cast their votes based on perceptions of who best represents their choices. If those choices are not carried out, the public has an opportunity to make new selections at the next election, which is their opportunity to hold the politicians accountable for neglecting the will of the majority—the institutional arrangements of allowing periodic elections are critical in allowing the population the opportunity to select their leaders.⁵⁹ For its part, the constitutional system must entrench equality by allowing all adults the right to run for political office; it must also entrench freedom of speech, including the right to criticise the government. There must also be freedom to form political associations to achieve the above rights.⁶⁰ These characteristics, together ‘with frequent alternations in office from one party to the other’, are defining of democracy.⁶¹

The criticism of this conception of democracy is that elections are more about maintaining allegiances and fulfil a more ritual function.⁶² Voting provides individual satisfaction

53 Berelson (n 45) 314.

54 Schumpeter (n 38) 269.

55 See John Stuart Mill, *Considerations on Representative Government* (Parker, Son and Bourn 1861) 233; BO Nwabueze, *Constitutionalism in the Emergent States* (East African Literature Bureau 1973) 11.

56 Schumpeter (n 38) 270.

57 To be otherwise would lead to totalitarianism, says Sartori (n 40) 77.

58 The actual institutional arrangements are described by Dahl and can be summarised as the right of all adults to elect government officials in whom is entrusted decision-making powers concerning government decisions: Robert Dahl, *Dilemmas of Pluralist Democracy* (Yale University Press 1983) 10–11.

59 *ibid* 84.

60 *ibid*.

61 Robert Dahl, *Who Governs? Democracy and Power in an American City* (Yale University Press 1974) 311.

62 Richard Rose and Harve Mossawir, ‘Voting and Elections: A Functional Analysis’ (1967) 15 (2) *Political Studies* 173 at 177. See also Murray Edelman, *The Symbolic Uses of Politics* (University of Illinois Press 1985) 2–3.

and a feeling of participation by ‘stirring people up and giving them a sense of their own potential significance, and attaching their sentiments to symbols which comprehend the entire nation.’⁶³ In its application, it means equal opportunity to select leaders and not an equality of power. The modern thinkers recognise that the majority are denied access to power because of their socio-economic status and a lack of resources.⁶⁴ They also say that the uneven access to resources, education and wealth is not antithetical to democracy. In the choice between equality and liberty, the latter is considered as more important.⁶⁵ Overall, the system enjoys legitimacy and ‘the belief and ritual aspects of political participation are more important than its substantive policy results.’⁶⁶

Ngcobo’s Approach to Democratic Theory in Relation to Traditional Thinkers

Ngcobo’s idea of participation rejects the predominant description and prescription for democracy. He articulates clear moralistic ideas about what democracy ought to be, not just as an ideal but as a reality, one that must be implemented in the law-making process. His views on democracy mirror the conception of Athenian democracy⁶⁷ and the views of Jean-Jacques Rousseau⁶⁸ and Thomas Jefferson,⁶⁹ in which the maximum participation of citizens in the decision-making process was advocated. Ngcobo J also finds inspiration in the traditional African conception, which emphasised a form of participatory democracy.⁷⁰ Rousseau’s idea of democracy is also found in the writing of Karl Marx, who similarly called for maximum citizen participation in the polity.⁷¹ The reality of citizen participation as found in Western countries, African one-party states or what existed in the communist world departs in fundamental ways from the traditional conceptions of democracy.

According to the practice of the ancient Greeks, democracy denoted rule by the citizen body (the common people) as opposed to rule by the rich.⁷² In this sense, it was very

63 Edward Shils, *Political Development in the New States* (Mouton 1962) 38.

64 Pateman (n 41) 9.

65 Milton Friedman, *Capitalism and Freedom* (The University of Chicago Press 1962) 195.

66 Osbun (n 38) 15.

67 Moses Finley, *Democracy Ancient and Modern* (Rutgers University Press 1973) 12–13. In truth, the conception of the people excluded women and slaves.

68 See Rousseau (n 12).

69 Geoffrey Stone and others (eds), *Constitutional Law* (7 edn, Wolters Kluwer 2013) 9. Again, the contradiction of Thomas Jefferson, like the ancient Greeks, excluded slaves and women from his conception of the ‘people’.

70 South African Communist Party (SACP), ‘The Road to South African Freedom’ (1963) 2 (2) *African Communist* 24, 41.

71 Jack Lively, *Democracy* (Basil Blackwell 1975) 33.

72 Finley (n 67) 12–13. In truth, the conception of the people excluded women and slaves.

much a class affair.⁷³ The ancient idea called for the full participation of all citizens in the political and legal matters of the community.⁷⁴ Democracy was achieved by the full meeting of the citizens, who in turn voted on their decisions.⁷⁵ In *Doctors for Life*, Ngcobo J invigorates democratic theory by taking it back to its ancient philosophical roots.

The learned Judge reads the Constitution as imposing an obligation on the Legislature to facilitate public participation in the legislative process.⁷⁶ This right he infers from the lessons of the political struggle of South Africans⁷⁷ and it also emanates from article 1(d), which speaks about a ‘commitment to accountability, responsiveness and openness’.⁷⁸ Ngcobo J buttressed his conclusion by invoking the Preamble to the Constitution, which lists the establishment of a democratic and open government as a basic objective of the Constitution. This means that the people shall participate to some degree in the law-making process.⁷⁹ Legislative and other measures must be adopted to ensure that the public has an effective opportunity for political participation, and there is an additional obligation to ensure that citizens have the necessary information and an effective opportunity to exercise their right to political participation.⁸⁰

Ngcobo J references the practice of public participation in traditional African societies.⁸¹ His idea of public participation is not found in the African one-party state. After achieving independence, leaders in many African countries rejected what they identified as Western conceptions of democracy as being incompatible with African traditions.⁸² Accordingly, the single-party system was presented as a model based on traditional African society.⁸³ Under the one-party state, power was *de facto* or *de jure* centralised around an individual.⁸⁴ The head of state revelled in being idolised and glorified to the point of becoming a cult personality beyond reproach;⁸⁵ those in power prevented any criticism in order to protect their positions; political participation of the masses or intra-

73 Macpherson (n 1) 5.

74 Howard Kainz and Paulo Davim, *Democracy East and West: A Philosophical Overview* (Palgrave MacMillan 1984) 15.

75 *ibid.* See also Graham (n 1) 12.

76 *Doctors for Life* (n 3) para 106.

77 *ibid* para 108.

78 *ibid* para 111.

79 *Doctors for Life* (n 3).

80 *ibid* para 105.

81 *ibid* para 55.

82 See Ziyad Motala, ‘Human Rights in Africa: A Cultural Ideological and Legal Examination’ (1989) 12 *Hastings International and Comparative LR* 91.

83 BO Nwabueze, *Presidentialism in Commonwealth Africa* (Hurst 1974) 105.

84 For example, as in Kenya, Ethiopia (under Selassie) and Ivory Coast. See Henry Bienen, *The Politics of Participation and Control* (Princeton University Press 1974) 75–76. To this list can be added Malawi (under President Hastings Banda) and Zaire (under Mobutu Sese Seko).

85 Nwabueze (n 55) 159.

party democracy was almost non-existent;⁸⁶ party membership was restricted to a select group. The practices in the single-party state are at fundamental variance with Justice Ngcobo's conception of an imbizo.

But the system of government in the traditional setting, although simple, had many democratic and popular features:⁸⁷ the chief or king, as a leader, did not rule on his own but was subject to a host of controls, notably the consensus of the elders;⁸⁸ the leader sounded out the elders and solicited their opinions in formulating decisions;⁸⁹ the elders represented other lineages, regions or the military. The chief and the elders were jointly responsible for the administration of the region, and together they consisted of the government;⁹⁰ they met regularly to decide matters of concern. The various interest groups competed to influence policy decisions.⁹¹ The elders constituted a council, which served as a check on the chief⁹²—important decisions were referred to a general meeting of the entire group⁹³ and were arrived at after a prolonged process of consultations.⁹⁴ There was a high premium on freedom of opinion:⁹⁵ all the parties were allowed to voice their opinions without threats or abuse.⁹⁶ When the leader rendered his verdict, he was not giving his personal opinion but was providing the consensus opinion.⁹⁷ The elders in turn would communicate the decisions taken to their respective lineages.⁹⁸ This traditional form of public participation Ngcobo J proclaims to be 'both a practical and symbolic part of our democratic processes' and a form of participatory democracy.⁹⁹

86 Leslie Rubin and Brian Weinstein, *Introduction to African Politics* (Praeger 1977) 187.

87 SACP (n 70) 41.

88 The term 'elders' is a reference to the older members of society.

89 Oginga Odinga, *Not yet Uhuru: The Autobiography of Oginga Odinga* (Heinemann 1967) 12.

90 KA Busia, *The Position of the Chief in the Modern Political System of Ashanti* (Oxford University Press 1951) 14.

91 Jacques Maquet, *Power and Society in Africa* (McGraw-Hill 1971) 92–93.

92 In some societies, the chief was obliged in all instances to act on the advice and concurrence of the council or face the risk of being deposed: KA Busia, *Africa in Search of Democracy* (Routledge and Kegan Paul 1967) 23. The divergent interests were articulated but the final decision summed up by the chief reflected the dominant opinions of the group. Peter Lloyd, 'The Political Structure of African Kingdoms' in Michael Banton, *Political Systems and the Distribution of Power* (Routledge 1965) 63, 80.

93 Rubin (n 86) 187.

94 Unfortunately, as in Athenian society, the consultations were limited to the male members of the society only.

95 Busia (n92) 29. Studies in southern Africa have brought up similar evidence of assemblies of people where issues of concern to the community were discussed by all in an atmosphere of free speech. See Edwin Smith, *The Golden Stool: Some Aspects of the Conflict of Cultures in Modern Africa* (Holbon Publishing House 1926) 164. The author describes the Basutho Pitso (National Assembly).

96 Busia makes the point that even the young and ordinary people participated in decisions either directly or through their chosen representatives: Busia (n 90) 9–10.

97 Odinga (n 89) 12.

98 *ibid* 16–17.

99 *Doctors for Life* (n 3) para 101. This is not to suggest that all traditional practices were beyond reproach. For example, the gender perspectives in traditional society would not comport with the new constitutional ethos.

Unlike the modern theorists, Ngcobo J emphasises that by providing opportunities for participation, citizens are encouraged to be actively involved in public affairs and to become familiar with the issues and laws as they are made.¹⁰⁰ His opinion, while not referencing the Athenian conception of democracy, is firmly rooted in the traditional conception with respect to the purpose and nature of participation by the population.¹⁰¹ Participation enhances greater social cohesiveness by allowing all voices to be heard, ultimately leading to laws that are likely to be more widely accepted and effective in practice. This enhances the legitimacy of legislation.¹⁰² In classical liberal theory, the most important proponent for direct citizen participation in the polity was Rousseau, as revealed in his writing: *The Social Contract*.¹⁰³ The American, Thomas Jefferson, built on Rousseau's teaching and also spoke against representative democracy and the compromising of the self-rule of the people.¹⁰⁴ For Rousseau and Jefferson, human beings were born free and the only way of ensuring this freedom was to vest the sovereign power in the hands of the people¹⁰⁵—democracy and participation is not merely an institutional arrangement. For Rousseau and Jefferson, participation had certain essential psychological and educational effects on the members of society. It is through participation that a citizen learns to become responsible in political action and to link their individual interests with the public interests. This enables the individual to be a public and private citizen.¹⁰⁶ The participatory system, once created, becomes self-sustaining, because it develops the qualities that are necessary to maintain a participatory system.¹⁰⁷ Jefferson describes this as 'civic virtue', which means the willingness of the individual to subordinate their personal interest for the general good.¹⁰⁸ Rousseau and Jefferson's model of democracy is the town hall meeting where all citizens can participate in the polity. When Ngcobo J writes about public participation contributing to informed and responsive legislation,¹⁰⁹ promoting the legitimacy of the law and enhancing democracy,¹¹⁰ he is rooted in a participatory model of democracy that is also reflected in the writings of Karl Marx.

100 *Doctors for Life* (n 3).

101 Osbun (n 38) v.

102 *Doctors for Life* (n 3) para 115.

103 Rousseau (n 12).

104 Stone (n 69) 9. Again, the contradiction of Thomas Jefferson, like that of the ancient Greeks, was to exclude slaves and women from his conception of the 'people'.

105 CF Strong, *A History of Modern Political Constitutions* (Sidgwick & Jackson 1964) 35; Rousseau (n 12) 190.

106 Pateman (n 41) 25.

107 *ibid.*

108 A participatory system of democracy creates an informed citizenry, inculcating civic virtue: Stone (n 69) 9.

109 *Doctors for Life* (n 3) para 205.

110 *ibid.*

The battle for democracy, Marx wrote, was ‘to raise the proletariat to the position of a ruling class, to win the battle of democracy.’¹¹¹ In this sense, Marx’s notion of democracy is consistent with the age-long version of democracy meaning the ascendancy of the lower classes.¹¹² There are fundamental points of departure between Rousseau and Marx, though. Marx’s version of democracy goes beyond Rousseau in that Marx conceives how the liberation of a class was going to result in the liberation of humanity through the overthrow of the capitalist system.¹¹³ However, in terms of their demand for maximum citizen participation, Rousseau and Marx share a large number of similarities.¹¹⁴

Democracy for Marx required the placing of the masses—what he termed the ‘dictatorship of the proletariat’—at the forefront of society with regard to economic and political decisions. Both Marx and Friedrich Engels refer to the Paris Commune of 1871, which existed for a brief period following the reign of Louis Napoleon in France, as providing the best expression of democracy and the dictatorship of the proletariat.¹¹⁵ Marx wrote that the Paris Commune overcame the distinction between members of civil society and members of political society in that state power and society were not separated.¹¹⁶ The Paris Commune was made up of paid officials who were elected by universal suffrage. The paid officials were ordinary working people who were subject to recall at any time. Hence, the Commune was a working body and not a body of elite representatives. Instead, they were public employees who received wages.¹¹⁷ The working body combined executive and legislative functions, its power the antithesis to elite rule. The Commune was at all times accountable to the electorate and had to act on instructions. In effect, the franchise was not simply an act of choosing who was to represent the people: at all times, the people exercised control over the officials.¹¹⁸

Marx, like Rousseau and Jefferson before him, criticised any notion of representatives or delegates who turned out to be masters over the people. The lack of accountability of delegates to the people, Marx said, created a situation in which the delegates became accountable to a parliament instead of being deputies of the society, ‘linked to their electors by an instruction, commission or mandate.’¹¹⁹ If the populace do not exercise

111 Marx quoted in Graham (n 1) 180.

112 Lively (n 71) 33.

113 Macpherson (n 1) 15.

114 Some writers go so far as to say that Rousseau provided the inspiration for Marx’s political theory Lucio Colletti, *From Rousseau to Lenin* (New Left Books 1972) 182.

115 For a full view of Marx’s views on the Paris commune, see Karl Marx, *The Civil War in France* (sl 1871).

116 Karl Marx, *Political Writings Volume III The First International and After* (D Fernbach ed) (Penguin Books 1974).

117 Marx (n 115) 42.

118 Marx (n 115) 42.

119 Marx’s critique of Hegel’s theory of representation quoted from Bob Fine, *Democracy and the Rule of Law* (Pluto Press 1984) 76.

control over the deputies, the latter become an organ that decides what is in the best interests of the people.¹²⁰

For Marx, the Paris Commune represented the optimum model of democracy for two reasons: first, it did away with the system of capitalist production,¹²¹ secondly, it gave the people a system of self-government. Marx advocated that this model should be replicated at every level of society.¹²² A number of villages or towns in a region should select their deputies for a District Assembly and the latter in turn should select deputies to serve at the National Assembly. However, each delegate should act in terms of the mandate given to them, which could be revoked at any time.¹²³ In Marx's scenario, he envisaged the 'amputation' of any authority that existed above society.¹²⁴

Like Rousseau, orthodox Marxism did not assume that man is irrational, but emphasised that human behaviour depends on the concrete situation that people find themselves in. Moreover, the rational man is not a prerequisite for democratic institutions. The political institutions must be developed in a way that makes maximum participation possible,¹²⁵ because it is through participation that the citizen develops the capacity to make rational judgements.¹²⁶

Like liberal revisionist theory, Marx's notion of democracy was criticised by subsequent communist leaders as being unrealistic, unsound and formulated on the basis of insufficient data.¹²⁷ One such critic was Vladimir Lenin, who revised the essential aspects of Marx's doctrines and replaced them with the notion of a vanguard movement.¹²⁸ For Lenin, the workers do not possess the necessary consciousness to transform the system and a consciousness has to be brought to them from outside. Lenin argued that the masses have tremendous energy but the conducting of the overall struggle requires a band of professional people; left to their own devices, all that the workers would be capable of was trade union consciousness.¹²⁹ For this reason, the professional group must make the struggle their full-time occupation. The core of the professional people must be small in number and they must conduct their activities in secret.¹³⁰ He believed that the quality

120 *ibid.*

121 Without control over the delegates, Marx wrote, the masses have to assume a position of trust instead of control over the deputies: Marx (n 115) 44.

122 *ibid.* 41.

123 Marx (n 115).

124 *ibid.* 42.

125 This comes out clearly in Marx's comments on the Paris Commune. See Marx (n 116) 36.

126 *ibid.* 37.

127 Otto Bihari, *The Constitutional Models of Socialist State Organization* (Akademiai Kiado 1979) 24.

128 Guenter Lewy, *False Consciousness an Essay on Mystification* (Routledge 1982) 6. The relative merits or weaknesses of this approach in the objective conditions of European society in the 19th century will not be considered. In the ensuing section, only its implications for democracy will be considered.

129 Vladimir Lenin, *What is to be Done? Burning Questions of Our Movement* (New World 1972) 31.

130 Lenin (n 129) 107–109.

of activity would be enhanced and the masses would benefit from decisions taken by the elite professional leadership.¹³¹ In Lenin's, words the 'strictest centralization and discipline are required within the political party ... in order that the organizing role of the proletariat ... may be exercised correctly, successfully, victoriously.'¹³² This control has to be maintained by the iron hold of the party.¹³³

Like the revisionist theorists, Lenin referred to the people as irrational and not being able to make proper decisions, therefore the population must not frame or decide on issues; consequently, choices have to be made on their behalf. The idea of vanguardism requires deference to the elite on political matters.¹³⁴ The elitist element in communist countries began with Lenin and proved to be an enduring feature many years after the 'revolution'.

Unlike the traditional thinkers, Ngcobo J did not conceive participatory democracy and representative democracy as alternatives, but rather as mutually supportive. Elections require the participation of the voters. For Justice Ngcobo, continuous public participation provides vitality to representative democracy.¹³⁵ In contrast, Rousseau, like Jefferson and Marx, saw the system of representative democracy as untenable. For Rousseau, 'sovereignty, being no more than the exercise of the general will, can never be alienated.'¹³⁶ Overall, in Rousseau's system, the general will would be arrived at if the people were adequately informed, and if they could communicate their thoughts to one another. This general will, like Jefferson's civic virtue, tend to be towards the good of society.¹³⁷ This raises the conundrum between direct democracies in a city-state as opposed to those in a larger nation state. Jefferson spoke out against the adoption of the American Constitution because he was opposed to a large republic, which he conceived as being inconsistent with the achievement of a deliberative process.¹³⁸ The modern nation state is a reality that is much larger than a city-state.

Marx, in contrast, was not opposed to a large state. His vision for dealing with the large polity was to replicate the Paris Commune at every level of society and the linking of each town or village to a District Assembly with a further link to an apex, the National Assembly.¹³⁹ Each delegate should act in terms of the mandate given to them, which

131 Lenin envisaged the setting up of various committees and organisations operating at various community and work-place levels. However, he saw the function of these bodies more as agents to carry out the decisions of the core group. In addition, he called for the specialisation of activities and, more importantly, the centralisation of decision-making: Vladimir Lenin, *Left-wing Communism, an Infantile Disorder* (Foreign Languages Press 1975) 53; Lenin (n 129) 123 and 127.

132 Lenin (n 129) 15.

133 Lenin (n 129) 15.

134 Graham (n 1) 210.

135 *Doctors for Life* (n 3) para 115.

136 Barker (n 12) 190.

137 *ibid* 194.

138 See Stone (n 69) 9–11.

139 *ibid* 41.

could be revoked at any time.¹⁴⁰ In Marx's vision, there could be no representatives that exercised authority free from the population,¹⁴¹ but it was a vision that was never to be realised in any nation state.

Ngcobo's approach, in contrast, recognises the reality of the nation state constituted in the large republic. The learned Justice departs from the absolute, 'pure' version of democracy and offers a hybrid that combines participatory and representative democracy. But his merging is not in terms of Marx's Paris Commune of instructions and mandates, neither is it the model of Rousseau or the palaver model of endlessly talking things over from traditional African society.

Traditional African society revolved primarily around the family, clan or lineage, which constituted the basic unit of organisation. The nation state as geographically defined by the colonial powers is a reality that African countries have accepted. The nation state is also a larger territorial entity than the city-states of ancient Greece or the New England towns in revolutionary America. Most nation states such as South Africa comprise populations of greater diversity, and with the emergence of the nation state, feelings of allegiance have to transcend the parochial affiliations to the new formation.¹⁴² And unlike in ancient societies, where the communities were smaller and there was more time available, today endless debate is not practical.

But Ngcobo J does not surrender to the revisionist vision: the essence of his approach is his recognition of the enduring values of democracy, namely widespread and meaningful consultation, as opposed to the revisionist view, which interprets the reality of the nation state very differently and redefines democracy downwards, abandoning the central tenets of what participation should require.¹⁴³

Given the complexity and size of the modern state, Ngcobo J accords the lawmaker considerable leeway in devising schemes for participation.¹⁴⁴ But the requirement to provide schemes for citizen participation beyond the right to vote is a constitutional imperative. Consistent with the Court's jurisprudence in other areas, Justice Ngcobo proclaimed that whatever scheme was devised, it must be reasonable.¹⁴⁵ It cannot be a pro forma, going through the motions, ticking off the boxes, of merely being afforded an opportunity to send suggestions to the lawmaker.¹⁴⁶ Unlike the approach of modern

140 Stone (n 69).

141 *ibid* 42.

142 Traditional institutions and practices would in many instances be incompatible with such a transformation. See Romano Ledda, 'Social Classes and Political Struggle in Africa' (1967) 22 *International Socialist Journal* (Rome) 560 at 568–570.

143 Edgar Brooks and JB Macaulay, *Civil Liberty in South Africa* (Greenwood Press 1973) 7. There are values from the traditional setting that are worth bearing in mind in the quest to introduce democratic structures and practices. See Rinta Hinde, *Africa and Democracy* (Encounter Pamphlet No 8 1962) 9.

144 *Doctors for Life* (n 3) para 124 and 145.

145 *ibid* paras 126–128; 145–146.

146 Discussed in section 4.

thinkers, for Ngcobo J democracy is not a symbolic, feel-good or allegiance-maintaining exercise. Whether the scheme devised can be regarded as reasonable is determined by whether the Legislature has provided measures to afford the public a reasonable opportunity to participate effectively in the law-making process.¹⁴⁷ What is reasonable would also depend on the nature of the legislation and whether the matter at hand is urgent.¹⁴⁸ This would require a case-by-case determination.¹⁴⁹

Nature of the Government's Obligation to Facilitate Participation

While the traditional thinkers wanted grassroots democracy akin to the Athenian city-state, the New England town hall meeting or the Paris Commune, Ngcobo J develops a deep and thoughtful model of participatory democracy that applies in a large nation state. There are two components to his conception:

- the right of the public to participate in public affairs, facilitated at the local level;
- the duty of the government to take affirmative steps to make sure that this right can be realised.¹⁵⁰

Providing for Participation through the NCOP

Not everyone can descend to a single place such as the legislative capital to participate in participatory democracy. Ngcobo J emphasised the importance of the NCOP's referring a matter to the provincial legislatures so that they could conduct hearings on legislative matters. Ordinary people are unable to attend the hearings of the NCOP in Cape Town because of the distance of the capital from their places of residence and the financial constraints attached to that.¹⁵¹ However, by its very nature, the NCOP is a link between the national government and the provinces. The public can more readily convey their views through provincial structures in a manner that better facilitates public participation in the law-making process.¹⁵²

In the case at hand, the NCOP took a decision that public hearings on the health Bills should be conducted in the provinces. The legislation being deliberated on—including the Traditional Health Practitioners Act (THP)¹⁵³ and the Choice on Termination of

147 *Doctors for Life* (n 3) para 129.

148 *ibid* para 146.

149 *Doctors for Life* (n 3).

150 *ibid* para 129.

151 *Doctors for Life* (n 3) para 161.

152 *ibid* para 162.

153 Act 35 of 2004.

Pregnancy Amendment Act (CTOP)¹⁵⁴ —was important for the delivery of healthcare. Interest groups had made known their interest in the Bills. The Legislature recognised the importance of public input and the NCOP had determined that the best way to facilitate public involvement was to conduct public hearings on the Bills.¹⁵⁵ The fact that six of the nine provinces did not afford the public an adequate opportunity to provide their input on the first Bill and failed to provide public hearings on the second Bill meant that the constitutional imperative of the right of the public to participate in the law-making process was not complied with. Some provinces did not conduct any hearings at all.¹⁵⁶

Moreover, the opportunities for participation had to be meaningful, and meaningful participation could not be achieved if the process was rushed, nor could it be satisfied without the public having been given adequate notice of the process.¹⁵⁷ The province of Gauteng provided only one day's notice about a hearing on the THP Bill. This was not an adequate time to prepare, study and give comments on the Bill. The Northern Cape conducted a hearing after it had decided on its position on the Bill.¹⁵⁸ This was not 'meaningful participation', because the input of the affected parties was not considered during the formulation of the lawmaker's decision. It also constituted a lack of respect for concerned citizens,¹⁵⁹ because the meaningful participation of citizens in the decision-making processes is part of acknowledging and respecting human dignity.¹⁶⁰ In total, interested members of the public, including interest groups, were denied a meaningful opportunity to participate on matters that they had a deep interest in and that concerned them.¹⁶¹ The failure to hold public hearings was therefore unreasonable.¹⁶²

Measures to Facilitate Participation

Furthermore, we learn from Ngcobo that not only must the State provide for and implement reasonable measures to allow public participation in the law-making process; the government has a duty to adopt positive measures to ensure that the people have a meaningful chance to avail themselves of the opportunities provided.¹⁶³ This second component is equally important, given the objective reality of inequality in

154 Act 38 of 2004.

155 *Doctors for Life* (n 3) para 195.

156 *ibid* paras 172–173. For the CTOP, only one province conducted hearings. See *Doctors for Life* (n 3) paras 183–185.

157 *ibid* para 170.

158 *ibid* para 171.

159 *Doctors for Life* (n 3).

160 *ibid* para 65.

161 With respect to THP and CTP: *Doctors for Life* (n 3) paras 181, 186. The Court found that there was nothing unreasonable with respect to not holding on the Dental Technicians Amendment Act as the Bill did not generate much interest. See also paras 190–192.

162 *Doctors for Life* (n 3) para 195.

163 *ibid* para 129.

wealth, education and knowledge in the population of South Africa, all of which are crucial to effective participation in the law-making process. Ngcobo J recognises that to proclaim that everyone has a right to participate may prove illusory at the end of the day unless measures are taken to facilitate public participation.¹⁶⁴ Parliament and the provincial legislatures must provide information, which might require educational programmes about both the legislation and the opportunities for participation.¹⁶⁵ By way of illustration, the educational programmes can be realised through road shows, workshops, media programmes and publications.¹⁶⁶

In contradistinction to the modern theory of democracy, Ngcobo rejects the assumption that political equality results in all sectors of the population having the same power to influence the political process: for him, political equality cannot be claimed in the absence of economic equality. Justice Ngcobo's approach recognises that, despite the presence of the right to vote, the real source of power and influence under many political systems is constituted in that sector of the population which has better education and greater financial resources.¹⁶⁷ The richer sectors of society have an advantage in getting their views across, a situation Arthur Miller characterises as an illusion of equality.¹⁶⁸ Ngcobo J recognises that those sectors of society with greater material resources are more influential when it comes to political action,¹⁶⁹ but inequality of access, if left unaddressed, contributes to a perception that the government is a representative of special interests.¹⁷⁰

Ngcobo J has delivered an optimistic view of democracy and not the cynicism of the revisionist thinkers. Public participation in the law-making process does not provide a right to veto a decision of the representatives, as the traditional thinkers advocate. However, Ngcobo J recognises the virtue of public participation and its contribution to informed and responsive legislation.¹⁷¹ It minimises the danger of arbitrary or irrational legislation, it promotes the legitimacy of the law and it enhances democracy.¹⁷² Failure to provide for public participation renders legislation invalid.¹⁷³

164 *ibid* para 130.

165 *ibid* para 131.

166 *ibid* para 132.

167 *Lively* (n 71) 28–29. Those sectors with greater financial resources have the ability to manipulate the political process: Arthur Miller, 'On Politics, Democracy, and the First Amendment: A Commentary on *First National Bank v Bellotti*' (1981) 38 *Washington and Lee LR* 21, 23.

168 *Miller* (n 167) 25.

169 See the dissent of Justice White in *Buckley v Valeo* 424 US 1 (1976) at 262; he recognised that money talks in politics.

170 See Harold Leventhal, 'Courts and Political Thickets' (1977) 77 *Columbia LR* 345 at 362. Leventhal refers to political polls conducted over the years pertaining to the people's perceptions regarding their confidence in the government and in 1974 seventy per cent of the people polled felt the government was run by a few big interests looking out for their own interests.

171 *Doctors for Life* (n 3) para 205.

172 *Doctors for Life* (n 3).

173 *ibid* para 209.

Expanding Opportunities for Participation for the Poor

There is a potential gap in the theory of Ngcobo's approach. How are we to determine if there was no public interest without the affirmative educational programmes Ngcobo required the Legislature to undertake? The Court held that the third piece of legislation, the Dental Technicians Amendment Bill, unlike the THP and CTOP, did not generate public interest. Therefore, the NCOP's failure to hold public hearings on the third Bill did not constitute a breach of the government's duty to facilitate public involvement.¹⁷⁴ The other two Bills generated enormous public interest, with public interest groups requesting public hearings. We are left with the reality that the squeaking wheel will receive the proverbial oil, and the squeaking will most likely manifest itself if someone had an interest or was independently enlightened and raised their concern. This is likely to be mitigated with an informed civil society. There is a potential danger in this because a law might be passed that favours the elite, who might not object to the Bill, but the disadvantaged, the poor and the uneducated might not realise the full implications of the law.

To state the test as requiring public hearings to be triggered if an interest group requests a hearing might not afford adequate protection to the poor and uneducated, who might be affected by the passing of the law. In practical terms, Ngcobo J is correct that ordinarily there is no case or controversy, unless someone challenges the law-making process for failing to provide for citizen participation. Given the widespread lack of education and poverty in South Africa, the threshold for public participation and the obligation on the government to provide information about proposed legislation must take into account the circumstances where the law affects the jobs, working conditions and financial security of the population.

By way of illustration, the government of South Africa entered into free trade and investment agreements with very little, if any, public consultation.¹⁷⁵ Many Western countries are experiencing political convulsions, recent evidence of which are the Brexit vote in the United Kingdom and the election of Donald Trump as President of the United States. Many in the United Kingdom felt that decisions within the European Union and about free-trade agreements were taken by elected elites for the benefit of economic elites.¹⁷⁶ In short, the ordinary person has not benefitted from globalisation. Similarly, leaving aside the scapegoating, distorted sense of racial grievance with ugly acts of intolerance, real anxieties about free trade and a perception of economic decisions taken by elites for the benefit of elites was a critical catalyst in catapulting Donald Trump into

174 *ibid* paras 191–192.

175 Motala (n 9) 50.

176 Julia Boccagno and Alain Sherter, 'In Trump, Brexit Supporters, a Shared Anger and Grievances' *MoneyWatch* (New York, 23 June 2016) <<http://www.cbsnews.com/news/in-trump-brexit-supporters-a-shared-anger-and-grievances/>> accessed 14 November 2017.

the presidency in the United States.¹⁷⁷ And citizens in many European Union states, including Spain, Greece and Ireland, feel as if they have relinquished their budgetary and fiscal policies to unelected European Union technocrats influenced by financial markets.¹⁷⁸ Institutions that serve the financial markets, unconcerned about the general welfare, determine economic and political choices and simultaneously oust democratic decision-making.¹⁷⁹ The common complaint with regard to globalisation is a lack of attention to the will and welfare of the common person. South Africa embraced the Washington Consensus¹⁸⁰ and expansive free trade after 1994 with little or no input by those affected by these decisions. Similarly, South Africa entered into the General Agreement of Trade and Tariffs (GATT),¹⁸¹ succeeded by the World Trade Organisation (WTO),¹⁸² under which it obligated the country to First World free-trade commitments as though South Africa were a developed country.¹⁸³ It systematically eliminated tariffs on imported items.¹⁸⁴ Even though South Africa is Africa's largest economy, the experience of the majority of the population remains that of an underdeveloped country.¹⁸⁵ The uncritical embracing of free trade resulted in the decimation of sectors

177 Nick Corasaniti, Alexander Burns and Binyamin Appelbaum, 'Donald Trump Vows to Rip Up Trade Deals and Confront China' *New York Times* (New York, 28 June 2016) <http://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html?_r=0> accessed 14 November 2017. This is not to negate the nationalism and xenophobia that drives a large segment of the Brexit and Trump movements. See Jared Bernstein, 'Brexit and Trump: When Politicians Light Xenophobic Fires, Everybody Gets Burned' *The Washington Post* (Washington DC, 22 June 2016) <<https://www.washingtonpost.com/posteverything/wp/2016/06/22/brexit-and-trump-when-politicians-light-xenophobic-fires-everybody-gets-burned/>> accessed 14 November 2017.

178 Vivien Schmidt, 'The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?' Discussion Paper (Publications Office of the European Union, 2015) <https://ec.europa.eu/info/sites/info/files/file_import/dp015_en_2.pdf> accessed 14 November 2017.

179 Harold Meyerson, 'Democracy is Losing Ground to Markets' *M Live* (Michigan, 9 December 2011) <http://www.mlive.com/opinion/muskegon/index.ssf/2011/12/harold_meyerson_democracy_is_1.html> accessed 24 November 2017.

180 *Washington Consensus*, WHO. The Consensus, among others things, requires financial, exchange rate and trade liberalisation, privatisation, reduced state involvement in the economy and the removal of barriers that impede the entry of businesses and competition into the country.

181 Ralph Folsom, *International Business Transactions: Foreign Investment* (10 edn, West 2009) 22–23; World Trade Organisation (WTO), 'What is the WTO?' <https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> accessed 19 November 2017.

182 WTO, Ministerial Declaration of 14 November 2001, WTO Doc WT/MIN(01)/DEC/1, 42 ILM 746 (2002) (hereinafter Doha Declaration).

183 See F Ismail, 'South Africa's Role in the Multilateral Trade System' (Conference on The Political Economy of Trade Policy in the BRICS, 27–28 March 2009, Tulane University, New Orleans) <<http://www.tulane.edu/~dnelson/PEBricsConf/Ismail%20SA.pdf>> accessed 19 November 2017. 'Some argue that South Africa took its rightful place among the developing world.'

184 Pauline Baker, Alex Boraine and Warren Krafchik, *South Africa and the World Economy in the 1990s* (Brookings Institution 1993) 174, 175.

185 Michael Aliber and others, 'Overcoming Underdevelopment in South Africa's Second Economy' (2006) 23 *Development Southern Africa* 45.

of the economy in South Africa, as has been the case in the United States and parts of the British interior. South Africa experienced the closure of large segments of the textile and clothing manufacturing industries, for example.¹⁸⁶ These industries were important in providing employment and keeping people out of poverty,¹⁸⁷ the very workers and communities who were not consulted when these free trade policies were adopted. At the time, they hardly realised the implications of the government's free-trade policies. Moreover, to suggest that citizen participation is triggered when an interest group seeks to make input ignores the reality that underprivileged communities and workers might not understand the full implications of extremely important decisions taken by political elites and supported by big business.

Revisionist theorists might argue that the popular vote for Brexit and the election of Trump prove that the majority of the people cannot make rational choices. They may read it as democracy inviting chaos. Instead, Brexit and the election of Trump to a large extent represents the revolt against globalisation and free trade by an alienated population, frustrated with the decision-making process controlled by unfettered elites making political and economic choices that favour elites. There is a perception that competing political and economic elites rig the game for their mutual benefit, to the disadvantage of ordinary people.¹⁸⁸ This tells us that holding periodic elections on its own is not adequate, but merely negates the idea that democracy works best through elite decision-making. The ethos of democracy that Ngcobo J provides must upend these kinds of elite decision-making and enable participatory democracy to negate the vices of economic elites.

Similarly, under the GATT and WTO agreements, the South African government is legally circumscribed in subsidising its industries. This means that the historically disadvantaged population, saddled with decades of discrimination and attendant disabilities, cannot receive State subsidies or be provided a competitive leg-up because this would invite charges of unfair trade practices against the government.¹⁸⁹ Had they understood the full implications of these policies, the affected workers and communities would have demanded input into government trade policies and, in all likelihood, would have opposed the government's committing the country to the agreements. With the

186 Lila Truett and Dale Truett, 'New Challenges for the South African Textile and Apparel Industries in the Global Economy' (2010) 35 *Journal of Economic Development* 73.

187 *ibid.* Successive rounds of the GATT agreements, including the Paraguay Round and the Doha agreements, resulted in the elimination of tariffs for textiles. The consequence of this was that the percentage of employees in the textile industry decreased dramatically.

188 Lawrence Summers, 'What's Behind the Revolt Against Global Integration?' *The Washington Post* (Washington DC, 10 April 2016) <https://www.washingtonpost.com/opinions/whats-behind-the-revolt-against-global-integration/2016/04/10/b4c09cb6-fdbb-11e5-80e4-c381214de1a3_story.html> accessed 14 November 2017.

189 Under the WTO rules, countries can impose countervailing duties against imports aided by subsidies. WTO, 'Subsidies and Countervailing Measures Overview' (2016) <https://www.wto.org/english/tratop_e/scm_e/subs_e.htm> accessed 14 November 2017.

decimation of key sectors of the economy, hundreds of thousands of workers lost their jobs. Yet to demand a reversal of government policy after the deleterious consequences have been felt is very difficult. In this respect, Brexit and Trump, in large measure, represent the response of the voters in the United Kingdom and the United States respectively to elite decision-making with respect to economic choices.

The free trade and investment policies adopted by South Africa have brought worse consequences than in the United Kingdom or the United States. The policies were neither informed by nor reflective of the input of workers and the communities affected by widespread job losses. It reflects a cavalier treatment of the interests of the poor and signifies, if not the first, perhaps the most consequential example of state capture by the elite. Minister Trevor Manuel, the erstwhile Minister of Trade and Industry and later Minister of Finance, is lionised and celebrated by the elites of business as a visionary for his trade and subsequent monetary policies. He championed orthodoxies and policies that showed obeisance to the status quo for which the elite and the media champion him as a hero. For the elite, he has delivered the steak; for the ordinary person, he has delivered mostly sizzle. The incongruence between those who needed to be helped and those who have been helped is both astounding and shameful, seen in the light of the greater inequality between the rich and the poor. This is another example of elite decision-making that has profound consequences for millions of people whose input was not solicited on critical matters that so intimately affect their daily existence. In the brutal conditions of the marketplace, the majority of the population are not merely consumers: they are also workers and producers.¹⁹⁰ When discussing democracy, it is worthwhile to consider the views of Montesquieu, who wrote:

in countries where the people are actuated only by the spirit of commerce, they make a traffic of all humane, all the moral virtues; the most trifling things, those which humanity would demand are there done, or there given, only for money.¹⁹¹

Without jobs, ordinary people do not have the ability to purchase goods, whether foreign or domestic, regardless of how cheap or abundant the goods might be.¹⁹²

There is a part of Ngcobo's opinion that needs to be developed further. This is where he refers to the idea of participatory democracy 'as a system in which people in our country would on an on-going basis participate in and have a say in every aspect of the lives in workplace, communities, streets and schools.' It should not be the case that participatory democracy is required only if there is an articulated concern to be heard by an interest group. As in the case of the government's free-trade policies, the poorer sectors of society might not immediately realise the full implications of government policy to be able to articulate their concerns.

190 We witness the tension between free trade and the interests of workers in the developed world also, as seen in recent political strife in the United States. See Summers (n 188).

191 Stone (n 69) 10.

192 BE Clubb, *United States Foreign Trade Law Lxii* (Little Brown 1991).

By way of another illustration, in addition to free trade, the political elites, at the behest of big business, also liberalised South Africa's currency controls and allowed major corporations to move their headquarters outside South Africa.¹⁹³ The conventional orthodoxy, disseminated by business, the media and many academics, suggested that these were also sound decisions which would enable these companies access to cheaper capital for use in South Africa.¹⁹⁴ The only benefit from this was that the individual companies and their shareholders benefitted by moving their capital to more lucrative markets; the moving of South African companies offshore has brought no advantages to the economy or to ordinary South Africans. Instead, it has had detrimental consequences for them. This is another instance of where workers and impoverished communities were not consulted about these decisions. The liberalisation of currency controls allowed companies that were truly South African to move their primary listing abroad, which permitted them to repatriate their profits to foreign destinations as if they were foreign companies, even though they were not.¹⁹⁵ They companies represented the crown jewels of the South African economy. Crucially, prior to the liberalisation in 1995, they had to invest their profits in South Africa for the benefit of South Africans.¹⁹⁶ Since then, they have been permitted to repatriate their profits to foreign jurisdictions. These decisions indulged the privileged sector and benefitted the business elite, who could move their capital out of South Africa and also reduce their tax liability in the country, to the detriment of the general welfare.¹⁹⁷ Big business supported these decisions, but if they had been consulted, what would the position of the trade unions, workers and the underprivileged communities have been with regard to these decisions that brought no benefit to them? Elites did not consult the workers in the United Kingdom and the United States either on their respective free-trade choices, hence the current political convulsions.

Since 1994, South Africa has signed forty Bilateral Investment Treaties (BITs).¹⁹⁸ The BITs allow foreign entities to challenge regulatory frameworks that advance the public good, which has undermined the social and policy objectives of the government. The

193 S Hattingh, 'BHP Billiton and SAB: Outward Capital Movement and the International Expansion of South African Corporate Giants' *Tax Justice* 11 (2007) <http://www.taxjustice.net/cms/upload/pdf/Ilrig_0809_South_African_giants.pdf> accessed 14 November 2017.

194 Personal Finance, 'Companies Going Offshore can Only Benefit South Africa' *IOL* (Johannesburg, 11 November 1998) <<http://www.iol.co.za/business/personal-finance/financial-planning/investments/39-companies-going-offshore-can-only-benefit-south-africa-39-1.992562?ot=inmsa.ArticlePrintPageLayout.ot>>.

195 Hattingh (n 193).

196 Ruchir Sharma, 'The Liberation Dividend' in Haroon Borhat and others (eds), *The Oxford Companion to the Economics of South Africa* (Oxford University Press 2014) 64.

197 Motala, 'Free Trade, the Washington Consensus' (n 9) 42.

198 'Anglo American South Africa Limited, Submissions to the Portfolio Committee on Trade and Industry on The Promotion and Protection of Investment Bill 2015' Anglo American SA Ld (15 September 2015) <https://www.thedti.gov.za/parliament/2015/AASA_15Sept2015.pdf> accessed 14 November 2017.

question, then, is this: How does one explain the existence of the post-1994 BITs and the liberal free trade and monetary policy? What is highly disturbing is the lack of foresight present when these BITs were entered into.¹⁹⁹ Starting from the very top, namely, Minister Manual, the first Minister of Trade and Industry after the 1994 elections, all the way to the bureaucrats who negotiated these treaties, there was no consultation with the public with respect to these BITs.²⁰⁰ It is disconcerting that there are no minutes of cabinet meetings or any sort of empirical findings to indicate the consequences or benefits that these agreements would bring to ordinary South Africans.²⁰¹ An informed analysis and dialogue with the broader interests affected by these decisions would have revealed that many of the provisions in the BITs were inimical to the constitutional imperatives and constituted a surrender of the State's law and policy control to the detriment of the historically disadvantaged. Under some of the BITs, the imperative of local, particularly black economic, empowerment was circumscribed by the national treatment and other clauses.²⁰² These examples aptly demonstrate that the trigger for participation should not be limited to whether an interest group wants to make submissions on a matter of concern to them. Otherwise, the rich and the better educated derive greater benefit from having access to the political process.²⁰³

As Ngcobo J mentioned, 'participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.'²⁰⁴ It is important to highlight that the Constitution has both horizontal and vertical application.²⁰⁵ Former Deputy Chief Justice, Dikgang Moseneke, on the occasion of the Ruth First Memorial Lecture a few years ago, remarked: 'The exercise of public power, and indeed of private power were it serves the same purpose as public

199 See Peter Leon, 'Creeping Expropriations of Mining Investments: An African Perspective' (2009) 27 *Journal of Energy & Natural Resources Law* 597 at 599–600 (explaining that there was a lack of understanding of the legal and economic implications of these agreements).

200 If truth be told, it is unclear whether the elites understood the true implications of these agreements. Mohammad Mossallem, 'Process Matters: South Africa's Experience Exiting its BITs' Working Paper in Global Economic Governance Programme (University of Oxford 2015) 7 <https://www.geg.ox.ac.uk/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf> accessed 14 November 2017.

201 *ibid.*

202 *ibid* 7–8.

203 Two decades later, we see the government attempting to achieve course correction by cancelling the BITs. See Robert Hunter, 'South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland' *International Arbitration and Investment LJ* <<http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/>> accessed 14 November 2017. However, most of these agreements cannot cancel the conditions under which current foreign investors entered into the South African market.

204 *Doctors for Life* (n 3) para 115.

205 The Constitution at s 8(2) reads: 'A provision of the Bill of Rights binds a natural or a juristic person, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

power, must be rational.²⁰⁶ Given the worker unrest and the tragic circumstances surrounding the Marikana disaster, the Legislature and the courts' should in future similarly be pushing the envelope and extending democracy into the corporate sphere. The disaster at the Lonmin mine should make us realise that meaningful consultations beyond collective bargaining are also required when corporate decisions are made.

There are comparative examples from which to draw inspiration. Germany, under its co-determination laws, imposes a duty on corporations over a certain size or asset value to give workers a vote on the supervisory board, the equivalent of a board of directors:²⁰⁷ for such companies, the workers select fifty per cent of the supervisory board.²⁰⁸ As members of the supervisory board, the workers participate fully in selecting management, declaring dividends and in the overall investment decisions of the enterprise. How would Marikana have turned out if we had had the same sort of participatory schemes at the corporate level, where the workers' participation as equals in the critical decision-making reduces industrial and social strife.²⁰⁹ Nor does Germany experience the same degree of worker alienation and the economic disparity is less pronounced than in South Africa. There is an inextricable link between democracy and economic justice.

The Interrelationship between Democracy and Economic Justice

Athenian democracy operated in a non-class or one-class society.²¹⁰ Under Rousseau and Jefferson's model, the ownership of private property was an essential right. However, Rousseau and Jefferson impose conditions on the right to property: nature, they argued, has provided amenities for the common use of humankind, and a part of society cannot deprive others of this right by excessive appropriation.²¹¹ Both envisaged an economic order where there is no widespread disparity in wealth. Moreover, individuals must take possession of the land with the intention of using it.²¹² Therefore, both Rousseau and Jefferson discouraged a situation of millionaires and beggars, both of which were inimical

206 Dikgang Moseneke, 'Ruth First Memorial Lecture' (*Mayihlome News*, 17 August 2012) <<http://mayihlomenews.co.za/2012-ruth-first-memorial-lecture/>> accessed 15 November 2017.

207 Ralph Folsom, Michael Wallace Gordon and John Spanogle, Jr. *International Business Transactions: A Problem-oriented Coursebook* (3 edn, West Publishing 1995) 965, 967.

208 EH McDermott, HH Will and WM Emery, 'German Co-determination at Board Level' (2008) *Lexology*, 29 April <<http://www.lexology.com/library/detail.aspx?g=65536e6f-c4dd-41ae-b9dc-3a1adad5e13d>> accessed 19 November 2017.

209 Folsom and Gordon (n 207) 965.

210 As a rule, the citizen population was not dependent on others for employment and everyone owned their own property. CB Macpherson, *The Life and Times of Liberal Democracy* (Oxford University Press 1977) 11–12.

211 Jefferson, writing as part of the anti-federalists, spoke against extreme disparities in wealth, education and power, all of which are inimical to civic virtue and arriving at the common will: Stone (n 69)10.

212 Barker (n 12) 187.

to liberty,²¹³ because the differences in access to property and wealth for Rousseau and Jefferson would result in class or factional divisions with divergent interests. In such circumstances, it would be impossible to arrive at Rousseau's general will or Jefferson's civic virtue, because the contending groups would have conflicting interests to protect and champion. In order to arrive at a common consensus in the interests of all, there was a need for economic 'homogeneity' in the form of a one-class society.²¹⁴ Rousseau's call for a homogenous economic order is another point of departure from most modern-day democracy theorists.

Participatory democracy under traditional African societies also occurred within an essentially egalitarian order: the socio-economic system was communal in nature;²¹⁵ the group catered for the welfare of all its members who shared the economic benefits;²¹⁶ property was held for the mutual benefit of the society; the individual had the right to use the land to produce food for themselves and their family, but that right did not extend to individual ownership.²¹⁷

Marx's theory of democracy is also highly moralistic, tilting as it does towards egalitarianism. For Marx, the struggle for democracy had to be linked to the struggle for socialism;²¹⁸ a civil right, even though it achieved political emancipation, was not sufficient. Marx advocated human emancipation, which he asserted could be achieved only by a transformation of the economic and social order.²¹⁹ For him, capitalist society was associated with class rule, where one class maintains control over the lower classes of society. The resolution of class exploitation required the overthrow of the capitalist system and its replacement with a socialist order in which all class distinctions were abolished.²²⁰ It was only when all class distinctions were abolished that human beings could achieve their humanity.²²¹

Unlike modern interpretations of democracy that do not recognise the structural imbalances in society, Ngcobo J's opinion, like those of Rousseau and Marx, recognises that economic disparity, a lack of equal access to education and unequal access to information are inimical to democracy. He recognises that the right to participate may prove illusory unless measures are taken to reduce inequality and facilitate public

213 In fact, Rousseau envisaged a system where no person would be dependent on another for their well-being: Barker (n 12) 217. Jefferson wrote that democracy would be undermined if one group had large amounts of property whereas others had very little: Stone (n 190) 9–10.

214 Macpherson (n 1) 17.

215 F Olisa Awogu, *Political Institutions and Thought in Africa: An Introduction* (Vantage Press 1975) 83.

216 Motala (n 82) 382.

217 *ibid* 382–383.

218 John Hoffman, *Marxism, Revolution and Democracy* (BR Grüner Publishing Company 1983) 93.

219 Ralph Miliband, *Marxism and Politics* (Oxford University Press 1977) 8.

220 Karl Marx, 'The Class Struggles in France: 1848 to 1850' in K Marx and F Engels, *Collected Works Vol X* (Lawrence & Wishart 1978[1850]), 6.

221 Karl Marx and Friedrich Engels, *The Communist Manifesto* (New York Labor News Co 1948) 22–23; Macpherson (n 1) 14.

participation.²²² Unlike Rousseau and Marx, though, Ngcobo does not suggest upending the socio-economic order. Neither does he link democracy with the elimination of wealth disparities. Instead, Ngcobo requires the government to take equalisation measures to ensure that participatory democracy can be brought to the population. Parliament and the provincial legislatures must provide information, which might require educational programmes, workshops and media programmes about proposed legislation and the opportunities for participation.²²³

The affirmative steps required of the Legislature, while important in realising direct participation do not address the structural concerns of Rousseau and Marx, however. Extreme inequality is inimical to liberty and counter-productive to long-term political stability.²²⁴ Undoubtedly, socio-economic rights are a cornerstone of the Bill of Rights, which the Court has recognised in a large number of decisions.²²⁵ There is a structural dimension to the way society is organised, alluded to by Rousseau and Marx, which, if left unchanged, would perpetuate wide disparities in wealth, and that constitutes a serious threat to democracy.²²⁶ South Africa has the dubious distinction of having the largest Gini coefficient in the world, which is used to measure inequality.²²⁷ Poverty and inequality are contributing greatly to the civil, political, educational and labour strife that plague the country and makes social and economic consensus difficult to accomplish.²²⁸ The basic clamour of the workers, who often work under the most difficult conditions, such as in the mines, is to receive an affordable wage.²²⁹ Continuing inequality, the traditional thinkers inform and instruct us, is inimical to democracy. Ngcobo J rejects the assumption of political equality and the notion that all sectors of the population have the same power to influence the political process. He recognises that those sectors of society with greater material resources are more influential in political action.²³⁰ For

222 *Doctors for Life* (n 3) para 130.

223 *ibid* paras 131 and 132.

224 Motala (n 39) 20.

225 See, for example, *Government of the Republic of South Africa v Grootboom* (n 15).

226 Barker (n 12) 190; Stone (n 69) 10.

227 The Gini coefficient is a measure of the degree of inequality among the population of a country. Available at <<http://www3.nccu.edu.tw/~jthuang/Gini.pdf>> accessed 18 November 2017.

228 Maeve McClenaghan and David Smith, 'South Africa: Killing of 34 Marikana Mine Strikers – The Role of British Company Lonmin' Global Research (24 November 2013) <<http://www.globalresearch.ca/south-africa-killing-of-34-marikana-mine-strikers-the-role-of-british-company-lonmin/5359728>> accessed 14 November 2017.

229 South Africa has experienced a wave of labour, education and service-delivery uprisings over the past few years: Michael Kaplan, 'South Africa Labor Strikes Costs Economy \$500m Per Year as Nation Struggles with Slow Economic Growth' *International Business Times* (18 September 2015) <<http://www.ibtimes.com/south-africa-labor-strikes-cost-economy-500m-year-nation-struggles-slow-economic-2103563>> accessed 14 November 2017.

230 See the dissent of Justice White in *Buckley v Valeo* 424 US 1 (n 169) at 262. In his dissent, Justice White recognised that money talks in politics.

these reasons, he imposes an obligation on the law-makers to facilitate participation. These measures are important. In the long term, it is more important to effectuate socio-economic transformation, otherwise socio-economic disparities will remain a predominant source of the strife and tension in South African society, contributing to the rancour and disparate factions that will militate against the realization of civic virtue. In its next rendition, it is to be hoped that the Court will articulate that the foundation of a vibrant democracy rests on the eradication of the structural dimensions that perpetuate socio-economic disparities. The Court has done in so many areas before now, which leads to optimism that in its future jurisprudence it will break new jurisprudential ground to secure democracy for all.

Conclusion

Democratic theory under traditional thinking—be it Athenian democracy, traditional African society, classical writers such as Rousseau, or as conveyed in the writings of Marx—all required citizen participation in the affairs of the polity. The educational consequences that accrue from participation are central to the traditional thinking. Modern practice, however, signifies a move towards empiricism and elite rule. Modern thinkers assert that political institutions which permit the free election and alternation of elites distinguish a democratic from a non-democratic system. Modern thinkers reject popular participation as impractical and unrealistic. In *Doctors for Life*, Ngcobo J reinvigorated democratic theory and gave it meaningful application. He instructs us that democracy should not be understood as merely a method of government constituted through the periodic election of elites. Citizen participation, relegated to the fringe in most countries, is elevated as a key component of the South African democracy. His opinion offers a meaningful lesson for reflection to rediscover the true meaning of democracy, not only as the basis of political choices but also of economic and business decisions. Recent developments, including the Brexit vote, the election of Trump as president in the United States and the economic and political turmoil in South Africa, reinforce the vitality of Ngcobo J's opinion and the need for citizen participation to be expanded into the economic and business realms. Justice Ngcobo's opinion further provides nourishment to reflect on the tragic consequences of elites' making economic choices without consulting ordinary people affected by these choices, a practice that has proved to be inimical to the welfare of so many. Just as in other countries, decision-makers in South Africa have made cavalier free trade and investment choices as exemplified in the grotesque 'state capture' soon after the 1994 elections. Ngcobo J's opinion recognises the challenges facing democracy in a society with widespread socio-economic disparities and constitutes a deep and rich contribution to the jurisprudence of democracy.

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