

Adjudicating the Right to Participate in the Law-making Process: A Tribute to Retired Chief Justice Ngcobo

Elizabeth Brundige

Associate Clinical Professor of Law, Cornell Law School,
former law clerk to Justice Ngcobo
Email: elizabeth.brundige@cornell.edu

ABSTRACT

This is a personal tribute to retired Chief Justice Ngcobo with a focus on two of his judgments dealing with the right to participate in the law-making process. It is written from the perspective of a former clerk reflecting on Justice Ngcobo's interactions with his clerks.

Keywords: right to participate; constitutional democracy; law-making process; effective citizenship; dialogic engagement

Introduction

Justice Ngcobo's law clerks were tired, but exhilarated too. For several hours, we had been discussing the legal issues presented by a new case. A central question was whether the Constitutional Court could consider the validity of the legislative process that led to the redrawing of provincial boundaries. As a foreign law clerk new to the Court, I struggled to understand how the Court could address the validity of the legislative process when it had never been raised by the parties. Indeed, the applicants had conceded that the resulting legislation was properly adopted. But Justice Ngcobo insisted that this could not be the end of the story. 'This case is about the right of people to participate in the process of making the laws that govern them,' he explained. 'Ignoring the constitutional issue that is so clearly at stake would not be in the interests of justice.'

In his twelve years as a judge of the Constitutional Court, the last two as South Africa's fifth Chief Justice, Justice Ngcobo made an enormously powerful contribution to the advancement of justice. A brilliant and courageous judge, he was and is guided in all things by the constitutional values of equality, freedom and human dignity. He cares

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deeply about the nature of South Africa's constitutional democracy and the role of the Constitutional Court in interpreting and defending its principles.

It was a tremendous privilege to serve as Justice Ngcobo's law clerk twelve years ago, and it is an equally tremendous privilege now to have the opportunity to pay tribute to the judge in this journal. In this brief piece, I discuss the experience of working with Justice Ngcobo on two cases that addressed the constitutional obligation of South Africa's law-making bodies to facilitate public involvement in the legislative process. I then highlight a few of the insights that the judge's judgments in those cases offer into the ways that international human rights may be given meaning and effect domestically. I also share some personal reflections on Justice Ngcobo and the ways in which my experience as his law clerk continues to guide my work as a human rights lawyer and teacher today.

An Opportunity to be Heard

The case that South Africa's former Chief Justice was reviewing with his law clerks one summer day in early 2006 was about the validity of the Twelfth Amendment to the Constitution of South Africa. Adopted in late 2005, that Amendment had altered the basis for determining the boundaries of South Africa's provinces. It also changed the boundary between the provinces of KwaZulu-Natal and the Eastern Cape, which, in turn, led to the drawing of new municipal boundaries. In the process, Matatiele Local Municipality was effectively demarcated and transferred from KwaZulu-Natal to the Eastern Cape province, where it was incorporated into an existing municipality. The Amendment was met with strong opposition from many members of the Matatiele community. They identified with KwaZulu-Natal, not the Eastern Cape, and they were concerned about the Eastern Cape's poorer record of service delivery in areas ranging from sanitation to education. The former municipality and a group of businesses, educators, associations and organisations within its community joined forces to bring a lawsuit against the national and provincial governments, challenging the validity of the constitutional amendment.

The hearing, which took place the day before the start of the term, was my first as a Constitutional Court law clerk. A chill of excitement went down my back as I proceeded down to the courtroom with the other clerks, through the airy, exquisitely designed and art-filled hallways of the new Constitutional Court building and into the lobby next to the courtroom. There, sunlight danced across silvery leaves perched overhead and played hide and seek among the tall, slanting mosaic columns. Visitors to the lobby were welcomed by the dancing light and warm colours, as if entering into a clearing in the forest where people could discuss and resolve problems together.

'Justice under a tree', Justice Albie Sachs had told the new law clerks, explaining how this traditional African form of dispute resolution had been incorporated into the Court's

design. In sharp contrast to the apartheid era's abrogation of justice, the Constitutional Court heard its cases under a symbolic tree that reminded judges, clerks and litigants alike that justice must remain open and participatory. I was filled with an overwhelming sense of gratitude for the incredible opportunity that I had been given to learn from Justice Ngcobo and contribute for a short time to the great constitutional project of the Court.

On the day before our conference in Justice Ngcobo's chambers, the courtroom had been filled with residents of the municipality of Matatiele. Wearing 'Choose KZN!' shirts, they had danced and sung outside the Court building before the hearing. We learned that they had taken a twelve-hour overnight bus to attend the hearing on their community's future provincial identity. During the court proceedings they listened intently, as if willing the justices to accept the arguments their advocate was putting forward.

The advocate for the applicants did his best, but his arguments were thin. The applicants' main claim was that the Twelfth Constitutional Amendment had unconstitutionally usurped the powers of the independent Municipal Demarcation Board, which is charged with demarcating the municipal boundaries of the provinces. But, as the Constitutional Court ultimately held, the board's power was subject to parliament's power to redefine provincial boundaries. Parliament had the right to redraw the boundaries of the provinces and if its drawing affected municipal borders, this was entirely within its authority. The applicants' claim could not succeed.

This might have been the end of the matter. But Justice Ngcobo saw a constitutional issue that the applicants had missed. In the applicants' founding affidavit, they had complained that the government had not consulted with them before changing the provincial boundaries that had moved Matatiele from KwaZulu-Natal to the Eastern Cape. The judge asked the applicants' advocate if there were any problems with the process through which the constitutional amendment had been adopted. No, the advocate replied, the amendment had been properly enacted. Despite this concession, however, Justice Ngcobo worried about the possibility that the amendment had been enacted without consultation, which raised a constitutional issue. Section 118(1)(a) of the Constitution states that 'a provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees'. The Constitution places equivalent obligations on the two houses of parliament.¹

A remarkably similar issue had been presented by another case that had come before the court prior to my arrival. In *Doctors for Life International v President of the Republic of South Africa*, the organisation Doctors for Life had brought constitutional challenges to four new health-related laws.² Doctors for Life argued that the National Council

1 Constitution of the Republic of South Africa, ss 59(1)(a) and 72(1)(a).

2 Doctors for Life International brought challenges to the Sterilisation Amendment Bill, the Traditional Health Practitioners Bill, the Choice on Termination of Pregnancy Amendment Bill and the Dental Technicians Amendment Bill.

of Provinces (NCOP, a house of parliament that is made up of delegates from the provinces) and several of the provincial legislatures had failed to hold public hearings or invite written submissions before adopting the new legislation. That case, for the first time, called upon the Constitutional Court to consider the nature and scope of the constitutional obligation of a legislative body to facilitate public involvement in its legislative processes, and the consequences of a failure to comply with that duty.

Justice Ngcobo, who had been assigned to write the judgment in *Doctors for Life*, had been deeply immersed in reviewing the parties' submissions when he set them aside to review the papers in the *Matatiele* case. As he read the pleadings, a question emerged that was similar to the issues in *Doctors for Life*: Had the KwaZulu-Natal and Eastern Cape provincial legislatures taken meaningful action to facilitate public involvement in the processes that had led to their ratification of the Twelfth Amendment Act? The answer to this question was not at all clear.

And so Justice Ngcobo wrote a decision that dismissed Matatiele Municipality's application for an order declaring the content of the Amendment Act to be unconstitutional but set the matter down for further hearing six weeks later.³ He noted that, as a general rule, courts 'should not embark upon a judicial frolic and decide matters that are not before them.' He added, however, that, 'like all general rules, this too is subject to exceptions. It must yield in the interests of justice.'⁴ Indeed, where the record before the Constitutional Court presents 'doubt as to whether a particular law or conduct is consistent with the Constitution, this Court may be obliged to investigate the matter.'⁵

In this case, there was strong doubt as to whether the process that had led to the adoption of the Twelfth Amendment was consistent with the Constitution. The questions of whether there had been a constitutional violation and, if so, whether this rendered the Twelfth Amendment invalid in relevant part were issues of great importance: 'They lie at the very heartland of our participatory democracy and the power of the provinces to protect their territorial integrity,' Justice Ngcobo explained.⁶ His order joined the Speakers of the provincial legislatures of KwaZulu-Natal and the Eastern Cape as parties and directed all of the parties to make further written submissions on whether the two provincial legislatures were required to facilitate public involvement in their processes, what that duty required, and if they had complied with those requirements.⁷ And for their part Justice Ngcobo and his law clerks got to work.

3 *Matatiele Municipality & Others v President of the Republic of South Africa & Others* [2006] ZACC 2, 2006 (5) BCLR 622 (CC) ('*Matatiele I*') para 114.

4 *ibid* para 66.

5 *ibid* para 68.

6 *ibid* para 22.

7 *ibid* para 114.

A Teacher and a Mentor

Our spirited discussions about whether there was a possible constitutional problem with the way that the Twelfth Amendment had been adopted were typical of Justice Ngcobo's chambers. The judge loved to debate, to look at legal issues from every angle and to think about the deeper principles at stake. He encouraged disagreement but required his law clerks to defend their positions vigorously and to support them with strong reasoning. I had always been more comfortable with written than oral advocacy, so this was challenging for me, but it helped me to build valuable skills that made me a stronger lawyer and, later, also a stronger teacher.

It was not at all unusual for the judge and his clerks to discuss cases for five or six hours, with only an occasional break for tea and biscuits. Time sped by in Justice Ngcobo's chambers. I recall one time looking up at the clock to see that it was nearly 21:00; our discussions had started at noon. My co-clerks and I were awed by our good fortune at being able to support our judge as he worked through challenging constitutional issues. Justice Ngcobo's sharp intellect, quirky wit and deep commitment to the advancement of justice were present in all that he did, wrote and said.

In addition to our lengthy conferences, Justice Ngcobo's clerks were known for keeping long hours. We worked hard because our judge worked even harder, and because he trusted us enough to give us real responsibility. He believed that we would take as seriously as he did the weighty mandate of the Court to build, case-by-case, a constitutional jurisprudence that would lay the legal foundations for the new South Africa that was, as the Constitution promised, 'based on democratic values, social justice and fundamental human rights.'⁸ We did take this responsibility very seriously, and at the same time our hard work was also fun. Justice Ngcobo has a wonderful sense of humour that is all his own, and his chambers often rang with laughter.

Coupled with the judge's high expectations of his law clerks was a deep concern for them as people. When he heard that an intoxicated man had grabbed me one evening after work as I waited for a mini-taxi, Justice Ngcobo took immediate action. He counselled me to leave work while it was still light or, if that was not possible, to take a taxi home. He then arranged for the Court to cover the costs of a taxi for its clerks on nights when we needed to stay late. Our work was important, but so was our safety and peace of mind.

The judge asked us often about our recent experiences in law school or practice, our hopes for the future, and our families back home. He himself left the Court a bit early at the end of each week to travel to Durban, where his wife, Zandile Ngcobo, an accomplished businesswoman, and their three children still lived. His devotion to his family was an important model for his young law clerks, showing us that work was not everything, no matter how important that work might be.

8 Constitution of the Republic of South Africa, Preamble.

As Justice Ngcobo's chambers turned to preparing the judgments in *Doctors for Life* and *Matatiele*, we were cognisant of the fact that this was the first time that the Court had been asked to consider squarely the nature and scope of the constitutional obligation of legislatures to facilitate public involvement in the law-making process. The absence of precedent was challenging and exciting. As a foreign law clerk with a background in human rights, I was charged with researching international and foreign law on the right to political participation. South Africa's Constitution requires courts to consider international law and invites them to consider foreign law when interpreting the Bill of Rights. The Court also regularly follows that approach when construing other constitutional provisions.

This was very different from my previous experience as a law clerk back home in the United States, where courts rarely consult international and foreign law. At one point not long after the first *Matatiele* hearing, US Supreme Court Justice Ruth Bader Ginsberg visited the Constitutional Court and told a stunned audience about the death threats that she and Justice Sandra Day O'Connor had received when they cited international and foreign law in their opinions. It was difficult for my South African co-clerks to imagine how drawing insight from the reasoning of courts in other countries or consulting the binding international obligations that a country has willingly assumed could be so bitterly controversial. And their questions strengthened my resolve to work to counter this form of American exceptionalism, which turns its back on the rest of the world and on its own international commitments.

Interpreting the Right to Political Participation

The Constitutional Court handed down the judgment in *Doctors for Life* on 17 August 2006, and the judgment in *Matatiele* one day later. In both cases, the Court found that the relevant legislative bodies had failed to comply with their duty to facilitate public involvement in their law-making processes. In *Doctors for Life*, the Court sought to understand the nature and scope of the obligation to facilitate public involvement in the legislative process. In interpreting this obligation, Justice Ngcobo, joined by seven of his colleagues, considered the constitutional role of the relevant legislative bodies in the national legislative process, the right to political participation under international and foreign law, and the nature of South Africa's constitutional democracy.⁹

Justice Ngcobo's judgment reviewed the international right to political participation and its interpretation by international and regional human rights bodies. It explored how that right has been elaborated upon and put into practice at the national level, considering examples from Canada, Columbia, Germany, Portugal, Tanzania and the United States,

⁹ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (12) BCLR 1399 (CC) para 78.

among others.¹⁰ Then, against the backdrop of these examples, it considered how the international right to political participation had been given meaning and effect in the specific South African Constitutional context.¹¹

Turning to South Africa, Justice Ngcobo discussed the historical roots of South Africa's constitutional democracy, the complete denial of the right to political participation during apartheid and the participatory nature of the anti-apartheid movement, and the traditional practice known in different languages as 'imbizo', 'lekgotla' or 'bosberaad'—a public gathering called by community leaders to discuss matters affecting the community.¹² The judgment explained that South Africa's particular form of constitutional democracy 'embraces the principle of participation and consultation'.¹³ It was in this context that the obligation to facilitate public involvement in the law-making process was to be construed.

Addressing the question whether parliament and the provincial legislatures had met their constitutional obligation in this case, Justice Ngcobo explained:

Parliament and the provincial legislatures have broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably.¹⁴

This obligation could be met in different ways, and legislatures were welcome to innovate in meeting it. Ultimately, however,

the duty to facilitate public involvement will often require parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that govern them.¹⁵

In this case, the Court reviewed the process that led to the enactment of three of the health statutes, after dismissing the fourth for lack of jurisdiction.¹⁶ It also dismissed the challenge to one of the three health statutes, the Dental Technicians Amendment Act, finding that the legislatures had acted reasonably in declining to hold public hearings or invite written submissions, given that the law had generated no interest when parliament first published it for comment.¹⁷

10 *ibid* paras 90–106.

11 *ibid* paras 110–146.

12 *ibid* paras 5, 108, 112

13 *ibid* para 145.

14 *ibid* para 145.

15 *ibid* para 145.

16 The Court found that it did not have jurisdiction to rule on the validity of the legislative process that had led to the adoption of the Sterilisation Act because that Act had not been signed into law at the time that the application was filed: *Doctors for Life* (n 9) paras 56–58.

17 *ibid* paras 190–192.

In contrast, the precursors to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Act were controversial Bills that had generated intense public interest. Several groups had requested public hearings, and the NCOP had concluded that public hearings were necessary and would be held in the provinces. In the end, however, a majority of the provinces did not hold public hearings and the NCOP did not take this task upon itself. In these circumstances, the failure to hold public hearings was unreasonable and violated the NCOP's and relevant provincial legislatures' obligation to facilitate public involvement in the law-making process.¹⁸ The Court declared the statutes invalid but suspended the order of invalidity for eighteen months to give the government time to re-enact the legislation, potentially in a different form, in a manner consistent with the Constitution.¹⁹

In the *Matatiele* case the respondents had conceded that the KwaZulu-Natal legislature had not held public hearings or invited written comments on the Twelfth Amendment Bill that redrew its provincial boundaries.²⁰ This was so despite the fact that the NCOP and KwaZulu-Natal had considered that public hearings were the most effective way to ensure that the affected communities had an opportunity to be heard.²¹ The Amendment had enormous symbolic and practical consequences for the people of Matatiele—it affected the community's identity and changed the governments responsible for delivering its health services, education and social welfare.²² Their opportunity to engage with the KwaZulu-Natal legislature was particularly important because the provincial body had the power to veto the constitutional amendment.²³ Therefore, in his majority judgment, Justice Ngcobo found that the failure of the KwaZulu-Natal legislature to hold public hearings was unreasonable in the light of the facts of that case.²⁴

The Court issued an order of invalidity for the part of the constitutional amendment that transferred Matatiele Municipality from KwaZulu-Natal to the Eastern Cape. As in the *Doctors for Life* case, it suspended the order for eighteen months, which allowed parliament and the KwaZulu-Natal legislature to remedy the constitutional defect and adopt a new amendment. The order also provided that if, following public consultation, parliament should decide not to proceed with the amendment or the KwaZulu-Natal provincial government should decide to veto it, the respondents should approach the Court for guidance on the consequences of the invalidity of that part of the Twelfth Amendment, which probably would include the holding of new elections.²⁵

18 *ibid* paras 167–189.

19 *ibid* paras 198–214.

20 *Matatiele & Others v President of the Republic of South Africa & Others* 2007(1) BCLR 47 (CC) para 74 (*'Matatiele II'*).

21 *ibid* paras 76–78.

22 *ibid* para 81.

23 *ibid* para 82.

24 *ibid* para 84.

25 *ibid* paras 87–89. In the end, following public hearings, parliament passed the Thirteenth Amendment, which confirmed the incorporation of the former Matatiele Municipality into the Eastern Cape

To my regret, my clerkship had concluded in July, and I was not able to attend the delivery of the judgments. I heard from Justice Ngcobo and my co-clerk, Mark, that the handing down had gone well and the judgments had received broad public support. With characteristic generosity, Justice Ngcobo had quietly recognised his law clerks' contributions: Mark told me that on the day that *Doctors for Life* was handed down, the judge had worn the tie we had given to him, which was patterned with little scales of justice.

Lessons for the Domestic Application of International Human Rights

Justice Ngcobo's thoughtful reasoning in *Doctors for Life* and *Matatiele* offers important insights for the world beyond South Africa. Others have written about its contribution to an understanding of the right to political participation and the role of respect and dignity as components of that right.²⁶ I would like to suggest some of the ways in which it may also offer a valuable model for the domestic interpretation and application of international human rights.

First, these judgments suggest that there is nothing radical about looking to international and foreign law to inform the interpretation of domestic rights. International law establishes minimum standards that bind countries that have consented to them. It makes sense for courts and policy-makers in those countries to interpret domestic rights and obligations in a way that, to the extent possible, is consistent with these standards. The judicial decisions, laws and practices of other countries, though clearly non-binding, can provide informative examples of how international rights and obligations have been realised domestically.

In *Doctors for Life*, Justice Ngcobo considered the international and regional treaties that guarantee the right to political participation as well as the interpretation of this right by relevant international bodies and international scholars. In particular, he noted that international law guarantees citizens not only the right to vote, but also the broader right 'to take part in the conduct of public affairs, directly or through their freely chosen

province. But *Matatiele*'s provincial identity continues to be a contentious political issue today. See Nce Mkhize, 'A Town with a Colorful History Looks Forward to a Smoother Future' *Business Day* (Johannesburg, 5 November 2016) describing the demand of the African Independent Congress, a political party born out of the *Matatiele* dispute which won significant seats in the 2016 election, that *Matatiele* be reincorporated into KwaZulu-Natal in exchange for the party's participation in a coalition with the ANC.

26 See Karen Sma Czapanskiy and Rashida Manjoo, 'The Right of Political Participation in the Lawmaking Process and the Role of the Legislature in the Promotion of that Right' (2008) 19 *Duke J of Comparative and Intl Law* 1.

representatives.²⁷ He explained that this is a programmatic right, which is to be given effect through the policies, programmes and practices of states.²⁸

This right will necessarily evolve over time, in the light of experiences at the national and sub-national levels. Whereas it is possible to comply with the international standard on its face by allowing citizens to participate through elected representatives only, this minimum bar may be raised as an increasing number of countries conclude that the right requires more direct forms of participation.²⁹ Examples from other jurisdictions suggest that the right to take part in public affairs may be realised in different ways, from petitioning the government and voting in referendums to engaging in public debate, consultation or other forms of dialogue with government representatives and exercising the right to freedom of assembly and association.³⁰ Those examples contribute to an understanding of the evolving international right and offer valuable insights for countries that are considering what that right means in their own particularised context.

Secondly, *Doctors for Life* and *Matatiele* reveal the importance of that particularised context in realising international human rights. Justice Ngcobo noted that ‘the precise nature and scope of the international right to political participation is a matter for individual states to determine through their laws and policies.’³¹ This right must also ‘be left to gather its meaning and content from historical and cultural experience.’³² Turning to South Africa, he considered the text of the South African Constitution, which, in its Preamble, talked about the new constitutional democracy’s goal of establishing ‘a society based on democratic values, social justice, and fundamental human rights.’³³ Its very first substantive provision emphasised South Africa’s commitment to principles of ‘accountability, responsiveness, and openness’.³⁴ These goals and values, Justice Ngcobo explained, illustrated the participatory nature of South Africa’s democracy.³⁵

Beyond the text of the South African Constitution, Justice Ngcobo found it important to consider the historical context in which the Constitution was adopted. He agreed with both parties in *Doctors for Life* that it was important to understand the importance of public participation in South Africa in the light of the country’s apartheid past, which involved ‘the exclusion of the majority of South Africans from meaningful participation in virtually every sphere of life.’³⁶ Yet, in the struggle against apartheid, the people had developed participatory structures of resistance and a vision of a radically different system in which the people would actively participate and have a say in every aspect of

27 International Covenant on Civil and Political Rights, art 25.

28 *Doctors for Life International* (n 9) paras 95–96.

29 *ibid* paras 96–97.

30 *ibid* paras 99, 100, 143.

31 *ibid* para 95.

32 *ibid* para. 97.

33 Constitution of the Republic of South Africa, Preamble.

34 Constitution of the Republic of South Africa, s 1(d).

35 *Doctors for Life* (n 9) para 111.

36 *ibid* para 5.

their lives, which in turn laid the groundwork for the South Africa's future participatory democracy.³⁷ Moreover, many South African communities had long relied on traditional practices of participatory consultation to resolve issues of common concern.³⁸ Active civic participation and its complete denial were both important parts of the historical context which led to the constitutional requirement that law-making bodies facilitate public involvement in their legislative processes.

Thirdly, the interpretation of human rights, particularly programmatic rights such as the right to political participation, is not just a matter for courts. Instead, as Professor Sandra Liebenberg has described in the context of socio-economic rights litigation, it involves a process of 'dialogic engagement' between the courts, the other branches of government and the broader public on the meaning of rights.³⁹ The idea of dialogue across governmental branches presents an alternative approach to traditional understandings of the doctrine of separation of powers, suggesting a more flexible model in which the three branches of government participate in a process of interaction and engagement involving the interpretation of rights and the defining and redefining of the limits of their own power.⁴⁰

This process of engagement may occur in multiple ways. In *Doctors for Life*, Justice Ngcobo emphasised that the constitutional obligation to facilitate public involvement 'does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard.'⁴¹ This discretion applies 'both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programs.'⁴² Such discretion makes sense since it is through the programmes, policies and practices of the political branches of government that programmatic rights such as the right to political participation are given meaningful effect.

Yet the power of the legislative bodies to determine how to realise their constitutional obligation is not unlimited. Rather, Justice Ngcobo explained, the Court had the authority and the responsibility to ensure that the legislatures acted reasonably in carrying out their duty to facilitate public involvement. In doing so, the Court paid particular attention to 'what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency.'⁴³ In both *Doctors for Life* and *Matatiele*, the Court, in determining that the failure to hold public hearings was unreasonable, considered the request for public hearings by interested

37 *ibid* paras 109, 112.

38 *ibid* paras 5, 101.

39 Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta 2010) 234.

40 *ibid* 66–71.

41 *Doctors for Life* (n 9) para 26.

42 *ibid* para 124.

43 *ibid* para 128.

groups, the determination by the relevant legislative bodies that public hearings were the appropriate way to facilitate public involvement and, in the case of *Doctors for Life*, the express promise to hold public hearings.⁴⁴ In both cases, the Court looked to the legislative bodies' own understanding of what constituted appropriate public involvement for guidance in interpreting the content of the constitutional right and its corresponding obligation.

This process of dialogic engagement also involved members of the public in elucidating the meaning of the right to political participation through their interactions with the relevant legislatures and with the Court. Doctors for Life first brought the constitutional issue to the NCOP when it sought public hearings as part of the government's duty to facilitate public involvement in the law-making process. When the relevant legislatures did not accede to this request and followed a flawed legislative process, the organisation and its lawyers filed an application to the Constitutional Court. The applicants in *Matatiele* did not explicitly raise the issue of inadequate participation in their founding papers, but they presented a record that made this issue clear and travelled across the country by bus to appear at the Court and insist on their right to be heard.

Justice Ngcobo's reasoning in these cases suggests additional opportunities for democratic engagement through litigation. If the right to political participation must, as he suggested, be interpreted in the light of its current and historical context, this affords great scope to the affected parties to 'place before the court a rich tapestry of historical and social evidence pertaining the claim.'⁴⁵ That, in turn, ensures that the courts' adjudications of rights claims are informed by the particular situation of the parties, the impact of the challenged government action or inaction, and the broader social and historical context in which the claim arose.⁴⁶

Finally, *Doctors for Life* and *Matatiele* highlight the connection between the meaningful realisation of human rights and the exercise of effective citizenship. Participation in the law-making process is an individual right that is interwoven with the right to human dignity.⁴⁷ Yet individuals exercise this right as members of communities. In *Doctors for Life*, Justice Ngcobo explained that this right

encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.⁴⁸

The right to participate is often of particular importance to people who are relatively disempowered, hold minority views or are members of communities that historically

44 *ibid* para 76.

45 Liebenberg (n 39) 487.

46 *ibid* 224.

47 See Czapanskiy and Manjoo (n 26) 39–40.

48 *Doctors for Life* (n 9) para 115.

have lacked a voice in the polity.⁴⁹ Justice Ngcobo also emphasised the importance of the right to political participation as an expression of South Africa's collective identity.⁵⁰ As suggested below, while ideas of citizenship and community may be particularly relevant when considering the right to political participation,⁵¹ they can also inform our understanding of other human rights.

Lessons for a Former Law Clerk

My clerkship with Chief Justice Ngcobo was one of the most transformative experiences of my early professional career. It continues to guide my work today as a human rights lawyer and a clinical professor. A recent advocacy project suggests how the insights above inform my approach to human rights practice and teaching. It also offers an example of Justice Ngcobo's important contributions not only to South Africa's constitutional jurisprudence, but also to the development and enforcement of human rights around the world.

I teach a Gender Justice Clinic in which students work under faculty supervision on cases and projects that address gender-based violence and discrimination. When I started the clinic in 2014, I met with colleagues at the Advocacy Center of Tompkins County, New York, a local civil society organisation that provides services to survivors of domestic violence and sexual assault. We decided to work together on an initiative that sought to confront the problem of domestic violence in our community.

Domestic violence is pervasive around the world and in our own backyard. About one in three women around the world will experience physical or sexual violence by an intimate partner during their lifetime.⁵² In the United States, more than one in four women and one in seven men have experienced severe physical violence by an intimate

49 *ibid* paras 115 and 234 (Sachs J, concurring).

50 In *Doctors for Life* (n 9), Justice Ngcobo repeatedly referred to 'our constitutional democracy', 'our constitutional order', and 'our participatory democracy'. Active civic participation and constitutionally mandated efforts to facilitate such participation are part of the story of post-apartheid South Africa and its people.

51 In its international form, the right to participation is expressly limited to citizens: International Covenant on Civil and Political Rights, art 25. Yet citizenship, more broadly understood, is 'characterized by meaningful participation, autonomy and agency through one's membership in a community – a community that is not necessarily defined by nationality. It is comprised of an indivisible and interrelated set of rights and it demands a corresponding obligation on States to respect, protect, and fulfill rights': United Nations General Assembly, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo, *Violence Against Women as a Barrier to the Effective Realization of All Human Rights*, UN Doc A/69/368 (1 September 2014) para 8. This broader and more inclusive definition may be most useful in understanding the relationship of citizenship to human rights generally.

52 World Health Organization, *Violence Against Women: Intimate Partner and Sexual Violence Against Women Fact Sheet* <<http://www.who.int/mediacentre/factsheets/fs239/en/>> accessed November 2016.

partner.⁵³ The Advocacy Center of Tompkins County receives around 2 000 calls to its domestic violence and sexual assault hotline each year, and many, many more cases go unreported. Yet, domestic violence has often been viewed to be a private matter, state responsibility in this area is insufficiently developed and many gaps exist in both law and policy.

I hoped that looking to international human rights law might bring a valuable perspective to this critical local issue, just as it did in *Doctors for Life* and *Matatiele*. So, my clinic students worked with our civil society partners to draft and advocate the adoption of local government resolutions recognising freedom from domestic violence as a fundamental human right. International law told us that domestic abuse was not just a private harm; it was a violation of human rights that governments at all levels have a responsibility to address. It highlighted that this responsibility includes the duty to act with due diligence to prevent and respond to private violence. The proposed resolutions cited this international standard, noting approvingly that

the United Nations has recognised that freedom from domestic violence is a human right affecting the realisation of many other rights and freedoms and that governments have a responsibility to prevent and respond to such violence.

But Justice Ngcobo had shown me that it is not enough to look to international human rights and argue that they should be enforced domestically. Rather, they must be interpreted and applied in the light of local historical, political and cultural contexts. And so the proposed resolutions considered how Tompkins County has been a leader in domestic violence prevention and response over the past twenty-five years. They also reflected upon the failures of governments locally and nationally to deal effectively with domestic violence. And they emphasised the importance of government and community members' working closely together on this issue.

Although our initiative was not focused on the courts, as in South Africa's political participation cases, it involved a process of engagement among different government entities and the broader public. The language of human rights, rarely used in US legislation and court decisions, resonated deeply with our Tompkins County community. Many community members participated in a photographic campaign in which they responded on a whiteboard to the prompt 'Freedom from domestic violence is a human right because...' Hundreds more signed a petition in support of the proposed resolutions. Our local legislators listened to these voices, raised questions, proposed amendments and, ultimately, in the Tompkins County Legislature and five other local legislative bodies, adopted resolutions that declared that freedom from domestic violence is a

53 Michele C Black et al, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention 2011) 43, 44.

fundamental human right.⁵⁴ On the executive side, the Mayor of the City of Ithaca issued a proclamation affirming the principles contained in the resolutions.⁵⁵

The law-makers who adopted these resolutions were anxious to ensure that they not be merely symbolic gestures but serve instead as a catalyst for meaningful change. Accordingly, several of the resolutions highlighted the need for a study of gaps and challenges in local domestic violence prevention and response. Responding to this call to action, the Advocacy Center of Tompkins County, the Tompkins County Office of Human Rights (a county government body), the Tompkins County Human Rights Commission (an independent body appointed by the legislature), and our clinic, launched a ‘Gathering Voices Campaign’. This initiative has involved numerous community stakeholders in conversations about the current landscape of government and community responses to domestic violence and the delivery of services to survivors.⁵⁶

This has opened up additional spaces for participatory engagement around the meaning of the right to be free from domestic violence. Although this right may not appear on its face to be a programmatic right such as the right to political participation, its realisation requires the government—at all levels, across different sectors and often working in partnership with civil society—to implement effective programmes, policies and practices. In interviews and story circles, judges, law-enforcement officials, legislators, service providers, educators, domestic violence survivors and many others identified gaps in our community’s response to domestic violence. They also elaborated upon what they believe it means to say that freedom from domestic violence is a fundamental human right. Our interview notes therefore give a deeply localised context and texture to the more minimalist international right. We hope that our final report will tell a rich

54 Tompkins County Legislature, *Declaring Freedom from Domestic Violence as a Human Right*. RES-2014-214 (18 November 2014); Ithaca Town Board, *Declaring Freedom from Domestic Violence as a Human Right* TB Res 2014-197 (8 December 2014); Lansing Town Board, *Declaring Freedom from Domestic Violence as a Human Right* Res 14-158 (17 December 2014); Village of Cayuga Heights, *Declaring Freedom from Domestic Violence as a Human Right* Res 7552 (12 January 2015); Tompkins County Council of Governments, *Declaring Freedom from Domestic Violence as Human Rights*, Res 002-2015 (22 January 2015); City of Ithaca Common Council, *Declaration of Freedom from Domestic Violence as a Human Right* (6 March 2015). See also Cornell Law School Gender Justice, ‘Clinic Legislative and Community-Based Advocacy in Tompkins County, New York Seeking Recognition of Freedom from Domestic Violence as a Human Right’ <<http://www.lawschool.cornell.edu/Clinical-Programs/global-gender-justice/Legislative-and-Community-Based-Advocacy-in-Tompkins-County-NY-Seeking-Recognition-of-Freedom-from-Domestic-Violence-as-a-Human-Right.cfm>> accessed 9 January 2016 (providing links to the local resolutions).

55 Svante T Myrick, Mayor of the City of Ithaca, ‘City of Ithaca Proclamation’ (24 April 2015) <<http://www.lawschool.cornell.edu/womenandjustice/upload/24b-Ithaca-City-Executive.pdf>>.

56 Another initiative that followed from the resolutions was proposed by a local legislator and has involved the development of a model policy and toolkit designed to assist employers in creating an accommodating, safe and secure workplace for employees who are victims of domestic violence. See Cornell Law School Gender Justice Clinic, ‘Domestic Violence and the Workplace Model Policy and Toolkit’ <<http://www.lawschool.cornell.edu/Clinical-Programs/global-gender-justice/DVWorkplacePolicyPrivateEmployer.cfm>> accessed 8 January 2016.

and valuable story about the content of this right and map the way towards giving it meaningful effect in our community.

My work with Justice Ngcobo also encouraged me to think about the relationship of human rights to citizenship and community. As former UN Special Rapporteur Rashida Manjoo has persuasively argued, ‘violence against women has an impact on all human rights, including civil political, economic, social and cultural rights, thereby acting as a barrier to full, inclusive citizenship.’⁵⁷ Moreover, its continued prevalence has broad effects beyond individual perpetrators and victims and is an obstacle to the achievement of equality in our society as a whole.⁵⁸ The denial of the right to be free from domestic violence affects and implicates us all. As one Tompkins County service provider explained, the proposition that freedom from domestic violence is a fundamental human right

is really profound and sort of like a basic truth, yet we know that it is not true on some levels, that people are not free from domestic violence. So, then the question is, how do we as a community and society make it true?⁵⁹

Our recognition of this right and our determination to realise it more effectively embraces our collective responsibility and enables us to shape in a powerful way our own story about who we are as a community.

Conclusion

The jurisprudence of retired Chief Justice Ngcobo shows us that the domestic application of human rights is, at its best, an interactive, participatory process that brings together the global and the local. Decision-making should be guided by international law but also by local historical, social and political context. The interpretation and implementation of human rights can be a valuable site for dialogic engagement among the different branches of government and the public, one that fosters civic participation and community investment in the realisation of rights. That deeply local and participatory process may, in turn, contribute to international and transnational conversations about the interpretation and implementation of human rights.

This approach is just one example of the extraordinary contributions that Chief Justice Ngcobo has made to South Africa’s constitutional jurisprudence and to the development of human rights norms globally. Likewise, my experience is only one of the many stories of law clerks, students, judges, lawyers, litigants and members of the public whose lives have been changed for the better by the judge and his work. I will forever be grateful to the Chief Justice for giving me the opportunity to serve as his law clerk, and for his

57 Report of the Special Rapporteur on Violence Against Women (n 51) para 68.

58 *ibid* para 38.

59 Interview with Richard Bennett, Director, Rescue Mission—Ithaca (Ithaca, New York, 12 April 2016).

guidance, mentorship and support. I have learned so much from his jurisprudence and from his example.

A brilliant jurist and an inspiring leader, Justice Ngcobo has worked tirelessly to fulfil the Constitution's promise of a society based on human dignity, equality and the protection of human rights and freedoms. His masterful judgments, courageous leadership and unwavering efforts to advance justice for all have built a lasting legacy in South Africa and in the world.

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