

# LESSONS FOR SOUTH AFRICAN SOCIAL ASSISTANCE LAW FROM INDIA: PART 2 – IS THERE MORE TO THE RIGHT TO LIFE IN SOUTH AFRICA?\*

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## SUMMARY

This is the second of two articles dealing with the constitutional right of access to social assistance in South Africa by way of comparison with the social justice provisions applicable in India. Part I dealt specifically with the significance of a comparison between these two countries and focused on the provisions of the Indian Constitution and court judgments which may inform social policy in South Africa. Part II, based on lessons from India, considers the use of the right to life as a solution for people not qualifying for any social assistance in South Africa despite being in desperate need.

## 1 THE MEANING OF THE RIGHT TO LIFE IN INDIA

“I do not want any people just to survive. I want them to live a life of human dignity and, for that, they must have the basic necessities of life including food and health. The right to life in my opinion includes the right to basic necessities of life. One of the major events in the judicial history of India has been the fuller exploration of the right to life guaranteed under Article 21 of the Constitution. This right is not merely lexical and legal, but expands as we conceptualise the dignity and divinity of the human personality. I would prefer the expression ‘right to live’.”<sup>1</sup>

For the Supreme Court of India, the right to life has included, *inter alia*, the right to live with human dignity,<sup>2</sup> the right to a healthy environment,<sup>3</sup> free

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<sup>1</sup> Justice Iyer as quoted in Tyagi *Judicial Activism in India* (2000) 126.

<sup>2</sup> *Francis Coralie v Administrator, Union Territory of Delhi* AIR 1981 SC 746.

<sup>3</sup> *MC Mehtare v Union of India* AIR 1987 SC 1086 1090.

education up to 14 years of age,<sup>4</sup> emergency medical aid<sup>5</sup> and privacy.<sup>6</sup> According to Bhagwati J, the right to live with human dignity actually derives from the directive principles, in particular clauses (e) and (f) of Article 39, and Articles 41 and 42 of the Indian Constitution.<sup>7</sup> In *Vikram Deo Singh Tomar v State of Bihar*<sup>8</sup> the Supreme Court emphasised that the right to live with human dignity is the fundamental right of every Indian citizen. The court held that while interpreting Article 21, it had been demonstrated that every person was entitled to a quality of life consistent with human personality.

The right to life is the most comprehensive and important human right in India. It has been interpreted as promising the all-round development of a human being.<sup>9</sup> Apart from improving the administration of criminal justice, the Supreme Court has used Article 21 creatively to improve the quality of life in the country and to imply “a bundle of rights” for the Indian people. In arguing that “life” in Article 21 does not mean merely “animal existence” but living with “human dignity”, the court has given very expansive parameters to the Article.<sup>10</sup>

## 1 1 The right to livelihood

In *Kesavananda Bharati v State of Kerala*,<sup>11</sup> Beg J described the relationship between the fundamental rights of individual citizens and the directive principles as follows:

“Look upon the directive principles as laying down the path of the country’s progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path, like the banks of a flowing river, which could be mended or amended by displacements, replacements or curtailments or enlargements of any part according to the needs of those who had to use the path.”<sup>12</sup>

The Constitution was drafted on the basis of the view prevailing at the time of its formation that social, economic and cultural rights could not be made easily justiciable and that it would require continuous policy making over a period of time before it would become possible for the majority of people in India to enjoy these rights. What was not realised was the fact that as the community developed and became rights-oriented, more and more social, economic and cultural rights also became justiciable since many groups and communities in the country positioned themselves to enforce

<sup>4</sup> *JP Unnikrishnan v State of Andhra Pradesh* AIR 1993 SC 2178.

<sup>5</sup> *Pramanand Kataria v Union of India* AIR 1989 SC 2039.

<sup>6</sup> *People’s Union of Civil Liberties v Union of India* AIR 1997 SC 568.

<sup>7</sup> *Bandhua Mukti Morch v Union of India* AIR 1984 SC 802.

<sup>8</sup> AIR 1988 SC 1782. See also *SR Kappor v Union of India* AIR 1990 SC 752.

<sup>9</sup> Tyagi 125.

<sup>10</sup> Jain “The Supreme Court and Fundamental Rights” in Verma and Kusum *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (2000) 1 30.

<sup>11</sup> AIR 1973 SC 1461; 1973 (4) SCC 225.

<sup>12</sup> *Kesavananda Bharati v State of Kerala* supra par 1802.

and enjoy those rights.<sup>13</sup> More importantly, the judiciary has increasingly interpreted these rights as being closely linked to fundamental rights, as will be illustrated below.

Article 39(a) provides that “the state shall direct its policy towards securing the right to an adequate means of livelihood for citizens, men and women equally”. Being a directive principle, there is very little case law indicating the provision of an adequate means of livelihood for those in need. The right to livelihood has, however, been recognised as a fundamental right derived from the right to life guaranteed by Article 21. In *Olga Tellis v Bombay Municipal Corporation*,<sup>14</sup> commonly known as the “Pavement Dwellers Case”, the court held that hawkers on pavements have a right to make their living by selling goods on the streets of Bombay. The right, however, was held to be subject to reasonable restrictions. Accordingly, while the validity of the Bombay Municipal Corporation Act, 1888, forbidding encroachments on pavements was upheld, the Corporation was directed to demarcate hawking zones and non-hawking zones and to allow the hawkers to sell their goods in the former as licencees from the Bombay Municipal Corporation (BMC). In other words, even though the state was not compelled to provide adequate means of livelihood or work to its citizens, any person who was deprived of the right to livelihood could challenge the deprivation as offending the “right to life” conferred by Article 21 except in so far as the deprivation had resulted from a fair and proper procedure (which included the provision of alternative accommodation within a reasonable distance).<sup>15</sup> It had previously been held that the right to life under Article 21 did not include a right to receive a livelihood.<sup>16</sup>

Although *Olga Tellis* did not actually result in an order of payment of an amount of money, this direction was given in 1993 when Muslim Imam Boards were directed, relying on the right to live with dignity conferred by Article 21, to pay Imams a salary.<sup>17</sup>

## 1 2 The right to work and public assistance

“The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”<sup>18</sup>

The social security component of the Indian welfare state concept has been provided by Article 41 of the Indian Constitution as quoted above. This Article corresponds with Articles 25, 40, 43 and 45 of the Constitution of the USSR 1977 and Article 45(4) of the Constitution of Ireland 1937. The Article

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<sup>13</sup> Manohar “Human Rights Agenda: A Perspective For Development” 2003 *Journal of the Indian Law Institute* 169.

<sup>14</sup> AIR 1986 SC 180; and 1985 3 SCC 545 (hereinafter referred to as “*Olga Tellis*”).

<sup>15</sup> Kumar *Constitutional Law of India* 2ed (2000) 231.

<sup>16</sup> *In re Sant Ram* AIR 1960 SC 932; and *Nachane v Union of India* AIR 1982 SC 1126.

<sup>17</sup> *All India Imam Organization v Union of India* AIR 1993 SC 2086.

<sup>18</sup> A 41 of the Indian Constitution

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relates directly to Article 23(1) of the Universal Declaration of Human Rights 1948 and Articles 6-7 of the International Covenant of Economic, Social and Cultural Rights 1966.<sup>19</sup>

Despite large-scale awareness of the severe problem of growing unemployment in India, no significant progress has been made to date in giving effect to the right to work even though most of the other constitutional directives relating to the protection and welfare of workers have been supervised through central and state legislatures.<sup>20</sup>

Whatever the intention of the framers might be, it is a difficult task to realise a promise of a right to work in India. The intention of the drafters of the Indian Constitution appears, at first glance, clear in this regard. In addition to Article 41 and Article 39(a), Article 19(1)(g) guarantees to all the citizens of India the right to practice any profession or to carry on any occupation, trade or business, subject to reasonable restrictions that may be imposed in the interest of the general public. Article 21, as mentioned above, guarantees the right to life and personal liberty. By holding that the right to life includes the right to livelihood in *Olga Tellis*, the Supreme Court has opened the door to an argument that deprivation of a right to work, which is a livelihood, could amount to the deprivation of the right to life.<sup>21</sup> Consequently, there is a growing debate as to whether the right to work should be interpreted as an independent fundamental right, with several groups of people demanding this on the ground that it has been guaranteed by the Indian Constitution.<sup>22</sup>

Adding support to this argument is that the word "right" is used only in Article 41 of the directive principles of state policy. The Article appears to be a general direction which the framers of the Constitution have given to the succeeding governments to ensure that in the Indian welfare state there shall be no undeserved want or unemployment. It has been observed that under certain circumstances there is a duty upon the state government to find and secure work for all persons in the state.<sup>23</sup>

A number of academics have cautioned against this notion for varying reasons. For example, it is difficult to define "work" and "employment" and it is arguable whether work or employment should be allotted in the public sector, private sector or in organised and unorganized sectors. It is also

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<sup>19</sup> Saharay *The Constitution of India: An Analytical Approach* 2ed (1997) 292. It has been argued that as India signed the UN Universal Declaration of Human Rights in 1948 and the International Covenant on Economic, Social and Cultural Rights of the ILO in 1966, both of which incorporate the right to work and to free choice of employment, it is imperative for the national government to provide this right, at least on "moral grounds". It is an accepted fact, however, that only very few countries who have signed these declarations have given an effective right to work to their citizens. Many developed economies which have signed these declarations have not given a constitutional right to work even when they can afford it. Hirway *Towards Employment Guarantee in India* (1994) 271.

<sup>20</sup> Devi, Maswood and Reddy "Right to Work as Fundamental Right: Illusion or Reality?" 2000 *Journal of the Indian Institute* 269 271.

<sup>21</sup> *Ibid.*

<sup>22</sup> Hirway 271.

<sup>23</sup> Devi, Maswood and Reddy 2000 *Journal of the Indian Institute* 269.

problematic to fix criteria to provide various types of work. In order for proper institutional mechanisms to be established to provide employment, fundamental changes in the economic policy, budgeting and planning would also be required.<sup>24</sup>

More problematic is that once the right to work is made an enforceable fundamental right, the government would be required to provide work opportunities to all those who are willing to work. Every individual would then be entitled to approach the courts to enforce the right. With hundreds of millions of unemployed people in India, it is physically impossible for the courts to provide employment by means of writs to all unemployed people.<sup>25</sup>

A closer inspection of Article 41 provides some insight into a realisation by the drafters of the Indian Constitution of these difficulties. The directive to the state to make effective provision for securing the right to work is qualified by the country's economic capacity and development. The words "within the limits of economic capacity and development" of the state contained in Article 41, although flexible, reflect the direct relationship between the provision of social security and the economic capacity of the state.<sup>26</sup> Persons employed under any national employment scheme such as Jawaharlal Rozgar Yojna (JRY) cannot, therefore, claim regularisation of their employment when that scheme comes to an end or when the money for the scheme has been exhausted.<sup>27</sup>

Justice PB Sawant, in *Delhi Development Horticulture Employees' Union v Delhi Administration*,<sup>28</sup> observed:

"This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles."

In this case, the petitioners, who were employed on daily wages in the JRY invoked the right to livelihood under Article 21 and claimed that they should be absorbed as regular employees in the Development Department of the Delhi Administration. The Supreme Court rejected the claim of the petitioners and held that they had no right of automatic regularisation even though they had put in work for 240 or more days.

Bearing in mind these practical difficulties, it is accepted that providing the right to work as a fundamental right is not feasible and that it is more appropriate and justifiable to retain the right as a directive principle in the Indian context.<sup>29</sup> It is significant to note in this regard that the internal

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<sup>24</sup> Devi, Maswood and Reddy 2000 *Journal of the Indian Institute* 272.

<sup>25</sup> *Ibid.*

<sup>26</sup> Hidayatullah *Constitutional Law of India* (1984) Vol 1 692.

<sup>27</sup> *Delhi Development Horticultural Employees' Union v Delhi Administration* 1992 4 SCC 99; and AIR 1992 SC 789.

<sup>28</sup> AIR 1992 SC 789 795.

<sup>29</sup> Devi, Maswood and Reddy 2000 *Journal of the Indian Institute* 272.

limitation to the Article (indicated by the words, “within the limits of its economic capacity and development”) which limits the ambit of the directive principle completely, precedes the actual content of the Article. The right is also couched in language indicating a future provision of the right – the state shall “make effective provision for securing ...” Since Article 41 is included as a directive principle, it is not legally binding in terms of Article 37 in any event. Nevertheless, the drafters have still couched the principle in terms clearly indicating the mammoth nature of any endeavour to give content to the right. Such a constitutional right in India is perceived, at this stage, to be bound to lead to unnecessary court battles.<sup>30</sup> There is thus no immediate obligation on the part of the state to guarantee a fundamental right to work for all citizens and the state can simply refuse the inclusion of the right as a fundamental right on the ground that it does not have the economic capacity to enforce such a right at present.<sup>31</sup>

Employment, according to Hirway, cannot be obtained through the courts but has to be provided by the development process.<sup>32</sup> It is submitted that such a concession indicates the importance of legislative and executive action but does not necessarily equate to all social and economic rights being unenforceable through the judicial process. The task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor is a task primarily for the legislature and the executive, although it is only through multi-dimensional strategies, including public interest litigation, that these social and economic programmes can be made effective.<sup>33</sup> The goal remains social and economic justice and there are instances where the will of the courts to achieve this has prevailed.

A law passed by the State of Madhya Pradesh in 1970 for the help of the destitute which sought to make it obligatory on the local authorities to provide relief to them, was upheld by the High Court placing reliance, *inter alia*, on Article 41.<sup>34</sup> The Act had made it compulsory for the local authorities to provide for the destitute and funds could be raised for meeting these expenses, provided they were spent in accordance with the provisions of the Act.

In another case, the age of retirement of the members of several state public services was first raised to 58 from 55, and subsequently on the change of government, again lowered to 55.<sup>35</sup> The reason stated by the state for the change was that the lower age would provide greater opportunities of employment to the public and thus, to some extent, relieve the acute educated unemployment prevailing in the state. The majority of the court observed that the provision of opportunities for employment is a duty

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<sup>30</sup> Hirway 271.

<sup>31</sup> *Radhakrishna Mills v Industrial Tribunal* 1954 AM 686.

<sup>32</sup> Hirway 271.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Bhagwandas v State* AIR 1972 MP 95.

<sup>35</sup> *N Srinivasan v State* AIR 1968 Kerala 158.

enjoined on the state by the directive principles, in particular Articles 39(a) and 41.<sup>36</sup>

In *Azad Rickshaw Pullers Union v Punjab*,<sup>37</sup> the Supreme Court demanded that the state of Punjab protect drivers of rickshaws from middle men and attend to their well-being by making sure that they had enough income to survive. Punjab had sought to protect the rickshaw drivers by setting up a licensing system and by providing them with financial assistance to buy their own rickshaws. The drivers complained that the statute afforded them insufficient assistance and that, as a result, they still depended on exploitative middle men. Although they did not make it clear which provision of the Indian Constitution they relied upon, the Supreme Court found in their favour. It rewrote the statute so that it included detailed directives as to how, when and under what conditions the drivers could secure and repay loans. It also asked the Municipal Commissioner to consult with drivers' unions and set up group property in the equipment as well as insurance schemes. The court went as far as to demand that the state of Punjab take steps to replace pulling with motors and scooters, so as to remedy health problems occasioned by driving traditional rickshaws, thereby imposing detailed statutory obligations on Punjab.<sup>38</sup>

The non-payment of minimum wages to workers has also been held by the Supreme Court in *People's Union for Democratic Rights v Union of India*<sup>39</sup> as a violation of the "right to life".

### 1 3 The right to shelter

The *Olga Tellis* case also provided an opportunity for the court to extend the application of the right to life to include shelter. Although the court admitted that everyone must have the right to shelter as part of the right to life, the court was faced with persons who were living on footpaths and who had to be removed in order to clear the footpaths for pedestrians. Therefore, the court held that the BMC could evict these people by simply issuing a notice and following the prescribed procedure under the BMC Act. The "right" to shelter as a fundamental right therefore turned out to be a platitude in this case when it could be dispensed with by the BMC after the proper procedure had been followed.<sup>40</sup>

In *Chameli Singh v Union of India*,<sup>41</sup> the Supreme Court emphasised the importance of the right to shelter as one of the basic human rights designed to ensure the development of a person as a member of a civilised society. The right to life guaranteed in any civilised society was held to imply the right to food, water, a decent environment, education, medical care and shelter.

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<sup>36</sup> Hidayatullah 694.

<sup>37</sup> 1981 1 SCR 366.

<sup>38</sup> Fabre *Social Rights Under the Constitution: Government and the Decent Life* (2000) 160.

<sup>39</sup> AIR 1982 SC 1473.

<sup>40</sup> Sathe *Judicial Activism In India: Transgressing Borders and Enforcing Limits* 2ed (2003) 118.

<sup>41</sup> AIR 1996 SC 105; and 1996 2 SCC 549.

The court held that shelter for a human being is not a mere protection of life and limb (a “roof over the head”) but is a foundation for a person’s physical, mental, intellectual and spiritual growth. As a result, the right to shelter was found to include adequate living space, a safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities such as roads for access to a workplace.<sup>42</sup>

In *Francis Coralie Mullin v Union Territory of Delhi*<sup>43</sup> Bhagwati J (one of the key proponents of public interest litigation) held that the right to life is not limited only to the protection of limb or faculty and that it must embrace something more than mere animal existence. It includes the right to live with human dignity which should, according to Bhagwati, include the bare necessities of life such as adequate nutrition, clothing, shelter, facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.<sup>44</sup> The actual magnitude and content of the components of the right would depend upon the extent of the economic development of the country, but must, in the court’s view, include the right to these basic necessities of life.<sup>45</sup>

In *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*<sup>46</sup> the court explained that the state has a constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter for its subjects in order for the right to life to be meaningful, effective and fruitful.

Although beyond the scope of this article, it is interesting to note the impact that the realisation of the right to shelter has had on the contentious land-claims issue. The right to shelter has been held to be a fundamental right which derives from the right to residence in Article 19(1)(e) and the right to life under Article 21.<sup>47</sup> To make the right meaningful to the poor, it is obvious that the state has to provide facilities and opportunities to build houses. The acquisition of land to provide sites for houses for the poor must, therefore, be a public purpose in furtherance of a constitutional duty.<sup>48</sup>

#### 1 4 The right to education

The directive principles place considerable emphasis on education. Article 41 directs the state, within the limits of its economic capacity and development, to make effective provisions for securing the right to education. Article 45 directs that the state shall endeavour to provide, within a period of 10 years from the commencement of the Constitution, free and

<sup>42</sup> Mehta and Verma *Human Rights Under the Indian Constitution: The Philosophy and Judicial Gerrymandering* (1999) 81.

<sup>43</sup> AIR 1981 SC 746.

<sup>44</sup> *Francis Coralie Mullin v Union Territory of Delhi* AIR 1981 SC 753.

<sup>45</sup> AIR 1981 SC 746 753.

<sup>46</sup> 1996 10 SC 485 par 13.

<sup>47</sup> *UP Avas Vikas Parishad v Friends Coop. Housing Society Ltd* AIR 1996 SC 114.

<sup>48</sup> *Chameli Singh v State of UP* AIR 1996 SC 1051.



compulsory education for all children under 14 years of age. The directive contained in Article 45 has not been fulfilled, though primary education has been made increasingly free and compulsory.<sup>49</sup> Article 46 is also relevant and directs the state to promote with special care the educational interests of the weaker sections of the people.

In *Unni Krishnan v State of AP*,<sup>50</sup> the Supreme Court held that the right to education up to the age of 14 years as enshrined in Article 45 is a fundamental right within the meaning of Article 21 of the Constitution. The court observed that “the right to education flows directly from the right to life” and read Article 45 into Article 21 in this case.<sup>51</sup>

The duty to take effective steps to provide education has acquired special significance in view of the recognition of a fundamental right to education partly in terms of this Article and the *Unni Krishnan* case. As there is now precedent for the right being judicially enforceable, a citizen has the right to call upon the state to provide educational facilities to him or her within the limits of its economic capacity and development.<sup>52</sup>

Sathe has criticised this decision of the court as verging on populism.<sup>53</sup> He submits that it is not for the court to convert a directive principle of state policy into a fundamental right. Moreover, according to Sathe, by doing so the court has merely converted a non-enforceable directive principle into a non-enforceable fundamental right.

“Where the literacy rate has been around fifty per cent, to say that all Indian people have a fundamental right to primary education is an exercise in romanticism. These are second generation human rights, which consist of social and economic rights of a positive nature and have to be backed up by political action. The rights such as right to education or right to livelihood can be a reality only when the State allocates resources for providing education or jobs to people. This will depend upon the economic policies that the State pursues.”<sup>54</sup>

This critique ignores the fact that the Article 45 directive is the only principle carrying a time limit (10 years) which was retained in the final draft of India’s Constitution. It may be argued that the fact that India has been unable to give complete effect to the right over 50 years after the enactment of the Constitution indicates the futility of attempting to recognise the principle as a fundamental right. On the contrary, it is submitted that the time limit indicated in the Article illustrates the extra-special protection required for this particular directive principle. The judgment in *Unni Krishnan* gave due consideration to this in holding that every child of the country has a right to free education only until he or she completes the age of 14 years.

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<sup>49</sup> Subba Rao *Indian Constitutional Law* 7ed (1998) revised by PK Rao 234.

<sup>50</sup> 1993 1 SCC 645.

<sup>51</sup> Subba Rao 234.

<sup>52</sup> Singh *VN Shukla’s Constitution of India* 10ed (2001) reprint Nov 2003 305.

<sup>53</sup> Sathe 119.

<sup>54</sup> *Ibid.*

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Thereafter, because of the scarcity of resources, the right to education is subject to the limits of economic capacity and development of the state.<sup>55</sup>

## **2 LESOTHO AND SOUTH AFRICAN CASE LAW ON THE RIGHT TO LIVELIHOOD**

### **2.1 *Baitsokoli v Maseru City Council***

The question as to whether or not the constitutional right to life encompasses a right to livelihood has recently been considered by the Lesotho Court of Appeal in *Baitsokoli v Maseru City Council*.<sup>56</sup> In this case members of a registered association of traders plying their trade along Maseru's main thoroughfare were removed to a new market approximately 200m away. As a result of this removal, both the association and an affected individual member instituted a constitutional challenge based on the violation of their right to life (as entrenched by s 5 of the Constitution of Lesotho). Section 5 of this Constitution reads as follows:

"Right to life

5 (1) Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life."

It was argued that, because of the removal, the income of the affected traders had been reduced to the extent that they were now completely unable to meet their basic needs such as the ability to purchase food and clothing for themselves and their dependants and that these people were "slowly starving to death". This was denied by the Maseru City Council and the other respondents who had assisted in the removal of the appellants.

The appellants' case relied heavily on both Indian and Bangladeshi case law, including the *Olga Tellis* case discussed above, to the effect that the right to life under Lesotho's Constitution was broad enough to encompass a right to livelihood. The court *a quo* held, however, that even the most expansive definition of the section 5 right to life did not allow such an interpretation.

On appeal, Gauntlett JA held that an actual threat to survival arising from the relocation of the traders' stalls had not been established by the affidavits before the Court of Appeal. The court, nevertheless, considered the important constitutional issue raised before it and, citing with approval Kriegler J's comments on constitutional interpretation in *Bernstein v Bester*,<sup>57</sup> cautioned against the careless application of foreign authorities. In dismissing the appeal, the court relied primarily upon the following two reasons:

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<sup>55</sup> *Inserted by the Constitution (Forty-Fourth Amendment) Act 1978. S 9 (w.e.f 20-6-1979). Singh 302.*

<sup>56</sup> [2005] 3 All SA 79 (LesCA) (hereinafter referred to as "*Baitsokoli*").

<sup>57</sup> 1996 2 SA 751 CC 811H-812B.

Section 5(2) of the Constitution of Lesotho contains a derogation clause in respect of the right to life and refers solely to instances where a person is deprived of the right to life in a criminal law context where death has occurred as the result of the necessary and justifiable use of force in listed circumstances. Section 4(1) of this Constitution prefaces the rights which follow in the Bill of Rights by subjecting them only to limitations as provided for in the provisions themselves.<sup>58</sup> As the limitations specified in section 5(2) are inconsistent with an interpretation of the right to life as encompassing the right to livelihood, the court's first reason for dismissing the appeal was that to hold otherwise would result in the main component of the right (to exist as a human being) being limited while the ancillary right to livelihood remained absolute.<sup>59</sup>

The court's second reason for their finding was based upon the inclusion in the Constitution of Lesotho of a separate chapter dealing with "Principles of State Policy" – similar to the separation of provisions in the Indian Constitution and other constitutions and international human rights documents (as discussed in Part 1).<sup>60</sup> The court held that section 29(1) of the Lesotho Constitution, which states that "Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts", amounts to an existing provision in this Constitution, distinct from the section 5 right to life, which already relates to the right to livelihood. Effectively, this amounted to the appellants having to argue the contradictory proposition that the right to livelihood appeared twice in the Constitution of Lesotho – once implicitly as part of the fundamental right to life, entrenched in Chapter II and with its internal derogation provisions and, secondly, in terms of a Chapter III directive principle (section 29) which possesses completely different characteristics and must be interpreted differently.<sup>61</sup> The court used this argument as justification for departing from the reasoning in the *Olga Tellis* case and also relied on the judgment of Chaskalson P in *Soobramoney v Minister of Health, Kwazulu-Natal*<sup>62</sup> to argue that the right to life should not enjoy a wide interpretation where other constitutional provisions deal directly with what must otherwise be inferred from the right to life.<sup>63</sup> As additional justification for not following the *Olga Tellis* case, the court criticised the Indian court for not considering the two arguments described above. It also differentiated the cases on the basis that the constitutional provisions in Lesotho and India were materially different, that the Indian court had been faced with a situation of "exceptional

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<sup>58</sup> There is no general limitations clause equivalent to s 36 of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") in the Constitution of Lesotho.

<sup>59</sup> *Baitsokoli* par 17.

<sup>60</sup> S 25 of the Constitution of Lesotho states that the principles contained in the "Principles of State Policy" shall not be enforceable by any court but shall guide the authorities and agencies of Lesotho in the performance of their functions with a view to progressively realising the principles within the limits of the economic capacity and state of development of the country at the time.

<sup>61</sup> *Baitsokoli* par 20.

<sup>62</sup> 1998 1 SA 765 (CC) 773E-774A.

<sup>63</sup> *Baitsokoli* par 23.

social severity, rendered urgent by the advent of the monsoon” and that “a situation akin to necessity applied” in that case.<sup>64</sup>

## **2 2 *Victoria & Alfred Waterfront v Police Commissioner, W Cape***

Prior to the *Baitsokoli* case, the right to livelihood was also raised, albeit indirectly, in the South African case of *Victoria & Alfred Waterfront v Police Commissioner, W Cape*.<sup>65</sup>

In this case the applicants, who were respectively the managers and owners of the waterfront shopping complex in Cape Town, sought to confirm an order prohibiting certain individuals from entering and engaging in certain objectionable conduct upon the premises. The question to be addressed by the court was whether or not a final interdict would contravene the South African constitutional provisions pertaining to the right to life and the right to freedom of movement.<sup>66</sup>

Relying only on the *Olga Tellis* case, the court, in a judgment by Desai J, commented that “the right to life encompasses more than ‘mere animal existence’. It includes the right to livelihood.”

This judgment elicited some criticism from the court in the *Baitsokoli* case, in particular because the analysis followed in the Lesotho case had not been considered at all. The Lesotho Court of Appeal also criticised the court in the *V&A Waterfront* case for not considering “the separate and explicit provision in section 26(1) of the South African Constitution for the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory”.<sup>67</sup>

Ultimately, the court decided the interdict application before it without any direct reference to the right to livelihood and balanced the competing rights of the parties by allowing them access to the complex but by restraining them from committing any undesirable type of conduct.

## **2 3 Analysis of the *Baitsokoli* and *V&A Waterfront* cases**

The court in the *V&A Waterfront* case unfortunately did not explain in any detail its own contention that the right to life encompasses the right to livelihood and the parts of the judgment of Desai J in this regard may be considered as being *obiter*. It also left open the question as to whether a prohibition against begging might not be unconstitutional on account of infringing the right to life as interpreted. There is, therefore, no binding South

<sup>64</sup> *Baitsokoli* par 24.

<sup>65</sup> 2004 4 SA 444 (C) (hereinafter referred to as “*V & A Waterfront*”).

<sup>66</sup> S 11 of the Constitution states that “everyone has the right to life”, while s 21 states, *inter alia* that “everyone has the right to freedom of movement”.

<sup>67</sup> *Baitsokoli* par 23.

African case authority for expanding the right to life to include the right to livelihood.

The *ratio decidendi* in the *Baitsokoli* case, however, rejecting such a notion in Lesotho, requires further analysis in order to determine whether its reasoning should preclude a South Africa court from an expansive interpretation of section 11 of the Constitution. The first reason of justification in the *Baitsokoli* case does not present such a problem given the specific wording of sections 4 and 5 of the Constitution of Lesotho (and the absence of a general limitations clause). This makes the *Baitsokoli* judgment distinguishable from both the Indian and South African scenarios but explains the outcome in that case.

The second argument presented by the court in the *Baitsokoli* case may be an obstacle for similar future cases in India given the comparable separation of “fundamental rights” and “directive principles” (India) or “principles of state policy” (Lesotho). In so far as South African courts are concerned, the judgment may be differentiated on the basis that first- and second-generation rights are treated equally in the South African Bill of Rights. Depending upon whether it is considered that what is claimed in a particular case is satisfactorily dealt with by other constitutional provisions (such as s 22 dealing with the freedom of trade, occupation and profession<sup>68</sup> and s 27 which provides rights of access to health care services, food, water and social security) the right to life may require a wider interpretation in cases more urgent or desperate than the facts in the *Baitsokoli* case. In situations as serious as the *Olga Tellis* case, for example, it may be argued that the lack of any economic opportunity or work for a prolonged period of time (“livelihood”) has actually resulted in an individual’s right to life (in a broader sense) being threatened – a situation uncovered by any other constitutional provision. It must, in such circumstances, be most appropriate to expand the right to life (given the desperateness of the situation) rather than deal with any other constitutional provision.

### 3 CONCLUSION

There is very little case authority supporting a constitutionally enforceable right to social security in India. There is, however, authority for the courts enforcing rights to livelihood, work, shelter, education and special support for weaker sections of Indian society, often via the right to life. This approach is based upon the separation between fundamental rights and directive principles in the Indian Constitution. If the picture painted by the Indian judiciary is that relief will be afforded in cases requiring serious judicial intervention, then the parts of Indian society experiencing severe problems relating, for example, to their rights to livelihood and work, should approach

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<sup>68</sup> The court in the *Baitsokoli* case appears to have erroneously dealt only with the Interim Constitution provision pertaining to the right to freely engage in economic activity and to pursue a livelihood anywhere in the national territory. S 22 of the Constitution does not expressly mention the freedom “to pursue a livelihood”. See De Waal, Currie and Erasmus *The Bill of Rights Handbook* 5ed (2005) 491.

the court using class actions to alleviate the poverty in the community concerned. The importance of access to justice is that it would be imperative for people in outlying areas to be aware of their (enforceable) rights at a particular stage of Indian development because, to be consistent, the courts would have to provide similar assistance in such cases of hardship to that provided in the cases mentioned above.

The target in India remains assistance in the form of work so that the people concerned may escape destitution. The provision of comprehensive social assistance in the event of unemployment remains a subsequent and distant stage of development. Seervai is of the firm belief that the agency for bringing about social and economic changes which would enable such a welfare state to be created is the legislative and executive powers of state.<sup>69</sup> From a legal point of view, there do not appear to be any constitutional hurdles standing in the way of the implementation of the directive principles or the ushering in of a "socialist pattern of society" (as directed by the preamble). On the contrary, the Indian Constitution makes a strong commitment to promoting the well being of citizens and this commitment has been translated into real improvements for some people due to the judiciary's liberal interpretation of its principles.

The right to life is a fundamental human right in both the Indian and South African Constitutions. It has been argued that the exercise of this right is essential for the exercise of all other human rights and that if it is not respected, all rights lack meaning.<sup>70</sup> In theory, the essence of the right to life includes not only the right of every human being not to be deprived of his or her life arbitrarily, but also the right that he or she will not be prevented from having access to the conditions that guarantee a dignified existence.<sup>71</sup>

Socio-legal action, public interest litigation or legal aid will, however, never have the funds to do as much as is needed to give complete effect to such laudable motives - regardless of the agency doing the work.<sup>72</sup>

The South African Constitutional Court, in accordance with this reality, rejected the invitation to set a core minimum obligation guideline for the right to housing in *Grootboom* (in fact holding that it was impossible to give everyone access even to a "core" service immediately), finding instead that the issue in terms of the Constitution was whether the standard of reasonableness had been complied with.<sup>73</sup> The court did hold that there may be cases where it could be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.<sup>74</sup> By avoiding the issue of establishing a

<sup>69</sup> Seervai *Constitutional Law of India: A Critical Commentary* Vol 2 4ed (1993) 1932.

<sup>70</sup> Sepulveda "The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights" 2003 Vol 18 *School of Human Rights Research Series* 152.

<sup>71</sup> *Ibid.*

<sup>72</sup> Mahajan "Law and Development" in Baxi *Law and Poverty: Critical Essays* (1988) 416 425.

<sup>73</sup> *Minister of Health v Treatment Action Campaign* 2002 5 SA 713 (CC) par 35; Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence" 2003 Vol 19 Part 1 *SAJHR* 1 17.

<sup>74</sup> *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) par 33.

minimum core obligation, the court refrained from holding that certain positive obligations in terms of socio-economic rights might be immediately complied with and are immediately enforceable by everyone.<sup>75</sup> Remembering that *Grootboom* dealt with rights under section 26 and 28 of the Constitution, it is possible to distinguish this aspect of the case from the context of the right of access to social security.

India provides an example for extending the applicability of the right to life to assist people desperately in need in certain situations. Although it may be argued that they have been forced to do so as a result of the status of directive principles,<sup>76</sup> the crux of the matter may be deciding which cases require serious judicial intervention.<sup>77</sup>

According to Bilchitz, and based upon the simple premise that people who are desperately in trouble require assistance from the government as a matter of priority, preference should be given to those whose very survival is threatened. It is possible to argue in favour of this despite the Constitutional Court's failure to set a minimum core obligation in *Grootboom*.

Bilchitz uses "urgency" as a method of differentiating between cases where a court should assist an applicant and cases where it cannot due to resource constraints. A paradigm developed by Bollyky may assist this argument. According to him, if a remedy (R) requires extensive policy (P) and budgetary choices (B), the court will only make them for a constitutional violation (C) which is proportionately extensive – described algebraically as  $R \text{ if } C > P + B$ .<sup>78</sup>

The Constitutional Court seems to have used similar methodology in reaching its decision in *Khosa*.<sup>79</sup> In this case, the court had little hesitation in holding that the importance of providing access to social assistance to all who lived permanently in South Africa (and the impact upon life and dignity that a denial of such access has) "far outweighs the financial and immigration considerations on which the state relies".<sup>80</sup>

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<sup>75</sup> De Waal *et al* 444.

<sup>76</sup> *Mohini Jain v State of Karnataka*, JT (1992) 4 S.C. 292 (India); *Unni Krishnan v State of Andhra Pradesh* [1993] S.C.C 645 (India). In *Mohini Jain*, the Indian Supreme Court upheld the right to education of every citizen even though education is not recognised as a right but as a directive principle. Its reasoning was that the rights to life and dignity, which the Constitution does recognise (Article 21), could not be assured unless they were accompanied by the right to education. The court concluded that fundamental rights have to be interpreted against the backdrop of the directive principles contained in the Constitution. Cf Olivier "Social Protection in the SADC Region: Opportunities and Challenges" 2002 Vol 18(4) *The International Journal of Comparative Labour Law and Industrial Relations* 377-395 on the preference of constitutional entrenchment of social rights.

<sup>77</sup> On what informs courts' decisions on when to provide relief, see Botha "Freedom and Constraint in Constitutional Adjudication" 2004 Vol 20 Part 2 *SAJHR* 249.

<sup>78</sup> Bollyky "R if  $C > P + B$ : A Paradigm for Judicial Remedies of Socio-economic Rights Violations" 2002 Vol 18 Part 2 *SAJHR* 161-201.

<sup>79</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC).

<sup>80</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* par 82.

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For the people of South Africa unemployed and not covered by any form of social assistance, a claim that their right to life is being infringed may elicit a remedy, based upon the Bollyky paradigm, if their situation is so serious or urgent that it overcomes policy and budgetary considerations. The fact that judges will decide this question is problematic, as discussed, due to considerations of consistency, certainty and proper separation of powers. A further concern is that decisions will be made on an *ad hoc* basis depending upon the severity of the situation (as perceived by a particular bench). Despite these issues, it is an expanded interpretation of the right to life which provides an avenue for the court to concern itself with situations falling outside of the ambit of the socio-economic rights contained in the Constitution and relating to urgent problems with an aspect of livelihood.<sup>81</sup> It must be argued that this avenue should be followed by the court in order to give effect to the spirit of the Constitution.

Once the provision of relief in this manner is acceptable, even for a single applicant, the right to equality should result in other people in an equally desperate situation being able to obtain similar basic relief (provided they are made aware of this development).<sup>82</sup>

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<sup>81</sup> As mentioned, there now appears to be a greater awareness of this type of argument as indicated by the question explicitly left open in the *V & A Waterfront* case.

<sup>82</sup> In addition to inadequate budgetary allocations for social security and chronic structural unemployment which places pressure on social assistance schemes to provide basic income support, a lack of knowledge on the part of beneficiaries of their social security entitlements can impede the accessibility of social assistance. Mashava "Introduction to the Right to Social Security in the South African Constitution" 2000 Vol 6 *A Compilation of Essential Documents on Economic, Social and Cultural Rights* (Economic and Social Rights Series) 16.