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## The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?

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**Summary:** *As a liberal constitution, the Constitution of Lesotho maintains a bifurcated human rights framework. Human rights are embodied in two distinct chapters – chapter II and chapter III – with different legal implications. Chapter II contains civil and political rights styled 'fundamental human rights and freedoms' while chapter III embodies socio-economic rights styled 'principles of state policy'. The right to life falls under chapter II, while the right to health is under chapter III. The juridical effect of this division is that socio-economic rights are not judicially enforceable. The courts have been tenacious in maintaining this division. The High Court's recent decision in Lesotho Medical Association v Minister of Health has challenged this prevailing judicial policy. In this case the Court adopted a liberal approach to the right to life in enforcing the right to health. The Court held that the failure by the Ministry of Health to provide personal protective clothing to health workers was a violation of the right to life. The main question for human rights scholarship is whether this decision could signal a change of approach by the judiciary in Lesotho in favour of the liberal approach to the right to life. This article sets out to investigate this question.*

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## 1 Introduction

The enduring feature of liberal constitutions is that their priority is to limit state power.<sup>1</sup> Human rights are a central pillar of this grand scheme – they are used to limit the state’s functional space.<sup>2</sup> Hence, under the liberal constitutional conception, the most important human rights are negative rights.<sup>3</sup> Negative rights pre-eminently *prevent* states from doing, rather than *directing* the state to do.<sup>4</sup> The development of human rights, to a great extent, is based on this approach.<sup>5</sup> The notion of human rights has developed through the stages that categorise them; these have been styled ‘generations’.<sup>6</sup> First generation rights comprise the classical rights that were the first to be accepted as inalienable and innate because of their affinity to liberal thought. These rights came to be known as civil and political rights. The central feature of these rights is that they are negative.<sup>7</sup> These rights became the chief struts of major revolutions such as the French Revolution and the American Revolution.<sup>8</sup> The right to life is categorised under this first generation of rights. Second generation rights, which came later in human rights development, comprise

- 1 M Tushnet ‘The dilemmas of liberal constitutionalism’ (1981) 42 *Ohio State Law Journal* 411; J Elster, R Slagstad & G Hernes (eds) *Constitutionalism and democracy* (1988); VJ Vanberg ‘Liberal constitutionalism, constitutional liberalism and democracy’ (2011) 22 *Constitutional Political Economy* 1.
- 2 J Nedelsky ‘Reconceiving rights and constitutionalism’ (2008) 7 *Journal of Human Rights* 139.
- 3 NW Barber ‘Constitutionalism: Negative and positive’ (2015) 38 *Dublin University Law Journal* 249.
- 4 S Barber ‘Fallacies of negative constitutionalism’ (2006) 75 *Fordham Law Review* 651; O Gerstenberg ‘Negative/positive constitutionalism, “fair balance”, and the problem of justiciability’ (2012) 10 *International Journal of Constitutional Law* 904; JM Farinacci-Fernós ‘Looking beyond the negative-positive rights distinction: Analysing constitutional rights according to their nature, effect, and reach’ (2018) 41 *Hastings International and Comparative Law Review* 31.
- 5 JD van der Vyver ‘The doctrine of human rights: Its historical and philosophical foundation’ in D Brand et al (eds) *From human wrongs to human rights – Part IV* (1995) 48; M Ishay ‘What are human rights? Six historical controversies’ (2004) 3 *Journal of Human Rights* 359.
- 6 JC Mubangizi ‘Towards a new approach to the classification of human rights with specific reference to the African context’ (2004) 4 *African Human Rights Law Journal* 93; C Wellman ‘Solidarity, the individual and human rights’ (2000) 22 *Human Rights Quarterly* 639; F Pocar ‘Some thoughts on the Universal Declaration of Human Rights and the generations of human rights’ (2015) 10 *Intercultural Human Rights Law Review* 43.
- 7 Mubangizi (n 6) 95; DD Basu *Human rights in constitutional law* (1994) 82.
- 8 SP Marks ‘From the single confused page to the Decalogue for six billion persons: The roots of the Universal Declaration of Human Rights in the French Revolution’ (1998) 20 *Human Rights Quarterly* 459; J Israel *Democratic enlightenment: Philosophy, revolution, and human rights 1750-1790* (2013); B Bailyn *The ideological origins of the American Revolution* (2017).

social and economic rights. These rights are pre-eminently positive – they impose positive obligations on states.<sup>9</sup> Along with other rights, such as the rights to housing, a livelihood, work, water and education, the right to health belongs to this generation.<sup>10</sup>

Second generation rights have not gained the widespread acceptance enjoyed by civil and political rights. Even where these rights have been included in the same Bill of Rights as civil and political rights, as in South Africa, their enforcement continues to generate much great controversy.<sup>11</sup> Although the Universal Declaration of Human Rights (Universal Declaration) treated human rights as indivisible,<sup>12</sup> human rights thus far have been remained primarily bifurcated. This division at the international level is evidenced by the existence of two main international conventions – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – that anchor this duality.<sup>13</sup>

The most recent category of rights, styled ‘the third generation of rights’, comprises collective rights such as the right to peace, the right to development, and the right to a clean environment. According to Mubangizi, ‘[t]he emergence of this category of rights is closely associated with the rise of Third World nationalism and the realisation by developing states that the existing international order is loaded against them’.<sup>14</sup>

This traditional categorisation of human rights has largely informed the way in which national constitutions treat human rights.<sup>15</sup> Most liberal constitutions have classified human rights into two main categories – civil and political rights, and social and economic

9 C Heyns & D Brand ‘Introduction to socio-economic rights in the South African Constitution’ (1998) 2 *Law, Democracy and Development* 153.

10 P Alston ‘A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?’ (1982) 29 *Netherlands International Law Review* 307.

11 MS Kende ‘The South African Constitutional Court’s construction of socio-economic rights: A response to critics’ (2003) 19 *Cornell Journal of International Law* 617; EC Christiansen ‘Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court’ (2006) 38 *Columbia Human Rights Law Review* 321; D Davis ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *South African Journal on Human Rights* 301; M Pieterse ‘Coming to terms with judicial enforcement of socio economic rights’ (2004) 20 *South African Journal on Human Rights* 383.

12 JW Nickel ‘Rethinking indivisibility: Towards a theory of supporting relations between human rights’ (2008) 30 *Human Rights Quarterly* 984.

13 UN General Assembly International Covenant on Economic, Social and Cultural Rights 16 December 1966, United Nations Treaty Series vol 993 3, <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 6 April 2021).

14 Mubangizi (n 6) 96.

15 Mubangizi 93; PS Jaswal *Human rights and the law* (1996).

rights. The former category is judicially enforceable, while the latter category is not.<sup>16</sup> The Constitution of Lesotho is a prototype of these liberal constitutions,<sup>17</sup> providing for a bifurcated human rights framework. Human rights are embodied in two distinct chapters in the Constitution – chapter II and chapter III – with varying legal implications. Chapter II contains civil and political rights styled ‘fundamental human rights and freedoms’,<sup>18</sup> which are enforceable. Section 22(1) of the Constitution provides:

If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

This is in sharp contrast to what the Constitution says about socio-economic rights, which are embodied in chapter III as ‘principles of state policy’. Section 25 of the Constitution provides that these ‘principles’ shall form part of state policy, and they

shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles.

The right to health falls under chapter III,<sup>19</sup> and it therefore is judicially unenforceable. The superior courts of Lesotho have been very consistent in maintaining the non-enforceability of socio-economic rights.<sup>20</sup> It appears that the High Court challenged this prevailing judicial policy in its recent decision in *Lesotho Medical Association v Minister of Health*.<sup>21</sup> The case arose from an extraordinary situation where health practitioners challenged the government’s short supply of personal protective equipment during the COVID-19 pandemic. The practitioners alleged, among others, that the short supply of protective gear was a violation of their right to life as envisaged under section 5 of the Constitution. Despite the plain language of

16 JC Mubangizi ‘The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation’ (2006) 2 *African Journal of Legal Studies* 1; FI Michelman ‘The constitution, social rights, and liberal political justification’ (2003) 1 *International Journal of Constitutional Law* 13.

17 NL Mahao ‘Judicial independence and the enforcement of the constitution in Lesotho’ (2005) 3 *Journal of Commonwealth Law and Legal Education* 51; H Nyane ‘Development of constitutional democracy: 20 years of the Constitution of Lesotho’ (2014) 21 *Lesotho Law Journal* 59.

18 See Ch II of the Constitution of Lesotho 1993.

19 Sec 27 Constitution 1993.

20 *Khathang Tema Baitsokoli v Maseru City Council* LAC (2005-2006) 85.

21 *Lesotho Medical Association v Minister of Health* CC 19/2019.

section 25 of the Constitution – that ‘principles of state policy’ shall not be enforceable in any court – the Court decided that the failure by the Ministry of Health to provide personal protective clothing to health workers was a violation of the right to life.<sup>22</sup> The main question for human rights scholarship is whether this decision could signal a change of approach by the judiciary in Lesotho in favour of the liberal approach to the right to life, or whether it simply was a knee-jerk solution to the then prevalent problem of the shortage of protective equipment for frontline health workers.<sup>23</sup> This article seeks to investigate this central question. The article contends that while the decision certainly is welcome, it may not significantly change the entrenched attitude of the superior courts of Lesotho towards social and economic rights. The article uses the content analysis method<sup>24</sup> to analyse the Lesotho Constitution, the judicial pronouncements, and the trends at the international level.

## 2 Conceptual framework: The interface between the right to life and the right to health

### 2.1 Right to life

The right to life is regarded as the most basic right as it forms the basis of all other human rights.<sup>25</sup> It is one of the most primordial human rights. In the Lockean conception the right to life philosophically antedates civil society. Alongside the rights to liberty and property, it forms the basis for the social contract.<sup>26</sup> Therefore, philosophically and historically it is the most animating of all human rights. As the South African Constitutional Court instructively observed in *S v Makwanyane*,<sup>27</sup> ‘[t]he right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them.’<sup>28</sup> Menghistu describes the pre-eminence of the right to life as follows: ‘The right to life is the most basic, the most fundamental, the

22 *Lesotho Medical Association* (n 21) para 2.

23 Lesotho, like the rest of the world, was affected by the coronavirus pandemic. For the country’s legal response to the pandemic, see I Shale ‘Implications of Lesotho’s COVID-19 response framework for the rule of law’ (2020) 20 *African Human Rights Law Journal* 462.

24 K Krippendorff ‘Content analysis’ in E Barnouw et al (eds) *International encyclopaedia of communication* (1989) 403.

25 BG Ramcharan (ed) *The right to life in international law* (1985); *R v Home Secretary, Ex Parte Bugdaycay* [1987] AC 514; AJ Ashworth ‘Self-defence and the right to life’ (1975) *Cambridge Law Journal* 282.

26 S Ratnapala *Jurisprudence* (2017) 121.

27 1995 (3) SA 391 (CC).

28 *Makwanyane* (n 27) para 326.

most primordial and supreme right which human beings are entitled to have and without which the protection of all other human rights becomes either meaningless or less effective.<sup>29</sup> The Human Rights Committee's General Comment 6 of 1982 identifies the right to life as 'the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'.<sup>30</sup> The 1982 General Comment has since been replaced by General Comment 36 of 2018.<sup>31</sup> The 2018 General Comment equally exalts the right to life as a right that should not be interpreted narrowly.<sup>32</sup> The General Comment expansively provides that the right to life 'is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation'.<sup>33</sup>

The right to life is protected in almost all modern constitutions. At the international level, the right is recognised under article 3 of the Universal Declaration,<sup>34</sup> article 6 of ICCPR,<sup>35</sup> article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>36</sup> and article 4 of the African Charter on Human and Peoples' Rights (African Charter).<sup>37</sup>

29 F Menghistu 'The satisfaction of survival requirements' in BG Ramcharan (ed) *The right to life in international law* (1985) 63.

30 Human Rights Committee General Comment 6: Article 6 (Right to Life) 30 April 1982. For an analysis of the latest General Comment of 2018 which replaces the 1982 General Comment, see S Joseph 'Extending the right to life under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 *Human Rights Law Review* 347.

31 Human Rights Committee General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, adopted by the Committee at its 124th session (8 October to 2 November 2018).

32 General Comment 36 (n 31) para 3.

33 General Comment 36 para 2.

34 UN General Assembly Universal Declaration of Human Rights 10 December 1948, 217 A (III), <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 8 April 2021). Art 3 provides: 'Everyone has the right to life, liberty and security of person.'

35 UN General Assembly International Covenant on Civil and Political Rights 16 December 1966, United Nations Treaty Series, vol 999 171, <https://www.refworld.org/docid/3ae6b3aa0.html> (accessed 6 April 2021). Art 6(1) provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

36 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms 4 November 1950, ETS 5, <https://www.refworld.org/docid/3ae6b3b04.html> (accessed 6 April 2021). Art 2(1) provides: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

37 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), <https://www.refworld.org/docid/3ae6b3630.html> (accessed 8 April 2021). Art 4 provides: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

Therefore, it is apparent that the right to life is exalted and sanctified within the broader human rights discourse.<sup>38</sup> This evident unanimity about the importance of the right to life notwithstanding, there is considerable controversy about its proper contours and purpose. The right continues to divide the scholarship and jurisdictions into two main schools of thought. On the one side are scholars who advocate the restrictive approach, while on the other side there are scholars who support the liberal and much more expansive interpretation of the right. The proponents of the restrictive approach posit that the right to life has the salutary purpose of protecting life; it protects human beings against the arbitrary deprivation of life.<sup>39</sup> It does not extend to the right of livelihood. Therefore, it is not a 'positive right' and it belongs to the realm of civil and political rights.

The restrictive approach distinguishes the right to life from what may be styled the 'right to living' which, according to Przetaczniak,<sup>40</sup> means an expanded definition of rights to include an 'appropriate standard of living'.<sup>41</sup> The 'right to living' thus includes other conditions that make life meaningful, such as health, food and water. The right to life exclusively and narrowly signifies every human being's entitlement not to be deprived of his or her life. This formulation follows the strictly dual human rights framework in terms of which the right to life belongs to the realm of civil and political rights, and the 'right to living' belongs 'to the domain of economic, social and cultural rights, which are recognised and affirmed in the International Covenant on Economic, Social and Cultural Rights'.<sup>42</sup> According to this formulation, the right to health is patently distinguishable from the right to life. The South African Constitutional Court endorsed this approach in *Soobramoney v Minister of Health (KwaZulu-Natal)*.<sup>43</sup> In this case a terminally-ill man suffering from renal failure needed dialysis treatment which the state could not provide. He sued the state and based his application on both section 27(3) of the Constitution, which provides that '[n]o one may be refused emergency medical treatment', and section 11, which stipulates that 'everyone has the right to life'.<sup>44</sup> The Court preferred a restrictive approach to the right to life and ruled as follows:<sup>45</sup>

38 Ramcharan (n 25).

39 Y Dinstein *The right to life, physical integrity, and liberty* (1985); F Przetaczniak 'The right to life as a basic human right' (1976) *Revue des droits de l'homme* 585.

40 F Przetaczniak 'The right of living as basic human right' (1994) 6 *Sri Lanka Journal of International Law* 203.

41 As above.

42 Przetaczniak (n 40) 204.

43 1997 12 BCLR 1695 (CC).

44 *Soobramoney* (n 43) para 7.

45 *Soobramoney* (n 43) para 19.

In our Constitution, the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfil its primary obligations under sections 27(1) and (2) to provide health care services to 'everyone' within its available resources.

However, the Constitution of South Africa must be treated with caution. Unlike the constitutions of which the human rights frameworks are bifurcated, such as those of Lesotho and India, the Constitution of South Africa has one Bill of Rights, which renders both political and socio-economic rights enforceable.<sup>46</sup> Therefore, there is no desperate need to seek the expansive approach to the right to life to realise socio-economic rights such as the right to health.<sup>47</sup> Nevertheless, there still are pockets of decisions in South Africa that favour the liberal, rather than the restrictive, approach to the right to life, for example, *S v Makwanyane*,<sup>48</sup> *Minister of Health v Treatment Action Campaign (No 2)*,<sup>49</sup> *Hay v B*<sup>50</sup> and *Victoria & Alfred Waterfront v Police Commissioner, Western Cape*.<sup>51</sup>

The liberal approach to the right to life, on the other hand, posits that the right to life may not be denied only through the direct termination of life,<sup>52</sup> but may also be denied by denying the essential conditions of livelihood such as food and health.<sup>53</sup> The liberal approach seems to be dominating the contemporary conception of the right to life at the international, regional and domestic levels. The international level is based on article 6(1) of ICCPR, which provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' In interpreting the article, the Human Rights Committee has adopted the liberal rather than the restrictive approach.<sup>54</sup> The Committee decried the narrow interpretation of the right, observing

46 I Currie & J de Waal *The Bill of Rights handbook* (2013).

47 See *Soobramoney* (n 43).

48 In *S v Makwanyane* O'Regan J stated (para 326) that '[t]he right to life is more than existence, it is a right to be treated as a human being with dignity: Without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

49 2002 (5) SA 721 (CC).

50 2003 (3) SA 492 (W).

51 [2004] 1 All SA 579 (C).

52 The most common way of protecting life is by rendering the arbitrary deprivation of life a crime. The typical crime across jurisdictions is murder. See M Milanovic 'The murder of Jamal Khashoggi: Immunities, inviolability and the human right to life' (2020) 20 *Human Rights Law Review* 1. In Lesotho murder and culpable homicide are crimes in terms of secs 40 and 41 of Penal Code Act 6 of 2010.

53 Menghistu (n 29).

54 General Comment 36 (n 31).



that '[t]he expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.'<sup>55</sup> The Committee's approach is that it should include positive steps 'to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics'.<sup>56</sup>

The liberal approach seems to have percolated to the sub-regional level. Article 4 of the African Charter provides that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'. The African Commission on Human and Peoples' Rights (African Commission) has taken the liberal approach to article 4. In the case of *Forum of Conscience v Sierra Leone*<sup>57</sup> the Commission found that the failure to follow due process in the trial that culminated in the death sentence violated article 4 of the African Charter. The case concerned the 24 soldiers who were tried and sentenced to death by a court martial for their alleged roles in the *coup* that overthrew President Tijan Kabah. The Sierra Leonean court martial, which tried and convicted the above-mentioned soldiers, allowed no right of appeal against conviction or sentence to a higher tribunal. The Commission noted that the right to life was the 'fulcrum of all other rights'.<sup>58</sup> The Commission further noted that the right to life, as envisaged under article 4 of the African Charter, was 'the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life'.<sup>59</sup> The Commission took a similar approach in *Amnesty International & Others v Sudan*.<sup>60</sup> It found that death resulting from acts of torture or trials concluded in breach of article 7 due process guarantees also violated the African Charter's prohibition against the arbitrary deprivation of life.<sup>61</sup>

The jurisprudence of the Inter-American Court of Human Right is among the most illuminating on the interface between the right to

55 General Comment 36 para 5.

56 General Comment 36 para 5. General Comment 36 para 3 also provides: 'The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.'

57 (2000) AHRLR 293 (ACHPR 2000), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2000/22> (accessed 16 May 2022).

58 *Forum of Conscience* (n 57) para 19.

59 *Forum of Conscience* (n 57) para 19.

60 (2000) AHRLR 297 (ACHPR 1999), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/11> (accessed 17 May 2022).

61 *Amnesty International* (n 60) para 52. See also NJ Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105.

life and the right to health.<sup>62</sup> It is based on article 4 of the American Convention on Human Rights,<sup>63</sup> which states that '[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' In construing this section, the Court has unequivocally adopted the liberal approach to a wide array of socio-economic rights such as the right to healthcare services, the right to food and the right to water.

On the right to health, in particular, the flagbearer for the jurisprudence is the decision in *Yakye Axa Indigenous Community v Paraguay*.<sup>64</sup> In this case the Inter-American Commission on Human Rights had approached the Court to decide, *inter alia*, whether Paraguay had breached article 4 (the right to life).<sup>65</sup> The Commission alleged that the state had not ensured the ancestral property rights of the Yakye Axa indigenous community and its members because although the community's land claim had been processed since 1993, no satisfactory solution had been found. According to the Commission in its application, such delay made it impossible for the community and its members to fully own their land. Such land deprivation kept the community in a vulnerable situation in terms of food, medical care and public health care.<sup>66</sup> The state argued for a restrictive approach to the right to life and contended that it had not arbitrarily deprived the community members of any life.<sup>67</sup> The Court rejected the restrictive approach and instead adopted its long-established approach that '[e]ssentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated'.<sup>68</sup> The Court further reaffirmed that 'one of the obligations that the state must inescapably undertake as guarantor, to protect and ensure the right to life, is that

62 See JM Pasqualucci 'The right to a dignified life (*vida digna*): The integration of economic and social rights with civil and political rights in the Inter-American human rights system' (2008) 31 *Hastings International and Comparative Law Review* 1; FT Monica 'Justiciability of economic, social, and cultural rights in the Inter-American system of protection of human rights: Beyond traditional paradigms and notions' (2007) 29 *Human Rights Quarterly* 431.

63 Organisation of American States American Convention on Human Rights (22 November 1969) art 4.

64 IACTHR, 17 June 2005.

65 Organisation of American States American Convention on Human Rights (22 November 1969), <https://www.refworld.org/docid/3ae6b36510.html> (accessed 9 April 2021). Art 4(1) provides: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.'

66 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 2.

67 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 121.

68 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 161.

of generating minimum living conditions that are compatible with the dignity of the human person'.<sup>69</sup>

At the domestic level, the jurisprudence of the Supreme Court of India arguably is the trailblazer for this approach.<sup>70</sup> The Constitution of India subscribes to the separation of human rights into two categories – political rights and socio-economic rights.<sup>71</sup> Nevertheless, the Indian Supreme Court has been highly innovative in deriving the realisation of socio-economic rights from civic and political rights, in general,<sup>72</sup> and the right to life, in particular.<sup>73</sup>

On the interface between the right to life and the right to health care, the flagbearer of the Court's jurisprudence is its decision in *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal*.<sup>74</sup> In this case the applicant, who had fallen off a train and suffered severe head injuries and a brain haemorrhage, sued the state for its failure to provide adequate health care. The case was based on article 21 of the Indian Constitution, among others. Article 21 provides that '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law'. The Court took a liberal approach to the right to life and found that in addition to the state's obligation not to arbitrarily deprive people of life, the state also has an obligation to preserve life. The Court decreed that the '[f]ailure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21'.<sup>75</sup>

Hence, it is apparent that at almost all levels – international, regional and domestic – the approach to interpreting the right to life is moving discernibly towards the liberal approach.<sup>76</sup> The right to life no longer protects life only against arbitrary deprivation. It

69 *Yakye Axa Indigenous Community v Paraguay* (n 64) para 162.

70 JS Muralidhar 'The expectations and challenges of judicial enforcement of social rights' in JS Muralidhar *Social rights jurisprudence: Emerging trends in international and comparative law* (2014) 102.

71 Part III of the Constitution of India provides for what have been styled 'fundamental rights', which are mainly civic and political rights. Art 32(2) provides: 'The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.'

72 R Abeyratne 'Socio-economic rights in the Indian Constitution: Toward a broader conception of legitimacy' (2014) 39 *Brooklyn Journal of International Law* 1; *Olga Tellis v Bombay Municipal Corporation* AIR 1986 (SC) 88; *Tellis v Bombay Municipal Corporation* [1987] LRC 351 (Const); *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCR 594.

73 *Paschim Banga Khet Mazdoor Samity v State of Bengal I* (1996) AIR SC 2426.

74 As above.

75 *Paschim Banga Khet Mazdoor Samity v State of Bengal* (n 73) 5.

76 Ramcharan (n 25).

also protects against the deprivation of life through the denial of the conditions necessary to sustain life.

## 2.2 Right to health

Unlike the right to life, which is widely accepted and enforceable across jurisdictions, the right to health does not have a very firm grounding in the global human rights discourse.<sup>77</sup> This precarious position of the right to health in international and domestic rights instruments is a common feature of all social and economic rights.<sup>78</sup> The recognition of the right to health is a relatively recent phenomenon. It was first recognised only in 1946 as a 'right' in international law by the World Health Organisation (WHO) constitution.<sup>79</sup> The preamble provided that '[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions'. This formulation inspired the development of the right at the international level. In 1948, when the Universal Declaration of Human Rights (Universal Declaration) was adopted – the norms of which are now generally regarded as principles of international customary law<sup>80</sup> – the right to health was recognised under article 25, albeit bundled together with other rights such as the rights to food, clothing, housing and medical care.<sup>81</sup> In 1966, when the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted, the right was recognised for the first time in a binding international convention. Article 12(1) provides that the state parties to the Covenant 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Thereafter, the right was recognised in a broad range of international conventions.<sup>82</sup>

77 EA Friedman & OG Lawrence 'Pillars for progress on the right to health: Harnessing the potential of human rights through a Framework Convention on Global Health' (2012) 14 *Health and Human Rights* 4; CM Vargas-Peláez et al 'Right to health, essential medicines, and lawsuits for access to medicines – A scoping study' (2014) 121 *Social Science and Medicine* 48.

78 C Jung, R Hirschl & E Rosevear 'Economic and social rights in national constitutions' (2014) 62 *American Journal of Comparative Law* 1043.

79 The Constitution was presented at the International Health Conference in New York on 22 July 1946. See FP Grad 'The Preamble of the constitution of the World Health Organisation' (2002) 80 *Bulletin of the World Health Organisation* 981.

80 H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1996) 25 *Georgia Journal of International and Comparative Law* 287.

81 It provides: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and the right to security in the event of sickness, disability.'

82 See, eg, UN General Assembly Convention on the Rights of the Child 20 November 1989, United Nations Treaty Series, vol 1577 3, <https://www.refworld.org/docid/3ae6b38f0.html> (accessed 9 April 2021). Art 24(1) provides: 'States

The way in which the right is formulated in these international instruments confirms that the expression 'right to health' is shorthand for different formulations of the right in various instruments. Some scholars have observed that the shorthand formulation is misleading. For instance, Roemer observes that 'the phrase a *right to health* may be incomplete and conceptually misleading. We suggest that a more correct phraseology would be a right to health protection, including two components, a right to health care and a right to healthy conditions.'<sup>83</sup> For convenience, the shorthand formulation is often preferred, as it is in this article.<sup>84</sup>

The content and scope of this right are always dependent on how it is formulated in a particular instrument and how it has been interpreted under that specific instrument. Article 25 of the Universal Declaration recognises the right to a standard of living adequate for health. It seems that the approach of the Universal Declaration is that the right is composite – it includes 'food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.<sup>85</sup> Article 12(1) of ICESCR has improved slightly upon the formulation of the Universal Declaration, in that it recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The jurisprudence about this article demonstrates that the right is not limited to health care, but extends to broader conditions for a healthy life. While this right, like all other socio-economic rights, is progressively enforceable given the available

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Parties recognise the right of the child to the enjoyment of the highest attainable standard of health.' Organisation of African Unity African Charter on Human and Peoples' Rights 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), <https://www.refworld.org/docid/3ae6b3630.html> (accessed 9 April 2021). Art 16 provides: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.' UN General Assembly International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965, United Nations Treaty Series, vol 660 195, <https://www.refworld.org/docid/3ae6b3940.html> (accessed 9 April 2021). Art 5(e)(iv) provides that state parties undertake to prohibit and eliminate racial discrimination in the enjoyment of 'the right to public health, medical care, social security and social services'; UN General Assembly Convention on the Elimination of All Forms of Discrimination Against Women 18 December 1979, United Nations Treaty Series, vol 1249 13, <https://www.refworld.org/docid/3ae6b3970.html> (accessed 9 April 2021). Art II(l) (f) provides that state parties shall take all appropriate measures to eliminate discrimination against women in the enjoyment of 'the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction'.

83 L Hernan Fuenzalida-Puelma & S Scholle Connor (eds) *The right to health in the Americas* (1989) 600.

84 DM Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 541.

85 Art 25.

resources, it imposes minimum core obligations on states.<sup>86</sup> These are the minimum essential levels below which a state may not drop in discharging its obligations under the Convention.

Under the African Charter the right to health is defined as the 'right to enjoy the best attainable state of physical and mental health'.<sup>87</sup> States have obligations to take the necessary measures to protect their people's 'health and ensure that they receive medical attention when they are sick'.<sup>88</sup> The African Charter uses the formulation used in article 12 of ICESCR with a slight modification. While the African Charter uses the word 'best', ICESCR uses 'highest'. Perhaps the difference is insignificant. The essence of the formulation is that the right to health, like all socio-economic rights, is progressively realised. The obligations of states differ depending on the available resources, as long as the minimum core obligations are met.<sup>89</sup>

In keeping with the pattern at the international level, the emergent trend in Africa is that the right to health is a necessary component of the right to life. In 2015 the African Commission adopted General Comment 3 on the African Charter on Human and Peoples' Rights.<sup>90</sup> The Comment demonstrates that article 4 of the African Charter must

86 See para 43 of UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant) 11 August 2000, E/C.12/2000/4, <https://www.refworld.org/docid/4538838d0.html> (accessed 9 April 2021). The minimum core obligations are (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; (b) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (d) to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (e) to ensure equitable distribution of all health facilities, goods and services; (f) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalised groups. See also D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

87 Art 16(1) of the African Charter. See also *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

88 Art 16(2) African Charter.

89 E Durojaye 'The approaches of the African Commission to the right to health under the African Charter' (2013) 17 *Law, Democracy and Development* 393.

90 African Commission on Human and Peoples' Rights General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Art 4), adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights, 4-18 November 2015, Banjul, The Gambia, <https://www.achpr.org/legalinstruments/detail?id=10#:~:text=Without%20the%20right%20to%20life,to%20focus%20on%20this%20right> (accessed 17 May 2022).

be given a liberal interpretation. In particular, it provides that there is a symbiotic relationship between the right to life and the right to health. According to the General Comment, states' obligations under article 4 include the duty 'to address more chronic yet pervasive threats to life, for example, with respect to preventable maternal mortality, by establishing functioning health systems and eliminating discriminatory laws and practices that impact individuals' and groups' ability to seek healthcare'.<sup>91</sup> The treatment of the right to health as an integral part of the right to life was new to the jurisprudence of the African Commission. In its 2001 decision in *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*<sup>92</sup> the Commission was seized with a complaint, among others, alleging that the oil consortium has exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards.<sup>93</sup> The African Commission found:<sup>94</sup>

The pollution and environmental degradation to a level humanly unacceptable has made it living in the Ogoni land a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni community as a whole. They affected the life of the Ogoni society as a whole.

A similar approach – that the right to health is part of the right to life – is preferred at several domestic levels in Africa and beyond. The Constitutional Court of Uganda is one of the flagbearers of this approach. In a landmark decision in *Centre for Health, Human Rights and Development (CEHURD) v Attorney-General*<sup>95</sup> the Court had to deal with a petition challenging the Ugandan government's failure to provide basic maternal health services in violation of both the right to health and the right to life under the Ugandan Constitution. The Court found, among others, that 'the government's omission to adequately provide basic maternal health care services in public health facilities violates the right to life and is inconsistent with and in contravention of article 22 of the Constitution'.<sup>96</sup> A similar approach was adopted by the High Court of Kenya in *Patricia Asero Ochieng v*

91 African Commission (n 90) para 42.

92 (2001) AHRLR 60 (ACHPR 2001).

93 SERAC (n 92) para 2.

94 SERAC (n 92) para 67.

95 Petition 16 of 2011, <https://ulii.org/ug/judgment/constitutional-court-uganda/2020/12> (accessed 17 May 2022).

96 CEHURD (n 95) para 10(b).

*the Attorney General*.<sup>97</sup> There the Court held that the rights to health, life and human dignity are inextricably bound.

The jurisprudence of the Supreme Court of India remains the trailblazer for domestic courts on this approach. In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,<sup>98</sup> for instance, the Indian Supreme Court found that 'the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter'.<sup>99</sup> In a much more direct manner, in *Parmanand Katara v Union of India*<sup>100</sup> the same Court decreed:<sup>101</sup>

Article 21 of the Constitution casts the obligation on the state to preserve life. The provision as explained by this court in scores of decisions has emphasised and reiterated with gradually increasing emphasis that position. Therefore, a doctor at the government hospital positioned to meet this state obligation is duty-bound to extend medical assistance for preserving life.

In similar manner, in *Consumer Education and Research Centre v Union of India*<sup>102</sup> the Court gave more meaning to the interface between the right to health and the right to life, as follows: 'The right to health to a worker is an integral facet of [the] meaningful right to life to have not only a meaningful existence but also robust health and vigour without which [a] worker would lead [a] life of misery. Lack of health denudes his livelihood.'<sup>103</sup> India is not the only country where the dilemmas of enforcing the right to health, and other socio-economic rights, have been circumvented by liberalising the interpretation of the right to life. This emergent global pattern is also discernible in the jurisprudence of the Constitutional Court of Colombia.<sup>104</sup>

97 Petition 409 of 2009 eKLR. For commentary on the case, see E Durojaye & G Mirugi-Mukundi 'States' obligations in relation to access to medicines: Revisiting the Kenyan High Court decision in *PAO and Others v Attorney-General and Another*' (2013) 17 *Law, Democracy and Development* 24.

98 (1981) 2 SCR 516.

99 *Francis Coralie Mullin* (n 98) para 6.

100 *Parmanand Katara v Union of India* (1989) 4 SCC 286.

101 As above.

102 1995 AIR 922.

103 *Consumer Education and Research Centre* (n 102) para 26. The Court went further and held that 'the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make[s] the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker [and] is a minimum requirement to enable a person to live with human dignity.'

104 AE Yamin & O Parra-Vera 'Judicial protection of the right to health in Colombia: From social demands to individual claims to public debates' (2010) 33 *Hastings International and Comparative Law Review* 431.



### 3 Constitutional framework in Lesotho and the judicial approach: Is the approach changing?

The Constitution of Lesotho follows a model of negative constitutionalism.<sup>105</sup> Therefore, Chapter II is dedicated to negative rights – otherwise styled as civil and political rights. This is the characteristic feature of liberal constitutions.<sup>106</sup> The right to life is located in Chapter II of the Constitution. Section 5(1) provides that '[e]very human being has an inherent right to life. No one shall be arbitrarily deprived of his life.' The framing of the section already suggests that the drafters had in mind the restrictive conception of the right. The right is couched in a manner that protects life against the arbitrary deprivation of life, and no more. Its draftsmanship is not as open-ended as the similar section in the Constitution of South Africa, which frames the right in a general and all-encompassing manner, as '[e]veryone has the right to life'.<sup>107</sup>

In fact, the right to health in Chapter III is envisaged as an unenforceable 'principle of state policy'. Section 27 of the Lesotho Constitution provides that 'Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens'.<sup>108</sup> The formulation of the right to health under Lesotho's Constitution has adopted the approach of both the Universal Declaration and ICESCR. It recognises the right in a composite manner. It imposes duties on the state to provide for the reduction in the rate of stillbirth and infant mortality and the healthy development of the child;<sup>109</sup> to improve environmental and industrial hygiene;<sup>110</sup> to provide for the prevention, treatment and control of epidemic, endemic, occupational and other diseases;<sup>111</sup> to create conditions which would provide everyone with medical services and medical attention in the event of sickness;<sup>112</sup> and to improve public health.<sup>113</sup> Therefore, it can be safely deduced that the jurisprudence on the right to life, developed under the ICESCR,<sup>114</sup> applies to Lesotho's interpretation of the right. The essence of this

105 See S Barber 'Fallacies of negative constitutionalism' (2006) 75 *Fordham Law Review* 651.

106 JM Farinacci-Fernós 'Post-liberal constitutionalism' (2018) 54 *Tulsa Law Review* 1.

107 Sec 11 of the Constitution of South Africa, 1996.

108 Sec 27 of the Constitution of the Constitution of Lesotho, 1993.

109 Sec 27(1)(a) Constitution of Lesotho.

110 Sec 27(1)(b) Constitution of Lesotho.

111 Sec 27(1)(c) Constitution of Lesotho.

112 Sec 27(1)(d) Constitution of Lesotho.

113 Sec 27(1)(e) Constitution of Lesotho.

114 ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12) adopted at the Twenty-Second Session of the Committee on Economic, Social and Cultural Rights, 11 August 2000 (contained in Document E/C.12/2000/4).

jurisprudence is that the right not only protects health, but also recognises the conditions necessary to sustain health.

There is a paucity of scholarly commentary and judicial precedent in Lesotho on the right to life, in general, and its interface with the right to health, in particular. The most critical case in which the superior courts – both the High Court and the Court of Appeal – had to deal with the scope of this right in Lesotho was *Khathang Tema Baitsokele v Maseru City Council*.<sup>115</sup> The issue did not concern the arbitrary termination of life. Rather, it concerned the question of whether the right, as it is couched under Lesotho's Constitution, can be interpreted to include the right to livelihood. The applicant organisation, in this case, represented the street vendors who were plying their trade along Maseru City's main street, Kingsway. The market along the street is more lucrative. However, the Maseru City Council refused to grant them permits to trade along Kingsway Street and the Council, therefore, removed the vendors from the street. The vendors approached the Court seeking to challenge the decision of the Council to deny them permits.

The mainstay of their case was that their removal from their trading areas along Kingsway Street in Maseru was a violation of their right to life as envisaged under section 5 of the Constitution. Therefore, the Court was confronted with the dilemma of choosing between the restrictive and liberal approaches to the right. The Indian jurisprudence, which favours the liberal approach, was presented to both the High Court and the Court of Appeal to persuade the courts to adopt the liberal approach to the right.<sup>116</sup> Both courts declined to do so. The High Court was very forthright about its interpretation of the right, finding:<sup>117</sup>

A fair reading of section 5 of our Lesotho Constitution gives one an irresistible impression that it is the 'right to life' of the human being and its biological existence as a living organism that is being protected by the Constitution rather than its wellbeing, happiness or welfare. The court comes to this somewhat restrictive interpretation because under section 5, what may be abridged under subsections 2(a), (b), (c) and (d) is not the livelihood but the deprivation of human life itself eg through act of war, lawful execution (ie hanging) or self-defence.

115 *Khathang Tema Baitsokele & Another v Maseru City Council* (CONST/C/1/2004) LSHC 25; *Khathang Tema Baitsokele & Another v Maseru City Council* (n 20).

116 The Indian cases that were presented for the Court's consideration were *Olga Tellis v Bombay Municipal Corporation* AIR 1986 (SC); *Tellis v Bombay Municipal Corporation* [1987] LRC 351 (Const).

117 *Khathang Tema Baitsokele* (n 20) para 15.

The Court adopted this approach despite having praised the Indian jurisprudence, which is liberal. The Court confirmed that ‘the Indian approach to the right to life is indeed very progressive and deserves all laudation’.<sup>118</sup> The Court of Appeal vindicated the restrictive approach adopted by the High Court.<sup>119</sup> The Court of Appeal took the approach of widening the gulf between Chapter II and Chapter III of the Constitution. The Court stated that

the right to life in section 5 of Lesotho’s Constitution does not encompass a right to a livelihood. That is the subject of specific and separate provision in section 29. The latter derives its status from its inclusion as a principle of state policy.<sup>120</sup>

The Court of Appeal’s disjunctive and restrictive approach made it very difficult for these two generations of rights – political and socio-economic – ever to be treated as interdependent and mutually reinforcing in Lesotho.<sup>121</sup>

The innovative approach to the interface between the right to health and the right to life emanated from *Lesotho Medical Association v Minister of Health*.<sup>122</sup> The case was heard in the early days of the COVID-19 global pandemic in Lesotho. It is imperative to note that Lesotho started introducing measures to combat COVID-19 before the official registration of the first case.<sup>123</sup> The first case was recorded in May 2020,<sup>124</sup> yet the strict measures were pre-emptively instituted in March 2020.<sup>125</sup> On 19 March 2020 the Government Secretary published a memorandum styled ‘National Emergency Response to the Coronavirus (COVID-19)’.<sup>126</sup> This memorandum communicated

118 *Khathang Tema Baitsokoli* (n 20) para 30.

119 As above.

120 *Khathang Tema Baitsokoli* (n 20) para 28.

121 In *Lesotho Chamber of Commerce and Industry & Others v Commissioner of Police & Others* (CIV/APN/405/2011) [2011] LSHC 127 para 30 the High Court demonstrated this attitude when it stated: ‘In reality, labour and other socio-economic issues affect the livelihood of many people directly and sometimes touch on very survival of these people. Such delicate issues must always be addressed by the stakeholders in a dispassionate manner, realistically and without prejudice or favour. Whereas the socio-economic rights which are provided for under the Constitution of Lesotho are “not enforceable” in the courts of law, these issues should be addressed “out of court” through bargaining, agreements, negotiation, mediation, reconciliation or arbitration and other lawful measures’ (emphasis in original).

122 *Lesotho Medical Association v Minister of Health* (n 21).

123 N Ngatane ‘Lesotho declares national emergency over COVID-19 outbreak’ *Eyewitness News*, <https://ewn.co.za/2020/03/19/lesotho-declares-national-emergency-over-covid-19-outbreak> (accessed 12 August 2021).

124 Lesotho recorded the first imported COVID-19 case on 13 May 2020. National Emergency Command Centre ‘Health experts confirm Lesotho’s first COVID-19 case’, <https://www.gov.ls/health-experts-confirm-lesothos-first-covid-19-case/> (accessed 27 July 2021).

125 Shale (n 23).

126 Government Secretary ‘National emergency response to the coronavirus (COVID-19) 19 March 2020’, <https://lesotholii.org/ls/Cabinet%20decision.pdf>

the decisions of the Cabinet on measures intended to contain the spread of the virus. These were far-reaching measures such as, but not limited to, limitations on meetings, the closure of schools, the closure of borders and the limitation of working hours. In communicating these measures, the Government Secretary did not refer to any provision of law permitting such drastic human rights derogations. The government departments responded immediately to these Cabinet decisions.

The brief facts of this case are that the applicant association, which represents the healthcare workers, applied to the Court to, among others, declare that the government's failure to provide their members with protective equipment against COVID-19 was a violation of their right to life. The Court's approach was that section 5 of the Constitution, which embodies the right to life, imposes both positive and negative state obligations. The state not only has a duty to respect the right to life (negative), but it also has a duty to fulfil, promote and protect the right to life.<sup>127</sup>

The Court extensively toured the comparative jurisprudence of the European Human Rights Court,<sup>128</sup> and gleaned five principles that may apply to interpreting the right to life in Lesotho.<sup>129</sup> The first principle is that the state must discharge its positive obligation to the right to life by putting in place the legal framework for protecting life. A failure by the state to discharge this obligation is a violation of the right. The second principle is that if the state is aware of the threat to the right, it cannot plead lack of resources as justification for not discharging its obligation. The third principle is that the state has a responsibility to take preventive operational measures to protect life. The fourth principle is that the state should preserve life in any context – whether in public or private contexts. The fifth principle, which is derived from the UK Supreme Court's decision in *Smith v Minister of Defence*,<sup>130</sup> is that the failure to provide equipment to groups such as soldiers, police and doctors who work in risky environments is a violation of the right. The Court observed that '[a]lthough the medical doctors' routine job is inherently risky and carries with it the potential for loss of life from infection with deadly diseases, however, constitutionally they cannot be left to

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(accessed 27 July 2021).

127 Government Secretary (n 126) para 32. For this it relied on the decision of the Commission on Human and Peoples' Rights in *SERAC* (n 92).

128 *Osman v United Kingdom* (23452/94) [1998] ECHR 101 28 October 1998; *Oneryildiz v Turkey* (48939/99) [2004] ECHR; *Stoyanovi v Bulgaria* (42980/04) [2010] ECHR 9 February 2011.

129 *Lesotho Medical Association* (n 21) para 39.

130 *Smith & Others v The Ministry of Defence* [2013] 3 WLR 69.

their own devices by the state'.<sup>131</sup> It is intriguing to note that the Court considered the precedent already set by the Court of Appeal in *Khathang Tema Baitsokoli* in which the Court of Appeal categorically refused to liberalise the interpretation of the right to life.<sup>132</sup> The High Court in *Lesotho Medical Association* sought to distinguish the two cases, perhaps to cleverly avoid any direct contradiction with the apex court.<sup>133</sup> However, it is clear that the High Court wanted to chart a new approach to the enforceability of socio-economic rights in Lesotho. To that end, the Court observed:<sup>134</sup>

While I agree that the DPSP [Directive Principles of State Policy] are not justiciable, this should [not] be taken to mean that they are worthless. The DPSPs are not merely decorative of the paper on which they have been crafted, they are relevant as a constitutional guide to the state in formulating policies and, with regard to the courts, as a constitutional interpretative guide in interpreting legislation.

This somewhat progressive view of the Court was influenced by Viljoen's view that, at the very least, Directive Principles of State Policy should work as aides to the interpretation of the Constitution.<sup>135</sup> In particular, Viljoen criticises the approach of the Court of Appeal in *Khathang Tema Baitsokoli*.<sup>136</sup> Indeed, the approach of the Court of Appeal to the right to life and its interface with socio-economic rights, in general, and the right to health, in particular, may not stand the test of time as in many respects it is out of step with contemporary developments in the area.<sup>137</sup>

Ultimately, the Court in *Lesotho Medical Association* held in favour of the applicants, finding that the state's failure to provide protective medical gear constituted a violation of the right to life.<sup>138</sup> It consequently ordered the government to comply with its constitutional obligation in terms of section 5 of the Constitution, within a reasonable time, by providing medical doctors and other

131 *Lesotho Medical Association* (n 21) para 41.

132 KE Mosito 'The enforcement, adjudication and monitoring of social security rights in Lesotho' (2013) 20 *Lesotho Law Journal* 65.

133 Since Lesotho is a common law country, judicial practice is based on the doctrine of judicial precedent. See JW Salmond 'Theory of judicial precedents' (1900) 16 *Law Quarterly Review* 376. Sec 123(1) of the Constitution provides: 'There shall be for Lesotho a Court of Appeal which shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law.' For the application of the doctrine of judicial precedent in Lesotho, see *Lepule v Lepule* (C of A (CIV) 34/2014) [2015] LSCA 29 (22 September 2015).

134 *Lesotho Medical Association* (n 21) para 9.

135 F Viljoen *International human rights law in Africa* (2012).

136 Viljoen (n 135) 552-553.

137 Ramcharan (n 25); J Tobin *The right to health in international law* (2012).

138 *Lesotho Medical Association* (n 21). At para 44 the Court found that '[i]n the result the following order is made: (a) The failure by the 1st, 2nd and 3rd respondents to provide the doctors with personal protective equipment is declared unconstitutional for violating s 5 of the Constitution.'

health professionals with personal protective equipment.<sup>139</sup> The Court's finding and order are very innovative given the restrictive approach taken in *Khathang Tema Baitso'koli*.<sup>140</sup>

## 4 Conclusion

The jurisprudence of the superior courts in Lesotho, as demonstrated in *Khathang Tema Baitso'koli*,<sup>141</sup> is tenaciously in favour of the restrictive approach to the right to life. If this approach were to hold, the glimmer of hope for a liberal approach started by the High Court, exercising its constitutional jurisdiction in *Lesotho Medical Association*,<sup>142</sup> would be extinguished. In any event, the Court of Appeal's decision would still prevail in light of the doctrine of judicial precedent. However, as demonstrated in the foregoing survey of the foreign and international developments on the scope and content of the right to life, the approach of the Court of Appeal to the right to life is not in keeping with the international trends. It is now almost settled that the right to life not only protects the physical existence of a human being, but also covers the conditions necessary to sustain life.<sup>143</sup> The Indian Supreme Court's jurisprudence is the most persuasive guide for Lesotho's constitutional jurisprudence as the constitutions of both countries maintain bifurcated human rights frameworks that render socio-economic rights unenforceable.

The High Court's approach in *Lesotho Medical Association* is laudable. It may be recommended in future situations where the court is confronted with the interface between the right to life and socio-economic rights, in general, and the right to health, in particular. To that end, the jurisprudence of the Constitutional Court of Colombia may provide some guidance. Its essence is that the right to life is intertwined with the right to health.<sup>144</sup> However, care should be taken to ensure that the liberalisation of the right to life does not blur the boundaries between the right to life and the right to health, because the two rights remain distinct.<sup>145</sup> The part of the right to health that is more intricately related to the right to life has been styled the 'core obligation'.<sup>146</sup> The obligation to ensure the equitable

139 *Lesotho Medical Association* (n 21) para 44.

140 *Khathang Tema Baitso'koli* (n 20).

141 As above.

142 *Lesotho Medical Association* (n 21).

143 Yamin & Parra-Vera (n 104).

144 As above; KG Young & J Lemaitre 'The comparative fortunes of the right to health: Two tales of justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179.

145 Viljoen (n 135) 552-553.

146 SR Keener & J Vasquez 'A life worth living: Enforcement of the right to health through the right to life in the Inter-American Court of Human Rights' (2008) 40

distribution of all health facilities, goods and services, as the High Court ruled in *Lesotho Medical Association*, is part of the state's core obligation.<sup>147</sup>

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147 *Columbia Human Rights Law Review* 595.  
*Lesotho Medical Association* (n 21).