

HUMAN RIGHTS WRITING COMPETITION

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Introduction

The constitutions of Commonwealth Caribbean states were the end product of centuries of struggle for recognition of personhood and the basic provisions of life¹. Emancipation created free men and women but the lack of any say in political decision-making meant the absence of minimum standards of work, provision for education, and other social goods. Popular unrest in response to these conditions led to universal adult suffrage and semi-responsible government then to self-government and independence. As the paramount symbol of independence these constitutions secured a bundle of rights to which all citizens were entitled. Despite the origins of the struggle being conditions of severe want the rights provisions only secured civil and political rights (eg. due process of law and freedom of expression) with no acknowledgment of economic and social rights (ESR) (eg. right to health care, and education). The drafters of the texts were undoubtedly of the view that such needs were to be secured through the political branches².

Such a position is not unreasonable. In a speech entitled *The Judicial Enforcement of Socio-Economic Rights*, Albie Sachs, a former judge of the Constitutional Court of South Africa, discussed the history of the inclusion of ESR in that country's constitution³. He highlights that those opposed to the inclusion of such rights argued, among other things, that separation of powers required the judiciary to stay away from issues having "major implications for governmental spending". Others base this argument on lack of institutional capacity, saying that such rights are "unmanageable through the judicial process"⁴. Sachs himself expressed some agreement on the institutional point indicating that members of the judiciary "do not have the know-how and the capacity to handle" questions on "houses, hospitals, schools and electricity". But he goes on to suggest a more limited role for the judiciary where ESR are placed in constitutions. That role relies on knowledge of

¹ Nettleford places the starting point at emancipation. See Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (The Caribbean Publishing Law Company 2002), pg 2-3

² eg. Norman Manley described his generation's role as securing independence and that of his successors as "reconstructing the social and economic society and life of Jamaica". See Manley & *The New Jamaica: Selected speeches & writings 1938-1968* (Longman Caribbean 1971), 380-381

³ 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' (Inaugural Human Rights Lecture, 23 June 2005) <<http://www.lawsociety.ie/Documents/committees/hr/lectures/23.6.2005.pdf>>

⁴ Aryeh Neier, "Social and Economic Rights: A Critique" in Henry J. Steiner, Phillip Alston, Ryan Goodman (eds), *International Human Rights in Context* (3rd edn, OUP 2008)

human dignity to ensure a qualitative dimension is added to the decisions of efficiency for which the political branches are responsible.

This limited role was first carved out in *Government of the Republic of South Africa v Grootboom*⁵. The following uses that decision as the guidepost for interpreting those ESR which eventually made it into constitutions in the region. Before doing so those rights which can be found expressly or impliedly in the constitutions are outlined.

Expressly stated Economic and Social Rights

The only constitutions containing at least one ESR are those of Belize, Guyana, and Jamaica. The sole such right in Belize is the right to work⁶. This right has been interpreted as protecting the opportunity to work⁷ rather than providing a right to work. This interpretation is correct because “within countries that adhere to labour policies based on market conditions, the State will have great, if not insurmountable, difficulty in guaranteeing a right to work”⁸. As a country primarily reliant on market based principles this reasoning would apply in Belize.

Jamaica’s Charter of Fundamental Rights and Freedoms includes the right of Jamaican children to education up to the primary level⁹. There is also the right of all children to “such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State”¹⁰. The precise scope of this provision is not clear. One may therefore conjecture that as children do not ordinarily possess the means of providing for their material needs this provision could be relied on to require the state to provide those needs in order to protect them from want. In fact, this section bears similarity to Article 24 of the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of the American Convention on Human Rights. In respect of the former, the Human Rights Committee has acknowledged that the rights contemplated by those words “may also be economic,

⁵ [2000] ZACC 19

⁶ Belize Constitution s15

⁷ *Fort Street Tourism Village v AG* (2008) 74 WIR 133 at 172. In *Wade v Roches* (CA Belize, 9 March 2005) a teacher who was fired after becoming pregnant was discriminated against on the basis of sex and denied the opportunity to work.

⁸ Stephen Vasciannie, “International Law and Selected Human Rights in Jamaica” (Council of Legal Education 2002) 21

⁹ Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, s13(3)(k)(ii)

¹⁰ *ibid.*, s13(3)(k)(i)

social and cultural”¹¹. The Inter-American Court of Human Rights has made a similar finding¹². A Jamaican court would therefore be entitled to give a generous interpretation of the right thereby securing ESR for children.

The constitution of Guyana stands apart from any other in the region. The fundamental rights are found in Title 1 of Part 2 of the constitution. ESRs here include the right to free choice of employment¹³, the right to any pension or gratuity to which a public sector worker is entitled¹⁴, free primary and secondary education to publicly owned or funded schools¹⁵. Guyana ostensibly goes further by providing an entitlement to the rights enshrined in specified international treaties including the Covenant on Economic, Social and Cultural Rights and the Covenant on the Rights of the Child. Curiously the constitution immediately says that those rights do not include any of the fundamental rights under the Constitution¹⁶ and also limits the responsibility of the state in honoring those provisions by (i) requiring that regard be given to “the socio-cultural level of development of the society”, (ii) allowing the state to divest itself of provisions under those treaties by a two-thirds vote in parliament, and (iii) providing redress not through the courts but to a Human Rights Commission established under the constitution although the ability of that body to grant redress is doubtful¹⁷. These provisions have led one academic to describe Article 154 as “a masterpiece of legal obfuscation” which is “unlikely to enhance the domestic enforcement of human rights”¹⁸.

Implied Economic and Social Rights

Even where no express ESRs are listed the question remains whether such rights can be secured in other ways. Assistance in this regard can be found in India where the Indian Supreme Court, in the landmark decision of *Olga Tellis v Bombay*

¹¹UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, available at:

<http://www.refworld.org/docid/45139b464.html> [accessed 19 February 2015] at [3]

¹² Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, [1996]

¹³ Constitution of Guyana art.149A

¹⁴ *ibid.*, art.149B

¹⁵ *ibid.*, art.149H

¹⁶ *ibid.*, art. 154A(2)

¹⁷ Article 212O(2) allows the Commission to apply to the courts for redress suggesting the Commission has no such powers.

¹⁸ Arif Bulkan, *Democracy in Disguise: Assessing the Reforms to the Fundamental Rights Provisions in Guyana* (2004) 32 Ga. J. Int’L & Comp. L. 613, 625 and 629

*Municipal Corporation*¹⁹, interpreted the right to life to include the right to a livelihood.

The court came to this view by reading the Article 21 right to life in the context of Articles 39(a) and 41. Article 39(a) directs the state to adopt policy towards securing adequate means of livelihood while Article 41 requires the state to make provisions for securing the right to work in cases of unemployment and undeserved want. It should be noted that Articles 39(a) and 41 are 'directive principles of state policy' in the Indian constitution and as such are to be considered by the state in making laws but are otherwise not enforceable by any court²⁰. These directive principles were used to interpret the substantive right to life. The court reasoned "[i]f there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21"²¹. The right to life therefore included the right to livelihood but since the right was qualified, it could be taken away in accordance with fair procedure established by law.

Such an approach would face some difficulty in being applied in the region. In the first place, with the possible exception of Guyana, no country has an equivalent to directive principles. There is therefore nothing in the text themselves to influence the meaning of the right to life. Guyana is somewhat different. It has a Chapter on "principles and Bases of the political, economic and social system' which mirrors India's directive principles in its listing, among other things, the right to housing and medical care. The chapter ends by enjoining the parliament, government, and the court (the three branches that comprise the state) to consider the principles therein in the discharge of their functions but leaves the decision to have those rights enforceable in the hands of Parliament²². The similarities to India's directive principles are clear. On the surface it therefore appears that Guyanese courts could follow their Indian counterparts.

Guyanese courts would however face the second stumbling block faced by other countries in the region. As Demerieux observes, the formulation of the right to

¹⁹ 1986 AIR 180 << <http://judis.nic.in/supremecourt/imgs1.aspx?filename=9246>>>

²⁰ Indian Constitution 1950, art. 37

²¹ *Olg Tellis*, 80-81

²² Guyana Constitution art. 39

life in the region “confer[s] an entitlement not to be killed”²³ but neither “imposes or could impose on the state some duty to afford persons within its boundaries the means of survival”²⁴. Thus in Jamaica there is “the right to life...and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted”²⁵. The specific qualification of “the sentence of a court” instead of “procedure established by law” as obtains in the Indian constitution suggests the scope of the former is more limited than the latter. On the other hand a purposive interpretation could view the right to life as a standalone right encompassing the right to a livelihood. The qualifier would therefore only apply where the right in its ‘not to be killed’ sense is being restricted. This view might well be more in the way of “divination and not interpretation”²⁶ in so far as it would mean there exists an unqualified right to livelihood.

Trinidad has the equivalent qualifier to the right to life as India. The language used is “the right of the individual to life...and the right not to be deprived thereof except by due process of law”²⁷. Trinidad does not however have directive principles but like other rights in this text it is for the courts to work out the practical details of these rights as they are listed “briefly and without elaboration”²⁸. To this end resort may be had to Trinidad’s international obligations and the principle that courts will interpret legislation so far as possible to ensure compliance with those obligations²⁹. This principle normally applies where legislation is passed subsequent to a state entering into a treaty which is not incorporated into domestic law but it can be extended to interpreting the constitution although it came into existence before the state entered into those treaty obligations³⁰. It would therefore follow that since T&T is party to agreements such as the International Covenant on Economic, Social and Cultural Rights and Convention on the Rights of the Child, the obligations imposed on states therein could stand in the place of India’s directive principles giving the right to life in T&T more fulsome meaning than obtains elsewhere in the region.

Enforcing Economic and Social Rights

²³ Margaret Demerieux, *Fundamental Rights in the Commonwealth Caribbean Constitutions* (1992), p. 122

²⁴ *Ibid.*, p. 123

²⁵ Charter of Fundamental Rights, s13(3)(a)

²⁶ Byron CJ (as he then was) in *R v Hughes* (2001) 60 WIR 156, 161

²⁷ Constitution of Trinidad & Tobago s4(a)

²⁸ *Panday v Gordon* (2005) 67 WIR 290 at [22]

²⁹ *Boyce v R* [2004] UKPC 32 [25]

³⁰ *Ibid.*, [26]

It now remains to be considered how these rights should be given effect by courts in the region. The *Grootboom* case is useful in this regard. The central issue in that case was the right to housing as guaranteed under sections 26 and 28(1)(c) of the constitution. The former grants the right to “have access to adequate housing” and places an obligation on the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right” while the latter gives the right to shelter for every child. The parties lived in appalling conditions and took the decision to move onto other people’s land to escape those conditions, only to be evicted by the owners of the land. They then occupied state owned land, living in “intolerable” conditions, while waiting in queue for state sponsored low-cost housing.

In the lead judgment of Yacoob J the court found that the right to housing was justiciable. In so finding he dismissed the argument that simply because ESR inevitably involve budgetary considerations does not mean they cannot be enforced because such concerns apply to the enforcement of social and political rights as well³¹. The proper question for determination was **how** to enforce those rights. The court then proceeded to distill the meaning of the questioned sections. Section 26 placed both negative and positive obligations on the state. The positive obligation is to provide housing. This can be done through legislation and other measures that create “conditions for access to adequate housing for people at all economic levels” of society³². The judgment gave much flexibility to the state in determining the contours of reasonable legislative and other measures to secure the right³³.

In applying those principles the court found the state wanting because “no provision was made for relief to the categories of people in desperate need”³⁴ such as the claimants in the case. Regarding the entitlement of children to shelter, the court ruled that this was primarily the obligation of parents. The state’s obligation would only arise where parental or family care is absent³⁵.

The court therefore sought to give effect to ESR by ruling them justiciable, outlining in broad ways the content of any programme that could be found to be compliant with the right, but leaving the details to policy makers. This approach is to be commended for it recognizes the reality that these types of decisions are at their essence policy choices of the type the executive and legislature are more equipped

³¹ *Grootboom* [20]

³² *ibid.*, [35]

³³ *ibid.*, [39]-[43]

³⁴ *ibid.*, [69]

³⁵ *ibid.*; [76]

to determine. Sachs put it in the following way: “[i]t was in this way that we sought to balance out the need to protect the fundamental dignity of human beings on the one hand, with recognition of the fact that it was the role of the state, in respect of which its institutional capacity was superior to that of the Court, to determine the priorities, texture and detail of the manner in which it should fulfil its responsibilities”³⁶. In giving effect to ESRs in Commonwealth Caribbean constitutions courts in the region would be wise to follow suit. The supremacy of the constitution would be upheld and the minimum dignities denied our people in their centuries struggle for personhood abolished.

³⁶ Albie Sachs, ‘The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case’ (Inaugural Human Rights Lecture, 23 June 2005) <<http://www.lawsociety.ie/Documents/committees/hr/lectures/23.6.2005.pdf>>