

HUMAN RIGHTS WRITING COMPETITION 2015

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Topic: "We (judiciary) are institutionally completely unsuited to take decisions on houses, hospitals schools and electricity. We just do not have the know-how and the capacity to handle those questions. But we do know about human dignity, we do know about oppression and we do know about the things that reduce a human being to a status below that which a democratic society would regard as tolerable. An implication of placing social and economic rights in a constitution is to say that decisions, which however well-intended might have the consequence of producing intolerable hardship, cannot be left solely in the hands of the overburden and administrators and legislators. Efficiency is one of the great principles of government. The utilitarian principle of producing the greatest goods for the greater number might be well starting -off point for the use of public resources, But the qualitative element based on respect for dignity each of us, should never be left out" Justice Albie Sachs

Does this have any relevance in the Caribbean today?

The Justiciability of Social and Economic Rights

A. Introduction

In assessing Justice Albie Sachs¹ statement one can consider the justiciability of social and economic rights from a conceptual framework. In doing so, one has to review some of the major concerns that are constantly raised in relation to whether social and economic rights should be adjudicated by the judicial system. There has been a growing body of jurisprudence that has adjudicated on the enforceability of social and economic rights and this has provided a deeper understanding of the issue and its relevance in the Caribbean today.

B. Background

The recognition of the right to education, health, housing and other minimum decencies acquired strong support after the Second World War. These rights were encapsulated in what is called the International Convention on Economic, Social and Cultural Rights (ICESCR) 1966. The implementation of these rights in constitutions has created problems with enforcement especially in small developing countries in the Caribbean.

C. The Controversy: Social and Economic Rights

The justiciability of social and economic rights is a debatable arena. One of the most notable features of the South African Bill of Rights is the insertion of the socio-economic rights in the constitution to tackle the issues of poverty and inequality at the time of implementation.² However, the judicial enforcement of socio-economic rights is often times seen as complex and unattainable. It is argued that socio-economic rights are dependent on the availability of resources and are therefore progressively realizable. Also, it is feared that the inclusion of these rights would open the flood gates for litigation over enforceability. This has been experienced by Guyana and Belize in relation to the right to work as recognized by those states.³

In countries like India, socio-economic rights are incorporated in the constitution as simple directives of state policy expressing non-justiciable rights. However, Caribbean countries such as Cuba, St. Lucia, St. Kitts and Nevis and Antigua and Barbuda have avoided the inclusion of socio-economic rights within their constitution while others despite the progressive rhetoric; have been willing to pass laws which recognize these socio-economic rights.⁴ In 2011, Jamaica for example, amended its constitution to introduce a new Charter of Fundamental Rights and Freedoms. In this amendment it recognizes the right of every child who is a citizen of Jamaica to publicly funded education at the pre-primary and primary levels among other rights which include the right to enjoy a healthy and productive environment. Similar provisions are found in Chapter 1 Part 4 of the Trinidad and Tobago constitution.⁵

D. South Africa's Evolving Jurisprudence

The Constitutional Court of South Africa has evolving jurisprudence on socio-economic rights that can be reviewed through three leading cases. These include **Soobramoney⁶, Grootboom⁷ and Minister of Health v TAC⁸**.

1 Justice of the Constitutional Court of South Africa

2 Section 25- 29 South Africa Bill of Rights

3 Adair K. 2013, Proposed Bahamian Constitutional Reform: No Room for Socio-Economic Rights

4 Mukulu, M. 2011. Rights and Responsibilities under the Charter by Gleaner, Jamaica

5 Section 13 (3) K & L of the Charter of Fundamental Rights and Freedom Act 2011

6 Soobramoney v Minister of Health 1998 1 SA 765 (CC)

7 Government of the Republic of South Africa and others v Grootboom and others 2001 1 SA 46 (CC)

8 Minister of Health and others v Treatment Action Campaign and others 2002 5 SA 721 (CC)

Soobramoney was the first major case to consider the enforceability of socio-economic rights. In the case Mr. Soobramoney was suffering from chronic renal failure. He sought an order from the courts directing a state hospital to provide him with ongoing dialysis treatment. He had received a session of life saving dialysis previously, but was told by the hospital that he did not qualify for further treatment because the limited resources meant only thirty percent of the persons suffering from the chronic renal failure could be treated. Consequently, he applied to the court stating that his constitutional rights were being denied. This was a very interesting case since it was up to faith of the court to determine whether this man would live in light of the fact that there was no judicial precedent to follow. *Chaskalson J* commenced the judgment with an oft-quoted passage recognizing the circumstances of poverty and economic inequality that existed in Africa. It was decided that his claim to a right to receive emergency medical treatment had to be rejected because the court was of the view that a claim for emergency medical treatment did not apply to chronic medical conditions. The court took this position based on the notion that if all chronic illnesses were to be regarded as emergency cases then this would result in a situation where no money would be available to fund the health sector due to large demands. It was also noted that the constitution should not be read in a way which would produce distorted allocation of resources and it was apparent based on the judgment that the political and administrative organs of the state would be afforded wide latitude in realizing socio-economic rights, particularly in relation to setting social and budgetary priorities.

Likewise, Mrs. Grootboom Case addressed a similar issue. The case concerned a group of adult and children who had moved onto a private land due to the deplorable conditions in which they lived previously. They were evicted from the private land that they occupied and following the eviction they camped in another area but could not erect adequate shelters as most of their building materials were destroyed during the eviction. These individuals found themselves in a precarious position where they had neither security of tenure nor adequate shelter. They applied to the high court for an order against the government to provide temporary shelter. The courts noted that it would be difficult to determine in abstract the minimum threshold required for the realization of rights as opportunities for fulfilling these rights varied considerably. The court determined the standard of reasonableness in assessing the state's obligation to realize socio-economic rights and it was on this basis that they decided that the government's housing programme was substandard. The case made it abundantly clear that the acceptance of minimum core obligations does not require the court to define in abstract the precise basket of goods and services that must be provided. Instead it could define the general principles underlying the concept of minimum core obligations as it relates to socio-economic rights and apply these contextually on a case by case scenario.

Lastly, the case of *Minister of Health v TAC*⁹ concerned the application by the Treatment Action Campaign and others to compel the state to devise and implement an effective national programme to prevent mother to child transmission (MTC) of HIV. In granting the orders sought by the applicant the court relied on the principles enunciated in the Grootboom case as aforementioned. An important feature of this case was the court's rejection to the state's argument that the availability of resources would determine whether there would be a further national MTCT prevention programme. According to *Botha J* the obligation to formulate a coherent plan to roll out such a national programme existed independently of the availability of resources.

E. The Significance of the Cases

These three cases illustrate perfectly the problems with enforcing socio-economic rights in a society where resources are always limited. In this context socio-economic rights will invariably involve rationing and such rationing should be done strictly for its proper exercise. Socio-economic rights differ from civil and political rights as it regards to the mode of enjoyment. The progressive realization of socio-economic rights within available resources indicates that a system of apportionment is essential.

9 Ibid

The existence of various rights must have different implications and as such the right to a treatment of a particular kind cannot be equated with other civil and political rights. The existence of socio-economic rights in any given constitution will create a problem for the courts in determining the scope of these rights. Notably, the Grootboom judgment represents a landmark in the development of the jurisprudence on socio-economic rights as the court elaborated in detail on the approach to be taken to interpret these rights. The TAC Case however, indicates how the Grootboom jurisprudence can be used strategically to support a border campaign to advance access to socio-economic rights.¹⁰

F. The Relevance of Enforcing Socio-Economic Rights in the Caribbean Today

It is often believed that socio-economic rights entails resource-intensive obligations that requires the state to provide the maximum levels of social goods to assist those citizens in need. This creates a standard that most Caribbean countries like Haiti, Jamaica, Dominican Republic and Cuba simply cannot meet. This is so because these Caribbean countries are operating at the developing level economically. Therefore problems such as scarcity, poverty and lack of finances create barriers in provision for what is deem 'necessary' to address socio-economic needs. The better view on the matter points to the fact that maybe Caribbean legislatures will have to wait until the state can fully finance and provide for socio-economic needs to its maximum capacity. Consequently, there is research to show that a failure to recognize socio-economic rights to its full extent has contributed to other problems in the Caribbean. For example, in Jamaica, due to the failure to recognize socio-economic rights extensively, crime has become a worrisome factor over the years. The crime problem which is evident based on the high murder rates has resulted in Jamaica being labelled as one of the most dangerous places in the world.¹¹

Additionally, several socio-economic rights require significant expenditure by the state before they can be fully realized. Professor Stephen Vasciannie¹² noted that if we should posit that there is a right to education, then we are simultaneously arguing that the state has a duty to make such payments to ensure that an efficient system of education is implemented. He further states that this does not deny the existence of the right to education, but raises questions: which refers to whether the right is applicable to secondary and tertiary levels, and whether society would be ready to make tax payments to the full extent required for "free education" to tertiary level. These questions in essence highlight the fact that socio-economic rights tend to be dependent on economical constraints.

In the Caribbean there is an imperfect system as it relates to the separate of powers doctrine. It is well accepted that the judiciary should not be involved in decisions that has major implications for government expenditure as inevitably the courts would find their authority diminished on what are political and economical issues as appose to legal issues. This position seems fair as institutionally it would be inappropriate for judges to take positions on highly controversial questions which relate to socio-economic needs and the risk of being subjected to the influences of the state. However, the current reality facing major Caribbean countries such as Trinidad and Tobago, Barbados and Jamaica is that the judiciary system is often times influenced or inextricably linked to the executive arm of the government which affects how the judges can perform their duties in enforcing socio-economic rights.

On July 8, 2013, the Constitutional Commission of Bahamas announced its willingness to make reference of socio-economic rights in the constitution on the condition that they are explicitly made legally unenforceable and recognized as only imposing only a moral and political obligation on the state to use its resource for the welfare of citizens. Adair in her article noted that this approach was insufficient. Particularly where resource insufficiency is a reality, she noted that constitutional rights

10 Liebenberg Sandra, South Africa's Evolving Jurisprudence on socio- economic rights: An effective tool in challenging poverty? University of Western Cape

11 Jamaicans for Justice. 2013, Pay Attention to Human Rights

12 Vasciannie Stephen Prof. 2002, The Nature of Human Rights

adjudication can serve a crucial role in elucidating priorities, assessing the reasonableness of government action through judicial accountability and ultimately securing the socio-economic rights of citizens as the South African experience demonstrated.¹³ In observance of this statement a lurking view emerges which points to the fact that there is a constitutional connection between the maintenance of judicial independence and protection of human dignity as explored in the Grootboom case. In this manner it would be incumbent on the court to ensure that the basic respect for human dignity is maintained.

Essentially, the social background of the judges in the Caribbean and the nature of their legal thinking which tends to look at questions in abstract and formulaic ways can pose questions as to whether they can pronounce on issues of housing, land and other social realities. If judges in the Caribbean Court of Justice find it difficult to subject a state to comply with orders made under the original jurisdiction due to the lack of enforcement mechanism under the Treaty of Chaguaramus imagine the level of difficulty judges would encounter to enforce socio-economic rights that are varied in scope and limited by lack of resources. This notion seeks to fall squarely within Justice Sachs view that Judges do not have the know-how and the capacity to handle these issues.

The constitution of Caribbean countries that have incorporated socio-economic rights seems to require more from the judiciary than an insistence that the state is responsible for the provision of socio-economic programmes. Critics say that the constitution requires the court to come to the assistance of any individual who falls below the minimum core of entitlement consistent with human dignity. One would ask whether Caribbean countries should give a judge in each court the right to decide who would have priority to access social goods. In a region where the population is relatively small in comparison to others it is frequently argued that budgetary allowances can be made to facilitate the provision of social goods.¹⁴ But can this be readily achieved? And more specifically, are there sufficient financial resources to allocate these goods?

Undeniably, the existence of socio-economic rights in the constitution will always pose a task on the courts to determine the scope of the right to access social and economic needs and the extent to which the state is obligated to fulfill these needs. One can say that it is constitutionally inappropriate for judges to determine social policies but if the constitution itself gives the constitutional court the task of enforcing constitutional rights then this would not constitute as interference with the government given that the rights are conferred under the constitution, even if enforcing these rights intrude on questions of policy. If this is to the contrary, then it seems then, that socio-economic rights are as vasciannie describes it “only statements of intention, laudable goals of policy that often times cannot be constituted as rights.”

G. Developments: The way forward

In the Caribbean enforcing socio-economic rights are slowly evolving. According to Mukulu, in Jamaica for example citizens have the right to bring proceedings against a public body if his or her right has been infringed.¹⁵ Proceedings can be commenced in the Supreme Court without seeking leave. What is most revolutionary in the context of Jamaica is the fact that public or civic organizations can initiate proceedings in the Supreme Court on behalf of a person whose right has been infringed. This creates a statutory invitation to campaigning groups such as Jamaican for Justice or Jamaica Environment Trust to initiate a claim on behalf of someone who may lack the resources. This is a remarkable development in a sense, as these activist groups equipped with the requisite resources, may force the judiciary to perform the role of giving life to the rights provided for in the constitution and

13 Adair K. 2013, Proposed Bahamian Constitutional Reform: No Room for Socio-Economic Rights, Oxford Human Rights Hub blog.

14 Sachs Albie, The Justiciability of Socio-Economic Rights

15 Section 19 of the Jamaica Constitution

to conduct the required balancing exercise between the state and the individual in order to enforce socio-economic goals.¹⁶

H. Conclusion

In analyzing the evolving jurisprudences it is clear that the enforcement of socio-economic rights are slowly becoming justiciable in its full extent. The principle of reasonableness provides the basis for challenging the state for not giving effect to the positive duties imposed by socio-economic rights. This is practiced in the Caribbean as social programmes can be challenged for being unreasonably implemented by a person aggrieved or by activist groups in countries like Jamaica. However there is still room on the reform agenda to make socio-economic rights more enforceable throughout the Caribbean (as seen with civil and political rights) notwithstanding the barriers as it relates to limited resources, the fear of numerous litigious claims and state influences on the judiciary system. Thus, the enforcement of socio-economic rights in the Caribbean is relevant to the development of the jurisprudence and to citizens who fall below the minimum core of entitlement consistent with human dignity.

16 Mukulu, M. 2011. Rights and Responsibilities under the Charter, Para 7 & 8