

Human Rights Writing Competition 2015

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Topic:

“We are institutionally completely unsuited to take decisions on houses, hospitals, schools and electricity. We just do not have the knowhow and the capacity to handle those questions. But we do know about human dignity, we do know about oppression and we do know about 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 overburdened administrators and legislators. Efficiency is one of the great principles of government. The utilitarian principle of producing the greatest good for the greatest number might well be the starting-off point for the use of public resources. But the qualitative element, based on respect for the dignity of each one of us, should never be left out.”

-Justice Albie Sachs

Does this have any relevance in the Caribbean today?

The judiciary is often referred to as the 'Guardians of the Constitution'. Indeed, it is institutionally predisposed to preside against the oppression and degradation of human beings, as it stands between those who would seek to separate the citizen from his rights. The rights entrenched in any Constitution sets a boundary for what is considered acceptable conduct in relation to the rights holder and provides the judiciary with a context in which to enforce them. However, Albie Sachs, in his paper, '*The Judicial Enforcement of Socio-Economic Rights*'¹ postulates that the function of the judiciary is limited in relation to taking decisions which relate to housing, schools, electricity and hospitals. He intimates that the judiciary is 'completely unsuited' to enforce socio-economic rights against the State as not only does the enforcement of these rights interfere with the separation of powers doctrine, but that they also seek to interfere with the State's allocation of resources, which were already limited to begin with. Considering the fact that Justice Sachs writes from a perspective which captures the realities of his African society, the writer disagrees with his assertions, and is behooved to juxtapose his findings against her Commonwealth Caribbean realities to show that the judiciary is not completely unsuited to enforce socio-economic rights in the Caribbean.

The rights afforded in Commonwealth Caribbean Constitutions may generally be categorized into three generations of human rights: political and civil (first generation rights), social and economic (second generation rights) and the right to self-determination and development (third generation rights). First generation rights are those political and civil rights which are expressly stated in our Constitutions and enshrined as being fundamental in nature. The African Constitution progressively includes provisions which afford its citizens the right to adequate housing, healthcare and education.² Regrettably, those socio-economic rights are not expressly spelt out in all Caribbean Constitutions. For this reason, certainty becomes an issue

¹Albie Sachs, '*The Judicial Enforcement of Socio-Economic Rights*'

<https://www.lawsociety.ie/Documents/committees/hr/lectures/23.6.2005.pdf>, accessed on February 20, 2015

² **Constitution of the Republic of South Africa 1996**, s26, s27, s29

when the distinct boundaries of socio-economic rights are not clearly defined to the rights holder. Against this background, treaties like the **International Covenant on Economic, Social and Cultural Rights** (the ICESCR) in which most Caribbean countries are signatories, goes further than Commonwealth Caribbean Constitutions do by specifically outlining the right to various social and economic rights like education, housing and healthcare. Nevertheless, the treaty itself clearly indicates that these rights are in effect statements of intentions which each State agrees to gradually work towards in realization of these rights, through the implementation of legislation to that effect.³ In short, the treaty does not ensure these socio-economic rights to member States but outlines the recommended standard to which countries are expected to strive. This certainly shows the difficulty which the judiciary must face in trying to enforce socio-economic rights in the Caribbean.

The trend in some Caribbean Constitutions is to outline the right to education which should generally be publicly funded at various levels.⁴ The debate surrounding the enforceability of this right may be subject to considerations of State funding, budgets and availability of spaces in public schools. The duty created by the right is what led Mr. Sachs to conclude that “*social and economic rights by their very nature involved rationing*”.⁵ The writer does agree that if this line of thinking is to be adopted, then the enforcement of socio-economic rights would prove more difficult to administer because of the pressures it would create on the State’s budget. In keeping with this discussion Ambassador Stephen Vasciannie in an article entitled, ‘*The Nature Of Human Rights*’, states that, “if we 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

³ **International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27: Article 2**

⁴ **The Constitution of Guyana** s27 and **The Constitution of Jamaica** 13 (3) (k) (ii)

⁵ Albie Sachs, ‘*The Judicial Enforcement of Socio-Economic Rights*’
<https://www.lawsociety.ie/Documents/committees/hr/lectures/23.6.2005.pdf>, accessed on February 20, 2015

efficient system of education is in place..."⁶ Mr. Vasciannie continued along this breath by pointing out that enforcement of these rights raises questions of commitment, particularly in relation to how far would the duty of the State extend. He continues by asking, "is this right to be applicable to secondary and tertiary levels? Is the society ready to make tax payments to the full extent required for "free education" to tertiary level, and so on?"⁷ Although validly made points by Mr. Vasciannie, the writer doesn't believe that this approach is the correct starting point in this debate. It is in my opinion that a better view would be to realize that what the judiciary is expected to enforce is not necessary the right to work or the right to an education, but the right to the opportunity. In the ***Fort Street Tourism***⁸ case where cement concrete walls were built on the boardwalk, impeding tourists from accessing the tourist village, a claim was brought for breach of the constitutional right to gain a living by work⁹. The courts held that, "while it was often referred to as the right to work, what in fact was guaranteed was not the right to work but the opportunity to work...It was the opportunity that must not be denied to the citizen."¹⁰

In the case of ***Mohammed v Moraine***¹¹, a Muslim pupil was accepted to a school after successfully passing her common entrance examination but was later denied admission solely because she needed to wear a hijab as part of her religious observance. An action was brought for breach of her constitutional right, particularly the right for her parents to choose a place of education irrespective of their religious belief.¹² The school contended that she should go to another school if she could not comply with their dress code, as section 27(d) of the Education Act gave the principal power to enforce discipline within the school and they interpreted this as extending to the upholding of a uniformed dress code. The question therefore was whether the

⁶ Stephen Vasciannie, 'The nature of Human Rights' <http://jamaica-gleaner.com/gleaner/20020106/focus/focus3.html> accessed February 17, 2015

⁷ ibid

⁸ ***Fort Street Tourism Village v Attorney General of Belize and others, Fort Street Tourism Village v Maritime Estates Ltd and others*** - (2008) 74 WIR 133

⁹ S15 (1) of the ***Constitution of Belize***

¹⁰ Per Conteh CJ, ***Fort Street Tourism Village v Attorney General of Belize and others, Fort Street Tourism Village v Maritime Estates Ltd and others*** - (2008) 74 WIR 133

¹¹ ***Sumayyah Mohammed v Moraine and Another*** - (1995) 49 WIR 371

¹² ***The Constitution of the Republic of Trinidad and Tobago 1976***, S4 (f)

court could coerce this public school, whose functions were already guided by the Education Act, to allow the child admission to the school. Though the courts did not find that her constitutional rights were breached, they made a determination that the child should be allowed to attend the school wearing the modified version of the uniform which would accommodate the hijab. They concluded that the wearing of the hijab would not incite indiscipline in other students, nor erode the sense of loyalty or tradition of the school. It is in the opinion of the writer that their decision was not particularly concerned with her right to education but instead was more concerned in preserving the opportunity of an education at the school of her choice. The courts did not force the school to arbitrarily accept a child who advanced a right to education. What the courts did was to compel the school to accept a child who had attained the requisite academic qualifications and enforce the opportunity which the school had initially afforded her.

Additionally, it is difficult to agree that the judiciary is completely unsuited to take decisions on socio-economic issues because they 'do not have the know-how or capacity to handle those questions'. The judiciary boasts many learned members, who themselves have garnered an appreciation for, and in some cases are specialists in, diverse areas of social, economic, political administrative and corporate areas of learning. The richness of their outlook is what contributes to the desired unbiased, critical and balanced perspective from the bench and shows their capacity to adjudicate on more technical issues which do not necessarily relate to the oppression of man. It is true that there may be others who are more suited than the judiciary, whether institutionally or based on proficiency, experience or tenure, but to assert that the judiciary is completely unsuited to deal with socio-economic rights cannot be categorized as a fair and true statement. In the words of Lord Nicholls of Birkenhead, *"It is for the courts to decide, in a principled and rational way, how the fundamental rights and freedoms listed in the Constitution are to be applied in the multitude of different sets of circumstances which arise in practice. It is for the courts to decide what is the extent of the protection afforded by these*

constitutional guarantees."¹³ Therefore the judiciary as an institution is more than equipped with the 'know-how' of handling a plethora of issues even those relating to schools, hospitals electricity and housing.

Mr. Sachs, while a judge in the Constitutional Court of South Africa, had to wrestle with the decision of the Grootboom case.¹⁴ In that case, South Africans who had been living in terrible housing conditions had applied to the municipality for subdivision approval but had been placed on a waiting list. Faced with the impending rainy season, they sought refuge on a hill which was set aside for low cost housing. They were forcibly removed after being declared unlawful occupants, their make-shift homes destroyed and their belongings either damaged or burnt. The issue was whether the socio-economic rights in the Constitution were enforceable against the State so as to compel them to provide adequate temporary housing for these dispossessed Africans. They mulled over the specificities of this case noting that though low cost housing plans were developed to assist vast numbers of poor people in an attempt to comply with constitutional obligations, it nevertheless did an injustice to children in particular, who were among those occupants who were forcibly removed. This clearly violated section 28 of the Constitution which outlined that every child had a basic right to shelter.

Likewise, the issue of squatting is not a new phenomenon in the Caribbean, as judges are often faced with tackling concerns of squatter housing settlements. In the Jamaican case of ***Allen et al v. Minister of Water and Housing***¹⁵ squatters occupied Crown land and built structures, some assessed to be at the quality of middle-class homes. The difference between this case and the Grootboom case is that in this case the government provided an area for relocation and gave the 'squatters' \$30,000.00 to assist in their moving. The Court was able to state that by Section 89 of the Judicature (Resident Magistrate) Act the State had the right to

¹³ ***Panday v. Gordon*** (P.C.A. No. 35 of 2004 at para. 22)

¹⁴ ***Government of the Republic of South Africa and others v Grootboom and others*** (2000) 10 BHRC 84

¹⁵ ***ALLEN ET AL v. MINISTER OF WATER AND HOUSING ET AL*** JM 2004 SC 25

the self-help remedy of expulsion, using no more force than was necessary to remove persons from Crown land, after giving them the proper notice. This conduct is in line with the precepts of the report entitled the '*Courts and Legal enforcement of Economic, Social Cultural Rights: Comparative Experiences of Justiciability, Comparative experiences of justiciability*'¹⁶ which states that "the State also has an immediate negative duty to refrain from forcefully evicting persons from their housing without legal justification."¹⁷ The legal justification in this case was that the 'squatters' did not have a legal or equitable right to the land, neither was the right to adequate housing afforded in the Jamaican Constitution. Nevertheless, the qualitative element in this decision was preserved as the court realized the fact that the State had taken steps to acknowledge the human dignity of the squatters when they covered the expenses of relocation. Thus, the judiciary has been able to take decisions on housing because the reality in the Caribbean is substantially different from those seriously dire and extreme circumstances Mr. Sachs faced. The fact pattern of the Grootboom case is one which has never, in my estimation, been equaled in the Caribbean. Therefore, because Mr. Sachs' circumstances are completely different from the realities faced in Commonwealth Caribbean jurisdictions, the relevance of his statement is extraneous.

When the writer says that the judiciary is suited to take decisions on socio-economic rights, be clear, I am not saying that it is the place of the judiciary to step into the role of Parliament and in effect dabble in policy making. What I unequivocally contend is that the role of the Judiciary is an authoritative one and it is their duty to ensure that the policies which are passed by Parliament are fundamentally sound in law. In the case of ***Trinidad And Tobago Civil Rights Association and Basdeo v. Attorney General of Trinidad and Tobago***¹⁸ the

¹⁶ Christian Courtis, '*Courts and Legal enforcement of Economic, Social Cultural Rights: Comparative Experiences of Justiciability, Comparative experiences of justiciability*' (International Commission of Jurists: Geneva 2008) http://www.humanrights.ch/upload/pdf/080819_justiziabilitt_esc.pdf

¹⁷ Ibid

¹⁸ ***Trinidad And Tobago Civil Rights Association and Basdeo v. Attorney General of Trinidad and Tobago*** TT 2005 HC 98

Judicial Review Amendment Bill was introduced by Parliament, the aim of which was to repeal section 4 and 5 of the Constitution by limiting the categories of persons who could file for judicial review. This Bill would also limit the court's ability to deal with public interest litigation. In considering whether the court could intervene on matters of executive policy, the court was guided by principles elucidated in the 5th Edition of the text the *Judicial Review of Administrative Action*.¹⁹ The writers opine that "courts are not institutionally suited to engage in the task of weighing utilitarian calculations of social, economic or political preference. These tasks are best suited to institutions in the political arena." I understand that the utilitarian principle of presenting 'the greatest good for the greatest number' is probably the popular starting point in the use of public resources. It may very well be the better view, but we must never underestimate the important role of the judiciary as the supervisory guardian of these rights. This role is not so much competitive as it is co-operative. Thus, it is the role of the court "to adjudicate both upon the scope of a power and the manner of its exercise."²⁰ What we must understand is that the judicial institution doesn't exist to correct the actions of Parliament or breathe their opinion on what they think Parliament should have legislated. The authors of the text solidify this argument by stating that, "...despite the important limitation on their capacity, Courts are able, and indeed obliged, to require the observance of those principles that govern lawful public decision-making. In so doing they seek to reinforce representative government, not to oppose it - and to promote, not to undermine, the inherent features of a democracy."²¹

Furthermore, it is important to note the separation of powers doctrine: that each branch of government plays a particular role and no other branch is permitted to step into the shoes of the other or assume the role and responsibilities of the other. It is solely and clearly that branch's duty to fulfil their individualistic function. However, this doctrine does not preclude the

¹⁹ Stanley Alexander De Smith, Harry Woolf & Jeffrey Jowell., 'The Judicial Review of Administrative Action' (5th edition, Sweet & Maxwell) 1995 p. 18 1-032

²⁰ *ibid*

²¹ *ibid*

judiciary from questioning the legality of a policy or law passed by Parliament which affects the socio-economic rights of citizens. The justiciability of socio-economic rights is seen when the judiciary questions the legality of the policy or law, protects the opportunity to exercise the right and ensures that the scope of the State's power and the manner in which it is exercised falls in line with established principles of human dignity. This is how the courts perform their supervisory role and takes decisions on socio-economic issues.

It is on this premise that the writer concludes that the judiciary is not completely unsuited to take decisions on schools, hospitals, houses and electricity, since testing the legality of policies and laws passed by Parliament does not breach the doctrine of separation of powers, but rather complies with the distinct supervisory role that the judiciary is entitled to uphold. Although Parliament may be better suited to take those utilitarian decisions on social and economic issues, it is the judiciary that is suited, in its specific capacity, to guide them in ensuring that the qualitative element of policy making is upheld.