
HUMAN RIGHTS ESSAY

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"We (the 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 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?

In considering whether the aforementioned is relevant in the Caribbean today, further insight can be gained from another statement also made by Justice Sachs. He stated, *"The very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being. It is not the duty of courts to side with one section of society against another, however powerful or weak they might be and however sympathetic to their claims individual judges might feel. But there is every reason why it should be incumbent on the courts to see to it that basic respect for the dignity of every person is maintained at all times. That is why we have fundamental rights. The Bill of Rights is there not simply to protect the vested interests of those that have, but to secure basic dignity for those that have not."*¹

These words, uttered by Justice Sachs, have great relevance in the Caribbean today. Caribbean countries are now more cognizant of the role of the judiciary ensuring there is a qualitative aspect to human rights by way of social and economic policies and laws. In Jamaica, like the Bill of Rights mentioned by Justice Sachs above, the Charter of Fundamental Rights and Freedoms as an amendment to Chapter III of the Constitution, enures to the benefit of the citizen whereby the Judiciary can reference this most powerful document, basic rights of humans to determine when a citizen's rights are compromised or breached.

The Caribbean region has now taken a no-nonsense approach to how it deals with matters of human rights. To support this point, I make reference to the creation of the Caribbean Court of Justice (CCJ) in 2005. Indeed, one of the propelling factors for the creation of the CCJ was to replace the Privy Council in the United Kingdom as the final appellate court for Commonwealth Caribbean countries, but a deeper consideration of the implementation of the CCJ finds a more meaningful reason behind its creation. For example, the CCJ has the power to decide on constitutional matters brought for appeal, arising from cases heard in the Constitutional Courts for the different Caribbean territories. But how is this different from being able to appeal to the Privy Council? The difference may be slight, but carries so much weight. The CCJ, unlike the Privy Council will undoubtedly have a greater understanding, appreciation and awareness for any constitutional matter brought before its court from one of the Caribbean territories it serves. The impact of this, is that any individual who has his constitutional case adjudged by the CCJ, has without even making his first submission, been afforded the greatest acknowledgement and respect for his rights through his ability to present it in a *qualitative* manner, before a fair and informed panel of judges. Further, the

¹ Sachs, A. The Judicial Enforcement of Socio-Economic Rights, The Grootboom Case. June 23, 2005 page 9

CCJ has the power to adjudge on constitutional matters which give rise to issues of human rights breaches in its original jurisdiction.

Every Caribbean territory, which is a member of the Caribbean Community (CARICOM) and a signatory to the Revised Treaty of Chaguramas, has afforded its citizens, as “a person of the contracting party,” realization of their innate rights as human beings, because they may make use of the CCJ as our regional court. A “person of the contracting party” is the language used in the CCJ’s judgement and speaks to the right of a citizen of a member state to bring a cause of action to its courts. Of course, this is only one way in which the qualitative element of social and human rights is ensured, but the legislators even when they err to the detriment of human dignity in their national policymaking, have remedied such by providing a qualitative avenue for restoration, or at least a declaration by a higher authority, that they are culpable.

“But the qualitative element, based on respect for the dignity of each one of us, should never be left out.” – Justice Sachs

When Justice Sachs uttered these words, he most likely, would have been unaware as to how far-reaching its effect would be, not only on the country of South Africa, but the Caribbean region. While we as citizens of a particular Caribbean country are more likely to be directed to cases of breach of human rights which arise in our own country, the case of **Shanique Myrie v. Barbados**² was an eye-opening matter drawing attention from the entire region.

The case brought to light, a true example of how “decisions which, however well intended, might have the consequences of producing intolerable hardships...” (Justice Sachs). The ‘decision’ here, is that of the Government of Barbados, through its seemingly strict local Immigration Act enacted for the greater good of its country (no doubt, by way of limiting the number of drug-traffickers, illegal immigrants and other unwanted persons trying to enter through uncontrolled borders, placing stress on the country’s financial and social resources), compromised in a most significant way the respect and dignity for a citizen of Jamaica, and more importantly, a citizen of a member state to the Revised Treaty of Chaguramas who was afforded free movement within the Caribbean region. Shanique Myrie brought a case against the State of Barbados in the original jurisdiction of the CCJ, claiming she was denied her right to free movement within the Caribbean Community, and that the treatment to which she was subjected by border officials in Barbados amounts to a serious violation of this right.³ Ms. Myrie further claimed that she was discriminated on the basis of her Jamaican nationality.⁴ The case arose following her denial of entry into Barbados and an intrusive cavity search by officials who sought to recover drugs from her person, though such did not exist.

The CCJ, in a most welcomed ruling, confirmed what Justice Sachs stated in his short dictum. That is, they considered whether Ms. Myrie’s dignity and status as a human being had been compromised, and following such consideration, declared that the State of

² CCJ Application No. OA 002 of 2012

³ Shanique Myrie v. The State of Barbados, p. 3

⁴ Shanique Myrie v. The State of Barbados, p. 3

Barbados breached Ms. Myrie's rights pursuant to Article 45 of the Revised Treaty of Chaguramas and ordered the State of Barbados to pay pecuniary damages.

It is noteworthy, that implied in the judgement of the court is that were it not for the limitations on its jurisdiction and the remedies which can be sought from the Court, an award for the breach of fundamental and human rights issue would have been likely. This brings hopeful prospects to the relevance that indeed the Caribbean region is honouring the qualitative aspect of human rights even so far as they are limited in their ability to compensate for a breach of these rights. The CCJ's decision in this case undoubtedly, is a reflection of the relevance that Justice Sachs statement has on the Caribbean region.

It is proposed that realistically, it will be virtually impossible for the judiciary to remedy every case and situation which gives rise to the *oppression*; the *reduction in one's status as a human*; and the *diminishing in value of human dignity* that will inevitably arise from the imposition of legislations and directives from the state. Albeit, that such legislations and directives are done with good intention, and as Justice Sachs states, with "*the utilitarian principle of producing the greatest good for the greatest number...*" (Justice Sachs) However, the recognition alone by the Judiciary, of the need to find reconciliation between intolerable hardships imposed by administrators and legislators, and the respect for the dignity of humans is indicative of the fact that there exists the true enactment of Justice Sachs' words. However, the Judiciary is in a position to rectify those hardships and resulting oppression of the individual who seeks redress by way of bringing a case before the Court. That individual has provided the opportunity for the Court to make use of its powers to interpret the decisions of the Legislature in such a way that it rectifies the oppression, or prevents it from occurring. That is to say, the Court can, on an individual basis address those issues which call into question the reduction in human dignity.

Justice Sachs makes clear in his statement that it is not the role, nor is it within the power of the Judiciary to make social or economic decisions. This of course, is a power vested in the Legislative arm of the Executive. However, Justice Sachs proposes that where, arising out of those decisions made by the Legislature, which is arrived at by using whichever method they deem fit, e.g. the utilitarian principle, intolerable hardship results, the Judiciary has the responsibility of remedying such hardship. This, because the Legislature oftentimes is unable to, not by choice, provide for the needs of every single individual in their quest to in fact, provide for every individual. For to do so, it would mean that there could never be any decisions made because the requests and needs of one person would likely conflict with those of another person. The needs of every person cannot be met.

The relevance of Justice Sachs' statement is undoubtedly relevant in the Caribbean today if merely by way of the Constitutions in force in the Caribbean territories as well as the Charter of Fundamental Rights and Freedoms or the Bill of Rights which give further protection to our status as humans. The recognition that the Judiciary protects human rights further marks this relevance today. Institutions such as national Constitutional Courts and the CCJ are evidence that the once 'accepted reality of intolerable hardships' jeopardizing human rights, can now be challenged in an informed and impartial forum. Justice Sachs no doubt, has paved the way for even further development of the Judiciary's role in protecting citizens' rights in the Caribbean.