Remarks by Justice Winston Anderson at the CANARI Workshop

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice

Climate Litigation and Access Rights: Strengthening environmental justice in the Caribbean Workshop

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Caribbean Natural Resources Institute (CANARI) is a non-profit technical institute with more than thirty years' experience of research, policy influence and capacity building for participatory natural resource governance in the Caribbean. In 2009, CANARI became the first Caribbean organisation to receive the MacArthur Award for Creative and Effective Institutions. CANARI was established under its present name in 1989 but evolved out of a 1976 initiative of the Rockefeller Brothers Fund and the University of Michigan's School of Natural Resources that became known as the Eastern Caribbean Natural Area Management Programme. Since 2001, CANARI's main office has been in Trinidad and Tobago, and we are also legally registered as a non-profit organisation in Saint Lucia and the United States Virgin Islands. CANARI has recently completed a two-year period of learning and reflection on its role and priorities to inform our new 10-year strategic plan.

CLIMATE LITIGATION, ACCESS RIGHTS AND ENVIRONMENTAL JUSTICE

CANARI WORKSHOP

DOWNTOWN KINGSTON, JAMAICA

25 June 2024

PRESENTATION BY

HON MR JUSTICE WINSTON ANDERSON

Introduction

Thank you, colleagues. I interpret the topic assigned to me as inviting a discussion on the impact of climate change litigation and environmental access rights upon the development of environmental justice in our region.

Environmental Justice

The US Environmental Protection Agency defines environmental justice[1] as referring to the *"equitable distribution* of environmental risks and benefits" and, equally, the "*processes* that bring about" inequitable distribution of risks and benefits, among them the lack of fair and *meaningful participation* in environmental decision-making.

If we were to adopt this paradigm, we could say that there are two aspects to environmental justice. (1) Substantive aspects: fair and equitable exposure to environmental risks and benefits. Fair treatment means no group of people should bear a disproportionate share of the negative environmental consequences. Justice requires equal treatment. (2) Procedural aspects: meaningful involvement in environmental decision-making, access to public participation and information about the environment, and access to justice to litigate environmental issues. Justice requires equal participation.

Substantive environmental justice

UNDP released a Technical Paper in June 2022 entitled "Environmental Justice: Securing our Right to a Clean, healthy and Sustainable Environment." That paper identified the 3 planetary crises of climate change, biodiversity and ecosystem loss, and pollution as existential threats facing humankind. This trifecta of environmental

[1] "Environmental Justice". U.S. EPA. November 3, 2014. Retrieved 9 August 2020.

challenges intersects with and interrupts the full enjoyment of human rights, whether we are speaking of social, economic, cultural, civil and political rights.

Amongst the trifecta, climate litigation has recently assumed increased importance in responding to these challenges to human rights. At the international level, the 2021 agreement between Antigua and Barbuda and Tuvalu for the establishment of a Commission of Small Island States on Climate Change led to the historic *Advisory Opinion of 21 May 2024 from the International Tribunal for the Law of the Sea (ITLOS).* That Advisory Opinion recognized the responsibility of states to combat GHG emissions that pollute the oceans by taking the necessary measures dictated by objectively defined criteria.

This seminal case is part of a wider mosaic that appears to be developing. A 2023 global review of climate cases[2] reports that as of December 2022, there were 2,180 climate-related cases filed in 65 jurisdictions. Add to these, the important advisory opinions on climate justice from the Inter–American Court of Human Rights and the International Court of Justice expected in 2024, and 2025, respectively, and we truly have a growing body of climate justice jurisprudence.

Procedural environmental justice

On the procedural environmental justice side, the leading international legal instrument (at least in our part of the world) is undoubtedly the Escazú Agreement adopted on 4 March 2018. As we are aware, the three critical access rights in the Escazú Agreement (elaborating on Principle 10 of the Rio Declaration 1992) are:

1. Access to information on the environment (Articles 5 and 6)
2. Access to public participation (Article 7).
3. Access to justice (Article 8).

The judicial branch has seen a significant uptake in the number of environmental cases presenting for adjudication. Having followed this area of the law for over 30 years, I can say without question that there has been a noticeable shift in judicial attitudes towards how environmental cases are handled in the courts. The first Caribbean attempts in 1993, 1996, and 1998 to seek judicial review of environmental decision-making were all wrecked on the rock that the applicants lacked "locus standi" or, to normal people, standing. This was even though there were genuine environmental issues at stake.

[2] Global Climate Litigation Report (2023 Status Review). UNEP/Columbia Law School/Columbia Climate School. Page XIV.

Those bad old days are long gone. Standing (as well as other procedural rights – such as the right to information and to participate) are now routinely recognized and enforced in Caribbean jurisdictions. However, I do think that much remains to be done in terms of sensitising our profession (lawyers and judges) to the law in this area. There is also a need for organisations like CANARI to redouble their efforts to attract the consideration of our policymakers of environmental justice rights.

Education/Sensitisation of the profession

So, to go back to the Global Review of those 2,180 climate-related cases I mentioned earlier. As far as I could tell, the only Caribbean country featured was Guyana. Consequent to the recent oil and gas activities in Guyana, 3 cases were reported. In one of those case, *Henry v. Environmental Protection Agency* (2022), three citizens questioned the decision of the EPA of Guyana to grant a modified environmental permit allowing Esso/ExxonMobil to flare gas without considering GHG emissions. I was not able to find any cases from any other Caribbean jurisdictions.

To take another example closer to home. The CCJ heard its first environmental case recently (from Guyana), and judgment is expected in two days, on Thursday, 27th June 2024. Yet I do not recall any mention of the Escazu Agreement in the written and oral arguments. Of course, it is entirely a matter for counsel as to how to develop the case and as to which arguments are deployed. But in an instance where an environmentalist is coming forward to argue for the State ought to interpret environmental legislation in a way that favoured environmental protection over risks posed by petroleum exploitation, it seems that mention of Escazu should have been a given.

Judicial Knowledge and Judicial Notice

It is possible for judges to take judicial notice of notorious facts and judges are presumed to know the law. So that even if the lawyers do not reference a relevant convention, it may be possible for the Judge to do so himself/herself. Of course, the critical issue then becomes whether the Judge is aware, in this case, of the Escazu Agreement. This would seem to implicate the need for continuing judicial sensitisation efforts – something that CANARI might wish to bear in mind. But even if the Judge is aware, further questions arise:

1. Has the State concerned signed the treaty?
2. Has it ratified the treaty?
3. Has it passed laws to implement the treaty?
4. Have relevant institutions and processes been established?

A judge would probably want to be sure of most, if not all, of these matters ***before*** basing a decision upon, or even referencing the treaty. Fortuitously, in the case of Guyana, there are constitutional provisions empowering the courts to consider international conventions that bear on human rights. See sections 39 (2) and 154A. In fact, the latter section requires the 3 arms of the State – the Executive, Legislature, Judiciary, "and all organs and agencies of Government" to respect and give force to specified human rights agreements.

More widespread State adoption of Escazu

Finally, the case of Guyana, with its expansive constitutional recognition of treaty rights, is virtually unique. Outside of these special provisions, courts are not able to rely on the Escazu Agreement unless it has been accepted and implemented into national law. As presently advised 8 Caribbean counties have ratified the Agreement: Antigua and Barbuda (2020); Belize (2023); Dominica (2024); Grenada (2023); Guyana (2019); St Vincent and the Grenadines (2019); St Kitts and Nevis (2019); and St Lucia (2020). This is a significant number. However, Jamaica only signed in 2019; it has not yet ratified. Trinidad and Tobago has neither signed nor ratified.

So there remains significant work to be done by CANARI and like-minded organisations to attract the attention of Caribbean policymakers to Escazu and related treaties.

I hope this Workshop will stimulate further action on the fronts I have identified.

Thank you very much for your attention.