

Emerging issue of legal mechanisms of Caribbean countries to force action on climate change and its existential consequences

ABSTRACT

As we progress through the third decade of the 21st century faced by a barrage of natural disasters with fingers pointed at climate change, What is clear is that the poor and vulnerable are the greatest victims of the ravages caused by changing weather conditions due to climate change. According to Dr Fahad Saeed in response to the 2022 monsoon apocalyptic impact on many Pakistanis, "People with the smallest carbon footprints are suffering the most" Dr Saeed says. "The victims are living in mud homes with hardly any resources - they have contributed virtually nothing to climate change," he says...Yusuf Baluch, a 17-year-old climate activist from Balochistan, says that inequality in the country is making the problem worse. He remembers his own family home being washed away by flooding when he was six years old. "People living in cities and from more privileged backgrounds are least affected by the flooding," he explains".¹ The Caribbean has not been spared from the savagery being inflicted on humanity by forces associated with climate change and this paper examines the prospects of litigating climate justice in the Caribbean.

¹ Rannard, G. (September 02, 2022) *How Pakistan floods are linked to climate change*, *BBC News*,. https://www.bbc.com/news/science-environment-62758811?xtor=AL-72-%5Bpartner%5D-%5Bbbc.news.twitter%5D-%5Bheadline%5D-%5Bnews%5D-%5Bbizdev%5D-%5Bisapi%5D&at_custom2=twitter&at_medium=custom7&at_campaign=64&at_custom3=%40BBCWorld&at_custom4=8A6B2FA2-2B6E-11ED-B776-1584FC756850&at_custom1=%5Bpost+type%5D

Introduction

The Caribbean has already been placed on the frontline in the struggle against the consequences of climate change. It is projected that as oceans warm-up, storms will increase in intensity and regularity. British Broadcasting Corporation stated, “*Scientists cannot say whether climate change is increasing the number of hurricanes, but the ones that do happen are likely to be more powerful and more destructive because of our warming climate.*”² Data compiled by Weather Underground in 2017, shows that in only twelve hours Hurricane Maria strengthened from a Category 2 hurricane to a Category 5. “*When the storm made landfall in Dominica, on Monday, it unleashed a-hundred-and-seventy-five-mile-per-hour winds on the island of seventy thousand people.*”³ The words of the Prime Minister of Dominica in an address to the United Nations General Assembly (UNGA) in the aftermath of Hurricane Maria, expresses the deep anguish of the people. “*To deny climate change is to procrastinate while the earth sinks; it is to deny a truth we have just lived. It is to mock thousands of my compatriots who in a few hours without a roof over their heads will watch the night descend on Dominica, in fear of sudden mudslides . . . and what the next hurricane may bring.....My fellow-leaders, there is no more time for conversation. There is little time left for action. While the big countries talk, the small island nations suffer. We need action and we need it now*”.⁴

² BBC News (September 2019) *Hurricane Dorian: Scale of Dorian Devastation Emerges*. <https://www.bbc.com/news/world-latin-america-49574900>

³ Meade, N. (September 24, 2017) *New Yorker Eden Is Broken*: A Caribbean Leader Calls for Action on Climate Change, <https://www.newyorker.com/news/news-desk/eden-is-broken-a-caribbean-leader-calls-for-action-on-climate-change>.

⁴ Meade, N. (September 24, 2017) *New Yorker Eden Is Broken*: A Caribbean Leader Calls for Action on Climate Change, <https://www.newyorker.com/news/news-desk/eden-is-broken-a-caribbean-leader-calls-for-action-on-climate-change>

Two years later, it was the turn of the Bahamas to provide a quick echo of the plight of Dominica in the form of Hurricane Dorian. Dorian hit Abaco Islands of the Bahamas as a Category 5 storm with 185 mph winds, tying it for the strongest landfall of any storm on record. Indeed, Dorian is tied for being the second-strongest hurricane (in terms of wind speed) ever recorded in the Atlantic. What distinguished Dorian was the manner in which it stalled over the Bahamas and refused to leave until all had been destroyed in its path. An increase in sea surface temperatures strengthens the wind speeds within storms and also raises the amount of precipitation a hurricane will dump. The Prime Minister of Bahamas at UNGA, two years later, spoke in a similar manner to Skerrit. *“Small island countries ... around the world, are on the frontlines of being swallowed into an abyss, created initially by human activity and increasingly by inaction”*⁵ (Hubert Minnis, Prime Minister, Bahamas).

The emerging issue is what legal mechanisms are available to the citizens of Caribbean countries to force action on climate change and its existential consequences.

Climate Justice: Legal Approaches

Climate change litigation has two broad categories, namely public law actions against governments and public authorities, raising human rights, constitutional and administrative law arguments, and private law actions based primarily on tort law.

⁵ United Nations, General Assembly (September 2019) *General Debate of the 74th Session of the United Nations General Assembly*. <https://gadebate.un.org/generaldebate74-archive/en/>

Internal Approach

The internal approach involves the initiating of legal action both in public and private law by entities resident within a state. The public law internal approach involves challenging the state. The intention is to compel action to provide a commitment to reducing greenhouse gas emissions, the main anthropogenic factor in climate change. This type of action was seen in the matter of *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*⁶.

Courts have also been approached to adjudicate private law actions involving private corporations. In *Kivalina v. ExxonMobil Corp. (2012)*⁷, individuals from an Alaskan island facing extreme erosion and weather events claimed damages from energy companies, claiming the weather patterns were due to climate change, which had been caused by the defendant's actions.

External Approach

Climate justice litigation may also have an outward approach that sees the action being initiated by external entities. In the *People's Climate Case*⁸ litigation, action was initiated by 10 families from Portugal, Germany, France, Italy, Romania, Kenya, Fiji, and the Saami Youth Association Sáminuorra against the European Parliament and the European Council as EU legislators, argues that the EU's 2030 climate target of reducing domestic

6 *Urgenda Foundation v. State of the Netherlands* (2015) HAZA C/09/00456689 (June 24, 2015); aff'd (Oct. 9, 2018).

<http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>

7 *Native Village of Kivalina v. ExxonMobil Corp* (2019) 696 F.3d 849 (9th Cir. 2012). <http://climatecasechart.com/case/native-village-of-kivalina-v-exxonmobil-corp/>

8 *People's Climate Case* (2019)ECLI:EU:T: (2019:324). <https://peoplesclimatecase.caneurope.org/>

greenhouse gas emissions by at least 40% by 2030 compared to 1990 levels is not sufficient to protect lives, livelihoods and fundamental rights from the impacts of climate change.

Although initiated by Greenpeace Norway, the *Greenpeace Norway vs. Government of Norway*⁹, was largely externally motivated. Greenpeace Norway filed for the review of the Norwegian Ministry of Petroleum and Energy's decision ("the decision") to grant production licenses for deep-sea extraction of oil and gas in the Barents Sea. The plaintiffs argued that the licenses would allow extraction from undeveloped fossil fuel deposits, which would be inconsistent with climate change mitigation and temperature targets agreed upon in the Kyoto Protocol and Paris Agreement. The plaintiffs have filed an appeal before the Norwegian Supreme Court on the grounds of, inter alia, incorrect application of the law and assessment of the evidence.

A private law external approach can be seen in the action of *Saúl Luciano Lliuya v. RWE*¹⁰. Luciano, a Peruvian farmer, brought a general nuisance claim in the Essen Court, based on article 1004 German Civil Law code, against energy company, RWE alleging that RWE's carbon-emitting activities have contributed to climate change and that RWE, therefore, bears responsibility proportionally to its historical carbon dioxide emissions for the melting of mountain glaciers near Huaraz, the plaintiff's home town in Peru. He claimed that his house was placed at imminent risk of being destroyed or damaged due to an outburst flood. The central argument, therefore, was that the flood hazard created interference with his property.

⁹ Greenpeace Norway vs. Government of Norway (January 2018) 16-166674TVI-OTIR/06.
<http://www.lse.ac.uk/GranthamInstitute/litigation/greenpeace-norway-v-governmen...>

¹⁰ Luciano Lliuya v. RWE AG (24th November 2015). District Court Essen, Case No. 2 O 285/15 Essen Regional Court, <http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/>

Prospects of Litigation in the Caribbean

The Caribbean, comprising of low to middle-income countries, has generally seen environmental litigation pursued within the context of constitutional and public law principles. Although no climate justice litigation has yet been initiated in the Caribbean, there are principles of environmental law that can be used in such litigation.

Right to a Healthy Environment

The issue of a right to a healthy environment is a right already being articulated in pursuit of climate justice. This was raised in Trinidad and Tobago (TT) in *Fishermen and Friends of the Sea v The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (Interested Party)*.¹¹ The Court was asked to imply a right to a healthy environment from existing constitutional rights to life, protection of the law, respect for family and private life and the right not to be subjected to cruel and unusual punishment. Justice Stollmeyer took a conservative view of the expansion of constitutional rights to incorporate a right to a healthy environment. “*While I accept the existence of certain common law environmental rights (to which I have already referred), I am reluctant to elevate them or categorize them together with those rights entrenched in the Constitution, despite also accepting that the latter is a living document which should be interpreted generously.*” However, the matter is by no means settled as this is only a judgment of the lowest court.

¹¹ Fishermen and Friends of the Sea (Appellant) v Environmental Management Authority and others (Respondents) (Trinidad and Tobago) (2003) HCA CV 2148 of 2003. <https://tt.vlex.com/vid/fishermen-and-friends-of-793978573>

Precautionary Principle

The precautionary principle is part of the legislative environmental framework of TT through the NEP 2018. It is stated in Section 1.05: *The finite nature of the earth's systems and processes dictate that there are limits to the amount of human activity tolerable before there is a risk of abrupt and irreversible environmental changes. The GoRTT will adhere to the principle that if there are threats of serious irreversible damage to humans or the environment, lack of full scientific certainty will not be used as a reason for postponing social and environmental safeguards*". There are three decisions of the courts of TT that have endorsed the entrenchment of the precautionary principle in TT.¹² Climate justice litigation can proceed on the basis that there is a duty of the government to take steps to implement mitigation and abatement measures to deal with the threat of climate change on the basis of the precautionary principle.

It is noteworthy that the precautionary principle was accepted as a settled norm of customary international law. However, there is further buttress for the acceptance of the precautionary principle as The Judicial Committee of the Privy Council, the highest appellate court of TT, in striking down water pollution regulations for being in violation of the Polluter Pays Principle, accepted that the NEP was equivalent to statutory law (**Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment.**)¹³ The Privy Council endorsed the view that the NEP possessed statutory strength as a result of Section 31 of the Environmental

¹² Fishermen and Friends of the Sea v The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (Interested Party), (2003) H.C.A. Cv. 2148 of 2003 <https://tt.vlex.com/vid/fishermen-and-friends-of-793978573>; People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago, (2007) CV 2007-02263 <https://tt.vlex.com/vid/people-united-respecting-the-793597693>; and Bhadase Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and the Ministry of Energy, (2014) CV 2014-00813 <https://tt.vlex.com/vid/sooknanan-and-fishermen-and-793699529>.

¹³ Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (2016) P.C.A No. 0028 of 2016. <https://vlex.co.uk/vid/fishermen-and-friends-of-805758309>

Management Act.¹⁴ “ *The Authority and all other governmental entities shall conduct their operations and programs in accordance with the National Environmental Policy established under section 18.*” Therefore, the possibility exists of climate justice litigation being instituted against the state for not taking robust action in its regulatory affairs in violation of the precautionary principle.

Future Generations Equity

Intergenerational equity is a value concept which focuses on the rights of future generations. The present generation is regarded as a custodian of the planet for future generations, extending the scope of justice into the future. The principle of intergenerational equity is entrenched in the environmental legal regime of TT through the NEP 2018. Section 1.05 – “*In addition, future generations are entitled to enjoy a fair level of the common patrimony. Thus, each generation has the duty of ensuring that pursuit of development does not impede the ability of each citizen, or successive generations of citizens, from meeting their needs. In addition, the GoRTT assumes responsibility for fairly allocating and regulating scarce resources to ensure that all benefits and burdens are equitably shared amongst all members of society.* This accurately reflects the preamble of the Environmental Management Act with respect to intergenerational equity. “*Whereas, the Government of the Republic of Trinidad and Tobago (hereinafter called “the Government”)* is committed to developing a national strategy for sustainable development, being the balance of economic growth with environmentally sound practices, in order to enhance the quality of life and meet the needs of...future generations....”.

¹⁴ Environmental Management Act Chapter 35:05. Act 3 of 2000. (December 2016)
https://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/35.05.pdf

Climate justice-related litigation has already sought to invoke the rights of future generations. In *Future Generations v. President, the Ministry of the Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to act in coordination with the National Environmental Agency (2018)*,¹⁵ twenty-five children who argued that the rapid deforestation of the Amazonian basin, which comprises 35% of Colombia's territory, is contributing to global warming and affecting their rights, as well as those of future generations.

Common Concerns of Humankind

The NEP 2018 introduced into the jurisprudence of TT, the ethical responsibility in international environmental law that dealt with common concerns of humankind. NEP 2018 Section 1.05-“*The GoRTT recognizes that the management of the climate system and biodiversity of the Earth are common concerns for humankind...The GoRTT, sub-national actors, and transnational organizations within its boundaries shall share responsibility for addressing common concerns, minimizing harm to issues of common concern...*”. It is clear that climate change is a common concern of humanity, and therefore the NEP creates a legal obligation on behalf of the state to take steps to address such concern.

Policy Commitment

There are expressed commitments on the part of the government of TT to deal with climate change in the NEP. “*The GoRTT acknowledges that projected global climate change will have adverse impact son physical, biophysical and socio-economic sectors in Trinidad and Tobago.*

¹⁵ Future Generations v. President, the Ministry of the Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development to act in coordination with the National Environmental Agency (2018) <https://www.informea.org/en/court-decision/future-generations-vs-ministry-environment-and-others>

Accordingly, and in accordance with SDG 13, the GoRTT will: w) Mobilise resources, and seek global partnerships to secure resources, for the implementation of the adaptation measures contained in the National Climate Change Policy and other national policies related to climate change adaptation and resilience building; 38 National Environmental Policy x) Conduct assessments of the climate risk and/or vulnerability of communities and/or sectors to the impacts of climate change, including the development of GIS-based climate risk maps; y) Establish early warning systems for climate risks in vulnerable sectors; z) Revise existing legislation, or develop new legislation, standards, codes and policies, as appropriate, to ensure that climate change vulnerability and adaptation are integrated into national and sectoral development planning to enhance and maintain climate resilience; aa) Maintain and enhance, as appropriate, ecosystems that provide climate resilience services that minimize the adverse impacts of climate change and/or which minimise climate risk; bb) Strengthen institutional arrangements within and among public, private and nongovernmental sectors for conducting systematic observations, vulnerability assessments, research and climate modelling; cc) Support community-based adaptation and resilience building efforts led by governmental entities, private sector and/or non-governmental organisations; and dd) Encourage the use of infrastructure designs and land use plans that include elements to adapt to the effects of climate change such as enhanced storm water conveyance and detention capacity.” There is little sign of any of the commitments contained in the NEP with respect to climate change being

Non-Legal Challenges for Climate Justice in Trinidad and Tobago

The pursuit of climate change litigation in the Caribbean seen through the prism of TT will go beyond the viability of legal principles upon which such litigation will possibly be based. Environmental litigation in

TT is pursued mainly by Non-Governmental Organisations (NGOs). Thus, by far, the greatest challenge is the availability of funding to oppose decisions both through the public education and mobilization process and in the Courts. Most environmental NGOs struggle financially and this creates a significant barrier to some civil societies launching public interest environmental litigation.

Additionally, effective public interest environmental litigation often hinges substantially on the ability of civil society to present their legal position within a sound scientific and technical standpoint. One promising development in the drive to obtain scientific and technical assistance has been the work of Environmental Law Alliance Worldwide operating out of the USA. This group has started to provide scientific and technical assistance to aid the challenges by civil society through public interest litigation to question approvals granted by the EMA. In the case of *Trinidad and Tobago Civil Rights Association v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago*,¹⁶ Staff Scientist of Environmental Law Alliance Worldwide submitted a written expert affidavit on behalf of the claimants in this matter. Another major impediment to environmental challenges is the cost of litigation and access to expert attorneys. Very often, the governmental agencies being challenged have access to state funding that allows for legal representation at the highest level. In *People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago*,¹⁷ the state entities had a full team of senior and junior legal officers while PURE was represented by two junior attorneys.

Further, intimidation is a factor as engaging in public interest environmental litigation can be dangerous in the Caribbean as TT has acquired a strong reputation for violence. Dr. Peter Vine, a scientist, involved

¹⁶ Trinidad and Tobago Civil Rights Association v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago (2005) HCA No. S1070 of 2005. <https://www.elaw.org/content/trinidad-tobago-%E2%80%93-trinidad-and-tobago-civil-rights-association-v-environmental-management-au>

¹⁷ People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago (2007) CV 2007-02263. <https://t.vlex.com/vid/people-united-respecting-the-793597693>

in the matter of *People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago*¹⁸ was reportedly physically manhandled in front of the media. The editor of a national daily newspaper expressed strong sentiments as to the lack of action by the police authority on the matter. “Vine, who is known for dramatizing his protests, had a fishing vessel take him close to a barge being used by the surveyors. He then jumped off the pirogue, swam to the barge, and was actually helped aboard by one employee (video footage would show this). Once on-deck, he appeared to be pleading with the eight-or-so men on board, to abandon their work... Suddenly, one goon grabbed Vine in a most vicious manner. Clearly a bigger man than the activist, he shoved, pushed, and finally threw Vine overboard the tug.... What that goon did was assault Vine, not only with battery (as the law would say) but with anger that oozed from his quivering frame. To date, although the brutal assault was captured on video, no action has been taken by the police against the perpetrator”. Finally, there is the risk of costs and bankruptcy In the case of *Fishermen and Friends of the Sea v Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party)*,¹⁹ the EMA sought to drive a dagger into public interest litigation in TT by recovering costs from the unsuccessful litigation launched by FFOS. The EMA, in order to recover costs, filed an application for the directors of FFOS to be personally liable to pay the costs. Fortunately, this position was rejected by the court in its refusal to lift the corporate veil and hold directors of FFOS personally liable.

It is clear, therefore, that in the Caribbean, climate justice litigation will meet a range of challenges, not limited to those that are predicated purely on legal principles.

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¹⁸ People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago (2007) CV 2007–02263. <https://tt.vlex.com/vid/people-united-respecting-the-793597693>

¹⁹ Fishermen and Friends of the Sea v Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party) (2002) HCA No. 1715 of 2002. <https://tt.vlex.com/vid/fishermen-and-friends-of-793978573>

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