



Environmental Justice: Workshop on Capacity- Building for Public and Civil Organisations

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

**Second Meeting of the Negotiating Committee of the Regional
Agreement on Access to Information, Participation and Justice in
Environmental Matters in Latin America and the Caribbean**

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Principle 10 - otherwise known as the environmental democracy principle - was adopted 1992 as a part of the **Rio Declaration on Environment and Development**. The regional process towards the adoption of a **regional agreement on Principle 10** began in 2012, with the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean adopted in the framework of the United Nations Conference on Sustainable Development (Rio+20) in June 2012. In this Declaration, signatory countries committed, with the support of the Economic Commission for Latin America and the Caribbean (ECLAC) as technical secretariat, to advance **the implementation of a regional agreement** for the full implementation of the rights of access to information, public participation and access to justice in environmental matters.

Keynote Address

By

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

on the occasion of

**The Environmental Justice: Workshop on Capacity-Building for Public and Civil
Organisations**

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I have been asked to present at this Workshop on “Environmental Justice and Capacity Building” in the context of Principle 10 of the Rio Declaration¹ and it might be useful to start by examining first principles.

What is environmental justice? I’d like to say straightaway and emphatically that environmental justice is not to be equated with Principle 10 which deals (as does the ECLAC Draft Regional Agreement to implement Principle 10 in Latin America and the Caribbean²³) with rights of access: to environmental information; to participation in environmental decision-making; and to justice before judicial and quasijudicial forums. These access rights, which received juridical elucidation in the Aarhus Convention of 1998,³ are important and useful but they are, by definition, merely the means to the end of achieving environmental justice. So, again, what is environmental justice?

¹ Adopted June 14, 1992 by the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil. Reprinted in 31 ILM 874 (1992).

² This is reflected at Point 8 of the Santiago Decision from the Fourth meeting of the focal points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, Santiago, November 4 – 6, 2014. The first meeting of the Negotiating Committee was held in Chile in May 2015 and the second was held in Panama, 27-29 October 2015. ³ 2161 UNTS 447, 38 ILM 517 (1999).

One perspective on environmental justice is that persons have the right to enjoy a certain level of environmental wellness and that others (mainly the State), have the duty to preserve the environment so as to ensure enjoyment of that right. Consider, for example, the first document in international law to recognize the right to a healthy environment. Principle 1 of the Stockholm Declaration on the Human Environment 1972⁴ declares, in part, “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being...” This was taken up in the Rio Declaration on Environment and Development which was adopted to guide future developmental activities around the world. Principle 1 of the Rio Declaration states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”⁵ There is also copious references to the right to environmental quality in numerous Constitutions and environmental laws enacted in nations around the planet in the four decades since 1972. Among the most recent is Article 29 of the British Virgin Islands Constitution 2007⁵ which provides:

“Every person has a right to an environment that is generally not harmful to his or her health or well-being and to have the environment protected, for the benefit of present and future generations, through such laws as may be enacted by the Legislature...”

This approach, which equates environmental justice with the human right to environmental quality, is so familiar and is so widespread as to be regarded as orthodoxy. The International Court of Justice stated in the *Nuclear Weapons Advisory Opinion* 1996,⁶ and repeated in the *Danube Dam*

⁴ Adopted on June 16, 1972 by the United Nations Conference on the Human Environment at the 21st plenary meeting held in Stockholm, Sweden. Reprinted in 11 ILM 1416 (1972). ⁵ Ibid., Rio Declaration (n 1).

⁵ CONSTITUTION ORDER (S.I. 1678, 2007).

⁶ *I.C.J. Reports 1996*, pp. 241 -242, para. 29.

case 1997,⁷⁸ that it attached great significance to respect for the environment because, in the words of the court: “...the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”

Similarly, in the world famous case of *Oposa v Factoran (as Secretary of the Department of Environment and Natural Resources)*⁹ the Supreme Court of the Philippines considered the provision in section 16 of the Filipino Constitution asserting “the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature”.

The court decided that the Applicants were entitled on their own behalf and on behalf of future generations, to maintain their legal challenge to the Secretary to halt deforestation in the country by cancelling all the timber license agreements and desisting from approving new ones. *Oposa* is widely regarded as a land mark case in judicial thinking on governance of the environment⁹ and has been followed by courts in several countries.¹¹

Now, this anthropocentric and utilitarian perspective is based on Western religious traditions that ordained that *Homo sapiens* were the lords and conquerors of the environment. The Abrahamic religions subscribe to the edict recorded in Genesis whereby God gave Man dominion over the natural world with instructions to conquer and subdue it.¹² Aristotle, one of the founding fathers of Western philosophy, believed that the ultimate purpose of nature was the fulfilment of human needs; that “nature has made all things specifically for the sake of man.”¹⁰ Likewise, Thomas Aquinas, among the most prominent of the Church Fathers, argued that nature was “ordered to

⁷ *I.C.J. Reports 1997*, p.41, para 53.

⁸ ILM 173 (1999).

⁹ See: Lal Kurukulasuriya, “The Role of the Judiciary in Promoting Environmental Governance and the Rule of Law”. ¹¹ See e.g., *Farooque v Government of Bangladesh*, WP 998 of 1994, CA 24 of 1995 (1996.07.25) (Bangladesh). ¹² See e.g., Genesis 1: 26; 9:1-2 (King James Version).

¹⁰ Aristotle (*Politics*, Bk. 1, Ch. 8) maintains that “nature has made all things specifically for the sake of man”. ¹⁴*Summa Contra Gentiles*, Bk. 3, Pt 2, Ch 112.

man's use".¹⁴ And modern economics is based on the notion that nature is "raw materials" that may be "harvested" to "yield" the "maximum" possible utility.¹¹

Yet, it has become apparent that human intervention in nature based only on human material needs promises a very bleak future for the environment.¹² Unadulterated utilitarianism, harnessed to modern technology, has, between the start of the industrial revolution era 200 years ago to present, resulted in the extermination of thousands of species of fauna and flora. The planet itself has begun to show signs of exploitation fatigue evidenced in climate change, global warming, and loss of biological diversity.

It bears underscoring that anthropocentrism has sought to accommodate environmental concerns in two main ways, neither of which has been satisfactory. First, there has been a concern for future generations, expressed in the principle of intergenerational equity asserted in *Oposa*. This requires the striking of a fair balance between present rates of exploitation and the ability of future generations to meet their natural resource requirements. Notice, however, that utilitarianism is maintained since the concern is to maximize human welfare and happiness in the future.¹³

Indeed, from the perspective of nature, (assuming such a thing exists), 'intergenerational equity' could be conceptualized as being about human domination of nature into eternity.¹⁴¹⁵

Secondly, what is called 'enlightened anthropocentrism' connects human happiness to nonmaterial human concerns. Happiness is said to require more than the immediate maintenance of an environmental life support system through the supply of dietary, medicinal, economic, aesthetic,

¹¹ E.g. Article 61, Law of the Sea Convention, 1982.

¹² Garrett Hardin, Tragedy of the Commons, 162 SCIENCE 1241 (1968).

¹³ JOHN ALDER & DAVID WILKINSON, ENVIRONMENTAL LAW & ETHICS 50 (1999).

¹⁴ Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AJIL 28 (1991).

¹⁵ W.L.R. 1037 (C.A., 1995) (Eng.); *see also* Ford v. Wiley, 23 Q.B.D. 203 (1889).

and other instrumental values possessed by nature. Psychological well-being may be enhanced by natural beauty and endangered by wanton cruelty to animals or vandalism of lakes, forests, valleys, beaches, and so on: the English case of *R v. Somerset County Council ex parte Fewings*¹⁹ illustrates the interplay of the various strands of this theory in legal reasoning familiar to the common law world.¹⁶ It is not at all clear that there will be easy consensus on the psychology of what constitutes beauty in nature or what constitutes “wanton cruelty”. In any event it is clearly the case that the philosophical underpinnings of enlightened anthropocentrism is undoubtedly utilitarian.

The question arises as to whether this is the best possible explanation of the urgings and efforts to comply with the dictates of Principle 10 and to implement environmental access rights in our region of Latin America and the Caribbean; whether, in other words, utilitarianism is the best choice for defining environmental justice.

I believe there is a better alternative. As a starting point for this other hypothesis, consider that modern science and ancient philosophy are now at consensus on the fact of the essential continuity of humans and their environment. At the atomic and sub-atomic levels, human bodies, mountains, buildings, and rivers are composed of the same basic raw materials. What makes an atom of lead different from an atom of gold or from an atom in human circulatory system, is not on the material level but in the arrangement and structure of the atom. What appears to the human eye as “human bodies” and the “environment” are the modulations of these atoms into holographic forms familiar in everyday life. In reality, there is but one thing present in the dance of energy cognizable as forms by consciousness.

¹⁶ See Anderson, *Principles of Caribbean Environmental Law*, (ELI, 2012) at pp. 6-9. ²¹ New Living Translation.

Strands in the Abrahamic religious and philosophical traditions support the premise that all components of the environment are interdependent and integrated and therefore sacred. King David mused in the Psalms that, “The heavens declare the glory of God. The skies display his craftsmanship.”²¹

But the Jewish philosopher Baruch Spinoza saw more deeply that God was not a corporeal entity that stood separate apart from His creation, rather God was the Substance whose modes or modulations produced what appears as the physical world.¹⁷ For Spinoza, the natural environment (including human beings) was nothing other than the body of God externalized i.e., made manifest in, and known by, consciousness.

This way of looking at the World was, of course, the fundamental premise of the romantic poets of the 18th and 19th Centuries. From the very beginning of the Industrial Revolution the romantics warned against the destructive potential to the human spirit of man’s involvement in endlessly repetitive and mechanized systems of production. They advocated an escape from the shackles of commerce and industry to the freedom of nature. They sought an intimate relationship with nature that would transform the very conception of life itself.

William Blake was among the greatest of the romantics. His earlier *Songs of Innocence* were to be replaced by his exasperated *Songs of Experience* as he witnessed how the industrial system increasingly crushed human creativity by condemning people to a life of endless toil and a dehumanized existence.

¹⁷ Baruch Spinoza, *Ethics*, (New York: Everyman Classics, translation by G H R Parkinson, 1989).

Boys between 4 -7 years of age were sold into labour by their parents and sent to clean the cities' chimneys; many suffocated and most became deformed. In *Auguries of Innocence* (published after his death) Blake intuited that there were profoundly different ways of looking at the world:

“To see a World in a Grain of Sand
And Heaven in a Wild Flower
Hold Infinity in the Palm of your
hand And Eternity in an hour
.....
We are led to believe a Lie
When we see not Thro the Eye
Which was born in a Night to perish in a Night
When the Soul Slept in Beams of Light.”

The connection between the natural environment and the human spirit is a familiar theme in contemporary nature writers, mystics and jurists, many of whom have also been guiding lights of the emergent environmentalism: Ralph Waldo Emerson, Henry David Thoreau, John Muir, Rachel Carson, Richard Routley (later Sylvan), Arne Naess, Derek Walcott and Lawrence Tribe.

Many express or imply that nature gives rise to a sense of the dissolution of the ego; the disbanding of the boundaries that sharply divide one's own self from others. Others suggest the expansion of the ego to encompass and identify with all that is perceived. Sigmund Freud termed this experience "oceanic", and it has been a hallmark of religious mysticism in virtually every tradition, originating, as per the available records, in Eastern philosophy with Buddhism and Hinduism. A modern mystic, Eckhart Tolle, puts it this way in his book, *Silence Speaks*:

“We depend on nature not only for our physical survival. We also need nature to show us the way home, the way out of the prison of our own minds. We got lost in doing, thinking, remembering, anticipating - lost in a maze of complexity and a world of problems.

When you perceive nature only through the mind, through thinking, you cannot sense its aliveness, its being-ness. You see the form only and are unaware of the life within the form – the sacred mystery. Thought reduces nature to a commodity to be used in the pursuit of profit or knowledge or some other utilitarian purpose. The ancient forest becomes timber, the bird a research project, the mountain something to be mined or conquered.

When you perceive nature, let there be spaces of no thought, no mind. When you approach nature in this way, it will respond to you and participate in the evolution of human and planetary consciousness.”¹⁸

It is encouraging to note that recognition of the spiritual connection between human beings and their environment is steadily gaining a foothold in modern environmental jurisprudence. Quite fittingly, the acknowledgement of that linkage is being made, hopefully as a first step, in relation to land rights of indigenous peoples. Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples requires that States take all appropriate measures, “to mitigate adverse environmental ... or spiritual impact” of developmental projects on indigenous lands. Article 13

¹⁸ (2003) at pp. 107, 112.

of ILO Convention No. 169 on Indigenous and Tribal Peoples 1989, provides that in applying the provisions of the Convention:

“...governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands...”

The Inter-American Court on Human Rights has repeatedly underscored the legal obligation to respect and secure the spiritual connection between indigenous peoples and their lands. In the landmark case of *Mayagna (Sumo) v Nicaragua* the Court said:¹⁹

“...the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”

This dictum has been accepted and followed in later cases: *Plan de Sánchez Massacre v. Guatemala*;²⁰ *Yakye Axa v. Paraguay*;²¹ *Sawhoyamara Indigenous Community v Paraguay*.²² In *Saramaka People v Suriname*,²³ the Inter-American Court found for the applicants based on the strong spiritual relationship with their ancestral lands and the adverse effects of logging operations by outside companies on material, cultural and spiritual way of life of the Saramaka people. The spiritual connection between humans and the environment has also influenced judicial decisions

¹⁹ Judgment of August 31, 2001, at para. 149.

²⁰ Judgment of November 19, 2004. Series C No. 116, para. 85.

²¹ Judgment of June 17, 2005 Series C No. 125.

²² Judgment of March 29, 2006 at paras. 119, 131.

²³ *Western Australia v Ward* [2002] HCA 28, (2002) 191 ALR 1.

in the domestic courts in Southern Australia;²⁴ Sydney, Australia;²⁵ and Kenya.³¹ My own Court, the Caribbean Court of Justice, is currently grappling with a claim for damages by the Maya people of southern Belize based on the ground that their material, cultural and spiritual connection with the land has been infringed by the actions of the Government in granting mining and logging concessions and in failing to recognize Maya customary land rights in general law.²⁶

Now, a question could arise as to the point of this discourse. Does it make any difference to our work on ECLAC's Draft Regional Agreement to implement Principle 10, whether we define or think of 'environmental justice' in utilitarian terms or in spiritual terms? Does defining environmental justice in terms of non-duality make a difference to capacity-building for Public and Civil Society organizations in relation to their participating in international negotiations on environmental matters? I believe it does.

First, as advocates for the perfecting and the widespread acceptance of the P10 Regional Agreement on environmental access rights, it is important that we ourselves realize and hold in our awareness that there is more to us than just the physical self. That we are expressions of an indivisible Whole, and that the natural environment can help us to know ourselves as that Whole. There is a difference of feeling and very often in behaviour between a person who is aware of an underlying ground of being or continuum to every experience and every reality, and the person who isn't aware of it. The first feels at home in her surroundings; that she belongs; that she is an advocate for the ineffable and the inevitable. The second doesn't feel he belongs; he feels he is

²⁴ *Jones v Dodd*, Supreme Court, 15 July 1998, 1 April 1999.

²⁵ *Re Zen Pearls*, 82 ALD 573, Administrative Tribunal. ³¹

Letuya v Attorney General [2014] 4 LRC 413.

²⁶ Note that in *Maya Leaders Alliance et. al. v Attorney General* [2015] CCJ 15 (AJ), delivered on 30th October 2015, the Caribbean Court of Justice recounted that, "The parties mutually recognize and have given legal and constitutional effect to the umbilical relationship between the Maya people of southern Belize and the land and its resources that have long provided physical and spiritual sustenance to them and their forebears." (*Ibid.* at [10]).

engaged in a struggle and a contest to win an argument over the drafting of the text or the allocation of political power within the text.

Second, awareness that there is ONE underlying ground of being helps us to understand and sympathise with relationships and so avoid the shadowy remnants of the problem that has bedevilled the modern intellect since the Cartesian dualistic distinction between mind and matter. We can celebrate the relationships that the ECLAC Draft has forged with best practices in jurisprudence at the international, regional, and national levels. The important links the Draft makes, for example to the Rio Declaration and to policy statements before Rio such as the Port of Spain Accord on the Management and Conservation of the Caribbean Environment 1989,²⁷ and after Rio, such as the St. George's Declaration of Principles for Environmental Sustainability in the OECS 2001, revised 2006.²⁸

Awareness of our common ground of being helps us to sympathize with and to support the recognition in the Draft of the peculiar characteristics, needs, and capacities of the most vulnerable of the 33 Member States of our regional society. We can support, for example, Articles 7, 8, 9, linking the content and degree of the obligation to provide access rights with the capacities and characteristics of national laws. Similarly, Article 10, requiring parties to cooperate in building and strengthening human and institutional capacity within the least developed countries and the Caribbean Small Island Developing States. And Article 17 requiring that in implementation of the ECLAC regional agreement, the special requirements of the Caribbean SIDS are to be taken into account.

²⁷ Anderson, *Principles of Caribbean Environmental Law* (ELI, 2012) at pp. 12-13.

²⁸ Anderson, *Principles of Caribbean Environmental Law* (ELI, 2012) at p. 14.

We can celebrate the arrangements whereby significant institutional responsibilities are undertaken by the plenary of the whole; whether the Conference of Parties or the Secretariat. This is the case, for example, as regards establishment and operation of the Clearing House on access rights (Article 10); the Fund to finance the implementation of the Agreement (Article 11); and the Facilitation and Follow-Up Committee to support implementation (Article 17).

Third, the perspective that focusses on spirituality and the environment opens up significant and wideranging possibilities for framing environmental suits as actions to vindicate fundamental treaty and constitutional rights to freedom of religion. It is a short step from the right to religious freedom to the right to an environment which allows the experience of religious feelings. And perhaps in due course our constitutions and treaties will speak more accurately of the right to a spiritual life. No environmental action has been framed in these terms to date, but the future beckons.

Fourth and finally, the perspective of non-duality provides, perhaps, the most potent argument in the repertoire for environmental preservation. Resolution of the environmental problems that confront us demand far more than rational argument for sustainable management and capacity building by public and civil organizations. As Robert Perschel, the experienced forester puts it so eloquently:

“We have no hope unless we infuse the debate over the environment with the deep emotional and spiritual connections that it warrants and that will be required for a great social transformation.”²⁹

²⁹ Quoted in Gottlieb, Roger S. 2006. Environmentalism as Spirituality (excerpt from the book *A Greener Faith: Religious Environmentalism and Our Planet's Future*, June 2006, Oxford University Press). *Tikkun* 21(3): 21.