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### **Author**

Ramlogan, Rajendra

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## Using the Law to Achieve Environmental Democracy and Sustainable Development: an Elusive Dream for Trinidad and Tobago

Rajendra Ramlogan  
*University of the West Indies, St. Augustine, Trinidad*

### Abstract

Small island states are increasingly articulating their adherence to the philosophy of sustainable development. Sustainable development represents a new developmental paradigm that includes environmental protection. Pivotal to the attainment of sound environmental and sustainable developmental objectives at the domestic level is the need to propagate a strong sense of environmental democracy. As small island states attempt to integrate environmental protection mechanisms in the economic developmental decision making process, there must be the vesting of the right in the public to have its views heard and considered. An analysis of the attempt of Trinidad and Tobago to enshrine legal principles of public participation and public consultation in economic developmental decisions having environmental consequences reveals the presence of the challenges being endured by the public in seeking to participate in the decision-making process. The emerging story shows that while the state and its many branches publicly embrace environmental democracy, policies and actions reveal a somewhat pusillanimous approach.

### 1. Introduction

The concept of sustainable development emerged to offer a fresh perspective on the traditional developmental paradigm, and to attempt to provide global consensus on how to achieve sound environmental goals in a world characterized by economic disparities. The definition of sustainable development was significantly modified at the Rio plus 10 meeting in Johannesburg in 2002: "These efforts will also promote the integration of the three components of sustainable development, economic development, social development and environmental protection as interdependent and mutually reinforcing pillars... At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people..." (United Nation, 2004). The emerging challenge is to examine how State-operated environmental institutions incorporate the vision of sustainable development based on the premise of democratic participation, which at its basic level includes enshrining principles of public consultation and public participation in decisions having environmental consequences.

In Trinidad and Tobago, the new environmental regime, which was introduced in 1995, had as its cornerstone a two-pronged approach to environmental protection. The first was the introduction of the requirement for special approval of a list of designated activities covering the major economic sectors of Trinidad and Tobago so that any environmental impacts could be mitigated. The second prong was a permitting system that would see a gradual reduction in the output of pollutants from existing industry. The aim was the stabilisation of the output of pollutants by controlling the actions of new economic players and the gradual reduction of the existing pollution inventory through the permitting system. This paper will focus specifically on the use of the Environmental Impact Assessment (EIA) process for the making of developmental decisions with a brief examination of how the permitting process works in Trinidad and Tobago.

## 2. The Emerging Role of Public Participation

Governments make decisions that affect communities every day without the knowledge of constituents (Pirk, 2002: 1). Within an environmental legislative context, an environmental decision-maker is inevitably responsible for taking into account the public interest (Jeffery, 2002: 2). It is on this foundation that the uprising of a call for greater public participation has occurred. Public participation is a process by which interested individuals, organisations, and government entities are consulted and included in the decision-making process (Bran, 1996: 3). The public consists of a number of people reacting to a perceived interest (Bran, 1996: 2). Although environmental agencies may claim to consider all factors involved, in reality, a greater emphasis is placed on the scientific 'facts' that they glean from their research (Tai, 2005: 4). The public is the most affected segment by the consequences of environmental decisions, and as such should be able to effectively influence the outcome of environmental decisions (Bran, 1996: 12). Indeed, it is arguable that the environment is a public good (Jones, 1997b: 1), and therefore the public should ideally be able to participate in any environmental decision-making process.

Effective participation requires at a minimum: (1) education about the environment and things that might influence it; (2) access to information (including the fact that information exists and is available); (3) a voice in decision-making; (4) transparency of decisional processes; (5) post-project analysis and monitoring, as well as access to pertinent information; (6) enforcement structures; and (7) recourse to independent tribunals for redress. For each of these elements, the public also needs protection against retaliation by the government or by the non-governmental proponents of the activity (Popovic, 1993: 4).

The public will not participate in deliberative, consensus-building politics if it is not truly empowered in the process (Jones, 1997b: 9). However, the manner and degree of inclusion in any decisional process will vary depending on the subject, the legal framework, and the political and social context of a decision. Participation should thus be understood to include the full range of options that engage and integrate the public into the process of making or implementing a policy choice (Dannenmaier, 1997: 11). There are many different theories that have arisen based on different forms of public participation. The pluralist model, with predominant regulatory ideals of interest group inclusion and agency neutrality, rests on a foundation of utilitarianism (Guana, 1998: 4). The recently proposed civic republican model rejects utilitarianism in favour of a belief in true civic virtue (Guana, 1998: 4). Under this model, citizen inclusion is a regulatory ideal but is employed to achieve a form of deliberation focusing on true public good solutions rather than utility maximization. In this model, the public interest is an expression of a common good grounded in values people pursue not as individuals, but as a community. The form and efficacy of citizen participation may vary depending upon which model predominates in agency proceedings and the institutional mechanisms that might favour one approach over another (Guana, 1998: 4).

Experts increasingly recognize that even technical and scientific solutions to environmental problems involve value judgments (Guana, 1998: 6). Is science premised on ambiguous data and possibly erroneous assumptions? How is uncertain science to be translated into a concrete regulatory decision? How, and to what extent, should these uncertainties be conveyed to the public (Tai, 2005: 1)? In light of such questions, science should not be seen as superior to the opinions of the public, and the current trend of limited public or no public participation needs to be curtailed. The "step-up-to-the-microphone-and-have-your-say-in-less-than-fifteen-minutes" approach of many public consultations resembles more of a crude preference tally rather than meaningful deliberation (Guana, 1998: 17). Change would require agency officials to deliberately contemplate the limitations inherent in formal expertise (Guana, 1998: 18).

Responsible participation can be enabled through education and training, management support, access to information and availability of technical services, and through a regulatory framework that facilitates the establishment and operation of non-governmental organizations (NGOs) (Dannenmaier, 1997: 1). This promotes fiscal responsibility, transparency, and accountability to society. Responsible participation includes processes by which citizen organizations are established and operated in a transparent and accountable manner, and engage in public deliberation effectively and with technical competence (Dannenmaier, 1997: 6). A good example of this can be found in the consensus-building approach. The consensus-building approach requires that all interested parties develop implementation proposals for the

initiation of a project affecting the environment or the resolution of an environmental issue. The merits of the proposals are discussed and debated in a series of roundtable sessions moderated by neutral facilitators, and a final solution is only accepted when consensus, not total agreement, is reached. Every participant must agree that the negotiations were conducted in good faith and that all issues were heard and resolved within the limits imposed by law and economic feasibility (Mulliken *et al*, 2005: 12).

Another alternative to direct public participation is citizen advisory boards. Citizen advisory boards are chosen by a sponsoring agency. The agency chooses citizens who are affected by the decision or who are interested in serving on the board. The board investigates and recommends solutions to community controversies. Community working groups (CWG) are also a way that public participation can increase. These groups are formed when citizens feel that a working group is needed to evaluate an upcoming proposal or facility. Community monitoring of pollutants is another form of public participation that is sometimes overlooked. Although seemingly insignificant, this could put pressure on large companies to act in an environmentally friendly way towards their respective communities. Another deviation from traditional participation is regulatory negotiation, which was developed to form dialogue among regulators, regulated parties, and interested parties (Pirk, 2002: 4). It is used in rule making and is considered an efficient way to form rules on which everyone can agree (Pirk, 2002: 4).

Perhaps the most advanced of all forms of public participation currently available is found through the Internet. It has given the public and policymakers access to information not available ten years ago. The Internet and other factors have facilitated the creation of new "networks" of organizations, individuals, and experts devoted to finding new ways to do work in the field - whether in conjunction with or wholly apart from work by government officials. This new capability helps bring to the international setting the possibility of decentralized, grass-roots style communication and action that can aid in effective public participation (Lallas, 2000: 3). The most ineffective public participation technique is the public hearing (Paddock, 2004: 1). To be meaningful, the opportunity to participate should be genuine, commensurate with the importance of the issue, open, equally available to competing interests, and sufficiently early in the process (Tilleman, 1995: 22).

The participation of representatives of NGOs has been another important element of public participation. The participation by non-state actors in the international legal system enhances accountability because it can give a voice to citizens who would otherwise be unrepresented, ensure that actions taken meet local needs, counter effects of high-level governmental corruption, and produce outcomes that maximize human welfare efficiently (Lallas, 2000: 17).

In the absence of public participation, judgments about the distribution of environmental amenities or effects do not reside with those individuals and communities that will be affected most directly by the state of the environment. These putative decision-makers are not elected representatives responsive or accountable to the public, but bureaucrats or agency employees. In turn, the public may feel the loss of its right to govern, either directly through deliberative means or indirectly through elected representatives (Jones, 1997b: 3). Private rights are even more important than any of a nation's current laws and policies as they are classified as "fundamental", and are protected by the highest law - constitutions (Tilleman, 1995: 7). Consequently, the right to participate becomes particularly important with regard to those regulatory decisions that could influence one's life or the security (Tilleman, 1995: 22).

Public participation is also able to run against the tide of public mistrust and increase transparency (Lemmer, 2007: 2). Meaningfully implemented, citizen participation encourages government accountability, ensures continuation of a participatory democracy, and can stimulate inventive and socially acceptable answers to environmental problems (Jeffery, 2002: 3). The new status quo is no longer to 'announce and defend' (Jones, 1997a: 2) but rather it is 'open and participatory' (Morman, 2007: 3). Open and participatory environmental decision-making allows an informed citizenry to contribute to the efforts of a transparent and accountable government in producing higher quality decisions concerning the environment (Morman, 2007: 13).

Global trends highlight a positive correlation between public participation and economic growth. This "nexus" between public participation and successful economic growth is reflected in the historical experiences of developed and heavily industrialised States such as the USA and the European Union (Mulliken *et al*, 2005: 1). It is no coincidence that these States have created elaborate mechanisms for environmental public participation rights, and have been the most successful at injecting those rights into broad, far-reaching environmental legislation (Mulliken *et al*, 2005: 2).

Public participation in environmental decision-making is at the cornerstone of democracy, which echoes the phrase 'by the people for the people'. This principle is embodied in most of the constitutions of the countries of the world, whereby the nation's policies are founded upon the duty of the State to protect and serve its citizens, and by extension provide a safe and secure environment (Tilleman, 1995: 7). Although, for the most part, this duty has been overlooked in the past due to the short term vision of most governments, the tides of political pressure from pro-participation groups have led many governments to reconsider the foundations by which they operate. The people and what they value the most are now beginning to take greater priority for leaders around the world.

### **3. Public Participation in the New Environmental Legal Regime of Trinidad and Tobago**

Prior to 1995, there was no specialist agency dealing with environmental protection in Trinidad and Tobago. In light of the environmental challenges facing Trinidad and Tobago, the civil society looked on with much anticipation at the establishment of the Environmental Management Authority (EMA) in 1995. This was to be the promulgation of a new legal regime for the protection of the environment under the Environmental Management Act No. 3 of 1995, later replaced by the Environmental Management Act No. 3 of 2000 (EM Act 2000). The legal regime of both Acts recognised the importance of public participation.

The Preamble to the EM Act 2000 sets out the spirit of the legislation and its intended objectives. The preamble makes clear that public concerns are critical to the development of an effective legal regime for the protection of the environment by stating:

*"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 present and future generations;... And Whereas, management and conservation of the environment and the impact of environmental conditions on human health constitute a shared responsibility and benefit for everyone in the society requiring co-operation and co-ordination of public and private sector activities..."*

Text throughout the Act continues to emphasise the general principles articulated in the preamble. Section 4 of the Act emphasises the public role in terms of awareness and participation, while Section 16 assigns the EMA the role of fostering public awareness and public participation. The following sections demonstrate how the environmental legal regime that emerged from the EM Act 2000, has captured the spirit and intent of public participation.

#### **3.1 Making of Subsidiary Legislation**

In Section 27(1) the Act notes that in the making of rules the current Minister must contemplate public participation in the process:

*"(1) In the course of developing rules, the Minister shall - (a) submit draft rules for public comment in accordance with section 28; (b) consider the public comments received and revise the rules as he thinks fit..."*

The Act, therefore, built into its statutory regime the need for public participation on rules that would vest power in the EMA.

### **3.2 Granting of Permits**

The right to grant permits has been vested in the EMA under the EM Act 2000 in several key areas including waste (Sections 55-58), water (Sections 52-54), air (Sections 49-51), noise (Sections 49-51), hazardous substances (Sections 59-60), sensitive species (Sections 41-46), and sensitive areas (Sections 41-46). The Act makes no provision for public participation in the granting of permits. Rules have been made to deal with water pollution, sensitive areas, and sensitive species, yet these rules fail to provide any avenue for the public to comment on the grant of a permit to any particular entity. This is of concern as Trinidad and Tobago follows a pattern of mixed development and it is not unusual for a heavy polluting industry to be in close proximity to residential communities. Despite this, the public has no means of expressing its view on the granting of a permit during the permit application process and must resort to judicial review if there is disagreement with the terms and conditions of the permit granted by the EMA.

It is noteworthy however that with respect to noise, there is provision for public participation in the granting of a permit for the emission of noise in Rule 10 of the Noise Pollution Control Rules, Legal Notice No. 60 of 2001. The right of the public to comment on the granting of permits for the emission of noise is commendable but somewhat strange in light of lack of similar rights with respect to the granting of other permits.

### **3.3 The Certificate of Environmental Clearance Process**

The Certificate of Environmental Clearance (CEC) process allows the EMA to control the environmental impacts associated with new developments or environmental impacts associated with the significant modification of existing developments. The CEC is intended to ensure that there is no or limited environmental consequences of development activities occurring in the post EM Act 2000 era.

The CEC process captures the ideal of public participation in the environmental decision making process, as once an application for a CEC is determined to have environmental impacts, the person seeking the CEC ("the Applicant") may be required to provide additional information. Where the impacts are significant, this will often cause the initiation of the EIA process. This is a critical process and it is necessary to test the role of public participation in this process.

#### **3.3.1 Terms of Reference (TOR)**

The CEC is governed by subsidiary legislation made under the EM Act 2000 called the Certificate of Environmental Clearance Rules, Legal Notice No. 104 of 2001 (CEC Rules).

The first stage in the CEC process, as it applies to the requirement for an EIA, deals with the TOR for the EIA. The EMA prepares the draft TOR and forwards it to the Applicant who is then made responsible for obtaining comments from stakeholders and other members of the public. This is a critical function as the quality of the TOR often determines the quality of the EIA.

The EMA has interpreted Rule 5(2) of the CEC Rules to put full responsibility on the Applicant to determine who are the appropriate stakeholders and the manner of the consultations. The results have been varied with some stakeholders being invited to comment on TORs while others seeming to have equal standing are ignored. Additionally, some applicants have opted for public meetings where comments can be offered on the draft TOR while others elect to receive comments only in writing. By not laying down a set procedure for facilitating public comments on draft TORs, the EMA has unwittingly allowed a system to emerge that is totally dependent on the integrity and willingness of the Applicant to engage in the widest possible public consultation in the review of draft TORs.

### **3.3.2 Written Public Comment Period**

Once the EIA is completed and submitted to the EMA, it is placed into the public domain for written comments from the public. There are two issues associated with the written public comment period, namely the duration of the period and the documents that are made available for public comment.

With respect to the duration of the written public comment period, the EM Act 2000 establishes a minimum period of 30 days but sets no outer limit for such a period. Given the fact that many of the projects in Trinidad and Tobago are energy based (petroleum and petrochemicals), it is difficult to have large and complex EIAs reviewed within 30 days. Further, there is a paucity of technical expertise in Trinidad and Tobago willing to review EIAs, and therefore significant time is spent trying to obtain such resources. Additionally, the EMA often adopts the position that EIAs are copyright material, and therefore must be read at the Library of the EMA while only allowing 10 percent of the EIA to be photocopied according to copyright legislation. The situation is exacerbated by the fact that the review period is 30 calendar days as opposed to 30 working days, therefore reducing the number of days that the public may access the documents.

The issue of the duration of the written public comment period was raised in the first environmental public interest litigation launched in Trinidad and Tobago, the FFOS Matter. This case involved a decision by British Petroleum Trinidad and Tobago (bpTT) to expand its deliverability and transportation share in the Atlantic LNG Trinidad and Tobago Limited (ALNG) liquefied natural gas project. The main components of the project include the installation of two new drilling platforms, an upgrade of one existing platform (Cassia A), installation of two infield submarine pipelines (one 26" and one 6"), and installation of a 48" main trunk pipeline. Due to the perceived adverse environmental impacts on the lives of many residents of Trinidad and Tobago, the application for a CEC by bpTT was opposed by Fishermen and Friends of the Sea (FFOS), a local NGO. It was argued on behalf of FFOS that due to the complex nature of the proposed activities and the voluminous documents, which the public was required to peruse in order to comment properly on the EIAs, the EMA owed a duty to the public to provide a longer period for public comment than the statutory minimum period of 30 days. FFOS was not successful in their judicial review application as the matter was filed outside the date for submitting such an application.

The second issue that goes to the heart of the integrity of the written public comment period is the availability of all relevant information to allow for meaningful public participation. It is now accepted to be a clear duty on the part of a decision maker to provide sufficient information to allow for meaningful public participation.

### **3.3.3 Public Hearing**

Perhaps the most significant pillar of the public participation process is the discretion vested in the EMA to hold a public hearing when there is sufficient public interest. The EMA has made sparing use of this power, and it is certainly the exception for a public hearing to be held rather than the norm. The failure to hold a public hearing in the FFOS Matter constituted one of the grounds for judicial review, but this was not addressed due to the dismissal of the application.

The issue of the public hearing was also questioned in the second environmental public interest litigation to be filed in Trinidad and Tobago, Fishermen and Friends of the Sea (FFOS) v. The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago, HCA Cv. 2148 of 2003 (the ALNG Matter). In a case involving an appeal over the decision of the EMA to grant a CEC to ALNG for the construction and operation of a Fourth Train for the Liquefaction of Natural Gas, the EMA held a public hearing pursuant to Section 28(3) of the EM Act 2000 to receive verbal comments. The EMA, however, took the position that this section only required them to host a single meeting and hear the views of the public, and that there was no requirement to have any further meetings to discuss how the public's views were addressed by the EMA.

The current position of the law as it stands is to not require more than one public meeting. Yet, it is hoped that this limited view of the public hearing, which excludes any follow-up meetings, will not endure. Environmental democracy based on public participation and effective public consultation cannot be fulfilled with a single perfunctory meeting by an authority without engaging the public in a meaningful debate to demonstrate that their views were considered and addressed in any final decision.

#### **4. Factors Militating Against Public Participation in the Environmental Decision-making Process**

##### **4.1 The State as an Active Economic Player**

In Trinidad and Tobago, like many developing countries, the State is a major economic player. Thus, when the State decides to pursue a particular economic activity and must go to a State agency for approval, there is a clear conflict of interest that undermines the public perception of the transparency and objectivity of the approval process.

An example of the role of the State in economic activities can be found in the decision of the Trinidad and Tobago Government to construct and operate an aluminium smelter. ALUTRINT was originally established as a joint venture between the State-owned National Energy Corporation (NEC) and Sural, a Venezuelan aluminium company. NEC owns 60 percent of ALUTRINT's equity, and Sural owns 40 percent [it was announced in early 2009 that Sural had pulled out of the joint venture and in December 2009, the Government announced that a Brazilian industrial group, Votorantim Metais, will join the Government of Trinidad and Tobago as its equity partner in the smelter - see Metal Bulletin (2009)].

The present Prime Minister of Trinidad and Tobago has made this project a personal and powerful crusade, and it is difficult to see how a State agency can resist the inevitable push towards the establishment of a State majority owned smelter. In a recent address by the Prime Minister, his strident and aggressive tone made it clear that little resistance will be tolerated against the project (Manning, 2006). This places the State agency charged with responsibility for environmental clearance of this project in an invidious position. The ALUTRINT Matter has led to the halting of the smelter project pending further litigation.

Another example of the State engaging in major developmental activities can be found in the construction sector. With the high oil prices and increased revenues, the Government has embarked on a major construction drive. To the chagrin of the Government, this has led to a shortage in the supply of raw materials. Presently, quarrying is a major environmental problem in Trinidad and Tobago, which particularly affects the water resources of the country. Quarrying is one of the activities listed under the Certificate of Environmental Clearance (CEC) (Designated Activities) Order, Legal Notice No. 103 of 2001 as requiring environmental clearance from the EMA. The emerging practice is that all applications for CECs for quarrying are subject to the EIA process imposed by the EMA. This in turn provides the avenue for public participation and the opportunity for the public to express its views on the adverse effects quarrying has on its communities. The Government responded by passing the Certificate of Environmental Clearance (Designated Activities) Amendment Order Legal Notice No. 164 of 2007 and the Certificate of Environmental Clearance (Designated Activities) Amendment Order Legal Notice No. 186 of 2008, amendments stating that a CEC is only required to establish a quarry in excess of 150 acres. The reality is that it is unusual in Trinidad and Tobago to have a quarry in excess of 150 acres, effectively limiting the EMA's power to regulate quarrying.

As with many developing countries, the State is not only an active participant in economic activities, but sees itself as having a major role in facilitating economic development. Recently heavy industrialisation is being promoted in light of the perceived abundance of natural gas as a source of energy. One example is the support by the Government of a massive steel plant in the face of strong opposition by environmentalists and communities near the proposed plant. Prime Minister Patrick Manning said that the USD \$1.2 billion steel unit would proceed despite public concerns: "The construction of the steel plant proposed by the Ruias-led Essar group will begin shortly... This is an emotional issue (for) many. But



when you examine the facts of the case they are not borne out by the emotion you're seeing. In fact people are shedding heat on it, not light" (Ramoutar, 2008).

Another completed project that saw strong support from the Prime Minister despite opposition was the Atlantic LNG (ALNG) Train IV project, which culminated in the ALNG Matter. This project generated tremendous public interest and opposition due to the public perception of negative environmental impacts associated with earlier trains. The CEC process experienced some delays due to public pressure to have several critical issues properly examined before the CEC was granted to ALNG. As ALNG grew impatient with the process, the Prime Minister became a strong advocate of the Train IV project. In a June 2003 press conference the Prime Minister reported confidence that the EMA was on the verge of granting a CEC for the project (Quash, 2003). Yet the same article indicated that the Chairman of the EMA was far from satisfied with the status of the application.

Such situations have highlighted gaps between the State as an active player in economic activities, and its ability to nurture genuine public participation in the environmental decision making process. This situation is not helped by the governance structure of the EMA, which is managed by a Board of Directors appointed by the President. This lends the EMA to suspicion that it is easily manipulated and controlled by whichever political party holds power.

A second aspect of the EM Act 2000 that undermines the independence of the EMA is the power of the Minister over the actions of the EMA. Section 5 of the EM Act 2000 states, "The Minister may from time to time give the Authority directions of a special or general character in the exercise of the powers conferred and the duties imposed on the Authority by or under this Act." This power to issue directions of a special or general character that is vested in the Minister has created suspicion that the EMA can be manipulated and forced to act contrary to the public interest in the face of Ministerial directives. Having regard to the power of the State in appointing the Board of Directors of the EMA, and the right vested in the Minister to give special and general directions to the EMA, there is an obvious conflict created when the State is seeking to obtain an approval from the EMA.

#### **4.2 The Role of the Multinational Corporations**

Trinidad and Tobago, as noted in its economic profile, is the host of numerous multinationals, particularly in the energy sector. These corporations are often headquartered in the developed world where high standards of behaviour with respect to environmental issues are well established. Many multinationals operating in Trinidad and Tobago are quite proud to publicly proclaim their environmental pedigree, however these corporations may at times contribute to the low environmental standards in Trinidad and Tobago.

The issue of pressure being placed on the EMA because of the actions of large businesses is one that has been both in the Courts of Trinidad and Tobago and in the public domain. In the ALNG Matter, the applicant for judicial review raised the issue of unfair political action. The issue pertained to a letter from the Chief Executive Officer of ALNG to the leading Government energy expert in Trinidad and Tobago, who at that time was the Chairman of the Cabinet-appointed Standing Committee on Energy. It was argued on behalf of Fishermen and Friends of the Sea (FFOS) that this letter was an attempt by ALNG to have the EMA approve the project without properly considering the environmental implications. ALNG has many shareholders including BP plc, BG Group, Repsol YPF, Suez LNG, and the National Gas Company of Trinidad and Tobago (Atlantic LNG, 2007). However, the Court was clear that there was no evidence to suggest that the EMA did anything on behalf of ALNG with respect to this letter.

#### **4.3 The Absence of a Culture of Environmental Democracy**

One of the challenges confronting Trinidad and Tobago is the desire to obtain developed world status by 2020, with the hopes of being propelled by the current energy boom. This has raised the issue of whether the developmental thrust of Trinidad and Tobago is sustainable. The issue therefore becomes

one of sustainable development and to what extent are the voices of the public heard in determining the level of sustainability. The current Prime Minister quite succinctly explained the challenge of balancing the environment and development:

*“For us, therefore it has to be a question of sustainable development, that is to say, a balance between the requirements of development and the need to preserve as far as possible the sanctity of the environment in which we operate. It is neither one extreme nor the next. It is a judicious balance designed to improve our standard of living.”* (Manning, 2006)

The emerging issue is who determines the balance and by what means the balance is established. In a country where the notion of environmental democracy is emerging in the face of strong opposition from the State, there are questions being posed as to the effectiveness of public participation. The question is whether the State determines the balance between the environment and development, or whether the public is allowed to make a meaningful input to the national debate. According to the Prime Minister, the ‘right-wing environmentalists’ are slowing development (Manning, 2006). It is difficult to see how public participation will be advanced when the voices of the public are condemned once they stand in opposition to actions being promoted by the State.

## **5. Leading the Movement Towards Public Participation: Challenges Facing Civil Society**

If public participation is a necessary component of sustainable development, then there must be access to the judicial process and protection sanctioned by the Courts. Essentially, public participation has little significance if citizens lack the right to effective judicial review. Access to justice has often been linked to the concept of public interest litigation, which can simply be defined as litigation filed in a court of law for the protection of public interests, in areas such as the environment. What will be observed in the ensuing discussions is the uneven playing field in the judicial system, with the State wielding tremendous power.

### **5.1 Funding**

Civil society in Trinidad and Tobago faces tremendous challenges in the environmental decision-making process. 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 very often the major NGOs accept funding from the private sector leading to conflict with their advocacy activities. NGOs need funds to survive and pursue their environmental agenda. Unfortunately, satisfying this need from corporate funding may lead to an undermining of the ability of the NGO to pursue environmental advocacy fearlessly.

Membership in civic societies, especially those that are strong advocates of environmental causes, still tends to be limited. This is especially the case for NGOs that are prepared to challenge the state through litigation. For example, Fishermen and Friends of the Sea’s (FFOS) core activities are conducted by two main individuals. Similarly, Smelta Karavan, an NGO formed to oppose the construction of aluminium smelters in Trinidad and Tobago, has its mandate driven by a few people. This attitude in Trinidad and Tobago is not unusual, and the lack of involvement in a more radical environmental agenda translates into an unwillingness to contribute financially to public interest environmental litigation. While in developed countries groups such as Friends of the Earth and Greenpeace are often in a position to attract continuous funding at all levels of society, this is not the case in the Trinidad and Tobago. This therefore creates a significant barrier to some civic societies launching public interest environmental litigation.

### **5.2 Limited Recourse to Technical Assistance**

Effective public interest environmental litigation often hinges substantially on the ability of civil society to present their legal position from a sound scientific and technical standpoint. Trinidad and Tobago is a relatively small country with a population just in excess of one million people. Scientific and technical

professionals are not in abundance, and those that are present are very often engaged in earning their livelihood from work within the corporate sector. Therefore, it is not easy to attract technical and scientific assistance to support public interest environmental litigation. The struggle to provide technical and scientific support for public interest environmental litigation has been led almost entirely by two local scientists, Professor Julian Kenny and Dr. Peter Vine, the latter who filed an affidavit in support of an NGO in the ALUTRINT Matter. Both are academics and have done service in assisting legal professionals in developing their legal challenges from a scientific and technical standpoint in the effort to reverse decisions that they consider to be inimical to public interest and well being.

One promising development in the drive to obtain scientific and technical assistance has been the work of Environmental Law Alliance Worldwide. 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 Maxine Walters and the Trinidad and Tobago Rights Association v. The Environmental Management Authority, Alutrinc Limited and the Attorney General, HCA 2272 of 2007, Staff Scientist Mark Chernaik of Environmental Law Alliance Worldwide submitted a written expert affidavit on behalf of the claimants in this matter.

### **5.3 Litigation Resources**

A major issue has been the cost of litigation and access to expert attorneys. Very often the planning agencies that are being judicially reviewed have access to state funding that allows for legal representation at the highest level. In addition, the company that benefited from the planning approval, more often than not, will join the litigation as an interested party. In the ALUTRINT Matter, the EMA had a full team of legal officers including the services of a Senior Counsel. Additionally, Alutrinc Limited, the developer, engaged its own Senior Counsel and the Attorney General of Trinidad and Tobago decided to appear in the matter through Senior Counsel. All three entities also had available copious support resources in the form of junior attorneys. PURE was represented by two junior attorneys.

### **5.4. Intimidation**

Engaging in public interest environmental litigation can be dangerous in the Caribbean. Trinidad and Tobago has recently acquired a strong reputation for violence (Sanchez, 2009). Indeed, there is already a history of an environmental consultant being murdered by a prominent Trinidad businessman in Trinidad and Tobago (Staff Report, 1996). The situation is further exacerbated due to allegations of complacency by law enforcement officers with respect to illegal activities that adversely impact the environment. In Trinidad and Tobago, illegal quarrying has been blamed for many environmental problems and according to one journalist, the situation of possible police complacency has led to an all pervading sense of fear descending on those that are willing to confront the issue (Balroop, 2010).

Recently, the few environmentalists prepared to confront the Government on decisions that they believe could adversely affect the environment have faced, and continue to face, threatening circumstances. The attacks on local environmentalists have now attained the status of actual physical violence being inflicted on the few members of civil society prepared to confront the State decision-makers. Dr. Peter Vine was recently physically manhandled in front of the media, and the editor of a national daily newspaper, Raffique Shah, has expressed strong sentiments as to the lack of action by the police authority on the matter (Shah, 2008). It is becoming increasingly clear that the few members of civil society prepared to confront the State on environmental issues are not receiving the level of protection that ought to be present in a country with the democratic credentials of Trinidad and Tobago.

### **5.5 Risk of Costs and Bankruptcy**

In the case of the FFOS Matter, the EMA sought to drive a dagger into public interest litigation in Trinidad and Tobago by recovering costs from the unsuccessful litigation launched by the non-governmental organization, FFOS. While seeking recovery of legal cost was in itself legally justifiable if not ethically

wrong, attempts to hold directors personally liable for the legal costs could only have been intended to destroy future attempts at initiating public interest litigation by environmental non-governmental organizations. Despite judges in the various stages of the FFOS Matter acknowledging the environmental pedigree of FFOS as a bona fide public organization, the EMA still sought to argue that the organization was a façade for private individuals, namely its directors. Justice Pemberton saw through this thinly disguised attempt by a statutory body to quell any future attempts at challenging its decisions, and stated “Fishermen and Friends of the Sea was a body satisfying the ‘public interest’ component of the Judicial Review Act.”

## **6.0 Facilitating Judicial Scrutiny of Environmental Decisions: Public Interest Litigation**

A necessary element in environmental democracy is the ability to engage in judicial contest as part of the strategy to ensure that environmental decision-making properly considers issues that are important to the public. Challenging the State is most often undertaken by NGOs on behalf of members of the public. The genesis of public interest litigation lies in Section 5 of the Judicial Review Act, No. 60 of 2000 (JR Act).

The JR Act, by virtue of Section 5(2)b, has been enacted so far in three environmental matters by civil society, namely the FFOS Matter, the ALNG Matter and the ALUTRINT Matter. Indeed, public interest litigation has not been extensively used since the passage of the JR Act, and perhaps it has become infamous for its use in challenging the environmental decision-making process. The current Government moved swiftly to limit public interest litigation. The Judicial Review (Amendment) Bill 2005 (the Bill) was introduced by the Government in Parliament in 2005 with the express aim of limiting the categories of persons who might apply for judicial review by repealing Section 5(2)(b) of the JR Act, which vests jurisdiction in the Court to deal with public interest litigation. Due to the prolonging of Parliament in September 2005, the Bill effectively lapsed. However, during the time between the laying of the Bill in Parliament and when it lapsed, a challenge was launched by an NGO attacking the decision of the Government to remove public interest litigation in the case of *Trinidad and Tobago Civil Rights Association v. Attorney General of Trinidad and Tobago*, HCA No.1070 of 2005. The NGO won their challenge, but the decision of Justice Gobin was reversed at the level of the Court of Appeal in the case of *the Attorney General of Trinidad and Tobago v. Trinidad and Tobago Civil Rights Association*, C.A.Civ. 149/2005. The decision of the Court of Appeal suggested that the Court seemed inclined to adopt the position that while the Bill may have the effect of limiting the statutory right to public interest litigation, this right existed independent of the Bill in the judicial practice of Trinidad and Tobago.

## **7. Conclusion**

Trinidad and Tobago is at the cross roads of its environmental democratic process. The EMA was established to promote environmental management and embedded in its statutory remit were several instruments designed to promote public participation in the environmental decision-making process. Yet, it would appear that the EMA is pursuing its mandate in a manner that suggests a minimalist approach to promoting public participation. Furthermore, civil society is engaged in an uphill battle to ensure that environmental democracy is respected by the EMA. The State may be the inspiration behind the approach of the EMA. Political will exercised in furtherance of economic imperatives may be influencing the attitude of the EMA and the wider State machinery towards public participation in the environmental decision-making process. The indicators illustrating the growth in environmental democracy are not promising, and the challenge is to break the hegemony of State domination in the environmental decision-making process and to afford to the public the inalienable right to participate in decisions that ultimately affect the quality of life in Trinidad and Tobago. Unfortunately, the portents are not yet right for confronting such State domination, and this effectively diminishes the vaunted ideological adherence to democracy that is the bedrock of the society.

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- Rajendra Ramlogan, <Rajendra.Ramlogan@sta.uwi.edu>, Senior Lecturer, University of the West Indies, St. Augustine, Trinidad.