

Strengthening the Rule of Law Through a Rights-Based Approach in Guyana's Booming Oil Industry

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Abstract: *Guyana's massive oil discovery has positioned this small South American nation as one of the largest oil producers in the world per capita. Projections indicate that Guyana's oil reserves will contribute billions of dollars in revenue to Guyana's rapidly growing economy. The World Bank has forecasted that Guyana's annual gross domestic product (GDP) will grow 25% in 2023. This sudden upsurge in wealth allocation comes with a legitimate concern regarding the emphasis being placed on rule of law and human rights, which are ostensibly viewed as antitheses to economic development. The right to a healthy environment has always inhabited a place in the compendium of fundamental rights provisions encapsulated in Guyana's Constitution but has enjoyed a long slumber as part of the supreme laws of the land. Recently, the justiciability has been heavily relied on in light of Guyana's present socio-economic circumstances. The shift from former underutilisation to catalyst for change has been in response to arising environmental policy concerns regarding matters connected with Guyana burgeoning oil industry. A plethora of cases have graced the Guyanese judicial bench, initiated by environmental interest groups in Guyana, and *Collins and Whyte v. Environmental Protection Agency and Esso Exploration and Production Guyana Limited 2022-HC-DEM-CIV-FDA-1314* exemplifies arguably the most potential to date in support of a rights-centred to such issues, even as the case awaits appellate determination.*

Keywords: *right to healthy environment, constitutionalisation*

Takeaways from the Case

Socio-economic backdrop

The World Bank has forecasted Guyana to be one of the fastest growing economies in the world;¹ with an annual GDP growth of 25% in 2023 alone, and oil production pegged to be one of the highest levels per capita in the world.² Even as Guyana goes full speed ahead to exploit its newly-tapped resources for economic growth and development of the country, environmental interest groups have not been shy about challenging certain state-sanctioned decisions.

Cue the respondents

The judgment of the High Court in *Collins and Whyte v. Environmental Protection Agency and Esso Exploration and Production Guyana Limited 2022-HC-DEM-CIV-FDA-1314* is one of the most recent iterations of the necessity for state authorities to emphasise a right-based approach in protecting the environmental integrity of Guyana and at the same time ensure that there is corporate accountability by oil and gas companies in honouring pre-existing statutory mandates. Herein, the Court declared that ESSO Exploration and Production Guyana Limited ("ESSSO"), and affiliate, ExxonMobil Corporation

1 World Bank, 'Guyana -Country Partnership Framework for the Period FY23-26'(World Bank 2023) 5 <<https://documents1.worldbank.org/curated/en/099042423133024404/pdf/BOSIB06956cef807809aae0687fa5b9d08f.pdf>> accessed 29 October 2023.

2 International Monetary Fund (IMF), 'Guyana: 2022 Article IV Consultation-Press Release; Staff Report; and Statement by the Executive Director for Guyana' (IMF 2022) <<https://www.imf.org/en/Publications/CR/Issues/2022/09/27/Guyana-2022-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-the-523930>> accessed 29 October 2023.

(“ExxonMobil”) cannot shrug off its responsibility to bear clean-up costs for any oil spills as a result of its drilling off the coast of Guyana, and that by failing to provide liability insurance for clean-up costs, as well as for remediation and damage for any ensuing oil spills, the oil company was in breach of the conditions of the environmental permit³ granted to it. Similarly, the Environmental Protection Agency, a named respondent in the case and the issuing authority of environmental permits and the statutory authority established under the Environment Protection Act⁴ with responsibility to ensure, ‘the management, conservation, protection and improvement of the environment’⁵ as well as, ‘the prevention or control of pollution’⁶ has a concomitant obligation to ensure that these conditions are met. Being carried in the undercurrent is the statutory authority’s obligation to uphold and execute its mandate ultimately with a view to promoting the right to a healthy environment.

Golden opportunity?

While the ruling of the High Court in *Collins and Whyte* shed light on the rights discourse only peripherally, it presents an optimal opportunity for the appellate bench which will soon see the matter argued before it, to frontally endorse and emphasise the promotion and protection of rights as a matter of ‘grave importance of national significance’. As Guyana’s apex court reiterated in one of its more recent judgments,⁷ legislation should not be interpreted only with a view to achieving the objectives of the legislation but to achieve alignment

with, ‘fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions.’⁸ For this reason, ‘legislation must be interpreted so as to effectuate the protection it is intended to offer’.⁹

It should be foremost noted that this case has thus made strides by adding momentum to the turning tide on environmental rights and corporate accountability not only in Guyana but in the Caribbean region. In 2021, when the Court similarly heard a case regarding the protection of the applicants’ Article 149(J) rights under the Constitution of Guyana, which incidentally became the first climate-related constitutional case in the Caribbean region,¹⁰ the natural effect was that it created Caribbean jurisprudence in an area previously unexplored.

To what extent are state authorities obliged to protect the interests of the citizenry? Justice Kissoon in *Collins and Whyte* characterised the Environmental Protection Agency as ‘derelict, pliant and submissive’ on account of its failure to enforce compliance of the issued environmental permit. This does not bode well especially since the State, vicariously through its agencies, entities and authorities hold prime responsibility for respecting, promoting and protecting human rights.¹¹ This taken together with the devastating effects any future oil spills can have not only on Guyana but the wider Caribbean, as ExxonMobil’s own environmental impact statement¹² disclosed- the ecology, the livelihood and overall life of

3 Environmental Protection Agency Guyana, Liza Phase 1 Environmental Permit (Renewed) (Environmental Protection Agency Guyana 27 October 2022) < <https://epaguyana.org/download/liza-phase-1-renewed-permit-pdf/>> accessed 24 September 2023.

4 Cap. 20:05 of the Laws of the Co-operative Republic of Guyana (“Guyana”).

5 Ibid.

6 Ibid.

7 *OO v BK and the Attorney General of Barbados and others* [2023] CCJ 10 (AJ) BB.

8 Ibid. [67]

9 Ibid [68].

10 Center for International Environmental Law, ‘Guyanese Citizens File Climate Case Claiming Massive Offshore Oil Project is

Unconstitutional’ (*Centre for International Environmental Law Press Room*, 21 May 2021) < <https://www.ciel.org/news/guyana-constitutional-court-case-oil-and-gas/>> accessed 23 September 2023.

11 See: Article 2 of the ICCPR; Article 2 of the ICESCR; Article 2(1) of the Declaration on the Rights and responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Adopted by the General Assembly, resolution 53/144, A/RES/53/144, 9 December 1998) states that, ‘Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms...’.

12 Esso Exploration and Production Guyana Limited, ‘Environmental Impact Assessment: Liza Phase 1 Development Project’ (May 2017) < <https://www.oggn.website/wp-content/uploads/2018/01/Volume-I-Liza-Phase-1-EIA-1.pdf>> accessed 23 September 2023.

the people in the region- compellingly emphasise why a rights-based approach has ripened in Guyana. Providing formidable buttress are the Maastricht Principles on the Human Rights of Future Generations¹³ which clarifies the developing law and affirms States' present obligations, namely, to all people, whether present or generations to come, and concomitantly, States' obligation to respect future generations, taking account of conduct which they 'ought reasonably to foresee, will create or contribute to, a substantial risk of violations of the human rights of future generations'.¹⁴ Independent of guiding principles, it can be argued that Guyana's constitutional provision on the environment in itself has enough substance to stand on its own and contains an endorsement of the principle of intergenerational equity insofar as it obliges the State to 'protect the environment, for the benefit of present and future generations...'¹⁵

Consequence of a preference for judicial review

It is notable that in utilising judicial review actions, as was employed in *Collins and Whyte* and in subsequent cases¹⁶, there is the statutory requirement for the applicants to firstly establish *locus standi* to initiate the judicial review action, in accordance with the requirements of Guyana's Judicial Review Act.¹⁷ The success of the applicants in

Collins and Whyte as citizens of Guyana on a matter of public interest of environmental concern was similarly endorsed by a more recent judgment of the High Court¹⁸. Incidentally, the latter case also involved the same respondents. Engaging a rights approach, allows for the foregoing of the "standing threshold", allowing citizens to seek protection of their fundamental rights protected under the Constitution, the right to a healthy environment being no exception.

The Legal Landscape of the Right to a Healthy Environment

International Origins

Professor David Boyd¹⁹, UN Special Rapporteur on Human Rights and the Environment enunciated that while the right to a healthy environment was never part of the international bill of rights²⁰ as embodied in International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the remarkable origin story of the right to a healthy environment, however, is that the right had formed part of the constitutions of over 150 countries²¹ even before the adoption by the UN Human Rights Council's 2021 resolution²² of 'the right to a clean, healthy and sustainable environment as a human right that

13 Maastricht Principles on The Human Rights of Future Generations adopted 3 February 2023 < Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf (ohchr.org) > accessed 23 September 2023.

14 Ibid, [16].

15 See: Edith Browne Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 Vt. J. Envtl. L. 615, 616 where the concept is explained to mean 'all generations as partners caring for and using the earth. Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them'.

16 *Radzick and Hughes v. Environmental Protection Agency and others* 2023 HC-DEM-CIV-FDA-456. Electronic copy of judgment available here < <https://oilnow.gy/wp-content/uploads/2023/10/Radzick-vs-EPA-vs-EMGL-.pdf>>.

17 Section 4(1) of the Judicial Review Act 2010 Cap.3:06 of the Laws of the Cooperative Republic of Guyana states that '(1) The Court may on an application for judicial review grant relief in accordance with this Act- (a) to a person whose interests are adversely affected by an administrative act or omission; (b) to a person or group of person if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case'.

18 *Radzick and Hughes* (n 17).

19 Yann Aguila and Jorge E. Viñuales (eds.), *A Global Pact for the Environment: Legal Foundations* (Cambridge: Centre for Environment, Energy and Natural Resource Governance, 2019), 30.

20 United Nations Human Rights Office of the High Commissioner, 'International Bill of Human Rights. A Brief History, and the two International Covenants' (*United Nations Human Rights Office of the High Commissioner*) < <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>> accessed 19 September 2023.

21 UN Human Rights Council 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2019) UN Doc A/HRC/43/53 < <https://documents.un.org/api/symbol/access?j=G1935514&t=pdf> > accessed 20 September 2023.

22 UN Human Rights Council 'Resolution adopted by the Human Rights Council on 8 October 2021: The human right to a clean, healthy and sustainable environment' (2021) UN Doc A/HRC/RES/48/13 < <https://documents.un.org/doc/undoc/gen/g21/289/50/pdf/g2128950.pdf?token=Q5faFiAfOrcw6LRqst&fe=true> > accessed 20 September 2023.

is important for the enjoyment of human rights'. The subsequent passage of a UN General Assembly resolution²³ recognising the right is an implicit endorsement of the centrality of the right to human existence. This signified the culmination of the right to a healthy environment since its initial appearance on the international forum in 1972. Notwithstanding, the Declaration of the United Nations Conference of the Human Environment²⁴ ("Stockholm Declaration") that '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 ambitious enunciation remained only aspirational in nature.

Constitutional amendment and its symbolism

Guyana is one of the countries which opted to constitutionalise the right to environment before international recognition of the same, and this was done as part and parcel of its 2003 constitutional amendments.²⁵ This milestone marked the metamorphosis of the rights its previous aspirational nature to its present justiciable manifestation. The right to a healthy environment is enunciated as one of the fundamental rights of individuals by virtue of article 149J of the Constitution.²⁶ Applying the rationale that it is not obligatory that states constitutionalise the right, such a move indicates a deliberate interest of the State in

protecting this quintessential aspect of life- the environment – by elevating it to the status of fundamental right.²⁷ As Rodriguez-Garavito,²⁸ pioneer in human rights and climate change strategic litigation has illuminated, a critical ingredient of human rights and climate change litigation, which is similarly applicable to human rights and environment cases generally without issue, is the constitutional encapsulation of the requisite right. Pursuant to article 149J (1), 'Everyone has the rights to an environment that is not harmful to his or her health and well-being'.

Additionally, what is of critical note is that section (2) of article 149J of the Constitution of Guyana places a positive obligation on the State 'to protect the environment for the benefit of present and future generations, through reasonable legislative and other measures' to *inter alia*, prevent pollution and ecological degradation. What this means is that, in keeping with article 154A(1), such rights 'shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of government'. However, since the right has been accorded constitutional thrust, there has been a malaise to implement the right to a healthy environment. This is because, as Adam Chilton and Mila Versteeg²⁹ concede, constitutionalisation is not the ultimate resolve to a rights implementation deficit. In fact, notwithstanding the presence of a right in a state's

23 UNGA 'The human right to a clean, healthy and sustainable environment' (2022) UN Doc A/76/L.75 <<https://digitallibrary.un.org/record/3983329?ln=en>> accessed 20 September 2023.

24 Report of the UN Conference on the Human Environment Stockholm, (1972) UN Doc A/CONF.48/14/Rev.1 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf?OpenElement>> accessed 20 September 2023. Chapter 1 of this Report enunciates the Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration').

25 Arif Bulkan, Democracy in Disguise: Assessing the Reforms to the Fundamental Rights Provisions in Guyana (2004) 32 (3) Georgia Journal of International and Comparative Law 613. <<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1206&context=gjicl>> accessed 23 September 2023.

26 Constitution of the Co-operative Republic of Guyana Cap.1:01.

27 UNDP, 'Protecting Human Rights in Constitutions' (2023), 13; Katharine Young (ed.), *The Future of Economic and Social Rights*, (Part 1-2 Evan Rosevear, Ran Hirschl and Courtney Jung, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions', Cambridge University Press 2019), where it is discussed that post- 2000 many economic and social rights were either converged or distinct polarizations were drawn with the traditional enunciations of fundamental rights. Guyana's 2003 amendments are in tune with the former.

28 Cesar Rodriguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press 2002).

29 Adam Chilton and Mila Versteeg, 'Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending' (2016) Virginia Law and Economics Research Paper No. 2016-20, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 781, U of Chicago, Public Law Working Paper No. 598 <<https://ssrn.com/abstract=2857731>> accessed 23 September 2023

constitution, it falls on the judiciary to protect and promote these rights, a point supported by Young.³⁰ And as far as international human rights commitments are concerned, the opposite is also important to bear in mind, namely, that constitutionalisation is not a pre-cursor to the enforcement of a human right.³¹ States have no positive obligation to constitutionalise every human right ratified and contained in the international covenants.

Corporate Accountability

Human rights provide a two-pronged protection against state abuse and protection from violation by non-state actors.³² Concededly, the Constitution does not place an explicit obligation on corporate entities to honour human rights obligations. However, absence of explicit enunciation in the Constitution does not preclude or immunise against corporate accountability. The UN Guiding Principles on Business and Human Rights (UNGPs),³³ which has become 'the most authoritative and widely adopted set of principles for responsible business',³⁴ dictates that by virtue of the role played by business enterprises as specialised organs of society, responsibility falls on them 'to comply with all applicable laws and to respect human rights'. The circumstances of business operations give rise to this responsibility if there is a potential that a human rights risk may arise, as clarified in the UN Human Rights Office of the High Commissioner interpretive guide on The Corporate Responsibility to Respect Human Rights.³⁵

Conclusion

The nascency of Guyana's oil extraction makes it imperative for rights to be frontally considered, notwithstanding the potential of economic enrichment. Guyana's entrenchment of the right to a healthy environment in the Constitution does not create a mere aspirational right and a concomitant discretionary role of State. On the contrary, State action is obligatory in nature. While judicialisation is not the only remedy to secure the right to a healthy environment, at present it provides the most viable solution to ensuring that the right to a healthy environment is respected, protected and promoted.

30Katharine Young, 'The New Managerialism: Courts, Positive Duties, and Economic and Social Rights' (2021) Boston College Law School Legal Studies Research Paper No. 554 <<https://ssrn.com/abstract=3819991>> accessed 28 October 2023.

31 UNDP (n 27), 10.

32 Oscar Omar Salazar-Duran, *A Human Rights to Corporate Accountability and Environmental Litigation* (2009), University of San Francisco Law Review Vol. 43, 733, 734.

33 United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (HR/PUB/11/04, United Nations Human Rights Office of the High

Commissioner 2011) <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 22 September 2023.

34 UNDP, 'Business and Human Rights' < Business and Human Rights | United Nations Development Programme (undp.org)> accessed 29 July 2024.

35 United Nations Human Rights Office of the High Commissioner, 'The Corporate Responsibility To Respect Human Rights: An Interpretive Guide' (HR/PUB/12/02, United Nations Human Rights Office of the High Commissioner 2012) <https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf> accessed 22 September 2023.