

## **Saving the World Through the Law - Re-Engineering the Role of Law to Achieve a Just Society**

*This speech was delivered by the Honourable Mr. Justice of Appeal Vasheist Kokaram at the annual Student Prize Giving Ceremony of the Faculty of Law, UWI, St. Augustine Campus on Friday 20 October 2023.*

### **Introduction/Salutations**

I am honoured to address you this evening. But you will forgive me if I seem to trivialise this distinguished celebration of your excellence in the law by beginning, not with a reference to legal luminaries such as Oliver Holmes or Caribbean jurists such as Sir Hugh Wooding QC, but with a reference to a statement made by the DC comic character, Batman. On his mission to save the people of Gotham, when asked to reveal his identity, he growled ‘It is not who I am underneath but what I do that defines me’.<sup>1</sup>

What does the law do? What defines a just law and legal system? How will you be defined as servants of the law, the gatekeepers of justice? It is not what the law is declared to be but how it interacts with our lived realities that defines the quality of justice. It is not only what you have learned and excelled, in the study of the law but what you do as attorneys, as members of society, that will define your purpose as servants of justice, and if the interaction of known law with our lived reality takes divergent paths to justice and peace, how will you re-engineer, re-define, and re-code the law and yourselves to achieve a just and peaceful society? How will you advance the cause of social justice by giving deeper meaning to democracy and the rule of law and creating an environment that promotes sustainable human development to save us all?

### **A peaceful hike in the Amazon**

I was deep in the Amazon forest in Iguazu, Brazil. Its trees stretched to the sky, the spires of an impenetrable castle, thousands of insects among its citizens humming its quiet anthem. The interspersed calls from the orange-tipped

parrot were punctuated by the Morse code of the crimson crested woodpecker. I was on my knees on the red earth floor, my friend Joseph a member of the Gunerise tribe, indigenous to South America, was carefully scraping the bark off a tree. “It is good for an upset stomach”, he said he was showing me around his village. We walked almost half an hour to get from one hut to another; we stood atop an incline, and with a lazy brush of his hand, he showed acres of his ancestral lands. They live with the land. There is no idea of possession or any individual claiming ownership. “How would you settle a dispute?” I asked. Why would we fight? We share the trees; we share the forest; it is part of us. We give to her, and she gives to us. What more can we ask for? We are at peace.

No division, no obsession for wealth, no proprietary rights. My mind raced to locate this concept against my legal training of “estates”, “fee simple” or “fee tail” (the compost of a feudal past like the decomposing leaves on my trail), but as we walked through the deep forest, I heard the low, reverberating noise of a machine. Someone had acquired legal title from the State and was tearing down the trees and clearing the land to build a resort nearby. Monetizing this patch of earth now aggrandized, demarcated and identified by law. With a knowing but sad whisper Joseph says “it is only a matter of time when they will come this way. We don’t have the money to fight them”. His story could well be that of the Tainos here in Arima or Guyana or the Kalinago in Dominica or the marrons in blue mountain or the Mayans of Belize....and when Columbus waded through our Caribbean shores with the arrogance of power, the legal stakes of title and ownership rippled over the centuries of a strangeness of

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<sup>1</sup> Christopher Nolan, *Batman Begins* (Warner Brothers 2005).

law and a disconnect with indigenous notions of peace and communal justice. The law drawing new legal lines of responsibility and belonging while segregating, discriminating and eliminating an indigenous way of life...Our own ancestors later lured or kidnapped by legal regimes and constitutional constructs inked in blood. Law became an instrument of oppression in its “unaccommodation” to alternative visions of peace.

### **Scars of history-The Dualism of the Law**

In the famous trial of Anacaona in 1503, a Cacica chief of Hispaniola was arrested for breaking the law in resisting the occupation of the Spaniards. Ironically it was during a meeting of eighty caciques of which Anacaona was present to negotiate a peace with the Spanish colonisers, that the Spanish Governor, Nicolás de Ovando, ordered her arrest and trial. Found guilty of the crime, the Spanish offered her life as a concubine instead of the imposition of the death penalty. She refused and was burnt alive. Her wails no doubt to join the many voices dehumanised by a legal system which at that time was complicit with the State’s abuse of power.

Indeed, Tracy Robinson Bulkan and Justice Adrian Saunders would later make the point that the conventional claim that Caribbean indigenous peoples were extinguished was used to deny their existence and avoid responsibilities in our own legal system.<sup>2</sup> The acknowledgment of their existence being saved for symbols in our coat of arms such as Jamaica, Dominica, and Guyana.<sup>3</sup> In itself a powerful symbol of the dualism of law. On one part, asserting a personhood and identity of new and emerging nations but on the other, nations bearing scars of laws which demeaned and marginalised. It is at once a recognition of laws potent power to oppress and our challenge as legal engineers and your promise as students of the law to re-orient law with the power to liberate.

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2 Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021) 56.

3 *ibid.*

4 Don Robotham, “‘The Notorious Riot’: The Socio-Economic and Political Bases of Paul Bogle’s Revolt” 1981 Institute of Social and

Under our slavery laws, anthropologist Don Robotham observed that the judiciary:

became a vital link in the whole chain of oppression binding the people. Thus it was no accident that the issue which sparked the famous Morant Bay rebellion occurred at a Court House nor that this institution became the focus of anger of the people.<sup>4</sup>

Those who studied administrative law will be familiar with a famous precedent/law recognising the importance of natural justice in a just society, *De Verteuil v Knaggs*,<sup>5</sup> an interesting story originating from the sugar plantations in Trinidad of the famous De Verteuil whose indentured labourers were ordered to be removed from his estate as a result of a recommendation by the protector of indentured labourers. The case is indeed a *locus classicus* for any student of administrative law on the right to be heard before a decision is made adversely affecting one’s interest in property.<sup>6</sup> The cruellest irony was the discussion of the right to be heard of the owner of indentured labourers. What of the rights to be heard of the indentured labourers virtually imprisoned in dehumanising conditions in barracks in a society which then had no respect for their human dignity or condition?

### **Communal peace systems**

Is there a divergence in the law’s purpose of setting the parameters of conduct in a civilised society with its failure to achieve justice or peace in the real experience of persons impacted by the law? Let me juxtapose that statement of the dichotomy of the vision of a just society and the workings of the law in this story of our own communal dispute resolution system - the panchayat, an indigenous dispute resolution system of the East Indians brought here by the indentured labourers. It was a form of communal justice dispensed by 5 elders in the community. There is no better story of demonstrating

Economic Research (The University of the West Indies, Mona, Jamaica) Working Paper 28, 67.

5 [1918] AC 557.

6 *ibid.*

Joseph's vision of peace in community and concepts of individualism foisted by the law than that of Mr. Gopee.

Mr. Gopee, one of the wealthiest men in the village, gave his brother a lot of land to build his home together with his family. When he died, Mr. Gopee told his sister-in-law, the grieving wife Mrs. Subachan, that she must leave the land and that she was a squatter. The panchyee intervened and convened a meeting in an open area; most of the village came out. Both parties told their side but Mr. Gopee declared to the villagers "I want no part of her. My brother is dead. That woman is not my family now". The panchyee asked Mr. Gopee to consider what his sister-in-law had undergone and think about it and report back to them the next day to say how he will settle this in the interests of fairness. Mr. Gopee shouted out "This panchayat cannot do me nothing! Mr. Binda you could go to France!" (an expletive in those times).

Mr. Gopee went to a solicitor who then obtained a judgment from the court, a declaration by the law that he was the owner of the land. At the next meeting of the panchayat, a Superintendent Peters attended armed with the judgment and informed the Panchyee that their convening of the panchayat was a contempt of the Court! The Panchyee told the Superintendent "Officer why must I stop this meeting. This is the entire community you see before you they came to attend the regular meeting of the panchayat and we will start at 6:00p.m you may sit on the perra (a wooden stool) and look on". One of the African villagers stood up and said to Superintendent Peters "If you arrest Mr. Binda, you have to arrest all the villagers of Orange Valley". Chaos broke out and the Panchyee, as the respected elder, was able to calm the riotous voices and save Superintendent Peters from further embarrassment. Mr. Gopee was unrelenting and the panchayat had to express their opinion, which was binding, on all. This was their judgment: "Nobody in the village must talk to you from six o'clock today everybody will stop talking to you. No water will be distributed to you. You will do no shopping in this community. We will ask the cane factory to dismiss you." An action committee was appointed to carry out the decision. At the next

meeting of the panchayat Mr. Gopee stood in front of all the villagers and said "I am begging all of you in the village to forgive me for what I have done. Please I ask you to withdraw the restrictions put on me. Anything you ask of me I will do it." He agreed to assist Mrs. Subachan to complete the repairs to her home and according to Mr. Binda's account by the following week Mr. Gopee was his smiling self and back to normal.

Communal disputes systems were indigenous to the African communities with the elder system seeking justice through communal acceptance of joint futures and peaceful co-existence. A substitution of the "Ism" of our common law with a collectivism which is further aligned to peace and social justice. But these systems were replaced by a legal system focused on truth determination by attrition. The story of Joseph, Anacaona and Mr. Gopee are all of lives impacted by legal systems that exacerbates the conflict of those who come in contact with the law and the use of the oppressive and coercive power of the law to assert an individualistic view of justice. The law falls short of dealing with or improving the human condition unless it can find its way in the legal code of the dispute.

The law is meant to organise us. It is a management agent for guiding, standardising and changing social behaviour. Our Constitution's own supreme law is a vision of a just and civilised democracy where faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator: 'respect the principles of social justice and the operation of the economic system should result in the material resources of the community being so distributed as to subseries the common good'.<sup>7</sup>

But these stories of our history demonstrate a fracture between the law and the peace and justice the law is meant to deliver and a society of dignified co-existence. They have been uneasy bedfellows.

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<sup>7</sup> See The Constitution of the Republic of Trinidad and Tobago, preamble.

Even today, October 2023, the Privy Council in *AG of Trinidad and Tobago v Maharaj*<sup>8</sup> following this decision in *Chandler v State of Trinidad and Tobago (No 2)*<sup>9</sup> has shown how the dreary hands of the past still lay on our ankles in our quest to walk the path to a modern democracy. The saved law clause in our Constitution preserves in one space the uneasiness of our colonial past with the hope of designing a society envisioned by the preamble of our Constitution. A desire to adapt, mould and shape a new future with the growing demands by this generation. The saved law dichotomy symbolizes the very inconsistency of the law itself placing a value on remaining static as a measure of predictability but yet holding the promise of evolution to map changing mores and values. A supreme law itself it seems breathing and living but yet on life support from noxious gas of an undemocratic society.... what would be your new Constitution I wonder.

### **Who are we?**

As I take you on this journey of the past and future, this discourse takes you down the path of interrogating who are we? What are we doing as lawyers, students of law and what is our purpose? As students of law, future lawyers, chief justices, presidents, parliamentarians and leaders, this is the call to shape our future. I say this against the backdrop of many of us yet still unable to access the Caribbean Court of Justice (“CCJ”) as our final appellate court to interrogate laws so that it is indigenous and relevant to us. Of course what stands in your way between that vision of a just society and the CCJ as your apex court is - the law.

But as old as this story is, it is one which confronts you young graduates as a continuing challenge to synergise the law with the goals and deliverables of a just and peaceful society. Our challenge is to define the ultimate end the fundamental value to which the law will serve as a positive change agent.

Even when we turn to the international community, we ask the question where is the moral force in the law?

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8 [2023] UKPC 36 (Trinidad and Tobago).

9 [2022] UKPC 19 (Trinidad and Tobago).

10 UNHRC ‘Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International

Looking at the Middle East crisis, a Caribbean jurist had once beseeched the warring parties in breach of humanitarian laws to address the deeper social issues and called on the wider community to assist as the law cannot do it on its own. In its report on the investigation of violation of human rights law on the interception of a humanitarian aid flotilla bound for Gaza in 2010 leading to the death and wounding of many passengers by Israeli forces, Mr. Karl Hudson-Phillips QC chairing the investigating body reported that:

The parties and the international community are urged to find the solution that will address all legitimate security concern of both Israel and the people of Palestine, both of whom are equally entitled to “their place under the heavens”. The apparent dichotomy in this case between the competing rights of security and to a decent living can only be resolved if old antagonisms are subordinated to a sense of justice and fair play. One has to find the strength to pluck rooted sorrows from the memory and to move on.<sup>10</sup>

A sense of justice and fair play for all. Is that what is obtained when our society turn to the law? Perhaps the fault “lies not in our stars” but it is in our overestimation of what the law can do to solve our human problems. In *Life Without Lawyers: Restoring Responsibility in America*, Philip K Howard commented:

Law is supposed to be a structure that promotes our freedom. It does this by setting boundaries that define an open field of freedom. Instead law has moved in on daily life, becoming the arbiter of potentially every disagreement in a free society. We’ve asked law to do too much—trying to enforce fairness in daily relations is not freedom but a form of utopia that predictably

Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance’ (2010) UN Doc A/HRC/15/21, [275].

degenerates into squealing demands for me, me, me.<sup>11</sup>

Similarly to Mr. Gopee, our immediate resort to law as a means to resolve conflict lies at the heart of our problem. The use of law has become positional, confrontational, isolationist and individualistic. No different from a coloniser we wish to pummel and defeat opponents with the strong arm and force of the law. Using the judiciary as a coercive arm of the State to submit others to individualistic demands.

We have been gifted an adversarial system of justice which compels, that directs what to do and defines what you should not do:

Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretative acts signal and occasion the imposition of violence on others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.<sup>12</sup>

It is in fact warfare imbedded within the genetic code of law. In Port of Spain, recently, a Claimant looks to me in exasperation “I’m sorry Sir Judge with all due respect, I will get no justice here unless that man, the Defendant, feels the full brunt of the law, he needs to be punished.” Several injunctions, several applications for contempt later, the relationship between these parties are no better and the complaints to the police and to every level of our courts from the Magistrates Court to the Court of Appeal to enforce the law continues unabated...no justice here. In San Fernando, a Claimant seeking to preserve his right to possession to a parcel of land against the State files one witness statement, but has no corroborating evidence, no expert evidence. Despite the holes in his testimony shown up at the trial, no doubt crushed under the heel of brutish cross examination, he turns to the Court and whelps “But Sir, this is my mother’s land and her father’s land before her. It’s been with us for years since indentureship. If I knew you wanted evidence, I would have brought the

whole village today”. In response, the claim is dismissed, a heritage gone unacknowledged, no justice here...In a society’s quest for retribution a man is held in remand for years, victims subject to re-victimisation, no justice here....What I see before me that passes for justice are individual cries for dominance, quest for revenge, search for retribution and an insensitivity to the lived experience the real dimensions of the other.

From private relational disputes to larger institutional questions, if we treat these problems with the bullying force of rights without an appreciation of community, of identity, of the importance of dialogue, communication and empathy, we will rip our societies apart, we will destroy the basic foundational purpose of a Caribbean education to advance the common good of all our people.

Roscoe Pound said ‘Making or finding law, call it which you will, presupposes a mental picture of what one is doing and of why he is doing it.’<sup>13</sup> What is our vision? I stumbled on an essay of the humane judge and humanist advocate. Sudhish Pai recognised that “Justice is what mankind seeks and which cements the fabric of a secure society”. “Peace is the fruit of justice”. Would it not be worth our while to achieve a fundamental right to peaceful co-existence by giving full life to the humanism that should underlie our legal world.

Can we then use the law to save? Can it heal? Is there a genetic code of humanism which is ignored in our texts or legal training as lawyers which we can re-engineer into the law. If we are looking for laws to save the world or the role of the law to save us, we face the anxious task to interrogate the relevance of the law to our human condition in building or visioning the architecture of a just society...with peace as the output of our endeavour.

### **The Search for Peace**

Ultimately we are all joined in Joseph’s quest for peace. It would surprise you to know that of the persons polled who access our courts, 83% want to have a voice and to

11 Philip K Howard, *Life Without Lawyers: Restoring Responsibility in America* (WW Norton & Co 2010) 180.

12 Robert M Cover, ‘Violence and the Word’ (1986) 95 Yale LJ 1601.

13 Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale UP 1930) 59.

be respected.<sup>14</sup> Peace jurisprudence studies demonstrated that the feel of justice is much more important than the outcome. But importantly, 7% of litigants want to get a judgment at a trial. Why are they coming to our court? To have their conflict resolved not necessarily by trial and not necessarily by the strict application of law...they need help to arrive at a peaceful solution. They are using the legal system as a means to achieve peace and prefer the judge like the elder or panchyee to orchestrate it.

But human problems are far from linear and far more complex than legal precedent may offer. Interestingly, the Institute for Economics and Peace helpfully explains the difference between negative peace and positive peace. They assert that negative peace is simply the end of violence. This indeed is our response to conflict, how do we end this war. We seldom ask how can we grow from conflict. However, positive peace is a far more constructive. It sets in place the importance of peace indicators in a society which are essential for its stability, development and sustainability.<sup>15</sup>

Positive Peace can be seen as providing the necessary conditions for adaptation to changing conditions, a well-run society, and the nonviolent resolution of disagreements. [ . . . ] Positive Peace can be the guiding principle to build and reinforce the attitudes, institutions and structures that preempt conflict and help societies channel disagreements productively rather than falling into violence.<sup>16</sup>

Even though this report treats with peace through a macroeconomic lens, at its core are lessons for our legal systems that as an institution which sets the boundaries of acceptable human conduct, there is a need to focus on

peace-making initiatives. The time to do so is now when the development of peace is at a critical low in our society.

The Institute examines several pillars of positive peace in its 2023 report.<sup>17</sup> They are: ‘well-functioning government’, ‘sound business environment’, ‘acceptance of the rights of others’, ‘good relations with neighbours’, ‘free flow of information’, ‘high levels of human capital’, ‘low levels of corruption’ and ‘equitable distribution of resources’.<sup>18</sup>

On this Index Iceland is ranked No. 1, Afghanistan is ranked No. 163, India ranks No. 126 and Trinidad and Tobago ranks at No. 70.<sup>19</sup> It is the creation of a peaceful environment which allows for the re-focus of time, energy and resources to nation building and the development of our global humanity. There are growing humanitarian crisis of migration, climate change, biodiversity which call upon our collective effort. For the Caribbean three humanitarian crisis are on our agenda: 1) the refugee and migration crisis of Venezuela and Cuba 2) global warming and 3) violent crimes. I can do no better than to cite with approval the authors’ view on the transformational power of positive peace:

[ . . . ] finding solutions to these unprecedented challenges requires fundamentally new ways of thinking.

Without peace, it will not be possible to achieve the levels of trust, cooperation or inclusiveness necessary to solve these challenges. Much less to empower international and local institutions responsible for addressing them. Therefore, peace is the essential prerequisite for the survival of humanity in the 21st century.

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14 Poll conducted by author during time at High Court with parties and attorneys involved in Case Management Conference hearings.

15 Institute for Economics & Peace, *Global Peace Index 2019: Measuring Peace in a Complex World* (Institute for Economics & Peace 2019) 68 <<http://visionofhumanity.org/reports>> accessed 3 June 2024.

16 *ibid.*

17 Institute for Economics & Peace, *Global Peace Index 2023: Measuring Peace in a Complex World* (Institute for Economics &

Peace 2023) chap 5 <<http://visionofhumanity.org/reports>> accessed 3 June 2024.

18 *ibid.*

19 Institute for Economics & Peace, *Global Peace Index 2023: Measuring Peace in a Complex World* (Institute for Economics & Peace 2023) 8–9 <<http://visionofhumanity.org/reports>> accessed 3 June 2024.

[. . .] Positive Peace creates an optimal environment in which human potential can flourish.<sup>20</sup>

A parallel can be drawn with medical science. The study of pathology has led to numerous breakthroughs in our understanding of how to treat and cure disease. However, it was only when medical science turned its focus to the study of healthy human beings that we understood what we needed to stay healthy: physical exercise, a good mental disposition and a balanced diet are some examples. In this approach lies a deeper awareness of our purpose to heal through the law.

### **Peace Jurisprudence**

Students of law, if the law is our servant to achieve a just society, I challenge you to use this concept of positive peace as the axis of a just legal structure. I offer to you the concept of Peace Jurisprudence. It borrows from the work of Susan Daicoff that recognised the powerful influences in the legal world of studies and theories being advanced towards law as a healing profession but gives it a focused approach towards all the indicators of positive peace vital for a just society.

Peace jurisprudence is the process by which the law places the concept of peace as an outcome beyond simply the legal resolution of a dispute. It recognises that judges and attorneys have an important role of leadership in creating the environment for positive peaceful change in the lives of disputants. To this end, the law must be carefully analysed for its impact on the social realities of disputants and legal processes must engage individual's needs, outcomes collaboratively determined. Judging and lawyering must be seen and felt to be more humane. It is a combination of mediation, holistic, restorative justice and therapeutic jurisprudence practices. It is steeped in our historical desire for communal based approaches to conflict.

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20 Institute for Economics & Peace, *Global Peace Index 2019: Measuring Peace in a Complex World* (Institute for Economics & Peace 2019) 67 <<http://visionofhumanity.org/reports>> accessed 3 June 2024.

21 Mark Carey, 'Restorative Justice—A New Approach With Historical Roots' in *Corrections Retrospective 1959–1999* (Minnesota Department of Corrections 1999) 32.

### **Therapeutic Jurisprudence**

Co-founded by Professor David Wexler and Bruce Winnick, therapeutic jurisprudence is the study of law by the use of social science to determine the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects. It strives to reduce the anti-therapeutic consequences of the law and enhance its therapeutic consequences without subordinating due process or other justice values.

Therapeutic Jurisprudence emphasises notions of catharsis and empathy.

### **Restorative Justice**

Restorative justice is a philosophical framework that views crime as an injury and justice as a process for healing to take place. 'It seeks to balance the needs of the victim and community, rather than just those of the offender'.<sup>21</sup> Restorative justice practices are of increasing importance in today's society as it not only impacts the victim and offender but also the community members. In Trinidad and Tobago, the increasing incarceration levels indicates a need for the solid application of restorative justice practices in the society. While there has been some attempt to implement such practice in the prison system for example, the teaching of vocational skills, there is no tangible pieces of legislation to guide these practices.

According to Umbreit:

A significant new development in our thinking about crime and justice is the growing international interest in restorative justice theory.<sup>22</sup> Restorative justice offers a fundamentally different framework for understanding and responding to crime and victimization. Restorative justice emphasizes the importance of elevating the role of crime victims and community members, holding offenders directly accountable to the people they have

22 See Bazemore and Umbreit; Galaway and Hudson; Van Ness and Strong; Zehr as cited in Mark Umbreit, 'Restorative Justice', *Encyclopedia of Crime & Justice* (2nd edn, Macmillan Reference USA 2002) vol 3, 1333.

violated, restoring the emotional and material losses of victims, and providing a range of opportunities for dialogue, negotiation, and problem solving, which can lead to a greater sense of community safety, conflict resolution, and closure for all involved.<sup>23</sup>

It goes far beyond the traditional, liberal and conservative positions of the past by identifying underlying truths and joint interests of all of those concerned about crime policy in a democratic society.

### **Problem Solving Courts**

In the Caribbean there has quickly emerged on the judicial landscape problem solving courts. In Jamaica, Trinidad and Tobago, Barbados, Bermuda and the Cayman Islands are Drug Treatment Courts and in 2018 the launch in Trinidad and Tobago of The Children's Court.

### **Mediation and Judicial Settlement Conferencing ("JSC")**

The practice of judicial mediation informed by a peace jurisprudential outlook would have as its focus creating platforms for dialogue rather than focusing on settlement outcomes. It will give prominence to the "3 Cs" recognising compassion, collaboration and consensus building as an important aspect of the process.

The transference of these mediation skills and peace sensibilities into main stream legal work allows us to alter our roles from being adversaries and a manager of adversarialism to collaborator and equal partner in pursuing reconciliation

### **Collaborative Lawyering**

Collaborative lawyering is a non-adversarial mechanism for resolving disputes:

As a problem solver who is creative [. . .] [y]ou try to locate the best possible resolution for your client [. . .]. [Y]ou search for solutions that might benefit both sides and therefore might be

acceptable for settlement. You develop a collaborative relationship with the other side and mediator [. . .]. [Y]ou advocate your client's interests instead of legal positions, listen attentively and proactively [. . .]. You avoid derailing the search [. . .]. Enduring solutions, whether inventive or not, are likely because both sides work together to fashion tailored solutions that each side fully understands, can live with, and knows how to implement.<sup>24</sup>

### **Peace Jurisprudence in action**

The transference of these mediation skills and peace sensibilities into main stream legal work allows us to alter our roles from being adversaries and a manager of adversarialism to collaborator and equal partner in pursuing reconciliation.

I shall give you an example of Peace Jurisprudence in action. To the extent that restorative justice is applied in Trinidad and Tobago it underpins the work, mainly in our criminal courts, the Bail Boys project and the Drug Treatment Court. However, in the civil arena restorative justice principles were applied in the civil context on the question whether exemplary damages as a form of punishment should have any place in our legal outcomes purely from its anti-therapeutic value. In *Raymond v The AG of Trinidad and Tobago*<sup>25</sup> where the Claimants were prisoners savagely beaten by prison officers, there was a larger and deeper crisis in our prison system of prison violence. Exemplary damages within the prism of *Rookes v Barnard*<sup>26</sup> served only the purpose to punish and deter future conduct. However, in *Raymond* the court explored the use of damages to rehabilitate and to restore by using the award of damages to create a Prison Reform Fund to address the issue of violence facing both prisoners and prison officers in the prisons:

87. [. . .] [T]he Court questioned whether the idea of punishment was served by making an additional monetary award to be paid by the

23 Mark Umbreit, 'Restorative Justice', *Encyclopedia of Crime & Justice* (2nd edn, Macmillan Reference USA 2002) vol 3, 1333.

24 Hal Abramson, *Beyond the Courtroom: Resolving Disputes Through Agreement – Collected Articles and Essays* (Touro UP 2020) 70–71.

25 CV 2016-00029 (High Court, Trinidad and Tobago).

26 [1964] AC 1129.



taxpayer who play no part in the commission of the wrong which is being sought to correct. It is in short a question of public policy. To what extent retributive justice served by an award of exemplary damages should give way to distributive or restorative justice as an element of punishment. It is in fact an attempt to make such awards no longer anomalous but congruent to the concept of distributive theories of social justice and correctional theory.

[ . . . ]

140. As a matter of policy, for a small society witnessing unprecedented levels of violence and crime, every effort must not be spared in ensuring that our prisons are not a breeding ground for further violent and aggressive behaviour. The violence that are bred within those walls quite easily spill out. The degree of institutional violence is a direct product of prison conditions and how the State operates its prisons. To prevent abuse “the use of force must be controlled through clear policies, meaningful and constant supervision of all use of force, timely and truthful reporting of all use of force, accurate and unbiased investigation into excessive use of force, consistent imposition of progressive and proportional discipline when excessive force is used”, restorative justice programmes to restore balance in the relationship between inmates and prison officers and to deescalate levels of hostility.<sup>27</sup>

The Court’s award of exemplary damages was split between a direct award to the Claimants and towards a Court administered “Prison Reform Fund”. From the award of \$250,000.00 in exemplary damages, one third of that sum was prorated equally among the five Claimants and two thirds of that sum was to be paid into Court to be used as a “Prison Reform Fund” to assist in plans, programmes or NGO’s to assist both inmates and prison officers in reducing the level of violence in the prisons.<sup>28</sup>

This was our way to work around the futility of the law and make the law serve a higher purpose and humanistic value and need.

There should be a mindfulness that in most relational disputes the concept of reconciliation would require going beyond the legal brief. This promoted my own observations in a judicial review claim between organisations of the steelpan fraternity to step into their own “engine room” to offer solutions to their real dispute which lay under the legal brief. This was a dispute which concerned whether the control of the ticket sales and the collection of the ticket sales revenue should be vested in Pan Trinbago Inc, the body responsible for pan in Trinidad and Tobago or the National Carnival Commission, the body in charge of the regulation of Carnival. Essentially, it was a dispute on the promotion of Carnival:

24. I recognise this ultimately as a relational dispute between two bodies that must cooperate with one another and I have also approached this case with a therapeutic key mindful to bring about a satisfactory resolution to their dispute. There are underlying themes which may not be necessarily determinative of the issues raised in these judicial review proceedings but which certainly is a paramount consideration of practical importance for the parties of the issue of accountability in the use of state funds in the management and operation of Carnival activities by the Government who heavily subsidises, for the moment, steelpan and Carnival events.<sup>29</sup>

At the end of that judgment I mapped out a proposed path to peach for the disputants with the focus of promoting peace among these organisations for the development of Carnival.

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27 CV 2016-00029 (High Court, Trinidad and Tobago).

28 *ibid* [14].

29 *Pan Trinbago Inc v The National Carnival Commission of Trinidad and Tobago* CV2017-00468 (High Court, Trinidad and Tobago).

**A New Identity---New boundaries and new challenges-Your ethic of care-A healing profession**

Franz Kafka, in 'Before the Law',<sup>30</sup> trains you to be a doorkeeper but in that cruel parable he tells you that your doorkeeper role makes lives miserable while you wield the big stick. "'Everyone strives to reach the Law,' says the man, 'so how does it happen that for all these many years no one but myself has ever begged for admittance?'" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words roars in his ear: 'No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it.'<sup>31</sup>

If you embrace the concept of Peace Jurisprudence you embrace a higher duty as an attorney, an ethic of care. Kafka reminds us that in our quest to serve the end of justice you must not yourselves become barriers to access to justice. Envision yourselves with an ethic of care, compassion and empathy in the search for human solutions. Richard Susskind<sup>32</sup> famously theorised of tomorrow's lawyers as providing more than legal services. Already attorneys provide services to the client beyond legal advice. Lawyers today are more serving as counsellors, moral supporters and financial advisors. Susskind mapped the changing role of the lawyer to meet the new demands of society. He theorised that the future belonged to a different kind of professional with a different kind of mind - creators, empathisers, pattern designers. 'These people—artists, inventors, designers, storytellers, caregivers, consolers, big picture thinkers—will now reap society's richest rewards and share its greatest joy'.<sup>33</sup>

In this peace jurisprudence construct, the law is a healing profession and you are endowed with an ethic of care. It is a picture of a different lawyer from the traditional view

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30 Franz Kafka, *Kafka's The Metamorphosis and Other Writings* (Helmuth Kiesel ed, Continuum 2002) 68–69.

31 *ibid* 69.

32 Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services* (OUP 2008).

33 Quoted in Daniel Pink, *A Whole New Mind* (Cyan 2005) 1 (as cited in Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services* (OUP 2008) 282).

of what pertains in the Caribbean legal adversarial system. Your clients are not interested in litigation but on human solutions for human problems and we must rethink not only the adversarial model of dispute resolution but the role, function and purpose of the Caribbean attorney. Are we in a profession that destroys or heals? Should we not place a premium on the therapeutic effect of the law on human activity?

In his article 'Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court', Forrest S. Mosten theorises that:

A peacemaking approach can lead to greater client satisfaction largely because it is consumer-driven and takes into account the long-term needs of the family, fueled by a positive motivation of trying to help our client heal, improve family harmony, and prevent future strife.<sup>34</sup>

**The Agenda- The Blueprint**

A just society can't be achieved simply by maximizing utility or by securing freedom of choice. To achieve a just society we have to reason together about the meaning of the good life, and to create a public culture hospitable to the disagreements that will inevitably arise.<sup>35</sup>

Do you recall the image of lawyers locked arm in arm in protest in the streets of Pakistan? They took to revolt against the injustice of the suspension of the law by the president's attempt to manipulate the judicial process. The pictures of these attorneys forcibly being carried away by the police demonstrate in a visceral way attorneys as guardians of civilisation...standing up for what is right... displaying the ultimate expression of devotion to duty. What I ask of you tonight to interrogate our laws to question its values is to Yes...lead a revolution!!...in our way of thinking as lawyers as

34 Forrest S Mosten, 'Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court' (2009) 43 Fam LQ 489, 491.

35 Michael J Sandel, *Justice: What's the Right Thing to Do?* (Penguin Books 2009). See under 'Justice and the Good Life'.

healers..to recreate a humane environment. We do not need any more lawyers..nor judges..we need peacemakers as persons and leaders more attuned with peace as an output to navigate human conflict .

Let me sketch a blueprint as it were.

We need to be dynamic in designing dispute systems for our publics as well as making legal education relevant to promote peace in our Caribbean society. Our legal education will then refocus on relationship skills, emotional intelligence and problem solving skills. Carrie Menkel-Meadow saw this as being sensitive to procedural and substantive fairness, peace, decision making, leadership facilitation and management of people groups and complex information, creativity, counselling and governance.

It also includes building and designing collaborative institutions to address modern problems. Therapeutic Justice, Restorative Justice Models, Holistic Lawyering, Collaborative Law Practices.

With these undercurrents of abandoning the adversarial system, adopting a collaborative approach, feeling free to express one's humanity and observing the tenets of procedural justice, there is a greater case of an evolved judicial system that is relevant and carries a greater moral force.

- Make ADR a mandatory component of the law school curriculum.
- Convert your advocacy courses into mediation advocacy and collaborative dialogue courses.
- Institutionalise peace jurisprudence as an approach to legal education. We have begun this experiment at the HWLS with a Peace Jurisprudence Clinic, a "healing hub" of the law school curriculum. In this hub, students will be exposed to the synergies of therapeutic jurisprudence, restorative justice, holistic lawyering, psychology, emotional dialogue exchange, relationship building. This will take the form of both lectures and practical workshops. The students will be presented with dynamic case scenarios which will train them to recognize and address the important issues of their disputes in

connecting the underlying emotions of the parties. In developing a humanistic approach to their legal career, the students will learn to appreciate the importance of achieving peace within their clients and themselves so that they are able to make peace with the eventual outcome of their disputes. In this pursuit of a peaceful outcome, there is no victor and loser. There is only an amicable solution which is beneficial to all parties.

- Work with the Law Association of Trinidad and Tobago and the Judiciary in developing The Peace Project- A project designed to build awareness of dialogue and collaboration, to map our conflict and to design appropriate conflict design systems for national, international and regional disputes.
- Create Post sentencing and Post Judgment Clinics where you can assist those in need to understand and negotiate their future after decisions have been made impacting their lives.
- Use of technology and development of Online ADR skills.
- Declare your communities in which your law school operates as Zones of Peace and open dialogue with your community, listen to the voices of need and continuously engage in a recalibration to ensure that your courses, your curriculum, your approach aligns with human justice. Ensure that the needs of your unique communities can be fed back into your legal education.

### **Conclusion-what will you do?**

In the final scene in Batman, standing atop a convention centre he looks down at the people of Gotham who he owed a duty to save...water from the surging tides had flooded the convention centre.. his people were crying for help as an electric cable dangled dangerously over the water. Batman leaps off his perch and grabs the high tension wire. He is suspended in mid-air, dangling high in the rafters. He selflessly cuts the wire from its power source but it sends him plunging many feet into the water..he survives ... he trudges out and looks at all those around him who are grateful for his gesture of

sacrifice...he lights a flare in the dark night and leads his people to safety....

What you do will define you...young Graduates, shall we trod on the weary dead paths of known law or dare to be dynamic and inquisitive and reinvest a humanism in our law. Shall we light the pathway to peace and trudge into the dark night?

A peace jurisprudence may yet be that pathway to create a collaborative method for the re-focus on reconciliation rather than resolution, ultimately, leading to a society embolden and confident enough to finally repose full trust in itself and the innate power to heal one's own wounds.

What you do tomorrow will define you and us all.