Entre nous": 20 years of Judicial Mediation in Quebec

Supreme Court, Quebec

22nd November 2018

From Dispute Resolution to Dispute Reconciliation – The Birth of Peace Jurisprudence in the Caribbean

Au nom des îles des Caraïbes ensoleillées, je tiens à vous féliciter chaleureusement pour votre 20e anniversaire de médiation judiciaire au Québec.

On this special occasion may I offer you the offerings of our Caribbean's Aimé Fernand David Césaire:

"I would come to this land of mine and I would say to it: "Embrace me without fear… And if all I can do is speak, it is for you I shall speak."

And again I would say:

"My mouth shall be the mouth of those calamities that have no mouth, my voice the freedom of those who break down in the prison holes of despair."

And on the way I would say to myself:

"And above all, my body as well as my soul beware of assuming the sterile attitude of a spectator, for life is not a spectacle, a sea of miseries is not a proscenium, a man screaming is not a dancing bear…"

And behold here I am come home![1]

I offer these invigorating words from the Caribbean hoping it will find fertile ground at this seminar as we acknowledge our changing role of judging. That as Judges we must address human problems with humane solutions. We must be responsive to the social problems that challenges our society which underlie the larger dispute that seldom are told in the pleadings before us. Césaire's words inspire us as Judges to liberate those disputants who access our courts enslaved in their own chains of conflict. Those judges who seek to give voice to the voiceless. Those Judges who no longer wish to be spectators to the life of conflict that envelops litigants, but who choose to comfortably and boldly be immersed in it. Judges who are actively engaging parties in disputes to heal and release them from their prison holes of despair. Judges empathising with their sea of misery and providing a pathway to peace. These inspiring words of Césaire for me not only defines the work of the judge as judicial mediator but describes the ethos of judging with an "ethic of care" in mainstream courts which advocates non-adversarial justice with the promotion of peace as the focus of judicial endeavour. It is a recognition that peace is the "fruit of justice" and which is the essential and simple premise of a Peace Jurisprudence which holds out the hope of dispute reconciliation and not merely dispute resolution.

Of course Césaire was addressing a Caribbean's cry for self-determination and liberation from her European colonisers. He addresses a Caribbean itself a strange world of idiosyncrasies and contrasts. A melting pot of mixed cultures, religions and races all co-existing effortlessly even though birthed from a painful history of enslavement and indentureship. A proud rebellious spirit that abhors inequality, suspicious of authority but equally open, hospitable, warm and generous. A people jealously guarding our freedoms at times at the expense of sensible regulation. Creative and inventive, gifting the world our cultural gifts of reggae, steelpan, calypso and soca which unifies and soothes many the listener even though unable to salve our own deepening wounds of a society becoming more violent, acrimonious and hostile to itself. This is the Caribbean of contrasts. With so much potential but mired in so much conflict steeped in our history (our

[1] Notebook of a Return to a Native Land 1939 Aimé Fernand David Césaire a French poet and politician of Martinique and founder of the négritude movement in Francophone literature.

unconscious selves) leading to our lack of trust in ourselves and institutions and under development as a collective people.[2]

In such a society that I have described, what is the response of the judicial institution in our job of dispute resolution? Is our adversarial system of justice trustworthy? Is it time to reshape our judicial system to respond humanely to a growing discontent with insensitive authority? What role can the judiciary play to change our environment and lead positive social transformation beyond authoritarian decision rulemaking to instead humanely treating and transforming disputants? If arenas of civil warfare are transformed into platforms for dialogue how can this promote peace in the lives of our publics?

As you celebrate your 20th anniversary of judicial mediation allow me to share with you my own thoughts of a Peace Jurisprudence which, yet in its infancy, has been birthed to a large extent by the judicial mediation movement.

Peace jurisprudence is an idea of judicial humanism which can lead to positive social change. In my view, the core strands of judicial mediation of the 3 C's, Compassion, Collaboration and Consensus provide a vital road map to the development of a peace jurisprudence in which the law's focus can go beyond dispute resolution to dispute reconciliation. Where legal processes can go beyond peace as a by-product but as its goal. Where restoration and the harmonising of goals and interests plays a dominant feature in judicial outcomes. Where the judicial encouragement of self-determination and collective autonomy builds greater trust in peaceful outcomes and futures and the democratisation of the system of justice.

There are four aspects which I address briefly in this paper: First, what is peace jurisprudence and what is the link between dispute resolution and positive social transformation? Second, what is our Caribbean society's reception to the idea of a peace jurisprudence? Third, what can be the natural evolution of judicial mediation unique to our Caribbean peoples? Fourth, on a practical level what

[2]Local psychologist Professor Hutchinson at the Trinidad and Tobago Mediation Symposium 2017, described a major challenge facing our society as mistrust or a failure of trust. The only thing we trust is that someone is out to deceive us..a problem we face is developing trust in our society, in our neighbours, our peoples and its institutions. (September 2017)

is the template of Peace jurisprudence in transforming the business of judging with an ethic of care?[3]

I. Peace Jurisprudence

To engender the trust and confidence of our publics the judiciary must take a leadership role in transforming the way we do business so that it aligns with the expectations and hopes of citizens that access our services. They want justice. They want solutions. They want peace.

Our Judicial Education Institute (JEI) in its handbook, **Exploring the Role of the CPR Judge**[4] observed:

> "Court matters involve individuals with lives that extend beyond the parameters of the facts and issues placed before the court. Indeed, individuals interact with the Judiciary long before their matters ever reach the courthouse or a courtroom.
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> The first point of contact with the Administration of Justice usually begins even before a matter is filed. A perception of the courts and the court process is held by the general public whether or not they ever have to enter a courtroom or be involved in litigation. In every society, there are prevailing cultural perceptions of how the Judiciary administers Justice, and these perceptions impact on the degree of public trust and confidence in the Judiciary. These perceptions may be based on what is thought to prevail locally from experience and/or from second-hand reports and/or what is or what is thought to be the norm in other countries. As a result, shaping, managing and responding to these perceptions is also an important role and function of the Judiciary. Judges, Administrators and Judiciary Staff are the face of the Judiciary. They all play an important role in how the Administration of Justice is perceived.
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> The role of the CPR Judge is therefore of critical importance, because how Judges are perceived and experienced impacts not only on actual matters before the courts, but also on the degree of public trust and confidence in the general Administration of Justice.

[3] I have examined these questions against the backdrop of my own experience in mainstream civil adjudication.
[4] **Exploring the role of the CPR Judge** by Justice Peter Jamadar JA and Kamla Jo Braithwaite page 5

> Public confidence depends upon Judges doing our jobs well and efficiently. It also depends upon judicial officers being sensitive to the communities which we serve and upon our ability to effectively communicate to these communities, what we do and why. It depends on us being sensitive to the social context in which we perform our duties and it requires us to perform them in a way which is relevant to the communities which we serve. If we do all that, we will enhance the public confidence of the community in the judiciary and that is ultimately the vital protection of our [judicial] independence.
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> —The Honourable Wayne Martin, as Chair of the National Judicial College of Australia."

I must first treat with probably an obvious and at times oversimplified concept: Why is peace important? The Institute for Economics and Peace helpfully explains the importance of peace indicators in a society which are essential for its stability development and sustainability. It describes positive Peace "as the attitudes, institutions, and structures that create and sustain peaceful societies. These same factors also lead to many other positive outcomes which societies considers are important. Therefore, Positive Peace describes an optimum environment for human potential to flourish."[5]

Having a well thought out peace agenda is vital for our institutions which promote dispute resolution:

> "Positive Peace represents the capacity for a society to meet the needs of its citizens, reduce the number of grievances that arise and resolve remaining disagreements without the use of violence.
>
> Human beings encounter conflict regularly – whether at home, at work, among friends, or on a more systemic level between ethnic, religious or political groups. But the majority of these conflicts do not result in violence. Most of the time individuals and groups can reconcile their differences without resorting to violence by using mechanisms such as informal societal behaviours, constructive dialogue or legal systems designed to reconcile grievances. Conflict provides the opportunity to negotiate or renegotiate a social contract,

[5] Institute for Economics and Global Peace Index 2018

> and as such it is possible for constructive conflict to involve nonviolence. 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 pre-empt conflict and help societies channel disagreements productively rather than falling into violence."[6]

The report goes on to explain that Positive Peace is measured by the Positive Peace Index (PPI). It provides a baseline measure of the effectiveness of a country to build and maintain peace. It also provides a measure for policymakers, researchers, and corporations to use. "Positive Peace factors can be used as the basis for empirically measuring a country's resilience, or its ability to absorb and recover from shocks. It can also be used to measure fragility and to help predict the likelihood of conflict, violence, and instability."

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. When mired in our silos of conflict none of these crisis which are multidimensional can even be addressed adequately if at all. There is no surprise to learn that Canada ranks 6 on the 2018 Global Peace Index while Trinidad and Tobago and the Caribbean ranks between 84 and 90 on the Global Peace Index. Syria is rock bottom at 164 but it will interest you to know that USA earned 125 on the GPI! Unsurprisingly, some of the indicators that have been used to measure GPIs is criminality, violent crimes, corruption and terrorism. Even though this report treats with peace through a macroeconomic lens at its core are lessons for our Caribbean judiciaries, 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.

I can do no better that to cite with approval the authors' view on the transformational power of positive peace:

[6] Global Peace Index 2018 page 62

"In a globalised world, the sources of many of these challenges are multidimensional, increasingly complex and span national borders. For this reason, 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, let alone empower the international institutions and organisations necessary to help address them. Therefore, peace is the essential prerequisite for the survival of humanity as we know it in the 21st century. Without an understanding of the factors that create and sustain peaceful societies it will not be possible to develop the programmes, create the policies or understand the resources required to build peaceful and resilient societies. Positive Peace provides a framework to understand and then address the multiple and complex challenges the world faces. Positive Peace is transformational in that it is a cross-cutting factor for progress, making it easier for businesses to sell, entrepreneurs and scientists to innovate, individuals to produce, and governments to effectively regulate. In addition to the absence of violence, Positive Peace is also associated with many other social characteristics that are considered desirable, including better economic outcomes, measures of well-being, levels of inclusiveness and environmental performance. In this way, Positive Peace creates an optimal environment in which human potential can flourish. Understanding what creates sustainable peace cannot be found in the study of violence alone. 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. This could only be learned by studying what was working. In the same way, the study of conflict is different than the study of peace, producing very different outcomes. Seen in this light, Positive Peace can be used as an overarching framework for understanding and achieving progress not only in levels of global peacefulness, but in many other interrelated areas, such as those of economic and social advancement."[7]

[7] Global Peace Index 2018 page 61

Presently the mission statement for the Trinidad and Tobago judiciary is:

> "The Judiciary works towards the resolution of conflict in the society by resolving disputes that arise out of the operation of laws and involve the application of remedies and the punishment of offenders."

Its vision statement is:

> "The Judiciary of Trinidad and Tobago aims to provide an accountable court system in which timeliness and efficiency are hallmarks, while still protecting integrity, equality and accessibility and attracting public trust and confidence."

In my view, we will be achieving a fundamental shift in our philosophical approach to judging if the judiciary, recognising its moral authority as an arm of government, places peace and the promotion of positive peace as the focal point of our endeavour.

We have the collective experience to know that the resolution of disputes with legal outcomes do not result in peaceful ones. To a large degree, both in process and results, our legal system is a form of legalised warfare where the disputant is a statistic, his case easily and competently managed if we are true to the law at most times, devoid of humanism or compassion for the ultimate result. The need for Neutrality and Impartiality of the judge has been confused with lack of Compassion and Empathy. Hence the feeling of the "cold hand of the law" and the ominous and oppressive feel of our court rooms.[8]

Peace jurisprudence describes the process by which the law places the concept of peace as an outcome beyond simply legal resolution. It recognises that judges have an important role of leadership in creating the environment for positive change in the lives of disputants. To this end, the law must be carefully analysed for its impact on the social realities of disputants. Legal processes must engage individual's needs. Outcomes must be collaboratively determined. Judging must be seen and felt to be more humane.

This focus on the laws effect on human relationships can be seen for example in the treatment of the issue of wrongful dismissal in **Roger Carrington v The University of Trinidad and Tobago**

[8] The Judge, Lord Devlin

CV2016-03483[9]:

> "5. Employment law in some jurisdictions, notably Canada, are now, in this century, fast recognising principles to guide the Court in humanizing employment relationships. These contracts are recognised as a species of relational contracts which require a different analysis from the norms of purely commercial contracts. There is nothing in principle to prevent our Courts from similarly interrogating such relationships with principles such as honesty, good faith, trust and confidence. In modern employment law, the treatment of the person, the humanity of relationships, the dignity and self-esteem associated with employment are valued much more greatly in these very personal relationships where both parties are enjoined in a cooperative joint exercise of productivity. In such relationships, as Lord Steyn observed, the reasonable expectations of honest persons must be protected.
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> 141. The recognition of duties of trust and confidence and good faith similarly is simply a means of humanising employment contracts and to underscore the importance of the partners in production. The Court must continue to strike the right balance between preserving the dignity and value of employees with the demands for profit or achieving targets by employers.
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> 142. To this extent, employers can consider exit interviews, conflict management skills or other humanising processes in dealing with the termination of staff and the accompanying trauma that may be occasioned by such actions."

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:

[9] **Roger Carrington v The University of Trinidad and Tobago** CV2016-03483 paragraphs 5, 141 and 141

> "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."[10]

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.

In an earlier paper I noted[11]:

> "The mediation movement was once perceived as an unhappy bedfellow with the judicial system. Judges had viewed it with some scepticism as a bastard child in the legal spectrum. There is no room here for feelings. I don't want to ask "How do you feel?" I want to ask "How is that right?" Judging is hard work with legal principles. Let them see about soft justice! Indeed, it was feared ADR may make Judges irrelevant. Well we are still here! What if rather than fear that the judicial system becomes irrelevant with too many mediations we make mediation relevant within the system and infuse it in our approach to dispute resolution and peace-making. What if instead of a Judge you have an Expert Dispute Resolver who puts into practice the full array of conflict resolution skills from ENE to judicial mediation, from binding arbitration to adjudication. It will then no longer be "Go to them." Treating mediation as some external system. It will be "Come to us." If judicial activity now revolves around Compassion, Co-operation and Consensus building, it frees the Judge (or Expert Dispute Resolver) to deploy a full range of methodologies and modalities which treats with the underbelly of disputes to produce peaceful resolutions."

The new mode of judging requires therefore a new mindfulness of our moral authority to solve social problems and our duty to judge with an ethic of care. My concept of a peace jurisprudence

[10] **Pan Trinbago Inc v The National Carnival Commission of Trinidad and Tobago** CV2017-00468

[11] **The Foundations of a Peace Jurisprudence Movement- Lessons learnt from Caribbean Mediation (World Mediation Summit Madrid)** 14th June 2017

much like many of our Caribbean concoctions is a delightful mix of disparate strands of experience, theory and history. I draw from my own training and experience as a judicial settlement officer/judicial mediator in this jurisdiction, the study of therapeutic jurisprudence of Winnick and Wexler, restorative justice principles and our ancestral history of indigenous dispute settlement mechanisms in the Caribbean.

Mediation Training

Coincidentally, my mediation training began in 1996 from a certified mediation programme from the University of Windsor accredited by Stitt Feld and Handy.[12] Formal mediation training from a Canadian based training program was the first stepping stone for many of us in the Caribbean in the mediation profession (from Jamaica, the Organisation of Eastern Caribbean States (OECS) and Trinidad and Tobago). Our practice is predominantly facilitative mediation. Mediation in the Caribbean save for Trinidad and Tobago is largely an unregulated profession. However, in 2004 with the enactment of the Mediation Act, Trinidad and Tobago became one the world leaders in regulating the mediation profession and in so doing attempting to ascribe standards of professionalism for the practice of mediation. It was important in our development of mediation to do so to stymie any unregulated practices which may have led to unjust outcomes. The establishment of quality standards recognised the synergy between mediation and justice. Indeed the regulation of mediation is judge led with a judge and judicial officer holding the chair and deputy chair of the Mediation Board.

To the extent then that mediation is often viewed as an alternative to litigation it was made quite clear in Trinidad and Tobago that it is not a substitute for justice but must adhere to sound principles of trust and accountability which is demanded of our own judiciary.

Mediation is defined in the Mediation Act 2004 as "a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties, and seeks to assist the mediation parties in arriving at a voluntary agreement."

[12] **Getting to Yes** Professor Roger Fisher, William Ury, and Bruce Patton

The practice in Trinidad and Tobago and the Caribbean generally follows a basic 5 or 6 step process of introductions, presenting parties' perspectives and developing an agenda, identifying interests, generating options, refining options and arriving at an agreement and achieving closure[13].

Most of my mediation experience from 1998 to 2006 was in community and commercial mediation. Since 2009 it has been exclusively "judicial mediation." From my experience I can summarise the fundamental work of mediation as premised on three important pillars which I refer to simply as the three Cs of Compassion, Collaboration and Consensus. Compassion incorporates the notion of empathy, active listening, understanding interests and motives, identifying and validating concerns and needs. Collaboration involves our work with disputants, giving predominance to them of voice, confidentiality, their self-determination, their option generation and solution oriented discussions. Consensus building captures the voluntariness of the process and the tapping into our creative spirit, our invention of outcomes that matches needs and ability to create peace outcomes.

There are key elements of the mediation process which I view as integral to its success as a peace making initiative: Self-determination, Voluntariness, Confidentially, Informed consent, Creativity and Permanency in solution making. The characteristics of a mediator which has been legislated in our jurisdiction sets the platform for the qualities of the required neutral especially equipped for the resolution of disputes. In section 1(3) of the Third Schedule of the Mediation Act 2004, the qualities which the Mediation Board of Trinidad and Tobago take into account in certifying mediators are:

> "(a) objectivity;
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> (b) acceptance of individual differences;
>
> (c) ability to analyse;
>
> (d) ability to recognise and manage power;
>
> (e) strong verbal and communication skills;
>
> (f) active listening skills;

[13] See The Mediation Process Part 3, Christopher W. Moore 4th Edition.

(g) ability to articulate and identify the issues and interests of the parties;

(h) ability to control the process without dominating the parties;

(i) ability to generate movement in the discussion of the dispute;

(j) creativity/inventiveness and focus.

From the work and results of the mediation practice it became clear to me that is was a far superior system than litigation in obtaining peaceful results and plays an equally important role in the administration of justice. Since 2010 mediation has received active judicial encouragement:

> "The practice of mediation is regulated by legislation (the Mediation Act 2004 Chapter 5:32) unlike most other jurisdictions in the Commonwealth. The principle of regulation underpinning the Mediation Act is one method of ensuring access to justice through mediation. The Mediation Act establishes among other things the standards to be complied with by mediators, a Code of Ethics to guide mediators and a disciplinary process for mediators. Judges now also increasingly refer matters to judicial settlement conferencing (JSC) another form of consensual dispute resolution with similarities to the mediation process. The Chief Justice of this jurisdiction has piloted two projects on court annexed mediation and JSCs and indicated in his Opening Address for the 2017-2018 law term that a permanent court annexed ADR programme will be introduced in the new term."[14]

We have also noted the changing roles of the advocate in mediation.

In **Jennifer Moraldo v Kenneth O'Brien** CV2017-00857 I also noted:

> "While there are as yet no codes of conduct for attorneys in this jurisdiction that specifically govern mediation either in the Legal Profession Act or the Mediation Act, the role of the attorney in mediation undoubtedly takes on a new dimension fashionably referred to as "the mediation advocate". Such an advocate discharges his traditional ethical obligations under the attorney's Code of Ethics but the approach, however, is not adversarial but collaborative. The skills and services of the attorney to zealously protect or pursue a client's cause are now engaged to assist the client in the mediation process in a problem-solving

[14] **Jennifer Moraldo v Anthony Sandiford** CV2016-01946

model to help obtain the best possible negotiated settlement. It is important for attorneys to acknowledge that new role that they assume in mediation."[15]

The important therapeutic value of mediation was recently underscored judicially in my judgment in **Roger Carrington v The University of Trinidad and Tobago** CV016-03482[16]**:**

"5.Mediation provides not only an opportunity to apply problem solving skills to resolve a dispute, it provides a significant therapeutic purpose in allowing for face to face interactions with the other disputant. Such a therapeutic feature of mediation is a means by which procedural fairness is achieved contributing to the increased trust and confidence in the civil justice system by the litigant. Parties who refuse to try mediation must properly articulate their reasons for so doing and demonstrate that they have properly considered and weighed the benefits and disadvantages of mediation before arriving at their decision. A refusal without such considerations would be unreasonable.

…….

48. Importantly, mediation is more than just a process to effect a settlement. There are significant therapeutic benefits achieved by having parties meet face to face with a certified mediator. Professor Baruch Bush observes:

> "First, mediators can help parties put more information on the table and ensure that it is more reliable and less suspect than would be the case if the parties negotiated alone…Second, mediators can help parties perceive each other-including past and present actions, attitudes, motivations and positions- more fully and accurately than they would if left to themselves. The parties can thus avoid responses in negotiation that are based upon false assumptions about one another stemming from cognitive biases."

49. In mediation the focus on emotions, motives, relationships, explanation of events, moral accountability, conduct with the guidance of a certified mediator is a superior means of helping parties navigate difficult disputes even where the party's lawyer led negotiations have failed. In this respect, mediation should be embraced as the perfect complement to

[15] **Jennifer Moraldo v Kenneth O'Brien** CV2017-00857 paragraph 6

[16] **Roger Carrington v The University of Trinidad and Tobago** CV016-03482 paragraph 5, 48, 49, 50, 59, 60.

> the adversarial system of justice. It is through mediation that the civil justice system can provide effective procedural fairness by offering the parties a voice, respectful treatment, non-discriminatory and independent decision making and building trust in the Court system. See JEI handbook "Exploring the role of the CPR judge" pages 46-47. These aspects of procedural justice are the bedrock to therapeutic jurisprudence ensuring that the law impacts persons humanely."

Roger Carrington's claim was for damages for wrongful dismissal. He had indicated his desire to the Court to mediate the dispute but UTT, his employer refused. They felt that as a matter of principle they needed the Court to rule on an important area of the law of "implied extensions" of employment contracts and the application of principles of good faith in employment contracts. UTT was ultimately successful at the trial and in dealing with costs of the trial, both parties agreed that the refusal to mediate by UTT was reasonable having regard to the important areas of law to be explored. UTT further argued that their refusal to mediate was justified as they had a strong case which ultimately proved successful. I disagreed with both of them pointing out the failure by UTT to give thought to the "therapeutic value" of mediation in this relational dispute. I discounted UTT costs or made an adverse costs order of 30%. In the judgment I explored the question of the judicial encouragement of mediation by adverse costs orders. I departed from the English guidance in **Halsey v Milton Keynes General NHS Trust** [2004] EWCA Civ 576 which placed a party's view of the strengths of their case as one of the factors which may excuse a party from pursuing mediation (a merit based approach to the question whether the party unreasonably refused to try mediation).

> 50. In light of this philosophy of active encouragement of mediation, recognising its social utility and noting its significance in humanising the dispensation of justice it would be a retrograde step to leave it to the parties to dig their heels in with a merits based approach to the question whether they would try mediation…….
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> ……..
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> 59. I consider a merit based approach in determining whether a party has reasonably refused to try mediation is inappropriate for the following reasons. First that attempts at mediation in this jurisdiction have generated the feedback that matters were settled even when there was a poor diagnoses of settlement before mediation. Second, that the

underpinning of our pre-action process and the litigation process is that all attempts must be taken to mediate or use ADR. Third, that "relational" matters such as land and employment cases are well suited for mediation and there is a burden on the denying party to properly articulate sound reasons not to try to mediate. Fourth, parties should diagnose their disputes to determine whether it may be too early to mediate but remembering that it is never too late to do so. Fifth, the fact that attempts at different types of settlement negotiations or arbitration or conciliation failed before the offer to mediation is made does not mean that mediation is useless. At the very least it is for the denying party to properly set out its reasons why having already conducted prior negotiations, it thinks that mediation would not be useful. Finally, even though important issues of law ought to be determined in a proceeding it does not take away the importance of treating with the human aspect of the dispute in mediation. There is in fact room to mediate and resolve interpersonal differences, obtain closure and provide for safe venting. Ideally, parties may deal with those human aspects of the dispute and even if the matter is unresolved still emerge with a refined and pointed approach to the Court to determine the unresolved important issues of law. In this way, any feelings of vindictiveness, spite or suspicion would have been removed from the litigation and provide for a much more effective platform to collaborate with one another in the management of the case before the case managing judge.

60. In determining the question of unreasonable refusal the Court must then examine all the circumstances of the case and the conduct of the party. It is for the party who has refused to try mediation or ADR to justify their choice as reasonable:

- Is the real dispute between the parties as distinct from the legal battle one which is suitable for mediation?
- Is the choice consistent with giving effect to the overriding objective?
- What are the costs benefits?
- What is the impact on the timely disposition of the dispute?
- How is a refusal to mediate a proportional use of both parties' resources?

- Are these important factors or obstacles to negotiation which cannot be overcome in a mediation?

- How important is it to deny parties their voice in a safe face to face engagement or would the process be anti-therapeutic?"

My notion of a peace jurisprudence is not only informed from this practice in the field of mediation but in the work of the regulatory body in Trinidad and Tobago of the Mediation Board in the active promotion of peace initiatives with "mediation as our mind-set".

The work of the Mediation Board of Trinidad and Tobago (MBTT)

I was Chairman of the MBTT from 2010-2018. The development of the philosophy of mediation though the work of the Mediation Board from 2010 to 2017 deserves some brief reference.[17] The core work of the MBTT was the certification of mediators, trainers, training programmes and training agencies[18]. However, we saw our role as not limited to regulator but an educator and leader in building a culture of peace. This came on the heels of a Court Annexed pilot project in 2010 which saw a settlement rate of 75% and a client satisfaction rate of 95%. It prompted Professor Michael Laing, the mediator consultant, to report that disputants placed a higher value on their ability to speak openly about their problems rather than actually achieve a settlement[19]. From that early stage Professor Laing demonstrated that there was a therapeutic value in the process of mediation. It was a value which should not only be understood as the benefit of the mediation process but rather as a loss to our judicial system. If litigants and disputants value their stories being told in this way much in the oral traditions of our ancestors, then the purely adversarial process based on a foreign Anglo Saxon tradition was truly an alien one unsuited to the needs of our Caribbean people.

Importantly, our insistence on the regulation of the mediation profession was to ensure that the right atmosphere was created to achieve peaceful outcomes. There was for the MBTT an intense focus on process rather than outcomes. Further, in light of growing discontent in our society with

[17] I credit the hard work of the board members of the Mediation Board of Trinidad and Tobago for that period for their enthusiasm and passion for mediation and peace making.
[18] See **Lessons learnt-Sculpting a Mediator Certification Regime** by Ms. Giselle Yearwood Welch. The MBTT's certification process is well structured. See http://www.mediationboard-tt.org/
[19] See the Michael Laing report, DRC.

increased gang activity, juvenile delinquency, family disputes, domestic violence, guns and violence[20], we saw the need to increase the appeal of mediation nationally and to place peace on the national agenda. This lead to several public symposia and public education campaign which included initiated such as a "mediation pledge", Youth Ambassadors for Mediation, mediation caravans, mediation forums and National Mediation Symposia over the period 2010 to 2017.

In the process of certifying mediators and mediation trainers we ascribed to them the labels of "peacemakers" and "agents of positive change". In the face of the dire conflict in family life, young people and in our communities the need for these certified mediators to view their role as more than just setting about the business of settlement of disputes but of achieving peace and reconciliation was an important aspect of our certification process. We had embarked upon an ambitious project of equipping mediators to deal with domestic violence issues, a controversial area of mediation practice but a social crisis facing many countries. To that extent, any mediator whose focus was on peace would be more inclined to focus on the process of dialogue ensuring the right environment is present for collaboration rather than disproportionately focusing on a settlement at the expense of building trust and rapport with disputants.

As the work of the MBTT evolved these watchwords of "mediation as a mind-set" became imbedded even in our deliberations as a corporate body. How do we empathise which each other's needs as Board Members, how do we work together for creative outcomes and how do we build consensus? "Decision by consensus" became our mantra. It was difficult and time consuming as the minority voice in our Board meetings always caused us to again continue our board deliberations. The minority voice soon became for us the litmus test of rationality. The 3 Cs became for us at the Board a template of doing business, avoiding internal disputes ultimately recognising ourselves as agents of change and agents of peace.

Indeed to a large measure we lived out our own philosophy as espoused in the mission statement of the MBTT:

[20] See the Executive Report of the Committee on Young Males and Crime in Trinidad and Tobago- No time to quit: Engaging youth at risk by Professor Selwyn Ryan, Dr. Indira Rampersad, Dr. Lennox Bernard, Professor Patricia Mohammed and Dr. Marjorie Thorpe [2013].
See also my comments on child delinquency in **BS v The Children's Authority of Trinidad and Tobago et al** CV.2015-02799

> "To create a culture in Trinidad & Tobago of promoting peaceful interventions and harmonious relationships in the settlement of disputes. To this end, members of the public are encouraged to learn more about mediation as an effective conflict resolution tool."

The vision statement of the MBTT is:

> "A nation that is a peaceful society where the essence of mediation and conflict resolution is pervasive and growing through the language of collaborative consensus."

In our view, we saw it important to create an environment for dialogue as fundamental to any peace talks and any peace plan. Our template of creating platforms of dialogue was one which took our mediation movement into the social dialogue of creating peace platforms for unions and employers, communities, families, politicians, rivalling gangs and troubled youth[21].

It therefore begs the question, if such a movement can be created socially through mediators of a philosophy of mediation as a mind-set, of judicial encouragement of mediation taking into account the therapeutic effects of the humane treatment and results in mediation, what can it do for the actual business of judging and the potential of equally therapeutic outcomes from the legal process itself?

Therapeutic jurisprudence

With this background I embraced the work of judicial mediation and the concept of therapeutic jurisprudence. I will come to judicial mediation in a moment, but importantly the concept of therapeutic jurisprudence is no stranger to our jurisdiction with the growing recognition of the work of our problem solving courts as part of our jurisprudential landscape. 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 2017 the launch in Trinidad and Tobago of The Children's Court.

Therapeutic Jurisprudence is traditionally viewed as originating with the practice in problem solving courts and mental health applications. It considers the role of the law as a therapeutic agent and theoretically underpins the practice of problem solving courts. Therapeutic jurisprudence

[21] See National Mediation Symposium 2016, 2017, Restorative Justice Roundtables

advocates the use of social science to study the extent to which a legal rule or practice promotes psychological and physical wellbeing of the people it affects.

In **Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd** the learned authors commented at Page 396**:**

> "When therapeutic jurisprudence speaks of looking at the law as a potential therapeutic agent, it refers to looking at legal (and administrative) rules and procedures and at the roles of legal actors or 'players,' which typically include lawyers and judges but may include many other actors, such as therapists and employers … The emphasis on roles of legal actors, especially when the actors operate in a relatively unconstrained legal field — with great discretion in other words — is particularly ripe for therapeutic jurisprudence analysis."

In **Judging in a Therapeutic Key (Therapeutic Jurisprudence and the Courts),** Winick and Wexler commented:

> "TJ (therapeutic jurisprudence) can be thought of as a "lens" through which to view regulations and laws as well as the roles and behaviour of legal actors- legislators, lawyers, judges, administrators. It may be used to identify the potential effects of proposed legal arrangements on therapeutic outcomes. It is useful to inform and shape policies and procedures in the law and the legal process. TJ posits that, when appropriate, the law apply an "ethic of care" to those affected.
>
> TJ does not "trump" other considerations or override important societal values such as due process or the freedoms of speech and press. It suggests, rather, that mental and physical health aspects of law should be examined to inform us of potential success in achieving proposed goals. It proposes to consider possible negative psychological effects that a proposal may cause unwittingly. TJ doesn't necessarily dominate, but rather informs and in so doing provides insight and effective results. Such considerations enter into the mix to balance when considering a law or a legal decision or course of legal action.

> It is important for judges to practice TJ because – like it or not- the law does have therapeutic and anti-therapeutic consequences. This is empirical fact."[22]

Therapeutic Jurisprudence emphasises notions of catharsis and empathy. The work of Therapeutic Jurisprudence has now expanded beyond problem solving courts and fits squarely in the work of mainstream courts. In **Realising the Potential of Judging**, Michael King observed:

> "Solution-focused judging applies therapeutic jurisprudence, an approach to the law that, amongst other things, sees law and legal processes as having the potential to promote healing."

Two of the main drawbacks identified by academics of the Therapeutic Jurisprudence movement are the sacrifice of impartiality when the judge becomes emotionally invested in outcomes and the unconstitutionality of Therapeutic Jurisprudence methods where the lines are blurred in the separation of powers. In my view, the criticism of impartiality is correctly made in the purely legal context but it misunderstands the moral authority and social context of judges in a Caribbean society where litigants value the contributions of Judges and their input in their discussion. With regard to the separation of powers, in peace jurisprudence the lines between institutions are not to be rigidly drawn but there must be recognition that these institutions are all enjoined in a positive societal result. To that extent Peace Jurisprudence will encourage co-operation of powers rather than separation of powers.

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 victims and communities rather than just those of the offender[23]. 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

[22] **Judging in a Therapeutic Key (Therapeutic Jurisprudence and the Courts**) by Bruce J. Winick and David B. Wexler [2003]

[23] **Restorative Justice-A New Approach with Historical Roots. Corrections Retrospective** 1959- 1999, Minnesota Department of Corrections by Carey, Mark. p 32.

practice in the prison system for example, the teaching of vocational skills, there is no tangible pieces of legislation to guide these practices.

A significant new development in our thinking about crime and justice is the growing interest in the restorative justice theory.[24] Restorative justice offers a profoundly different context for understanding and retorting to crime and victimization. It accentuates the prominence of elevating the role of crime victims and community members, holding offenders directly accountable to the people they have 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.[25]

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.

In Jamaica the Dispute Resolution Foundation (DRF) is responsible for ground breaking work in restorative justice theory and applications. A useful tool frequently used is that of circles and conferences. 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 I had applied restorative justice principles 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 **Jason Raymond v The Attorney General of Trinidad and Tobago** CV2016-00029 of Trinidad and Tobago 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** [1964] UKHL 1 served only the purpose to punish and deter future conduct. However, in **Raymond** I explored the use of damages to rehabilitate and to restore by using the award of damages to create a Prion Reform Fund to address the issue of violence facing both prisoners and prison officers in the prisons:

[24] Bazemore and Umbreit; Galaway and Hudson; Van Ness and Strong; Zehr.
[25] Encyclopaedia of Crime and Justice | 2002 | UMBREIT, MARK

> "The Court questioned whether the idea of punishment was served by making an additional monetary award to be paid by the 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…….
>
> ……
>
> 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."[26]

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.

History and Culture

Finally, on this aspect of peace jurisprudence I draw reference to our ancestral history, our genetic codes of dispute resolution. At our Mediation Symposium 2017 in one of ours sessions entitled "Discussion with our Elders" a well-known pundit and commentator Ravi G spoke about dispute

[26] **Jason Raymond v The Attorney General of Trinidad and Tobago** CV2016-00029 paragraphs 87 and 140

reconciliation in the East Indian Community. Another leader in our Community for the Orisha Shouter Baptist Faith Eintou Pearl Springer spoke about the importance of motherhood and children. While Ravi G spoke about the story of the Ramayan and the analogies of reconciliation, the mother tongue of the East Indian was lost to me so to of Mother Springer. After generations and iterations what do we migrants have in touch with communal and historic dispute resolution systems? Professor Drayton would comment about our Caribbean people with "Time longer than Twine" that one of our problems is a legal system superimposed upon a society that is alien to it. For the indigenous Mayans in Belize they have worked with the judiciary in the establishment of their own mediation programme.

The voice of the Judge in assuming his role in our Caribbean society echoes through our genetic codes of the panchayee in the panchayat or the village elder in the elder system. He is the lead Negotiator and collaborator setting the scene for the discussion by the disputants. He searches of collaborative outcomes through empowering disputants to voice concerns and issues, identify needs and work out joint futures.

I am convinced that mediation provides much more than a promise of settlement but a promise of peace and reconciliation. It is a portal into which the truth and reality gap is dissolved. It is a process which gives the perception and feel of justice. Something that marries procedural justice with therapeutic objectives. To achieve peace through mediation the moorings must remain true to the principles of self-determination, self-worth, validation, and future centric goal setting building on our positives. For anyone locked in conflict, the reception of a forum where you are empathised with and re-directed is far more gratifying that building walls and throwing legal Molotov cocktails over them.

In the Caribbean there is much to be said for the lineage of mediation and it is no surprise that there are several mediation programmes thorough the English speaking Caribbean.

II. The Caribbean mediation movement

Jamaica

Jamaica has one of the longest standing automatic court annexed mediation programmed under Part 74 of the Civil Proceedings Rules where all commercial cases save for some exceptions, notably public law, are referred to mediation immediately after filing a defence. Mediations are

outsourced to the Dispute Resolution Foundation, a leader in mediation in the Caribbean conducting mediation and training in the region. Notably, the DRF projects go beyond the borders of Jamaica settling a dispute in Belize between the indigenous people and the Government over the development of their protected wetlands, conducting training in the region and in Sierra Leone, conducting mediations in Haiti. Other court annexed mediation schemes were The Judicature Resident Magistrates Court (Amendment) Rules, 1999, Criminal Justice (Reform) (Amendment) Act, 2001. In 2017, Jamaica enacted their new Arbitration Act 2017 to "facilitate domestic and international trade and commerce by encouraging the use of arbitration as a method of resolving disputes." In 2018, the DRF also sought to partner with the Citizen Security and Justice Programme (CSJP) III in implementing a community mediation project[27].

Guyana

Guyana's Mediation has been established within the compound of the High Court of the Supreme Court of Judicature at Georgetown Guyana since 2003. The new Guyana Civil Proceeding Rules 2016 provides for Court Ordered Mediation under Part 26. This Part sets out the Court's power to order mediation although parties are encouraged "to and may, without permission of the Court, refer their dispute to mediation at any time prior to a Pre-Trial Review." (Part 26.01 (1)). It also sets out the procedure on Court Appointed Mediation, fees and the outcome of the parties' failure to attend, participate or comply with the requirements of mediation. In addition, Guyana also has their Alternative Dispute Resolution Act No 24 of 20 Chap 7:05 to legally provide for the mediation of disputes as an alternative to litigation.

Barbados

In Barbados, there is an active mediator association in the ADR Association of Barbados Inc. which was incorporated in 2004 as the first professional Association for dispute resolution in Barbados.[28] The Arbitration and Mediation Court of the Caribbean Inc (AMCC) which an international commercial dispute resolution institution is also based in Barbados.[29] The Supreme

[27] DRF and CSJP III Partnering on Community Mediation Project https://jis.gov.jm/drf-and-csjp-iii-partnering-on-community-mediation-project-2/
[28] https://adrbarbados.org/
[29] The Arbitration and Mediation Court of the Caribbean https://www.caribcourt.org/

Court Civil Procedure Rules 2008 also provides for the use of mediation in encouraging parties to settle disputes and to further the overriding objective.

The Organisation of Eastern Caribbean States (OECS)

The OECS has made use of mediation with the passage of the Practice Direction No. 1 of 2003 which provides for Court Connected Mediation. Court-connected Mediation was introduced in St. Lucia by Practice Direction No. 2 of 2002 but Practice Direction No. 1 of 2003 extends court-connected mediation to all Member States. Further, Part 25.1(h) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 provides for the Court to actively manage cases by "encouraging the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures."

Belize

In Belize, the Mediation Rules of 2013 (Supreme Court (Civil Procedure) (Amendment) Rules 2013) provides for "court connected mediation." There is a mediation co-ordinator who is an officer appointed by the Chief Justice to coordinate the development of the court-connected mediation. There is also a National Court-Connected Mediation Committee which serves a policy making body and acts as an advisory committee to the Chief Justice. The Mediation Committee consists of representatives from the Belize Council of Churches, National Trade Union Congress of Belize, The University of the West Indies, the University of Belize, The Family Court, Restore Belize, The Magistrate's Court, The Attorney General's Chambers, The Justice of Peace and Commissioners of the Supreme Court Association and the Belize Chamber of Commerce and Industry. Importantly, the composition of their committee is community based. The Committee fulfils a number of important roles such as the selection of mediators to provide mediation services under Part 73 of the Rules, approving a code of conduct for mediators, monitoring the performance of mediators and addressing complaints and assessing the efficiency of the mediation process. They obtained guidance from the indigenous Mayans to explain how to settle disputes.

Trinidad and Tobago

In this model there is a firm and active community mediation model since 1998. In Trinidad and Tobago our formal experience in mediation began in the early 1990s when we formulated the new Civil Proceedings Rules recognizing the importance of ADR. In 1998 the Community Mediation

Act was enacted which established several community mediation centers to mediate both civil and minor criminal offences. It was repealed and replaced with a Mediation Act in 2004, which established the Mediation Board responsible for regulating mediation in our jurisdiction.

Community Mediation is offered at several community mediation centers throughout Trinidad and Tobago and the approach to mediation is quite unique. In the intake process the centres detect whether there are several social problems underlying the dispute as presented such as emotional or psychological or substance abuse and they offer social programmes to assist the disputants with these underlying social deficiencies which have resulted in disputes. There are single parent support systems, anger management for parents, adolescents and teens. They also offer services in leadership skills development, managing conflict in families and communities and building trust.

An important feature of the mediation practice in Trinidad and Tobago is that the mediation profession is regulated by a Mediation Act 2004. The Act ensures that mediators are properly trained and certified before embarking upon a mediation and regulates the players in the profession mediation trainers, mediation agencies and the development of training programs. At present in a population of 1.4million there are approximately 580 certified mediators. From this 20% per cent are attorneys and 80% represent an eclectic representation of various social backgrounds from manager, to school teachers, from ministers of religion to engineers.

In **Exploring the Role of the CPR Judge** it is observed[30]:

> "In Trinidad and Tobago, a court-annexed mediation pilot project was implemented, which showed promising results. As such, a one year Alternative Dispute Resolution Pilot Project was run from 23 January 2013 to 22 January 2014. The Pilot referred matters to either mediation or settlement conference on a voluntary basis. With regard to mediation, the Pilot covered all types of matters and the matters were randomly selected (i.e. every fifth matter) from the pool of matters in which the first case management conference was about to be fixed. A total of 435 matters were selected, with 228 being referred for mediation. There was consolidation of some matters so the total number actually referred was 222. Mediation was completed in 180 of these matters. Using this figure of 180, the results of the Pilot show that 67.0% of cases were settled (wholly or partially) at an early stage of

[30] **Exploring the Role of the CPR Judge** by Justice Peter Jamadar JA and Kamla Jo Braithwaite, page 19.

litigation. This is consistent with the rationale for the effectiveness and efficiency of the CPR (referred to above) and the expectation 'that a large percentage of cases would now be settled very early in the process which would otherwise have gone to full trial'. The CPR are premised on the philosophical and policy determination that 'justice on the merits'— substantive justice determined at a trial— is not the singular aim of the civil justice system in Trinidad and Tobago. Indeed, that it is not even the most desirable aim. What is sought is the just disposition of all matters brought before the civil courts. This includes an emphasis, aim, and expectation of early resolution by settlement of a 'large percentage of cases'.

It is therefore imperative that CPR Judges actively encourage and assist parties to settle their cases, and to do so in the most timely and economic ways possible, and on terms that are fair and just to all."

Ms. Giselle Yearwood Welch, a former member of the Board, authored an instructive article on the importance of certification of mediators and the Board's work in developing competency assessment tools.

One of the most important developments in Trinidad and Tobago was the infusion of mediation principles and practice into judicial activity with the introduction of judicial settlement conferences since 2009. It is this movement which has far deeper implications for our jurisprudence if we now grasp the opportunity to allow for those transferable facets of mediation to permeate the judicial system.[31]

III. Judicial Mediation in the Caribbean

I had earlier mentioned the impact of judicial mediation on the developing theory of peace jurisprudence. 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. To this extent our practice of judicial

[31] The **Regional Alternative Dispute Resolution Survey, prepared for the Caribbean Law Institute Centre, University of the West Indies** by Dennis Darby and Shireen Wilkinson July 2014highlights that countries such as Jamaica, Belize, Saint Lucia, Dominica, Grenada, St Kitts and Nevis, Saint Vincent and Grenadines, Antigua and Barbuda, Trinidad and Tobago and Guyana utilized Court Annexed Mediation and have ADR programs in place in the High Courts of those jurisdictions.

mediation has been facilitative and cautiously evaluative. This has sparked some controversy and debate. It was initially viewed that judicial mediators should be heavily evaluative. However, recognising our moral authority, the need to build trust and to humanise the legal process no effort must be spared to ensure the ingredients or procedural justice are achieved of voice neutrality, respect, trust.

Judicial Mediations or as we call them Judicial Settlement Conferences (JSCs) are not viewed as formal mediations under our Mediation Act but part of the judicial process of judging being carried out voluntarily by a sitting judge who is not the docketed judge assigned to the case. It features in the ADR landscape of Trinidad and Tobago only. Through lack of training and education it has not yet been introduced in the other Caribbean territories. Our formal training in JSC began in 2011 through JSC training programmes of Judge Nancy Flatters, Alberta facilitated by our JEI. Several of our judges are trained JSC officers and certified mediators. Our JSC rosters are created on a voluntary collegiate basis since the termination of the ADR pilot project in 2015. In that pilot the JSC roster was populated by sitting Judges, retired judges and Senior Counsel. It is expected that the Chief Justice will implement formal rules along the lines of the previous practice direction to re-introduce court annexed mediation and JSC[32]. At the moment the CPR governs the referrals to JSC under Parts 25 and 26 CPR.

The JSC judge conducts the session in private, in joint sessions with the concurrence of the parties. The judge is free to offer non-binding evaluative opinions and follows a basic five step process of introduction and table setting, storytelling, identifying concerns and interest, negotiations and conclusion. The judge can employ shuttle diplomacy and caucusing but must be mindful of judicial codes of conduct. I should acknowledge with gratitude the contribution made by Justice Robert Graesser in 2016 in exposing local judges and attorneys to the idea of "binding JDRs". It is a matter which caused quite a stir and much food for thought.

On average a JSC may be conducted on two meetings at two (2) hours each. However, due to the schedules of attorneys, sessions may well be more than a few weeks apart putting the time for resolution over on average a couple of months. Yet still the reception to this process is tremendous!

[32] Practice Direction Alternative Dispute Resolution Pilot Project

Judicial Mediations are now increasingly popular to the extent that it consumes one half of my regular docket. I have for this term from September to November conducted 63 JSCs, averaging 20 per month. The settlement rate is approximately 70% and I have notice a spike in referral for this year. Parties are now appreciative of the approach taken by judges to listen and actively engage. They now are being equipped with the ability to gain control over their lives. They are slowly rebuilding trust. Where negotiations break down, importance is placed on celebrating the steps that were made forward and ensuring positive results. The docketed judge in those instances operate like a tag team and would try to have the parties bridge the gap to achieve a settlement.

But even more ground breaking is almost by accident, I suppose like the mild mannered Peter Parker being bitten by a radioactive spider, once bitten by the judicial mediation bug it is difficult to return to the old robes of the adversarial judge. We cannot help but be touched and transformed by the ability to empathise, build trust in disputants, give them voice, help search for solutions and create a platform of dialogue. In my judicial practice I move from one JSC to a Case Management Conference (CMC) on my regular list. It became ever more apparent to me that the skills of the JSC judge are transferable to mainstream judging and the ethic of care did not evaporate when the JSC door was closed and the CMC door was opened. Can the adversarial system survive such an evolution? It surely cannot. Can this now lead to the emergence of the Peace Making Judge? It surely can.

IV Peace jurisprudence and Humanistic judging- The Peace-Making Judge

The transference of these mediation skills and peace sensibilities into judicial work allows the judge to alter his role from being a manager of adversarialism to collaborator and equal partner in pursuing reconciliation.

The transference of mediation skills into the business of judging and the creation of peace jurisprudence fits neatly in the recent research conducted by the JEI in **"Exploring the role of the CPR Judge"**. We have developed nine (9) standards of procedural fairness as the core features of the CPR judge's work ethic which when carefully examined, sets up in large measure a perfect framework for a Peace Jurisprudence:

"**Voice:** The ability to meaningfully participate in court proceedings throughout the entire process, by expressing concerns and opinions and by asking questions, and having them valued and duly considered ("heard") before decisions are made.

Respectful Treatment: The treatment of all persons with dignity and respect, with full protection for the plenitude of their rights, ensuring that they experience their concerns and problems as being considered seriously and sincerely, and having due regard for the value of their time and commitments.

Neutrality: The independent, fair, and consistent application of procedural and substantive legal principles, administered by impartial and unbiased decision makers and judicial personnel, without discrimination.

Trustworthy Authorities: Decision makers, judicial personnel, and court systems that have earned legitimacy by demonstrating that they are competent, and capable of duly fulfilling their functions, responsibilities and duties in an efficient, effective, timely, fair, and transparent manner; and by demonstrating to all court users compassion, caring, and a willingness to sincerely attend to their justifiable needs and to assist them throughout the court process.

Accountability: The need for decision makers and judicial personnel to fulfil their duties, to reasonably justify and explain their actions and inactions, decisions, and judgments and to be held responsible and accountable for them, particularly in relation to decisions, delays, and poor service.

Understanding: The need to have explained clearly, carefully, and in plain language, court protocols, procedures, decisions, directions given, and actions taken by decision makers and judicial personnel, ensuring that there is full understanding and comprehension.

Access to Information: The timely availability of all relevant and accurate information, adequately and effectively communicated in clear, coherent language, through open, receptive, courteous, and easily accessible decision makers, judicial personnel and systems, particularly in relation to each stage of court proceedings.

Availability of Amenities: The need for all court buildings to be equipped with the necessary infrastructure (both structural and systemic) to enable court users full and free access to court buildings, efficient information systems, relevant operational systems, and the enjoyment of functionally and culturally adequate amenities.

Inclusivity: The need for court users to feel that they are, and experience themselves as, an important part of the entire court process, rather than outside of or peripheral to it; non-alienation, by being made to feel welcomed and included in court proceedings and to actively, easily, and effectively participate throughout the process.

This information is critical to the role of a Judge under the CPR, where Judges have much broader responsibilities and consequential interaction with court users and where they are now permitted to be more pro-active. Ensuring procedural fairness in its broadest sense and taking steps to mitigate societal perceptions and experiences of bias are matters for urgent attention, if there is to be increasing public trust and confidence in the civil justice system in Trinidad and Tobago."[33]

We have also advocated proper social context training and effective communication skills:

"Some very broad and practical interventions that facilitate social context awareness include the following:

(A) Being exposed to media by authors of diverse backgrounds (including but not limited to cultural, religious, ethnic and socio-economic differences);

(B) Interacting with an intention to learn with and from groups that are different— in culture, religion, ethnicity and socio-economic standing;

(C) Becoming self-aware of when your emotional 'triggers' are being set off, and inquiring into root causes, searching for stereotyping assumptions and/or elements (often unconscious) of bias;

(D) Immersing oneself periodically in different and diverse cultural, religious, ethnic and socio-economic experiences; and

[33] **Exploring the Role of the CPR Judg**e by Justice Peter Jamadar JA and Kamla Jo Braithwaite pages 46 and 47

(E) Being aware of the concept and impact on court matters of intersectionality and adapting one's approach to achieve equality of treatment sensitive to the overlapping and interdependent discrimination and/ or disadvantages that the individual (or group) before the court may be facing…….

……..

The fundamental right to dignity, means that effective communication must also be respectful communication (respectful of the inherent worth and dignity of all human beings). In the context of dealing justly, Judges may consider the following four precepts (which can serve as guidelines) for respectful and effective speech:

(A) Does it need to be asked/said?;

(B) If so, does it need to be asked/said at this time?;

(C) Of/to whom does it need to be asked/said?; and

(D) How can it be asked/said so as to communicate respectfully, fairly and effectively?"

These are in fact some of the ingredients of peace making skills. In our jurisdiction with some 13 civil judges in the High Court and approximately 4000 civil cases being filed each year it is obvious that not all of those case can be tried. There is an average time of 18 months for disposition of a claim and three years for an appeal. The brutal fact is that about 90% of these cases should not have been filed, but are examples of mismanaged conflict mostly in family disputes which manifest itself in land disputes, estate claims and even corporate commercial disputes.

There is the unfortunate tendency in our jurisdiction for parties and attorneys to treat their engagement with the Court at CMCs as a sterile exercise of managing a case for trial without appreciating the anti-therapeutic effects of either the process or the ultimate outcomes of a trial. The CMC judge must now play a leadership role in altering that mind-set. For example, in CMCs where attorneys state that they have come for "directions" I respond that they can get directions from google maps or Waze and that "I am here to help them have a discussion to help the parties and find a practical solution to the dispute. Let's discuss by then we can agree on the steps we need to take going forward." In divorce proceedings, for example, it is very easy to grant a decree nisi. It takes only five minutes. But I have stopped doing this where there are children involved and

where there are outstanding ancillary matters. A future focused approach requires them to come up with their parenting and financial plans after divorce.

The transference of peace making skills into the mainstream civil courts would therefore see a fundamental shift in the approach to case management. The central goal for the case management judge would be to create a platform for dialogue and positive engagement. Creating the environment for peace leaves the end result solely at the control of the parties with the Judge being the collaborator to guide and usher parties to a position of common understanding. The judge's role in case management is then to actively engage and collaborate with the parties to arrive at a consensual outcome.

In this way outcomes are not imposed from "on high" which rubs against the grain of our historic insensitivity to authority. Parties become re-invested in their future. Outcomes become more realistic and achievable. Judges are perceived as guides and not masters. I perceive the key objective of Peace Jurisprudence are as follows:

a) Find practical solutions
b) Enter consent orders
c) Minimise appeals
d) Promote reconciliations either with the other disputants or with oneself

The main challenges are:

a) Time management
b) Attorney buy in
c) Bias
d) Judicial overreach

The commercial claims in our docket which are best suited to this process are land, family, employment, corporate, medical negligence and personal injuries, and some public law matters.

The following are some key features of the civil case management within the context of peace jurisprudence. Each deserve their own detailed examination but I merely list them for this paper:

A. **The case is not a number:** Treating the disputants as not mere statistics. The temptation with heavy case lists is to deal in the "numbers game". While time and efficiency is

important it is critical that disputants do not view their lives as being "counted". Caring and offering to help must be the judge's focal point. At the same time careful attention must be placed on proper time management in dealing a matter. A rough rule of thumb is 18 months from filing to disposition. Time management carefully explained will engender the respect of the parties who will understand the Judge's value of the parties' time and his job to bring an end to the conflict.

B. **Creating the environment for peace**: This will involve physically ensuring the setting is comfortable and appropriate. The intimate conference room settings must be preferred to the ominous open court rooms where the acoustics are inadequate and there is a deliberate atmosphere of distance and separation. Such a physical space is apposite to the setting to encourage dialogue and collaboration. If such an environment is inevitable extra care must be taken by physical seating arrangements to minimise distance and giving the litigant prominence and attention. Simple gestures of peace offerings also set a suitable environment such as even the offering of water or tea, even though many of my litigants have refused, others have warmly accepted the offering.

C. **Creating empathy**: Through body language and expression the judge must build trust, empathy and rapport with the disputants. Non-threatening gestures are important. While mindful of the judge's neutrality, rapport building will at times cause the judge to spend time with one or the other party. The judge must recognise this and explain why that is being done.

D. **Building hope**: Many litigants when they enter the court system feel hopeless, many feel already crushed and victimised by the other party and by their unfortunate circumstances of their life of conflict. Building hope is an important criteria of judicial leadership. Reassuring litigants that they are not alone and that their conflict is not unusual builds hope that positive outcomes can be generated even if they are initially sceptical. Building hope becomes infectious if the judge is the eternal optimist!

E. **Future oriented**: At its core the discussion must be future oriented focusing the party's attention on their futures and their desires in the years to come in a life without litigation. Allow them to paint those pictures and visualise how that can be achieved.

F. **Acknowledging history**: The mirror image of futures is of course history. The judge must acknowledge and understand historical realities while lessening the disputant's chains to their hostile past.

G. **Family, Culture, Tradition and Religion**: The judge must be culturally sensitive and pay homage to family, traditions and religious aspects of the disputants in a multi ethnic society such as ours. Within these customs are tell-tale pathways to peace which must be memorialised and developed by the parties.

H. **Co-opting help**: The judge should be keen to create circles of assistance. Determine who and what other means of assistance may be required to take the parties out of conflict from expert assistance (Part 33 CPR) to the consultation of psychologists or religious leaders. The co-chairing of sessions with such persons with moral authority can also be a method of building trust and creating effective forms of dialogue[34].

I. **Recognising the problem and explanations**: The judge must be keen to have parties identify the key problem areas and the rivalling explanations. In this process the parties must be able to identify areas which will require judicial determination such as making determinations of rights but must be done within the context of building positive outcomes.

J. **Keeping control and agenda setting**: The trial judge must always maintain control of the proceedings and set the agenda in collaboration with the parties.

K. **Revolving door litigation and the search for permanent solutions:** With a focus on peaceful outcomes the Judge must be careful to be aware of multiple disputes, revolving door litigants and satellite litigation. At times a permanent solution may involve third parties who are not parties to the action. The Judge must lead the conversation to deal with such realities head on with attorneys and their clients to check in on their motives for peaceful results.

L. **Buy in and good faith:** The judge must in this endeavour seek to obtain buy in and acceptance by the attorneys. The more the practice becomes imbedded in the judge's lexicon, the more the attorneys will accept and even lead the dialogue in this collaborative

[34] See my discussion on hot-tubbing in **Haroun Baksh v The National Gas Company of Trinidad and Tobago** CV.2015-00344

atmosphere. Judicial peace-making cannot work without the collaboration and endorsement of the attorneys who would become wonderful allies for the judge in this peace-making thrust.

M. **National Development and Community building:** It is the simple blocks that make the building. With each disputant being exposed to the therapy in our CMC rooms we begin a process of national healing and nation building. We end satellite litigation. We bring an end to spiralling violence spawned by unsatisfied legal outcomes. We begin the process of peace mapping. In a recent case, an oppression remedy action, the parties openly acknowledged that the issues that were being litigated affected more than just themselves, it affected their family, their business their employees and their families in those businesses. The ripples of their private conflict they acknowledged impacted negatively countless many others an effect which they never intended.

A template

I provide below a template of peace jurisprudence at work in the Case Management. It sets out in the left hand column the legitimate objectives of the CMC judge under Parts 25, 26 and 27 of the CPR but it also sets out in the right hand column the peace jurisprudence approach to the CMC which would inform the approach to CPR case management targets. The dialogue that must be engaged is focused on peaceful outcomes.

LEGITIMATE OBJECTIVES OF THE CMC JUDGE	PEACE JURISPRUDENCE APPROACH OF THE CMC
1) Information Exchange: Disclosure	1) Main concerns and needs of clients
2) Agreed facts/Agreed issues	2) Possible outcomes
3) Agreement on quantum if applicable	3) Risk assessment
4) Expert evidence (if necessary)	4) Reflection legal outcomes vs Concerns
5) Procedural applications/collaborate	5) Collaborative mechanisms to improve respective client(s) futures

6) Costs	
7) Timelines for resolution: a) ADR-Med/JSC b) Judicial Determination	

I have also used agendas to focus the parties' attention in CMCs. Below I set out an agenda in a CMC in a corporate dispute. Mindful of our therapeutic objectives or peace jurisprudence that agenda was as follows:

"**CMC AGENDA**

1. Main outcomes being sought by the Parties
2. Main issues of law/fact to be determined.
3. Preparation of agreed facts and chronologies and legal principles.
4. Disclosure:

   (a)Timing and scheduling of disclosure and inspection;

   (b)Agreement on core bundles such as Board minutes, Accounts, Correspondences, Formal documentation such as particulars of companies;

   (c)Disclosure hearings.
5. Expert evidence.
6. Procedural applications: Amendments, Further Information. Collaboration on procedural applications.
7. Costs of proceedings.
8. Likely list of witnesses
9. Parties' attendance and involvement at CMCs.
10. General timetable of events and trial window.
11. Perspective sharing:

(a)What are the Claimants' and Defendants' perspective on any improvements that can be implemented in the management of the affairs of the companies

(b)What are the parties' perspectives on the future of their business.

(c)What collaborative mechanisms can be agreed upon to protect the interest of the companies.

12. Timelines for mediation/JSC"

Such an agenda focuses the parties' attention on both legal aspects of the case but practical outcomes and futures. It sets the stage for the parties to actively pursue peaceful outcomes. Another approach in case management is to convene "Healing Conferences" where parties are allowed to express how they feel about the problem. It is particularly useful in medical malpractice cases.

Key skills and abilities for Judging with a focus on peace jurisprudence

I have already set out above the key skills and abilities of the mediator. It should be no different for a Judge to practice this form of peace jurisprudence in mainstream civil court work. To this I will add a heavy emphasis on reframing skills and emotional intelligence.

With this practice it is hoped that we will truly achieve the concept of the transformation of case management into platforms of peace-making. Trial will no longer have that place as a centre piece but as a collateral or side wing and even so collaborative exercises can further transform the trials into a more open and humane process to discover truth.

Practical Examples of Peace Jurisprudence in Action

In this approach of peace jurisprudence in the CMC room, the trials themselves can be transformed to a positive experience. The trial itself evolve along therapeutic outcomes. I have only begun to re-consider my approach to the conduct of trial. In terms of seating arrangements, why are the litigants so far away from the judge and sitting behind the lawyers. In a recent case when I was delivering judgment in a libel claim I asked that a seat was provided for the parties to sit directly in front of the judge with their lawyers behind them. Matters such as the striking out of evidence, how does this impact the feeling of the litigant that their story may not be told?

- In the cross examination of witnesses, is there now room for open ended questions by the judge searching for possible practice solutions to the dispute?

- It certainly would transform the Judge's use of expert evidence as a collaborative collegiate exercise. See my approach in **Haroun Baksh v The National Gas Company of Trinidad and Tobago** CV2015-00344.
- In the drafting of a judgment the careful choice of words to make the decision more appreciated and understood by the parties. See **Suzanne Shaffer v All Clear Co. Limited** CV.2016-02414 and **BS v The Children's Authority of Trinidad and Tobago et al** where the judgment was written as a letter to the parties.

Finally there are three practical examples of the application of peace jurisprudence in mainstream judging which can transform the adversarialism of the trial.

First: Pre-judgment resolution hearings: In these cases the parties are given an advanced draft of the judgment before it is delivered and an opportunity to further negotiate their own outcomes which may be superior to that of the judge. In **Jai Mahabir et al v Patrick Edwards et al** CV2016-02033 I explained the process as:

> "**Parties' agreement to post-judgment negotiations**
>
> 9. Both parties in this matter have tried to settle this dispute amicably. To further assist them in arriving at a resolution of their dispute, the parties agreed that their claims will be heard by this Court for the purpose of delivering a draft judgment which will be the basis for one final attempt between themselves to amicably resolve this matter.
>
> 10. I made it clear that the draft judgment represents the Court's findings and the parties agreed that should the matter remain unresolved, the Court's draft judgment and orders can then be delivered as the Court's final judgment and order. If, however, they are able to arrive at an agreement then the agreement will be entered as their final consent order with the draft judgment being relevant for the purpose of providing the background to the arrival of that agreement. In that circumstance, the Court's final order would be as contained in the consent order. This mechanism has been offered to parties as a recent judicial innovation in seemingly intractable and difficult cases to encourage parties to arrive at a practical and enduring solution to their dispute. See **Carlton Maynard v Cecil Cumberbatch** CV2016-01636 and **Wayne Greaves v Joseph Wilson and Alma Greaves** CV2016-02213.

11. The judgment was therefore issued to the parties in draft form with liberty to the parties to enter a consent order within fourteen (14) days of the date of issuing the draft to them on such terms as agreed by them and approved by the Court. In default, the draft judgment will be delivered as the Court's final judgment or order and entered accordingly."

Second: Post Judgment discussions: In this process the parties are led by the trial judge in post judgment discussions to deal with the judgment and its implication on their lives. It pre-empts appeals and it assists in the enforcement of judgments. See **Mootilal Ramhit and Sons Contracting Limited v Education Facilities Company Limited and The Attorney General of Trinidad and Tobago** CV2017-02465, **Oswald Alleyne and 152 others v The Attorney General of Trindad and Tobago Claim No.** CV2018-0044 and **Asma Ali v Mustapha Ali** CV.2016-03409. In these case the parties valued the Court's input in helping them manage the legal outcomes of their cases. In the first, the re-payment of a massive judgment debt could have led to receivership bankruptcy or worse for the Defendant after several judgment debts were obtained. However, parties were open to the judge working with them in multiple cases to deal with practice solution for debt repayment.

In **Oswald Alleyne** I noted that in a claim for constitutional damages a money payment would do little to solve a legal problem faced by the Claimants in relation to regulations which were enacted by the State. Rather than simply quantify damages the parties voluntarily consented post judgment to a judge led committee to re-examine the regulations to arrive at a joint position on amendment to be taken to parliament to address the concerns of the Claimants.

In **Asma Ali** a contested administration claim was resolved by the parties agreeing on a court supervised management of the estate. This is quickly becoming popular and allows for the court to keep the peace among rivalling factions of a family.

It can also be helpful in working out initiatives parties may agree are important outcomes of the dispute. The following is a memo which was recently sent out to parties who arrived at settlement:

"**Post Judgment Conference-Memo to the Parties**

The Court thanks the parties for volunteering to attend a post-judgment conference. The Court re-emphasises that these conferences are entirely voluntary in nature, confidential and solution-focused.

The Judge's role in these conferences would be purely facilitative to assist the parties in implementing any initiatives which they both view as a beneficial outcome of litigation.

Arising out of the discussion a number of initiatives have been identified as:

a) ---
b) ---
c) ---

The conference will be held on ----- for the parties to update the Court on these initiatives."

Third: Lit med lit models: This is similar in approach to an arb med arb model. In this process the parties begin in the traditional litigation mode then they are treated to the therapeutic approach of case management. If the attempts at settlement fails the Court in certain cases can lead their settlement discussions without touching the main issues for legal determination, if a global settlement is unsustainable the judge proceeds to deal with the triable issues. This is done with the recorded consent of the parties. See **Cai Trading LLC v Kiowa Rice Limited and Public Grains Investment Limited** CV2017-02150 CV2017-02151**.**

Fourth: Creative problem solving in judicial outcomes: In two separate approaches the Court is mindful of the impact the law will have on the larger social problems that were presented. In the question of exemplary damages: **Jason Raymond v The Attorney General of Trinidad and Tobago** CV2016-00029. Importantly, the social importance of apologies have been treated in the defamation case in **Geeta Ragoonath v Ancel Roget** CV2015-01184 and in the medical negligence claim in **Karen Tesheira v Gulf View Medical Centre Limited** CV.2009-02051.

<u>Adapting to Our New Environment</u>

Keeping true to my own mantra at the Mediation Board, a mediator viewing himself as a peacemaker cannot lightly take off that mantle when he enters the court room as a judicial officer. The judge must continuously interrogate his role as an agent of positive change and peace-making. We cannot help but be affected by the various stories told to us by our disputants, by the lives that

are mired on controversy and conflict. Their lives are not spectacles but mirrors of larger disputes affecting our society and affecting us. Without taking the time to dip our hands into their rivers of pain we would not be able to find enduring solutions so necessary in nation building so important for any society.

What I hope that I have contributed to the conversation here in Quebec in your celebration of 20 years of judicial mediation is the impact Peace jurisprudence can make on our roles as judges and the evolution of judicial mediation into a general practice of peace jurisprudence in mainstream courts. By achieving peace through justice we recognise: (a) the philosophical and historic moorings of the mediation practice (b) an imperative for the legal system to regain social acceptance and moral authority (c) the creation of the environment of peace organically and not superimposed, culture specific and idiosyncratic to the social needs of our different publics (d) the importance of procedural justice (e) the search for therapeutic outcomes in legal problems.

As a proud Caribbean citizen I am excited of the potential of peace jurisprudence and look forward to its various applications in the resolution of disputes. Through this I hope that our judicatures can regain the trust of our public, the moral authority to change lives for the better and to walk hand in hand with disputants to their various versions of peace. As Césaire so poignantly proclaimed.

> "And we are standing now, my country and I, hair in the wind,
> my hand puny in its enormous fist and now the strength is not
> in us but above us, in a voice that drills the night and the
> hearing like the penetrance of an apocalyptic wasp."

Justice Vasheist Kokaram