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The University of the West Indies, St. Augustine Law Journal *(UWISALJ)* is a regional legal journal with an emphasis on issues affecting the legal field, locally, regionally and internationally. The aim of the UWISALJ is to add to the legal research and academic discussions in multiple disciplines.

Editorial Note

The second Volume of the UWI St. Augustine Law Journal (UWISALJ) continues to serve as a platform for topical, impactful and critical analysis of regional and international legal issues. The UWISALJ has attracted the works of Judges of the Caribbean Court of Justice, regional and international academics and practitioners. The breadth of the articles in this Volume touches on issues of intellectual property, energy, international law and dispute resolution. There is also a poignant speech delivered at the Faculty's Annual Prize Giving Ceremony by the Honourable Justice of Appeal Vasheist Kokaram. The inclusion of this speech establishes a tradition of having senior members of the legal fraternity share their insights into legal education for our students.

The UWISALJ provides an opportunity for lawyers and academics to develop the jurisprudence in the region through a Caribbean post-colonial lens. This can serve as a much needed independent and objective commentary on issues that matter to the region. The volume of submissions received for the second Volume of the UWISALJ highlights the growing importance of the journal and the growing culture of critical academic writing in the region. The work which was selected in the second Volume was determined by the Editorial Committee to be of particular relevance to the region and the wider legal environment in which we exist.

Special thanks must be given to the Editorial Committee which continues to serve, with unwavering dedication, the cause of critical legal discourse. The Editorial team has also grown to accommodate the increasing administrative work required in producing an annual legal journal of this nature. To the many integral persons who have worked on this Volume, I would like to extend a sincere note of gratitude to you. The Dean of the Faculty of Law, Dr. Alicia Elias-Roberts, has been an ardent supporter of the Journal since its inception and her encouragement and input has pushed us along in our work.

It is my hope that this second Volume adds significant value to the literature in the region and that the UWISALJ continues to be a place where one can express ideas, critiques and regional legal aspirations in a protected space.

Timothy Affonso (Ph.D.)

Editor-in-Chief

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Guyana v Venezuela (Preliminary Objection)

Professor The Hon Mr Justice Winston Anderson

On 6 May 2023, the International Court of Justice ("ICJ" or "Court") delivered its decision in *Guyana v Venezuela* (Preliminary Objection);[1] its second judgment in the long running border dispute between Guyana and Venezuela. In this ruling, the ICJ: (1) admitted to adjudication of the Preliminary Objection raised by Venezuela to the Court's jurisdiction to determine the merits of the dispute; but (2) rejected the Preliminary Objection on its merits. The Court then (3) affirmed its jurisdiction to adjudicate upon the merits of the dispute in so far as the dispute fell within the scope of its 18 December 2020[2] judgment on jurisdiction. The Court made these decisions by a majority of 14-1, the lone dissentient being the *ad hoc* Judge chosen by Venezuela.

This most recent decision[3] revives important issues that continued submerged between the acceptance of the ICJ's jurisdiction in 2020 and the promised adjudication of the merits of the dispute in 2024. However, in one important regard, the decision postpones consideration of a significant and highly relevant point in law of State succession.

Firstly, the 2023 decision[4] clarifies and reifies the distinction between the existence of jurisdiction and the exercise of jurisdiction; this is a fine distinction with counterparts in other international as well as municipal systems; the latter counterparts have led to controversial progenies. Secondly, in considering the merits of the preliminary objection, the Court revisited and re-affirmed the "*Monetary Gold principle*"[5] which prevents the Court from adjudicating on rights of States not parties before it, notwithstanding recent academic criticism. Thirdly, the Court shone a light on the exceptional circumstance of a Colony participating in the negotiation and conclusion of a Treaty to which it succeeded upon attaining independence but did not go into the full implications of a Colony upon gaining independence, succeeding to a treaty on its border regime.

1 *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Preliminary Objection, Judgment) 2023 <https://www.icj-cij.org/sites/default/files/case-related/171/171-20230406-JUD-01-00-EN.pdf> accessed 16 April 2024.

2 *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Jurisdiction of the Court, Judgment) 2020 ICJ Rep 455.

3 *Guyana v Venezuela* (Preliminary Objection) (n 1).

4 *Guyana v Venezuela* (Preliminary Objection) (n 1).

5 See *Monetary Gold Removed from Rome in 1943 (Italy* v *France, United Kingdom of Great Britain and Northern Ireland, and United States of America)* (Preliminary Question, Judgment) 1954 ICJ Rep 19, 32-33.

The background facts remain as presented in the case note on the first decision in *Guyana v Venezuela* (Jurisdiction)[6] and need not be repeated here. Suffice it to say that the Court considered whether it had jurisdiction to determine the validity of the Arbitral Award of 3 October 1899, established by the Washington Treaty of 1897, to 'determine the boundary-line between the Colony of British Guiana and the United States of Venezuela'.[7] That jurisdiction was based on the terms of the 1966 Geneva Agreement adopted by the United Kingdom ('UK"), Venezuela, and British Guiana (now Guyana) and in particular on Article IV which specified progressive steps toward dispute settlement culminating, where the parties failed to agree, in the power of the United Nations Secretary-General to determine the means of settlement.[8] The parties having failed to agree, the Secretary-General exercised his power under Article IV to refer the matter to the ICJ. The Court ruled on 18 December 2020 that it had jurisdiction and was properly seised of the case.[9]

After this decision, Venezuela filed preliminary objections to the admissibility of the claims by Guyana and requested termination of the proceedings.[10] Venezuela referred to Guyana's possible lack of standing but the substance of the preliminary objection was that the UK was an indispensable third party without whose consent the Court could not adjudicate upon the claim.[11] Guyana responded that Venezuela's preliminary objection concerned the exercise of the Court's jurisdiction and the Court's Order of 19 June 2018, had required the Parties to plead 'all of the legal and factual grounds on which the Parties rely in the matter of its jurisdiction'.[12] Guyana further contended that Venezuela's preliminary objection was time-barred, as it had not been raised within the time-limit fixed by the Court's Order of 19 June 2018; and that its admission would be inconsistent with the 2020 Judgment and the principle of *res judicata*.[13]

The fundamental principle enunciated in *Monetary Gold*[14] was that the Court must decide whether a State that is not a party to its proceedings is to be deemed an indispensable third party without whose consent the Court cannot adjudicate. Citing numerous authorities, the Court held that a decision on that question, 'concerned the exercise of jurisdiction rather than the existence of jurisdiction'[15] so that Venezuela's objection based on the *Monetary Gold principle* was an objection to the exercise of the Court's jurisdiction and not an objection to jurisdiction'.[16] As the 2018 Order[17] and the 2020 Judgment[18] were both concerned with the existence of jurisdiction, Guyana's arguments based on time-bars, and *res judicata*, fell away.

6 Winston Anderson, '*Arbitral Award of 3 October 1899 (Guyana v Venezuela)*' (2022) 116 AJIL 836.
7 Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary
Between the Colony of British Guiana and the United States of Mexico (signed 2 February 1897) 5 UKTS 67 art I.
8 Agreement to Resolve the Controversy Over the Frontier Between Venezuela and British Guiana (signed 17 February 1966) 561 UNTS 321 art IV(2).
9 *Guyana v Venezuela* (Jurisdiction) (n 2).
10 *Guyana v Venezuela* (Preliminary Objection) (n 1).
11 ibid [27].
12 ibid [53].
13 ibid [56].
14 *Monetary Gold* (n 5).
15 *Guyana v Venezuela* (Preliminary Objection) (n 1) [63].
16 ibid [64].
17 *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Order of 19 June 2018) 2018 ICJ Rep 402.
18 *Guyana v Venezuela* (Jurisdiction) (n 2).

The Court commenced its examination of the merits of the preliminary objection, with the meaning and intent of the 1966 Geneva Agreement as interpreted in the light of the Vienna Convention on the Law of Treaties 1969 ("VCLT").[19] The Court noted the emphasis placed by the parties on British Guiana becoming independent and assuming responsibility under Article IV for reaching a settlement with Venezuela. The plain terms of the 1966 Geneva Agreement supported the interpretation that the common understanding of the parties was for Venezuela and British Guiana to have the sole role in the settlement of the dispute through the Mixed Commission. This was noteworthy because 'British Guiana was a colony which had not yet attained independence and was not yet a party to the treaty'.[20]

Applying art 31, para 3 of the VCLT, the Court noted that it could consider any subsequent practice which established an agreement of the parties regarding the interpretation of the 1966 Agreement.[21] It found that Venezuela's exclusive engagement with Guyana at the Mixed Commission and the failure of the UK to seek to participate indicated that there was a common understanding among the parties that there was no role for the UK in the dispute settlement process. Accordingly, the *Monetary Gold principle* was inapplicable in the case and the Preliminary Objection failed.

The ICJ treaded the needle between its finding in the 2020 Judgment of the existence of jurisdiction[22] and its 2023 Judgment that Venezuela could raise a Preliminary Objection to the exercise of that jurisdiction.[23] The distinction between the existence and exercise of jurisdiction is familiar, being firmly established in many domestic legal systems. An infamous application of the distinction in Private International law is *forum non conveniens* whereby a court in one country refuses to exercise its jurisdiction over a transnational dispute because a foreign court is the (more) natural forum for the trial.[24] International tribunals have not generally pursued this application. World Trade Organisation law appears not to accept the possibility of *forum non conveniens*; [25] and it must be extremely doubtful that the ICJ would. Further clarification of the practical effect for the ICJ of the distinction between existence and exercise of jurisdiction might be helpful to ensure that the present primary bifurcation of litigation into the jurisdiction and merits do not become a trifecta of litigation from jurisdiction to exercise of jurisdiction to merits.

Secondly, it is noteworthy that the Court reaffirmed the *Monetary Gold principle*.[26] The principle calls for a determination of whether the interest of the third party would constitute 'the very subject matter' of the decision so that the Court could not proceed without the third party's participation.[27] Venezuela argued that the UK was responsible for fraudulent conduct which deceived and

19 *Guyana v Venezuela* (Preliminary Objection) (n 1) [87] et seq.
20 ibid [91].
21 *Guyana v Venezuela* (Preliminary Objection) (n 1) [103] et seq.
22 *Guyana v Venezuela* (Jurisdiction) (n 2).
23 *Guyana v Venezuela* (Preliminary Objection) (n 1).
24 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460; Winston Anderson, *Caribbean Private International Law* (Sweet & Maxwell 2014), chap 9.
25 WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages—Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R [46]–[53].
26 *Guyana v Venezuela* (Preliminary Objection) (n 1).
27 *Monetary Gold* (n 5) 32.

coerced Venezuela's entry into the Washington Treaty that ultimately generated the 1899 Award.[28] Under Article 51 of the VCLT coerced consent to a treaty nullifies the legal effect of the consent.[29] Guyana argued that the allegations of misconduct made by Venezuela would go to the conduct of the arbitral tribunal which gave the award and not to the UK.[30]

The difficulty in identifying whether the third party's interest constitutes the "subject matter" of the case is among criticisms that has been levelled against the *Monetary Gold principle*.[31] Interestingly enough, there was no explicit determination by the Court as to the subject-matter of the dispute, and therefore whether the UK's interests were implicated. Implicitly, though, observations by the Court suggest that it thought, contrary to the views of both Venezuela and Guyana, that the bedrock of the dispute was the location of responsibility under the 1966 Geneva Agreement for reaching a settlement (though in *Guyana v Venezuela* (Jurisdiction),[32] the Court appeared to restrict its jurisdiction to considering only the validity of the 1899 Award, and not events occurring after the 1966 Geneva Agreement). The Court stated:

> In light of the foregoing, the Court concludes that, by virtue of being a party to the Geneva Agreement, the UK accepted that the dispute between Guyana and Venezuela could be settled by one of the means set out in Article 33 of the Charter of the United Nations, and that it would have no role in that procedure. Under these circumstances, the Court considers that the *Monetary Gold principle* does not come into play in this case. It follows that even if the Court, in its Judgment on the merits, were called to pronounce on certain conduct attributable to the UK, which cannot be determined at present, this would not preclude the Court from exercising its jurisdiction, which is based on the application of the Geneva Agreement. The preliminary objection raised by Venezuela must therefore be rejected.[33]

Following on from the passage just quoted, a third and final point may be made. Clearly, the Court has expressly left open the door that it could make adverse findings regarding the conduct of the UK as per the allegations of Venezuela. But if this is so, should not the UK indeed be party to the proceedings to answer those allegations? Would any negative findings against the UK have implications for the validity of the Washington Agreement[34] considering Article 51 of the VCLT?[35] If, for whatever reason, an appearance by the UK was impossible or inconvenient, is there another route to the final decision which both preserves *Monetary Gold principle*[36] and the integrity of the adjudication process against implicit pre-judgment? Specifically, would the provisions in the Vienna Convention on Succession of

28 *Guyana v Venezuela* (Preliminary Objection) (n 1) [76].
29 VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 51.
30 *Guyana v Venezuela* (Preliminary Objection) (n 1) [82].
31 See eg, Zachary Mollengarden and Noam Zamir, 'The Monetary Gold Principle: Back to Basics' (2021) 115 AJIL 41; but see Martins Paparinskis, 'Long Live Monetary Gold* Terms and Conditions Apply' (2021) 115 AJIL Unbound 154.
32 *Guyana v Venezuela* (Jurisdiction) (n 2).
33 *Guyana v Venezuela* (Preliminary Objection) (n 1) [107].
34 Washington Treaty (n 7).
35 VCLT (n 28).
36 *Monetary Gold* (n 5).

States in respect of Treaties 1978 (VCSS) relating to boundary regimes apply?[37] If the matter were to reach this far back in the now distant waters of the Washington Treaty,[38] would the 1978 Treaty provisions on border regimes on succession of states[39] inoculate Guyana against any claim to invalidity of the treaty-based Arbitral Award of 1899 which stood unchallenged for sixty-three years and which appears to have been assumed to be applicable and binding in the practice of the States?

Added to these legal considerations has been the recent saber-rattling evident in the December 2023 order by the Venezuelan President to create a new state called "Guayana Esequiba" following a controversial referendum in which Venezuelan voters approved the annexation of land from Guyana.[40] The oil-rich Essequibo region amounts to roughly two-thirds of Guyana's national territory, and that country has termed the creation of the new state, 'an existential threat'.[41]

The awaited decision of the ICJ on the merits of the *Guyana v Venezuela* dispute just assumed significant dimensions of anxiety and suspense.

37 VCSS (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3 art 11.
38 Washington Treaty (n 7).
39 VCSS (n 39).
40 Simmone Shah, Armani Syed and Mallory Moench, 'What to Know About Venezuela's Move to Claim Guyana's Essequibo Region' *Time* (originally published 6 December 2023, updated 11 December 2023) <https://time.com/6343549/guyana-essequibo-region-venezuela-dispute/> accessed 16 April 2024.
41 ibid.

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The Implementation of the UNCITRAL Model Law on Arbitration in the Commonwealth Caribbean

Justice Dr. Anthony D.J. Gafoor

Abstract: *The implementation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law in the Commonwealth Caribbean is a significant step towards the greater harmonisation of laws which impact regional integration and intra-regional trade. It also serves to reassure foreign direct investors of a standardised alternative to litigation before domestic courts which are often plagued by delay and higher costs in comparison with arbitration. Such a Model Law also helps to promote uniformity and predictability in the resolution of disputes as well as preserving party autonomy and confidentiality. Courts within the region have also become increasingly sensitive to giving effect to the parties' decision to resolve commercial disputes by arbitration instead of litigation. However, the role of State courts may still be important to support certain aspects of the arbitration process which may best be carried out by the domestic courts within the seat of arbitration. Several jurisdictions within the Commonwealth Caribbean have now implemented the Model Law such as Barbados, Bermuda, Jamaica, the Cayman Islands, the Commonwealth of the Bahamas and most recently Trinidad and Tobago. These developments coupled with the establishment of international arbitration centres in certain jurisdictions such as the British Virgin Islands, the Cayman Islands, Jamaica and Barbados, which also have their own Rules governing the conduct of institutional arbitrations, augurs well for the region which is characterised by the presence of several multinational companies, many of which may have disputes with the host Caribbean State. These developments may eventually lead to an increase in the resolution of disputes within the Commonwealth Caribbean by international commercial arbitration as a viable alternative to other more established international arbitration centres in New York, London and increasingly the Middle East and Far East.*

Key words*: regional integration; harmonisation; international trade; judiciary*

Introduction to the UNCITRAL Model Law on Arbitration

The United Nations Commission on International Trade Law (UNCITRAL) Model Law (Model law) on International Commercial Arbitration, since its inception, has been a pivotal instrument in shaping the landscape of international arbitration. Originating from the UNCITRAL, it offers a blueprint for legal frameworks, enabling countries to reform their arbitration laws in a manner conducive to international trade and investment.

In the Commonwealth Caribbean, the adoption of the Model Law has signified a commitment to establishing a uniform and modernised arbitration regime. This harmonisation seeks to alleviate the apprehensive concerns of foreign investors regarding the predictability and fairness of the legal processes within these jurisdictions. Embracing the Model Law reflects an acknowledgement of the increasingly interconnected global economy and the necessity for a common legal language in resolving cross-border commercial disputes.

The significance of the UNCITRAL Model Law in this region cannot be understated. By providing a comprehensive legal framework that is flexible yet robust, the Model Law has been instrumental in fostering a reliable and efficacious environment for arbitration. This not only encourages foreign direct investment but also serves as a cornerstone for the development of the rule of law and the reinforcement of judicial cooperation within the Commonwealth Caribbean.

The objectives of the UNCITRAL Model Law includes harmonization of international trade law; legal certainty for international transactions; promotion of arbitral proceedings and flexibility for adaptation to local contexts. As it relates to the harmonisation of international trade law, the introduction of a uniform legal framework for the recognition and enforcement of arbitral awards, the UNCITRAL Model Law plays a pivotal role in reducing legal barriers international trade participants might face. It singularly aligns disparate national laws, mitigating the unpredictability and complexity inherent in transnational commerce. Legal certainty for international transactions is one of the essential contributions of the UNCITRAL Model Law and seeks to instill confidence among international traders. By providing clear and predictable legal procedures, the law assures parties that their contracts and related dispute resolutions will be upheld across borders in the Commonwealth Caribbean jurisdictions. The UNCITRAL Model Law is meticulously drafted to promote arbitration as a preferable alternative to court litigation. This approach is beneficial in the Commonwealth Caribbean as it minimises the time and costs associated with dispute resolutions, thus maintaining the flow of trade and investment in the region. Additionally, whilst establishing a homogeneous structure, the Model Law is designed with flexibility, allowing individual Commonwealth Caribbean States to adapt its provisions within their legal systems. This characteristic addresses the needs and nuances of domestic legal cultures while adhering to an international standard.

Some Key Provisions of the UNCITRAL Model Law are:

1. Universality and Flexibility: The Model Law promotes a harmonised legal framework for international trade by advising States to adopt its provisions but allows for flexibility to accommodate specific legal traditions, fostering a more accessible and predictable trading environment across different jurisdictions.

2. Recognition of Arbitral Agreements: Outlining specific guidelines for the recognition and enforcement of arbitral agreements, the Model Law elevates the status of arbitration as a means of dispute resolution, thereby encouraging a

consensual and non-litigious approach to addressing commercial conflicts.

3. Interim Measures of Protection: Allowing for interim measures by arbitral tribunals, it supports parties in preserving their rights pending the resolution of a dispute. This function underscores the effectiveness and practical nature of arbitration under the Model Law.

4. Limited Court Intervention: By minimising court interference with ongoing arbitration proceedings, the Model Law respects the autonomy of the arbitral process and keeps judicial involvement in commercial disputes to what is strictly necessary, thereby expediting a resolution.

5. Cross-Border Enforcement of Arbitral Awards: It streamlines the enforcement of international arbitral awards, contributing to the predictability and reliability of arbitration as a means of dispute settlement. This provision of enforceability is pivotal in the global commercial arena.

Benefits of the Adoption of the UNCITRAL Model Law in the Commonwealth Caribbean

The adoption of the UNCITRAL Model Law on International Commercial Arbitration or the enactment of legislation based on the Model Law across the Commonwealth Caribbean in various jurisdictions has been significant. These include jurisdictions such as Bermuda (1993); Barbados (2007); the British Virgin Islands (2013); Jamaica (2007); and Trinidad and Tobago (2023). This marks an essential evolutionary step in the region's legal landscape. Committed to establishing a uniform framework for the arbitration process, these island nations have recognised the value of the Model Law as a means to foster a conducive environment for international trade and investment. These nations have also been updating their domestic arbitration laws in alignment with global standards, thereby enhancing their attractiveness as arbitration-friendly jurisdictions.

The revision of arbitration laws under the guidance of the UNCITRAL Model Law in the Caribbean is more than a mere legislative change; it symbolises a broader commitment to the principles of fairness, transparency, and efficiency in dispute resolution. By adopting the Model Law, the Commonwealth Caribbean underscores its readiness to adopt best practices in resolving commercial disputes, particularly those with an international dimension. The adoption of the Model Law has promoted a sense of uniformity in legal procedures for international arbitration within the region. This harmonisation is critical in reducing legal uncertainty for foreign investors and trading partners. By aligning with an internationally recognised legal framework, Commonwealth Caribbean countries have enhanced confidence among international businesses in their legal systems, potentially leading to an influx of foreign investment. The implementation of the Model Law fosters the development of domestic arbitration expertise. Legal practitioners in the region now have increased opportunities to specialise in international commercial arbitration, benefiting from the cross-pollination of ideas and practices from different jurisdictions. Additionally, the Model Law encourages the modernisation of the judiciary, as courts learn to give effect to arbitration agreements and to recognise and enforce foreign arbitral

awards, thereby reducing unnecessary judicial intervention in arbitrations.

The tangible benefits of the UNCITRAL Model Law serve as assets to the Caribbean as it aims to position itself at the heart of international commercial arbitration as other relatively small developing States which have also modernised their arbitration laws such as Singapore (1994); Hong Kong (2010); Dubai (2013); and Qatar (2017). The enshrined principles not only boost the economic prospects of these nations—but also reinforce a shared commitment to a fair and systematic resolution of cross-border commercial disputes.

The UNCITRAL Model Law promotes a harmonised legal framework for international trade by advising States to adopt its provisions but allows for flexibility to accommodate specific legal traditions, fostering a more accessible and predictable trading environment across different jurisdictions. Also, outlining specific guidelines for the recognition and enforcement of arbitral agreements, the Model Law elevates the status of arbitration as a means of dispute resolution, thereby encouraging a consensual and non-litigious approach to addressing commercial conflicts. Allowing for interim measures by arbitral tribunals, it supports parties in preserving their rights pending the resolution of a dispute. This function underscores the effectiveness and practical nature of arbitration under the Model Law. By minimising court interference with ongoing arbitration proceedings, the Model Law respects the autonomy of the arbitral process and keeps judicial involvement in commercial disputes to what is strictly necessary, thereby expediting a resolution. The awards from the enforcing body, streamlines the enforcement of international arbitral awards, contributing to the predictability and reliability of arbitration as a means of dispute settlement. This provision of enforceability is pivotal in the global commercial arena.

The adoption of the UNCITRAL Model Law on International Commercial Arbitration by nations within the Commonwealth Caribbean represents a significant stride towards creating a harmonious legal framework for resolving commercial disputes. The envisaged uniformity aims to foster an amenable business atmosphere that is essential for attracting foreign investment. The following points elucidate the manifold benefits that accrue from its implementation.

By embracing the UNCITRAL Model Law, Commonwealth Caribbean States benefit from a standardised legal foundation which significantly reduces the complexities associated with international trade laws. This uniformity not only simplifies the resolution of cross-border disputes but also projects a reliable and predictable legal environment for investors. There is also a boost in investor confidence by the establishment of a transparent legal system, undergirded by the UNCITRAL Model Law. This ensures that commercial disputes are resolved in a fair and predictable manner, instilling a greater degree of confidence among international traders and investors. This potentially leads to an uptick in economic activity and investment within the region. The Model Law is known for its emphasis on efficiency, with provisions facilitating expedited arbitration processes. This not only saves time and resources for the disputing parties but also lessens the burden on the local judiciary,

allowing it to focus on other pressing legal matters. There is also an increased autonomy for parties. One of the hallmark features of the Model Law is the degree of autonomy it grants to the parties involved in a dispute. Parties can select arbitrators with expertise specific to their case and choose procedural rules with which they are comfortable, leading to a more tailored and satisfying dispute resolution experience.

Thus, the incorporation of the UNCITRAL Model Law into the legislative frameworks of the Commonwealth Caribbean countries serves to facilitate a more consistent, transparent, and efficient legal arbitration process. This harmonisation greatly enhances the region's appeal as a secure and reliable hub for international business and arbitration.

Harmonisation of Arbitration Laws in the Commonwealth Caribbean

The pursuit of harmonisation in arbitration laws within the Commonwealth Caribbean has been significantly influenced by the adoption of the UNCITRAL Model Law. This model exemplifies legal modernity, particularly for commercial and international disputes, offering a framework that aligns with global standards. The intricacies of international trade and investment have necessitated such developments, aiming to provide a semblance of predictability and consistency in arbitral proceedings across different jurisdictions. Harmonisation ensures that Member States of the Commonwealth Caribbean do not operate in isolation but rather in synchronicity, regarding arbitration laws and procedures. This unity reduces legal uncertainty for international investors and enhances the appeal of the region as a serene business hub.

This alignment of legal practices through the UNCITRAL Model Law in the Caribbean has also served to strengthen regional integration. While each State retains its distinct legal identity, the shared principles foster a collaborative environment that is mutually beneficial for economic and social growth. In this regard, it is notable that the apex regional court within the Commonwealth Caribbean, the Caribbean Court of Justice, has also incorporated arbitration as an alternative means of resolving disputes within its foundational document, the Revised Treaty of Chaguaramas (2001).[1] This Treaty has been implemented into the domestic law of all Member States of the Caribbean Community.

The practical advantages of harmonisation are manifold. Legal practitioners within the region benefit from a common ground of understanding when handling cross-border disputes. Not only does this elevate the standard of legal service available in the Caribbean, but it also cultivates an environment that is conducive to professional development within the field. In turn, this empowers Caribbean arbitral tribunals in attracting more complex and high-profile cases.

The ripple effects of harmonised arbitration laws can be observed in the region's increased capacity to attract

1 Article 188(1) of the Revised Treaty of Chaguaramas Revised Treaty of Chaguaramas
Establishing The Caribbean Community Including The Caricom Single Market And Economy (RTC) recognises the use of arbitration as an approved mode of dispute settlement and Article 204 of the RTC specifies that 'A Member State party to a dispute may, with the consent of the other party, refer the matter to an arbitral tribunal constituted in accordance with the provisions of this Chapter'.

foreign investment. By ensuring that the arbitral framework adheres to internationally recognised standards, the Caribbean demonstrates its commitment to fair and equitable dispute resolution. This aspect is particularly vital in business sectors prone to international transactions, such as tourism, energy, and finance.

Ultimately, the implementation of the UNCITRAL Model Law within the Commonwealth Caribbean serves as a beacon towards achieving a seamless arbitration regime that resonates with international norms. It marks a concerted effort in advancing the region's legal infrastructure, thereby laying the groundwork for a more secure and stable business climate.

The pursuit of harmonisation in arbitration laws within the Commonwealth Caribbean has been significantly influenced by the adoption of the UNCITRAL Model Law. This model exemplifies legal modernity, particularly for commercial and international disputes, offering a framework that aligns with global standards. The intricacies of international trade and investment have necessitated such developments, aiming to provide a semblance of predictability and consistency in arbitral proceedings across different jurisdictions.

Challenges in implementing the UNCITRAL Model Law

There are, however, some challenges in the implementation of the UNICTRAL Model Law. One of the primary challenges is the reconciliation of the UNCITRAL Model Law with existing statutes and legal principles that govern commercial transactions within the Commonwealth Caribbean States. These jurisdictions possess unique legal frameworks, which have evolved through a mixture of common law tradition and legislative enactments. Adapting the provisions of the Model Law may require significant legal reform to ensure compatibility and prevent conflicts with domestic laws.

Second, there lies a degree of hesitation among some stakeholders regarding the perceived erosion of national sovereignty. The adoption of an international model law could be seen as ceding legal autonomy in favour of a global standard, which may not always align with the social and economic priorities of individual Caribbean countries.

There is also the fact that implementing the UNCITRAL Model Law necessitates a widespread understanding and expertise among legal professionals, the judiciary and business entities as well as the representative entities of such businesses as the national Chambers of Commerce. Establishing comprehensive educational programmes and training sessions to educate these groups about the nuances of international trade law and the Model Law's application is a substantial undertaking that requires both time and resources.

The economic implications are patent in the adoption of the Model Law. Adoption can have direct and indirect economic ramifications. It may initially impose a financial strain on governments and the private sector as they adapt to the new legal environment. There is also the perspective that ensuring compliance with an international standard opens the door for increased foreign investment and thus potentially stimulates economic growth over time.

A final point is that embracing the Model Law promises greater consistency in international trade law, promoting a more predictable legal environment for cross-border transactions. However, the diversity among Commonwealth Caribbean States means that achieving uniformity is a complex endeavor. Additionally, the variable pace of adoption between these States can create an interim period of legal fragmentation which, in itself, may deter the commerce it aims to facilitate.

Role of the Judiciary in Implementing and Applying the UNCITRAL Model Law

The UNCITRAL Model Law plays a pivotal role in harmonising the legal framework for international trade within the Commonwealth Caribbean jurisdictions. However, the effectiveness of this legal instrument largely depends on the interpretation and application by the domestic judiciary. Judges within the Commonwealth Caribbean are tasked with a demanding role as they negotiate the crossroads between national legal principles and international legislative harmonisation.

Their interpretative function is not a mere exercise of legal reading; it requires a profound understanding of the intricacies of international trade law, as well as sensitivity to the regional legal norms and precedence. The judiciary's competence in deploying the UNCITRAL Model Law is paramount to ensuring *predictability* and *uniformity*, which are the core objectives of the Model Law. This judicial function fosters a trade-friendly legal environment that attracts foreign investment and contributes to economic growth.

Fostering a Pro-Arbitration Mindset

One critical challenge the judiciary faces involves the arbitral award enforcement regime. Courts must align their decisions with the pro-arbitration stance envisioned by UNCITRAL. The Model Law's articles provide guidance, yet they leave room for judicial discretion, necessitating that judges have a thorough comprehension of arbitration mechanisms and principles. Their rulings not only affect individual cases but also set precedents that influence the efficacy of the Model Law's adoption.

Moreover, the judiciary's interpretation of the UNCITRAL Model Law often requires a delicate balance between intervention and non-intervention. Judicial restraint is essential, especially in arbitration matters, to honor the autonomy of the arbitral process. Such restraint underscores respect for parties' decisions to settle disputes outside the traditional court system, yet it must be strategically managed to ensure that legal redress remains available for serious procedural infractions.

Training and Capacity Building Initiatives for the Implementation of the UNCITRAL Model Law

Effectuating the UNCITRAL Model Law within the Commonwealth Caribbean requires a multifaceted approach, central to which are training and capacity building initiatives. These initiatives are tailored to equip legal professionals, judges, and policymakers with the requisite knowledge and skills to apply the Model Law effectively. By fostering a more comprehensive understanding of arbitration, the Commonwealth Caribbean can leverage this foundational international legal framework to modernise its arbitration laws.

Building a Solid Foundation through Knowledge Sharing

Training programmes are often conducted through workshops, seminars, and continuing legal education as part of the syllabi of tertiary level institutions such as the University of the West Indies, regional law schools in the Bahamas; Jamaica and Trinidad and Tobago and the pre-eminent global body for training arbitrators, the Chartered Institute of Arbitrators (Ciarb). These training sessions such as those offered by Ciarb thoroughly examine the principles embroiled within the UNCITRAL Model Law, methodically breaking down the legislative intricacies. Eminent arbitrators and legal experts from countries with a history of successful Model Law implementation frequently lead these discussions, offering first-hand insights that enrich the learning experience.

Capacity building goes beyond the mere comprehension of laws—it fosters a culture of international best practices within the arbitral process. The initiatives focus on practical aspects, such as drafting enforceable arbitral awards, managing complex arbitration proceedings, and ensuring procedural fairness. As such, the universal application of standardised arbitral procedures underscores the ethos of these training endeavours, encouraging uniformity and predictability in cross-border commerce.

Catalysts for Economic Progress

Integrating the UNCITRAL Model Law is not a superficial ceremonial undertaking; it bears significant economic implications. By equipping local professionals with the ability to navigate international arbitration competently, these capacity building initiatives serve as catalysts for economic progress. Establishing a reliable arbitration regime attracts foreign direct investment, assuages the concerns of international traders, and contributes to a stable legal environment - quintessential for economic vitality.

The long-term success of the UNCITRAL Model Law in the Commonwealth Caribbean hinges upon the ongoing commitment to these educational modules. They are not static but continually evolve to reflect the dynamic arbitration landscape. Like the tendrils of a vine, the spread of specialised knowledge enhances the entire legal framework's robustness - a testament to the powerful role of training and capacity building in the law's implementation.

Regional Integration, Legal Harmonisation and Trade Facilitation

The UNCITRAL Model Law's implementation in the Commonwealth Caribbean has been a transformative movement, leading to a harmonised legal approach to cross-border commercial transactions. The future looks promising, with further alignment and sophistication of local laws anticipated to integrate seamlessly with international business practice.

As nations within the Commonwealth Caribbean increasingly adopt the UNCITRAL Model Law, there is an evident trend towards regional integration. This unity fosters a stronger collective presence in the global market, as consistent laws across borders significantly ease the challenges of international trade.

Legal harmonisation is not an endpoint but a process. Future developments are expected to focus on refining the intricacies of the law to address evolving commercial challenges, such as digital transactions and e-commerce,

ensuring that Caribbean legal frameworks remain robust and responsive. The paramount goal remains the facilitation of trade. Growth in this sector is central to economic prosperity, and the clarity and predictability provided by the UNCITRAL Model Law are vital. The ongoing refinement and adoption of this legal instrument are set to continue bringing about brisk and efficient transaction environments, which will in turn attract more business to the region.

With an increased commitment to modernising legal structures, countries in the Commonwealth Caribbean are well-positioned to become even more competitive and attractive to international investors. Ultimately, this momentum could propel them to the vanguard of global trade liberalisation efforts and economic innovation.

Conclusion

The enactment of the UNCITRAL Model Law in various jurisdictions of the Commonwealth Caribbean thus marks a significant stride in harmonising regional trade laws with international norms. The adoption of this legislative framework reflects a commitment to updating and standardising legal structures in the face of globalisation.

In the fabric of international trade, the Commonwealth Caribbean States stand to gain a competitive edge by aligning their commercial legislation with the tried-and-tested provisions of the Model Law. It fosters legal predictability and reduces the complexities associated with cross-border trade, making the region more attractive to foreign investors. The results have already begun to manifest, with improvements in transparency and efficiency in transactions, thus reducing legal barriers and economic costs for international businesses.

Moreover, the implementation of the UNCITRAL Model Law aids in resolving disputes that emerge from international trade more objectively, with provisions that are widely recognised and enshrined by contracting States globally. It thus serves to instill greater confidence among traders and investors, which is crucial for the small economies of the Commonwealth Caribbean as they seek to amplify their presence in international markets.

In conclusion, the incorporation of the UNCITRAL Model Law within the Commonwealth Caribbean's legal systems is a testament to their resolve to partake proactively in global trade culture. It positions these States not merely as bystanders but as active participants shaping the dynamics of international trade law.

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Japs – Adding Flavour to the Trade Mark Law of Trinidad and Tobago

Justin Koo and Jehoshua Williams

***Abstract**: Trade mark law in Trinidad and Tobago, like many other legal fields, remains underdeveloped. The lack of case law has resulted in many key areas of registered and unregistered trade mark law remaining undefined and, in some instances, unclear. The novel issues concerning unregistered trade mark law that were discussed in the Japs case re-emphasised the need for more jurisprudence and academic study on trade mark law in Trinidad and Tobago. Therefore, this article will analyse the High Court and Court of Appeal decisions concerning the registrability of the 'JAPS' trade mark.*

***Keywords**: Trade marks; Goodwill; Non-use; Abandonment; Intellectual property; IP*

1 Introduction

It is important to note that the litigation concerning the 'JAPS' trade mark was ultimately a law of trusts case concerning an unregistered trade mark that both parties sought to register.[1] This may be unclear due to Mohammed J's statement in the High Court that the matter at hand concerned 'who has the right to have a trade mark associated with the name "Japs"'2 and Aboud JA's statement in the Court of Appeal that 'this is an appeal involving a trade mark dispute.'3 However, a deeper look at the discussion in the case reveals that the decisions in both the High Court and Court of Appeal were primarily about whether a trust was validly formed between the defendant, Thomas, and the third party, Maharaj, which had consequences for the registrability of the 'JAPS' trade mark. That aside, the main trade mark issues in the case concerned the existence of goodwill in the use of the brand 'JAPS', the abandonment of the unregistered trade mark and the determination of who is entitled to register the unregistered trade mark.

Japs Fried Chicken is a popular fast-food restaurant in Trinidad and Tobago competing with well-known brands such as KFC and Royal Castle. Japs is noted for their distinctive fried chicken, which is well seasoned. Japs, as we know it today, began as 'First Court Snack Box' in 1979 under the control of the defendant and the third party. In 1984, the defendant and third party renamed the business 'Japs Restaurant and Bar'/'Japs Fast Food'.[4] By 1989, the defendant had left the business, and in 2004 the third party and her son had renamed the business 'Japs Fried Chicken'. The claimant was incorporated in 2007 by the third party and her son. Since then, the Japs brand has matured into a successful business with several outlets nationwide. However, despite the success of the brand, the various operators of 'JAPS' have relied on unregistered trade mark protection since it was initiated in 1984. A registered trade mark was not sought until 2010. The trade mark application that was made and subsequently stayed due to the objections raised in the litigation forms the central focus of this article.

The claimant, Japs Fried Chicken Limited, applied to register a composite trade mark comprising the phrase 'JAPS FRIED CHICKEN…DE BEST TASTE AROUND' and the Japs logo (device) on 12 February

1 *Japs Fried Chicken Limited v Thomas and Maharaj* (2016) CV 2014-02595, TT 2016 HC 196 (*Japs v Thomas 2016)* and *Japs Fried Chicken Limited and Romario Mahabir v Nicholas Thomas* (2022) Civil Appeal No P-297 of 2016 (*Japs v Thomas 2022)*.

2 *Japs v Thomas 2016* [1].

3 *Japs v Thomas 2022* [2].

4 Aboud JA in the Court of Appeal decision referred to the business as 'Japs Fast Food'. See *Japs v Thomas* (2022) [10].

2010.[5] Consequent to the application made by the claimant, the defendant opposed the claimant's trade mark application and filed his own trade mark application for a similar composite trade mark on 1 July 2011. Given the conflict, the Intellectual Property Office stayed both applications pending the determination by a court of law about the ownership and right to register the unregistered trade mark.[6] The claimant subsequently filed suit and as a result litigation ensued.

2 The Cases

The litigation about the registrability of the 'JAPS' mark spanned: internal proceedings at the Intellectual Property Office, which resulted in the applications being stayed, referral to the High Court, and appeals to the Court of Appeal and Privy Council. The appeal to the Privy Council was refused[7] and, as such, the Court of Appeal decision provided the final decision allowing the claimant to register the trade mark sought.[8]

2.1 High Court Decision

The origin of the *Japs* case centred on the claimant's attempt to register an unregistered trade mark that was subject to competing ownership claims. The defendant argued that he was the sole proprietor of the unregistered mark, 'JAPS', and as such was the only person entitled to register the mark as a trade mark.[9] Mohammed J disagreed with the defendant's submission and instead held that both the defendant and third party were the proprietors of the goodwill in the unregistered trade mark given that they together started the business under the 'JAPS' branding.[10] While this may appear to be a trade mark case *prima facie*, it is actually a law of trusts case because Mohammed J's decision hinged on the establishment of the trust whereby the defendant's goodwill in the Japs business and brand name was retained despite him exiting the business by 1989.[11] Consequently, Mohammed J also found that the claimant did not acquire goodwill in the 'JAPS' brand because it was not incorporated until 2007, long after the goodwill in the brand/business had developed.[12] Thus, the claimant could not register the trade mark as the brand 'JAPS' was jointly owned by the defendant and third party.[13] The decision was appealed by both parties.

2.2 Court of Appeal Decision

The Court of Appeal's decision focused on the central question of whether the defendant had a valid trust with the third party. Aboud JA expressly acknowledged this, and furthermore stated that the interest in the business and resultantly the unregistered trade mark was attached to the establishment of the trust.[14] Thus, the consequence of Mohammed J holding that the trust was validly formed was that: the defendant's interest in the business continued after his 1989 departure, the defendant did not abandon the goodwill in the name 'JAPS', there was no separate goodwill in the brand 'JAPS' acquired by the claimant and the third party nor could the claimant individually register the brand 'JAPS' as a trade mark.[15] However, Aboud JA held that Mohammed J was wrong to find that a trust existed.[16] Therefore, Mohammed J's orders that followed from the finding that a valid trust was established were to be set aside.[17]

The reversal of the High Court decision meant that the finding that the defendant and third party jointly owned the goodwill in the brand 'JAPS' was incorrect. Instead, the defendant's departure from the business and the absence of a trust lead to the conclusion that the defendant abandoned the unregistered trade mark that was 'JAPS'. As a result, the goodwill now vests with the claimant and the third party given that they are the sole users of the

5 See appendix herein for the trade mark applied for.
6 This was done on the basis of section 14(3) of the Trade Marks Act 1955 Chapter 82:81 of the Laws of the Republic of Trinidad and Tobago (TMA 1955).
7 Judicial Committee of the Privy Council, 'Permission to Appeal – June 2023' <https://www.jcpc.uk/news/permission-to-appeal-2023-06.html> accessed 26 October 2023.
8 *Japs v Thomas* (2022) [134].
9 *Japs v Thomas and Maharaj* (2016) [13].
10 *Japs v Thomas and Maharaj* (2016) [120].
11 *Japs v Thomas and Maharaj* (2016) [10] - [18].
12 *Japs v Thomas and Maharaj* (2016) [6] and [21].
13 *Japs v Thomas and Maharaj* (2016) [115].
14 *Japs v Thomas* (2022) [37] – [38].
15 *Japs v Thomas* (2022) [38] subsection [22].
16 *Japs v Thomas* (2022) [72] – [126].
17 *Japs v Thomas* (2022) [126] – [134].

'JAPS' branding. Thus, there was nothing stopping the claimant from registering the trade mark given that the defendant abandoned the 'JAPS' brand.[18]

3 Trade Mark Issues

Despite the fact that it was previously argued in this article that the *Japs* case is a law of trusts case, both the High Court and Court of Appeal decisions addressed novel and critical trade mark law issues. However, the discussion of the trade mark issues was underwhelming because emphasis was reserved for the determination of whether a valid trust existed. That aside, the concepts of goodwill and abandonment that were raised in both decisions are worthy of further discussion. As such the remainder of this article will address these two concepts in addition to providing commentary on the general lessons to be learned from the *Japs* litigation.

However, before engaging in that discussion a couple points should be kept in mind. Firstly, the *Japs* case concerned the ability of the parties to register an unregistered trade mark. The case did not address the general registrability of the trade mark. It was accepted that the trade mark is registrable in terms of avoiding the absolute and relative grounds for refusal. Therefore, the statutory law on registered trade mark law was not directly applicable. That being said, the statutory provision concerning abandonment of registered trade marks could have been relied upon as the concept is similar for both registered and unregistered marks.[19] Secondly, even if the statutory law on trade mark law was applicable, the matter would have been addressed using the old 1955 Act. Whereas, trade mark law is now governed by the modernised Trade Marks Act 2015 Chapter 82:81 of the Law of the Republic of Trinidad and Tobago, which was proclaimed in 2020, and introduced different approaches to trade mark rights that could have impacted the decision of the *Japs* case.

3.1 Goodwill

Goodwill was correctly defined in the *Japs* High Court decision by using Lord McNaughton's definition from *The Commissioners of Inland Revenue v Muller & Co's Margarine.*[20] Even though goodwill was of paramount importance to the claims made in this case, there was limited legal discussion about the scope of the concept. This is of concern because the concept of goodwill though 'settled' in the case law concerning passing off, is actually quite controversial in the context of the abandonment of unregistered trade marks[21] and in the transfer of registered trade marks.[22] Perhaps this is why Mohammed J in the High Court came to the wrong conclusion about the operation of goodwill. Notably, goodwill was wrongfully tied to the 'JAPS' brand in and of itself and to the persons initially involved with the business.[23] This conflicts with the fact that goodwill attaches itself to marks that come to be associated with the business, but not in the mark itself.[24] While this may be a moot point given that the Court of Appeal extinguished the defendant's claim to the goodwill in the business, it is important for precedential value. The *Japs* case offered an opportunity to flesh out the scope of goodwill in Trinidad and Tobago, but this was not done. The lack of discussion on goodwill has consequences for the development and application of the tort of passing off, the determination of abandonment of unregistered trade marks and section 6 of the Protection Against Unfair Competition Act 1996 Chapter 82:36 of the Laws of the Republic Trinidad and Tobago ("Protection Against Unfair Competition Act").

The High Court erred in considering whether the defendant had goodwill for three reasons. Firstly, goodwill only vests in the business itself which extends to

18 *Japs v Thomas* (2022) [128].
19 Section 35 TMA 1955.
20 *Limited* [1901] AC 217 223-224.
21 See J Griffiths, '*Star Industrial Co Ltd v Yap Kwee Kor* [1976]: The End of Goodwill in the Tort of Passing Off' in S Douglas, R Hickey and E Waring (eds), *Landmark Cases in Property Law* (Bloomsbury Publishing 2017).
22 For academic discussion on the challenges of defining goodwill see: Irene Calboli, 'Trademark Assignment "With Goodwill": A Concept Whose Time Has Gone' (2005) 57 Florida Law Review 771.
23 *Japs v Thomas and Maharaj* (2016) [95].
24 Loinel Bently and others, *Intellectual Property Law* (6th edn Oxford University Press 2022) 874.

the branding/unregistered trade mark of the business.[25] The Privy Council in *Star Industrial v Yap Kwee Kor (Trading as New Star Industrial company)*[26], stated that 'goodwill, as the subject of proprietary rights, is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached.'[27] Therefore, with the defendant exiting the business in 1989 and subsequently, the business changing names several times, the goodwill in the initial business setup by the defendant and third party should have been considered extinguished. Even if one disagrees with this, the commencement of Japs Fried Chicken in 2004 by the claimant formally marked the extinction of the 1984 business and its goodwill created by the defendant. Thus, this facilitated the possibility for the creation of new goodwill notwithstanding the use of the 'JAPS' brand. Consequently, Mohammed J was incorrect to state that the claimant did not acquire separate goodwill especially in the aftermath of the formation of Japs Fried Chicken Limited given that it was a new business and separate legal entity.[28]

Secondly, building on the first point concerning where goodwill vests, the High Court misapplied the law by finding that goodwill runs with the 'JAPS' brand and/or with the defendant in his personal capacity. Mohammed J in holding that the claimant did not acquire separate goodwill argued that the mere use of the 'JAPS' brand did not give rise to separate goodwill because the name was already in existence prior to the commencement of Japs Fried Chicken Limited.[29] This reasoning is incorrect because goodwill can only vest in the business. Goodwill does not vest in the 'JAPS' brand itself nor the defendant. However, Mohammed J in stating:

> I would assume that a reasonable person who is taking over management of a business would want to make it clear to the public that he was disassociating himself from the defendant and one way of doing that was by using a different name which excluded the "Japs" brand[30]

failed to consider that the defendant and the business were separate entities. In doing so, Mohammed J seemingly attributed goodwill to both the 'JAPS' brand and the defendant thus ascribing the defendant a right to the goodwill outside the scope of the business. This flagrantly conflicts with the established common law concerning the vesting of goodwill and moreover, is factually problematic in this scenario because the defendant abandoned his interest in the business since 1989. Therefore, any potential claim in relation to goodwill should only come from the owners/operators of the 1984 business, which no longer included the defendant.

Thirdly, the High Court misdirected itself in focusing on the establishment of a trust to support the case of the defendant. Regardless of whether there was a validly formed trust, the defendant had exited the business in 1989, therefore his claim to the goodwill, which was tied to the business would no longer be applicable for the reasons discussed in the previous two paragraphs. Even if the trust was to be established and the defendant's share was to be preserved for his children, this should not have led to the decision that both the defendant and third party would have to consent to the registration of the unregistered trade mark. This is because the third party should be able to register the trade mark by herself/on behalf of the business because she had become the sole operator of the business. However, this entire line of argument should have been deemed irrelevant because the business established by the defendant and third party ceased to exist at the very latest with the commencement of operations of Japs Fried Chicken in 2004 or with the incorporation of Japs Fried Chicken Limited in 2007. Hence, any goodwill in the 'JAPS' brand relating to the 1984 business was abandoned and consequently any claim by the defendant for ownership of the 'JAPS'

25 Such an approach has been adopted by Bangladesh under section 35(1) of its Trademarks Act, Act No. XIX of 2009. See Mohammed Towhidul Islam and Md Jahid Al-Mamun, 'Protection of Unregistered Well-Known Trademarks: The Bangladeshi Trademarks Regime Revisited' (2021) 32(2) 15, 25.

26 [1976] UKPC 2 ,[1976] FSR 256.

27 *Ibid* 269.

28 *Japs v Thomas and Maharaj* (2016) [102].

29 *Japs v Thomas and Maharaj* (2016) [101].

30 *Japs v Thomas and Maharaj* (2016) [101].

branding must fail. Alternatively, if the goodwill had survived, it was now subject to the control of the claimant.[31]

As a result, it is argued that the Court of Appeal arrived at the correct decision in allowing the claimant to register the 'JAPS' trade mark, but the matter could have been resolved on grounds purely related to the operation of goodwill or in this case specifically, the non-existence of the goodwill claimed by the defendant. Unfortunately, the decision of Aboud JA in the Court of Appeal did not interrogate the concept of goodwill. The Court of Appeal's ruling exclusively focused on the validity of the trust, thus relegating the goodwill issue to a by-the-way consideration. Consequently, the precedent set in this case has implications for the law of passing off and section 6 of the Protection Against Unfair Competition Act because the possibility that goodwill may survive the closure of a business or the abandonment of a business in contexts where a valid trust is established creates legal uncertainty especially for businesses with multiple owners. The *Japs* decision in theory leaves open the possibility that goodwill can survive separate from the business where it was developed.

3.2 Abandonment

The issue of abandonment was crucial for determining who has the right to register the unregistered trade mark. The matter was decided based on the fact that the defendant had left the Japs business by 1989 and had not exercised any use of the 'JAPS' brand or its goodwill subsequent to his departure. Given that the claimant only attempted to register the trade mark in 2010, the Court of Appeal argued that the defendant had abandoned the mark. However, this determination of abandonment was not backed by any specific legal rule, but this was acceptable from a common-sense perspective because the defendant had not used the 'JAPS' brand in relation to food for more than twenty years, which undoubtedly points in the direction of abandonment. It is suggested that the court could have looked to the trade mark rules on non-use[32] to establish a clear rule for what constitutes abandonment. While this would involve the application of registered trade mark laws to an unregistered trade mark, the issue is comparable.

In registered trade mark law, a registered trade mark can be revoked for non-use where its owner does not use it for a 5-year period. Adopting a similar approach for unregistered trade marks would set a clear precedent for determining abandonment of unregistered trade marks in future cases. Such an approach creates some equivalence between registered and unregistered trade mark law, thus boosting legal certainty. This is especially important in the *Japs* scenario where there were initially co-owners of the unregistered trade mark.[33] Thus, with the defendant leaving the business it is critical to clearly identify at what point the defendant abandoned his rights in the unregistered trade mark used by the business. Moreover, a clear approach is required so that third parties can ascertain the precise time at which they can legitimately use an unregistered trade mark without permission.

3.3 Lessons Learned

The dispute in the *Japs* case that led to litigation could have been avoided had more proactive intellectual property management taken place. Trade marks, be it registered or unregistered, are of incredible importance to any business, especially where such trade marks relate to the name of the business or core products. As a result, it is suggested that business arrangements involving multiple persons should involve a clear discussion about ownership of intellectual property rights before commencing commercial activity. Ideally this should be recorded in a written contract that includes an account of all pre-existing intellectual property rights, the approach to intellectual property rights developed subsequent to the commencement of business and clear provisions on ownership of the intellectual property rights. Furthermore, the by-laws of the business should include provisions to address the intellectual property rights of the business in instances where a co-owner wishes to exit the

31 See discussion on residual goodwill in Bently and others (n 22) 883-884 and Chirstopher Wadlow, *The Law of Passing Off* (6th Edition, Sweet & Maxwell 2021) [3-459] – [3-488].

32 Section 35 TMA 1955.

33 For discussion on goodwill in businesses with multiple owners see: Bently and others (n 24) 890-892.

business or alternatively in situations where the business is to be dissolved.[34]

Had the defendant been more knowledgeable or better advised on the law of trade marks, he could have registered the trade mark at the inception of the business. Additionally, it is clear that the defendant did not appreciate the value of the 'JAPS' brand at the time he exited the business. It was only with the growth of the brand, orchestrated by the claimant and third party, that the defendant had become interested in staking a claim. Thus, the decision of the Court of Appeal was fair in allowing the claimant to register the trade mark because it was the claimant and the third party that was responsible for growing and developing the 'JAPS' brand in the years after the defendant abandoned it. From these proceedings it is evident that there is a need for greater awareness about trade mark rights and their importance.

4 Conclusion

Although the *Japs* case was primarily focused on the establishment of a trust, the decision is nevertheless significant because the Court of Appeal judgement was the first completed case to address trade mark issues since 2005. The case highlighted some novel and interesting trade mark matters, which evidenced the need for more trade mark case law to expand the jurisprudence and shed light on key concepts in trade mark law. The case also re-emphasised the need for members of the general public to be aware of their intellectual property rights and moreover to be commercially savvy in protecting and using their intellectual property. This is all the more important given that the registered trade mark law of Trinidad and Tobago received a major update via the 2015 Act that provides a robust level of protection for right holders.

34 See for example *Peter Byford v Graham Oliver and Steven Dawson* [2003] EWHC 295 (Ch) [26].

Appendix


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Japs
Fried Chicken
...de best taste around!

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The virtual absence of regional administration of virtual assets in the Caribbean as it pertains to OECD tax transparency guidelines

Deron J.M. Boyce

Abstract: *Virtual-assets, including cryptocurrencies, can be transferred, and held without interacting with traditional financial intermediaries and without any central administrator having full visibility on either the transactions carried out, or the location of crypto-asset holdings. This is an emerging digital market, and it is neither issued nor guaranteed by the central banks or a public authority. This new market of exchange is currently out of scope in the legislation, regulations, and policies of the Caribbean diaspora. The profound lack of attention in the governance of this digital market, creates risks for consumer protection and countries' financial stability. It also poses a threat to market manipulation, tax evasion and financial crimes. While we applaud the likes of Bahamas, Cayman Islands and Bermuda on being the first to legislate the digital market by inducting specific legislation, which itself partially meet this global concern, the region has not adopted a uniform policy framework to capture the exchange of information, identification of originators and beneficial owners in the interest of tax transparency and to the alleviation of financial crimes. CARICOM, as the governing body for the region, needs to impose key provisions for the issuing and trading of virtual-assets - covering transparency, disclosure, authorisation and oversight of transactions. Most jurisdictions are exposed to the risk differently and will seek to implement independent operational adaptation in silos, but there is an imperative proposition for a uniform collective policy agenda where consumers, policy makers, supervisors, and administrators would be better informed about the risks, costs and charges. This uniformed approach to the policy framework will promote accountability and transparency in support of financial market integrity and financial stability by developing a standard for regulating public offers of virtual assets, using artificial intelligence, financial intelligence, and an agreed regional guideline. Simultaneously it ought to be aligned to Financial Action Task Force Recommendation 15 which include measures against market manipulation and to prevent money laundering, terrorist financing and any other financial crimes.*

Keywords*: virtual assets, digital currency, Caribbean diaspora, CARICOM, tax fraud, money laundering, financial crimes.*

Introduction

The Covid-19 epidemic has accelerated the need to digitalize the world's economies, prompting the majority of the world's jurisdictions to adopt new business practises. For example, the prevalence of digital payments, E-commerce (online purchasing), remote work and digital collaboration, digital services and streaming, digital process transformation, FinTech, and digital banking are becoming increasingly prevalent. Although the process of digitizing economies was already underway before the onset of the COVID-19 pandemic, it served as a catalyst, hastening the acceptance and implementation of digital technologies in various sectors, including digital currency. Interestingly, the digital currency developing solution is fundamentally transforming our operational and commercial practises, exerting a profound and enduring impact on global economies.

The past decade has witnessed a meteoric rise in the emergence of novel digital instruments promising faster, easier, and cheaper global payments and transfers. These digital representations of value and contractual rights encompass a vast and ever-expanding landscape of assets, often referred to by various terms like cryptocurrencies, digital currencies, crypto assets, and virtual assets (VA).

All these terms point towards a common thread, that is, systems for storing and capturing value and rights in digitised form.

Many of these well-known digital assets, such as Bitcoin, utilise cryptographic technology to secure transactions and control the creation of new units. They often leverage distributed ledger technology (DLT), like blockchain, to build a shared and secure ledger across a network of computers. This distributed nature and the lack of central oversight present unique challenges for traditional regulatory frameworks, particularly in relation to anti-money laundering (AML) and combating the financing of terrorism (CFT) efforts.

The following excerpt from the International Monetary Fund's (IMF) FinTech Notes delves deeper into the intricate relationship between virtual assets and Money laundering (ML)/Terrorist Financing (TF) implications:

The last decade has seen a phenomenal rise in the number of new digital instruments promising easier, faster, and cheaper global payments and transfers.[1] These digital representations of value and contractual rights comprise a broad (and expanding) category of assets. Common marketplace terms referencing such new products include cryptocurrencies, *digital currencies*, crypto *assets*, *virtual assets*, all describing systems of storing/capturing value and rights in digital form. Some of the most well-known digital assets rely on cryptographic technology to secure transactions and control the creation of additional units, underpinned by DLT, such as blockchain, to construct a ledger (or a database) that is maintained across a network.[2]

While generally used for legitimate purposes, VAs have also been misused to serve nefarious goals. Some cases of large-scale fraud, theft, ML, and other crimes using VAs have involved millions of U.S. dollars' worth of illegal proceeds.[3] The exact extent of misuse of VAs around the globe is unclear, but so far appears to be smaller in volume and frequency than misuse of traditional financial service.[4]

By understanding the unique characteristics and risks associated with these digital assets, policymakers and regulators can develop effective and adaptable AML/CFT frameworks that safeguard the integrity of the financial system while fostering responsible innovation in the digital asset space.

What distinguishes electronic currency from digital currency?

While both "electronic currency" and "digital currency" deal with digital representations of value, they differ significantly in their origins and characteristics. Electronic Currency refers to any form of digital or electronic currency or monetary value. It incorporates a digital representation of traditional fiat currencies (government-issued currencies such as the US dollar, TT dollar, and EC dollar). Typically, e-currency is stored, transmitted, and transacted electronically via online banking systems, digital wallets, or other electronic payment methods. It can be used for online purchases, peer-to-peer transactions, and digital banking. [5] On the

1 Dong He and others, *IMF Staff Discussion Note "Virtual Currencies and Beyond: Initial Considerations*, (2016).

2 Nadine Schwarz, *Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (1)Some Legal and practical Considerations* (FinTech Notes Volume 2021 Issue 002 (2021) < Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (1): Some Legal and Practical Considerations (imf.org) > accessed 13 June 2024.

3 For example, the Silk Road Case, AlphaBay, and the Wannacry ransomeware attack. While these cases ultimately resulted in successful law enforcement action, success remains rare.

4 FATF, '12-month Review of The Revised FATF Standards on Virtual Assets and Virtual Asset Service Providers' (FATF, 2020) < http://www.fatf-gafi.org/publications/fatfrecommendations/documents/12-month-review-virtual-assets-vasps.html > accessed 13 June 2024.

5Tobias Adrian and Tommaso Mancini-Griffoli, 'A New Era of Digital Money' (IMF, June 2021) < www.imf.org/external/pubs/ft/fandd/2021/06/online/digital-money-new-era-adrian-mancini-griffoli.htm > accessed 13 June 2024.

other hand, Digital currency, also known as virtual currency or digital money, is a form of money that is native to the digital domain and has no physical equivalent. It operates on cryptographic principles, such as blockchain technology, and is typically decentralised but can sometimes be centralised. Digital currency refers to any currency that exists solely in electronic form. Interestingly, digital currency never departs a computer network and is exclusively exchanged digitally.[6]

What are the advantages and disadvantages of Digital Currency?

Digital Currency is often considered to have significant potential benefits and a few possible drawbacks. As stated in one of the IMF's publications,[7] these benefits encompass greater speed, lower cost, and increased efficiency in conducting domestic and international payments and transfers. Furthermore, these advancements have the potential to boost financial inclusion.

Although the advantages of virtual currencies are acknowledged, it is important to note that digital currencies also come with a few inherent drawbacks. The sheer number of existing and emerging digital currencies each with its own limitations, can overwhelm users in choosing suitable options. Further, anonymity inherent in peer-to-peer transactions raises concerns for regulatory bodies regarding beneficial ownership identification. Additionally, a basic understanding of technology remains crucial for tasks like creating wallets and securing assets, requiring a steep learning curve that can deter newcomers. Cultural resistance towards e-commerce and limited access to reliable internet infrastructure in some regions further impedes mass adoption. Finally, the notorious volatility of many cryptocurrencies creates uncertainty and discourages users, although stablecoins and Central Bank Digital Currencies (CBDCs) offer solutions for price stability.

Addressing these challenges is crucial for cryptocurrency to transition from a niche phenomenon to a mainstream force.

In addition, one of the most significant drawbacks is the fact that digital currencies are highly vulnerable to criminal exploitation.[8] This is simply because the regulators are faced with significant confusion due to the presence of varying degrees of anonymity or pseudonymity, which are among the characteristics of the digital currency. Digital currency operators and users may have a physical presence in one jurisdiction, while being registered in another and placing their servers in yet another (or multiple others). This allows them to provide services globally without the need for a central centre of command.

The intricate nature of these transactions poses a significant challenge for regulatory bodies worldwide, as they strive to have a clear sight of the transactions.[9] The aforementioned features have been exploited by corrupt individuals to perpetrate a range of unlawful activities, including but not limited to fraudulent acts, theft, ML, TF, and proliferation financing (PF) among other forms of financial irregularities.[10]

The Cayman Islands, situated in the Caribbean Region, is one of the jurisdictions within the region that have registered virtual providers. These service providers do not have any central activity within the Cayman

6 Ibid.

7 Aditya Narain and others, 'Bali Fintech Agenda'(11 October 2018), IMF Policy Papers, < The Bali Fintech Agenda (imf.org)> accessed 13 June 2024 ; He (n 1) .

8 David Carlisle, 'Virtual Currencies and Financial Crime: Challenges and Opportunities' (27 March 2017) Occasional Papers the Royal United Services Institute for Defence and Security Studies < https://rusi.org/explore-our-research/publications/occasional-papers/virtual-currencies-and-financial-crime-challenges-and-opportunities > accessed 13 June 2024.

9 Amy S. Matsuo and Damian Plioplys, 'Crypto and Digital Assets: Regulatory Challenges' (KPMG, Regulatory Insights) < https://advisory.kpmg.us/articles/2022/ten-key-regulatory-challenges-2022-crypto-digital-assets.html> accessed 13 June 2024.

10 'The Rise of Crypto Laundries: How Criminals Cash Out of Bitcoin" (Financial Times) < The rise of crypto laundries: how criminals cash out of bitcoin (ft.com) > Accessed 13 June 2024.

Islands borders, but they do carry out active operations outside the country of registration (Cayman Islands).[11]

In the absence of robust mitigation measures, digital currencies have the potential to pose a considerable risk to the soundness of the worldwide financial system. Digital currencies have the potential to facilitate ML, TF, and PF, which can result in severe economic ramifications.[12] Safeguarding the soundness of the worldwide financial system is an essential component in promoting financial stability, sustainable growth, and economic advancement. The implementation of effective regulations for anti-money laundering, combating the financing of terrorism and other financial crimes are of utmost importance.

How are Digital Currencies recommended to be regulated and administered globally?

In 2019 the Financial Action Task Force (FATF), an inter-governmental policymaking body with over 200 jurisdictions in its membership updated its global standards. The FATF's goal is to fight money laundering and terrorism financing through international standards and national-level policies. The update specifically included applying their standard recommendations and methodology to VAs and Virtual Asset Service Providers (VASPs).[13] In these standards the FATF crown the term virtual assets and released a set of guidelines and interpretative notes for the regulations of VAs.[14] The FATF in its Guidance Documents defined the term "virtual asset" as *"a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes."*[15] This digital representation of value can be owned or controlled by an individual or entity. These assets exist solely in digital or virtual form and do not have a physical counterpart.

The FATF Recommendations/ Methodology prescribes the standards that countries should establish among the regulatory, institutional, and legal frameworks in accordance with Recommendation 15 for the VAs and VASPs. These frameworks should be implemented in a risk-based approach and should confer sufficient powers upon supervisors, while also providing legal guidelines for sanctions and regulatory standards for inclusion, among other measures.

Conversely, the Organisation for Economic Cooperation and Development (OECD*)* is, 'an international organisation that works to build better policies for better lives.'[16] The OECD Tax Transparency is a crucial component of international tax cooperation, facilitating the exchange of information and bringing an end to bank secrecy and tax evasion. In 2022, the OECD introduced the Crypto Assets Reporting Framework (CARF) and Amendments to the Common Reporting Standards (CRS) to facilitate transparency and information exchange in the digital tax market.[17] Furthermore, in 2023 the OECD released Administrative Guidance (AG) for its implementation plan of a Pillar 1 and Pillar 2 initiative for

11 Discussed at CFATF Plenary 2023, held in Trinidad and Tobago, between May 28th to June 1st, 2023.

12 International Monetary Fund, Legal Dept., "Review of the Fund's Strategy on Anti-Money Laundering and Combating the Financing of Terrorism', [2019], Policy Papers, 2019 Issue , < Review of the Fund's Strategy on Anti-money Laundering and Combating the Financing of Terrorism in: Policy Papers Volume 2019 Issue 005 (2019) (imf.org). > accessed 13 June 2024.

13 FATF, 'Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT/CPF Systems', (FATF, 2023) < www.fatf-gafi.org/publications/mutualevaluations/documents/fatf-methodology.html > accessed 13 June 2024.

14 FATF, 'Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers' (FATF, 2021) < Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (fatf-gafi.org) > accessed 13 June 2024.

15 FATF, 'Virtual Assets' < www.fatf-gafi.org/en/publications/Virtualassets/Virtual-assets.html > accessed 13 June 2024.

16 OECD, 'Who We Are' < https://t4.oecd.org/about/ > accessed 13 June 2024.

17 OECD, 'Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard' (OECD Secretariat Report 2022) < Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard - OECD .> accessed 13 June 2024.

the Inclusive Framework on Base Erosion and Profit Shifting (BEPS).[18]

The Pillar 1 aims to allocate a percentage of profits of the largest multinational groups to the jurisdictions where their customers and users are located, based on a formula. Pillar 2 introduces a global anti-base erosion (GloBE) rules, which provide a coordinated system to ensure that multinational enterprises (MNEs) with revenue above €750 million pay an effective tax rate (ETR) of at least 15% on their adjusted financial statement income arising in each of the jurisdictions in which they operate, calculated according to specific rules. The two pillars are intended to address fundamental taxation issues and avoid double taxation. However, global concerns were raised concerning the complexity, administrability, and fairness of the system, especially for the U.S. Firms that are operating in offshore activities.[19]

To ensure effective transparency and tax compliance, the new CARF focuses on four key pillars: defining the scope of covered crypto-assets, identifying entities and individuals subject to reporting, outlining reportable transactions and required information above $50,000, and establishing due diligence procedures for user and owner identification and tax jurisdiction determination.[20]

Furthermore, there are multiple forms of virtual assets that are governed under CARF depending on their specific application. However, all such governance by CARF, applies to those VAs that are used for payments or investments (including certain Non-Fungible Tokens).

It is worth noting that three specific types of cryptocurrencies have been explicitly omitted. These include cryptocurrencies that are not utilised for payments or investments, CBDCs, and centralised stablecoins.

Additionally, it is imperative to have registered and licenced natural and legal persons, classified as VASPs and Crypto Assets Service Providers (CASPs) who are supervised to conduct transactions in the virtual space as indicated in both FATF and OECD guidelines.

In this context, the term 'Natural and legal persons' subject to these regulations encompass entities offering various services related to VAs, including exchange between VAs and fiat currencies, exchange between different VAs, transfer of VAs, safekeeping or administration of VAs or instruments controlling them, and participation in or provision of financial services related to an issuer's offer and/or sale of a VA.[21]

In the CARF there is a stipulation that each category of cryptocurrency transactions will be subject to its own set of reporting standards.[22]

With that being said, the complete framework of CARF's reporting requirements is highly complex, with distinct obligations assigned to individual operators. In accordance with the standard protocol, it is expected that all operators duly report each and every coin transaction that they undertake. Furthermore, it also requires that these transactions be securely stored for a period of no less than five years.[23]

In order to simplify the obligations:

> the fact sheets [below] illustrate the key steps that an MNE might go through in order to determine

18 OECD, 'Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)' (OECD/G20 Base Erosion and Profit Shifting Project, OECD Secretariat 2023) < Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), December 2023 (oecd.org) > accessed 13 June 2024.

19 Jean-Edouard Colliard, Lorraine Eden and Co-Pierre Georg, 'Tax Complexity and Transfer Pricing Blueprints, Guidelines, and Manuals' the revised version of the 'Tax Complexity, Tax Certainty, and the Pillar One and Two Blueprints Submission to the OECD Centre for Tax Policy and Administration in response to the Public Consultation Document on the Reports on the Pillar One and Pillar Two Blueprints, December 14, 2020'(2021) 50.2 Tax Management International Journal 76. < https://doi.org/10.2139/ssrn.3749740 > accessed 20 June 2024.

20 OECD (n 17).

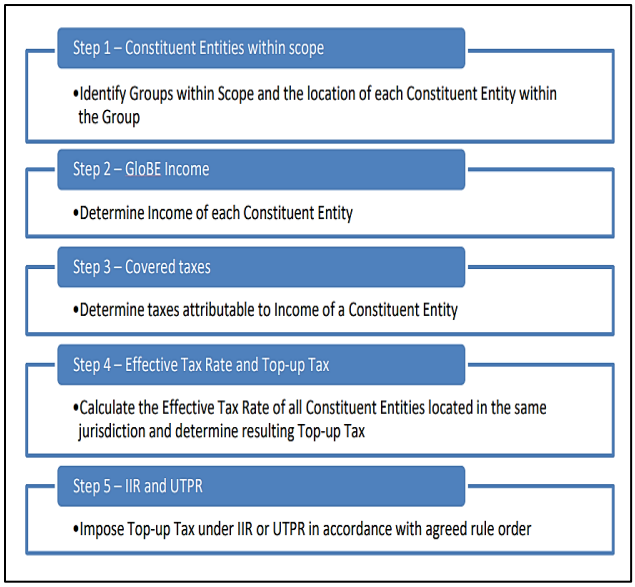
21 Nadine Schwarz (n 2).

22 OECD (n 17).

23 OECD (n 17).

its liability under the Pillar Two Model Rules. The fact sheets set out five key steps: starting with whether the MNE is within scope of the rules; working through the mechanics of a jurisdictional ETR [effective tax rate] calculation in order to determine the amount of any top-up tax that may be due; and finally to determine the jurisdiction where such tax is payable.[24]

Fact Sheet Pillar 2 Rules – OECD



Source: OECD, Pillar Two Model Rules in a Nutshell (OECD/G20 Base Erosion and Profit Shifting Project) <Pillar Two Model Rules in a Nutshell (oecd.org) > accessed 14 June 2024

What are the current legislative/ regulatory /supervisory framework within the Caribbean to VAs?

In the Caribbean, the FATF standards are monitored by the Caribbean Financial Action Task Force (CFATF), which is an organisation of twenty-four (24) states of the Caribbean Basin, Central and South America.[25]

Based on the writer's assessment the regional approach being taken is that each jurisdiction is developing tailored strategies to mitigate risks of the virtual assets, with a particular focus on introducing legislations and regulations for AML/CFT/CPF regime for VAs and VASPs that aligns with international standards.

We commend the Caribbean islands who have taken the initiative to introduce these international standards, however, it must be noted that the introduction of these standards by Caribbean legislators are progressing slowly across the region.

Of the 24 Caribbean basin states that are registered with CFATF, only 9 have implemented legislation that aligns with the international standards.[26]

Some of these countries, including Anguilla, The Bahamas, Bermuda, Cayman Islands, and Venezuela, have established an operational regime that includes licencing and registration of VASPs. Meanwhile, other nations such as Antigua and Barbuda, Dominica, and Grenada have enacted the necessary legislation and regulations, but VASPs are not yet licenced or registered. However, there are no published records where any Caribbean Island have opted to prohibit the act of VAs or VASPs. Also, based on research, two Caribbean countries have registered and licensed VASPs. Furthermore, the legislation does not clearly identify entry restrictions to any of the jurisdictions listed that have passed legislations and offer trading platforms.

In addition, all the legislations listed below do complement some degree of supervisory authority and enforcement of penalties to the sector.

Table 1: Caribbean Legislation pertaining to VAs

24 OECD, Pillar Two Model Rules in a Nutshell (OECD/G20 Base Erosion and Profit Shifting Project) <Pillar Two Model Rules in a Nutshell (oecd.org) > accessed 14 June 2024.

25 CFATF, 'CFATF Overview' < www.cfatf-gafic.org/home/cfatf-overview > accessed 14 June 2024.

26 CFATF, '4th Rd MEVAL Reports' < 4th Rd MEVAL Reports (cfatf-gafic.org) > accessed 14 June 2024.

Countries	Legislation
Antigua and Barbuda	The Digital Assets Business Act (DABA) came into effect on May 1, 2020.
Anguilla	The **Anguilla** Utility Token Offering Act ("AUTO Act") 2018
Barbados	The Financial Institutions (Non-Traditional Securities) Act, which includes provisions for virtual asset regulation, was passed in 2018.
Bermuda	the Digital Asset Business Act (DABA) and the Virtual Currency Business Act (VCBA) in 2018.
St. Kitts and Nevis	The Virtual Asset Act 2020 of St. Kitts & Nevis ('VAA 2020')
Countries	**Legislation**
Cayman Islands	The Virtual Asset Services Providers Act (2022 revision)
Dominica	the Virtual Asset Business Act 2022 of Dominica ('VABA 2022')
Grenada	the Virtual Asset Business Act 2021 of Grenada ('VABA 2021')
Bahamas	The Bahamas Digital Assets Registered Exchanges Act 2020 (the 'DARE Act')
St. Vincent and the Grenadines	Virtual Assets Business Act 2022 (VABA)

As we can see from Table 1 above, only 9 jurisdictions around the Caribbean have passed legislation to tackle VAs, which can be inferred that the jurisdictions have not given much attention towards the VAs sector. However, it is noteworthy, that like any other financial operation, a robust regulatory and supervisory structure is essential to ensure the stability of that sector as with the VAs sector. To ensure this process, it is imperative for jurisdictions in the Caribbean monitor all Service Providers of VAs and that they are duly licenced and registered and are subjected to sufficient AML, CFT and CPF obligations.

Table 2: Progress in implementing AML/CFT/CPF regulatory regime for VASP.

	FATF	FSRB	Total
Jurisdiction has necessary legislation for AML/CFT regime for VASPs			
Permit and regulate VASPs	27	25	52
Prohibit VASPs	1	5	6
Jurisdiction is in the process of introducing necessary legislation/regulations for AML/CFT regime for VASPs			
Permit and regulate VASPs	7	19	26
Prohibit VASPs	0	0	0
Jurisdiction has decided its approach on VASPs, but has not *yet commenced* the necessary legislative/regulatory process.			
Permit and regulate VASPs	1	5	6
Prohibit VASPs	1	5	6
Jurisdiction is yet to decide what approach to take for VASPs			
Approach to VASPs under consideration	1	31	32
Total	**38**	**90**	**128**

Source: FATF, 'Second 12-Month Review of Revised FATF Standards on Virtual Assets and VASPs' (FATF, 2021) < Second 12-Month Review of Revised FATF Standards - Virtual Assets and VASPs (fatf-gafi.org) > accessed 14 June 2024.

Nonetheless, the Caribbean is not in isolation in its pace of implementation, as numerous nations across the globe are slowly imposing such measures in diverse methods to alleviate the potential hazards to their financial systems' integrity caused by VAs. These measures encompass a spectrum of options, including complete or partial regulation of all or certain VA-related activities, as well as the exclusion of certain or all VA transactions.

According to the FATF's review[27], a significant number of countries, specifically 70 out of 128 surveyed, are yet to establish comprehensive AML/CFT/CPF regulations for the virtual asset industry.

As per the same report, it can be inferred that the revised FATF Standards have not been implemented adequately enough to establish a worldwide anti-money laundering and countering the financing of terrorism regime for virtual assets and VASPs. The table 2 below provides a breakdown of such.

This gap in the international framework presents opportunities for criminals. As the report notes at page 23:

> Certain VASPs are taking advantage of this to operate in jurisdictions that lack effective implementation of AML/CFT/CPF regulation and supervision or spread their operations over multiple jurisdictions, while offering services with extremely weak or non-existent AML/CFT/CPF controls. Illicit actors are taking advantage of poor CDD and screening processes within these VASPs for ML/TF purposes.

Furthermore, the concept of the Travel Rule is not yet fully imposed among the Caribbean region and although

27 FATF, 'Second 12-Month Review of Revised FATF Standards on Virtual Assets and VASPs' (FATF, 2021) < Second 12-Month Review of Revised FATF Standards - Virtual Assets and VASPs (fatf-gafi.org) > accessed 14 June 2024.

7 jurisdictions have a free movement of data flows no data protection laws are within Anguilla, Dominica, Grenada, Guyana, Montserrat, Suriname and Turks and Caicos as they have not yet enacted legislation mandating VASPs to comply with the Travel Rules.[28]

This underscores the pressing need for swift implementation of global standards like the FATF's recommendations. As virtual assets guidelines states, However, it is imperative to note that all FATF measures must be implemented as quickly as possible. This would ensure the openness of transactions involving virtual assets and keep criminal and terrorist money outside the cryptosphere." By effectively implementing these standards, we can foster greater transparency and accountability within the VASP industry, ultimately boosting confidence in blockchain technology as a legitimate and secure means of value transfer.[29]

Conversely, in relation to the OECD Guidelines it is premature to evaluate the measures that each nation in the Caribbean has implemented or plan to implement in order to comply with global norms within their respective territories. Despite this, both the Bahamas[30] and Bermuda[31] have formally indicated their intentions. The Bahamas is currently engaged in consulting on policy options in order to comply with Pillar 2, while Bermuda is actively considering policy measures to address the impact of Pillar 2.

Based on the writer's assessment of the pace of legislative progression in the Caribbean and the global concerns, coupled with the complexity of OECD guidelines, it is reasonable to infer that progress towards compliance with these standards will also be slowly introduced.

However, particular attention should be given to those Caribbean countries that are often observed to constitute tax structure that enable relax laws, namely: Cayman Islands, British Virgin Islands, Bahamas, Bermuda, Anguilla, and Turks and Caicos Islands.[32]

Challenges within the Caribbean to meet the Virtual Assets International Standards

The CFATF Mutual Evaluation Reports[33] of Caribbean jurisdictions revealed that a significant number of islands have yet to undertake a risk assessment that specifically addresses the presence or potential emergence of VAs or VASPs within their respective territories. Most of these jurisdictions have completed an initial review of the VAs in their National Risk Assessment but have not conducted a focus assessment in determining the outcome to the introduction or prohibition of VAs. It is fundamentally flawed to act on such measures of introduction or prohibition, without a thorough understanding of the complexities surrounding the unregulated activities of VA participants or the concept of the VAs and the arrangements of VASPs in each jurisdiction.

28 A collection of Data flows was developed across the Caribbean as at February 2023 where only 6 nations were recognised for a free flow of data protection, while all others may provide such, but with limited or no safeguards.

29 FATF, "Virtual Assets' (FATF) <https://www.fatf-gafi.org/en/topics/virtual-assets.html > accessed 30 June 2024.

30 KPMG, 'BEPS 2.0 –Pillar Two State of Play, Global Developments Summary (17 May 2024) < https://tax.kpmg.us/content/dam/tax/en/pdfs/2023/beps2-state-of-play-summary.pdf > accessed 14 June 2024.

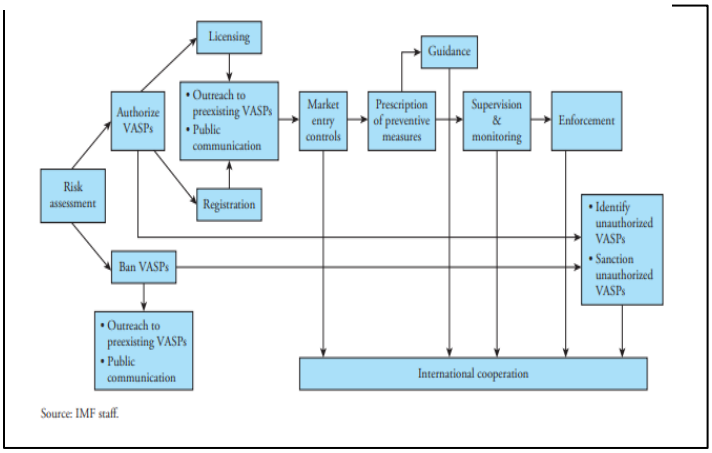
31 Government of Bermuda, 'Budget 2023-2024 Budget Statement In support of the Estimates of Revenue and Expenditure 2023 - 2024 presented by the Hon. E. David Burt, JP, MP Premier and Minister of Finance' (17 February 2023) < Budget 2023-2024 | Government of Bermuda (www.gov.bm) > accessed 14 June 2024.

32 Six territories in the Caribbean Basin received the highest corporate tax haven index score in 2021, at 100 points. These were the British Virgin Islands, the Cayman Islands, Bermuda, the Bahamas, the Turks and Caicos Islands, and Anguilla. The index is constructed to reflect how much a country's laws, policies, tax and financial systems enable corporate tax abuse. The higher the score, the more a jurisdiction enables companies to abuse tax laws. See Statista, 'Corporate tax haven index score of selected countries and territories in the Caribbean Basin in 2021' (*Statista Research department*, 2 February 2024**) <** Corporate tax haven index in the Caribbean | Statista > accessed 20-June 2024.

33 Documents < www.cfatf-gafic.org > accessed 14 June 2024.

Figure 1 below shows the actions envisaged under policy directions on whether to authorise or Ban VASPs.

Figure 1: Risk Assessment Framework for VA



Source: Nadine Schwarz, *Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (1)Some Legal and practical Considerations* (FinTech Notes Volume 2021 Issue 002 (2021) < Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (1): Some Legal and Practical Considerations (imf.org) > accessed 13 June 2024.

However, based on the writer's assessment the writer is of the view that the challenge faced by most of the countries in the region and possibly the world at large is the absence of relevant knowledge, training and infrastructure to properly manage, supervise and incorporate the VAs sector.

This emerging market is still not entirely understood and is susceptible to unpredictable shifts. However, in order to safeguard the integrity of the financial system from the

VAs, it is imperative that we undertake a thorough evaluation of the **regulatory, institutional, and operational frameworks to the known and anticipated situations following the steps of figure 1**. This will enable us to implement an effective domestic/ regional preventive measure.

Regulatory Framework

It is imperative to ensure adequate powers are given to the supervising authorities to undertake the necessary procedures for customer due diligence (CDD); record-keeping; politically exposed persons (PEPs); correspondent arrangements; reporting of suspicious transactions; identifying, assessing, and mitigating the ML/TF/PF risks that may arise in relation to new developmental technologies.

In addition, the process of registration, licensing, and supervision must be clearly outlined and is crucial to ensure compliance with regulations and the standards with a set structure of monitoring. Also, for optimal functionality, the system should be seamlessly integrated with existing databases to effectively identify the beneficial owners and to ensure that no funds or other assets are made available to or for the benefit of designated persons or entities in relation to the targeted financial sanctions related to terrorism, TF, and PF.[34] It is also critical that the system incorporates provisions for travel rules.

Furthermore, jurisdictions must ensure that secrecy laws do not inhibit VASPs/CASPs and the regulators from implementing AML/CFT/CPF obligations and certain preventive measures that deal with this sector and tis activities. The main substance of and principles behind these obligations are the same for all three types of reporting entities. [35]

34 In some jurisdictions, lists of sanctioned Bitcoin addresses have been released.

35 Nadine Schwarz, *: Virtual assets and anti-money laundering and combating the financing of terrorism (2): effective anti-money laundering and combating the financing of terrorism regulatory and supervisory framework—some legal and practical considerations* (FinTech Notes International Monetary Fund Volume 2021 Issue 002 (2021) < Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (2): Effective Anti-Money Laundering and Combating the Financing of Terrorism Regulatory and Supervisory Framework—Some Legal and Practical Considerations (imf.org) > accessed 14 June 2024.

Institutional and Operational Framework

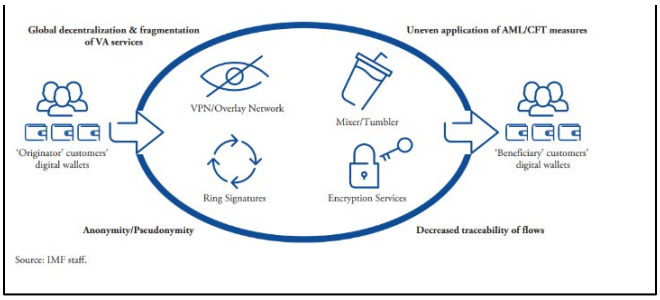
There ought to be a composition of techniques to investigate the presence of VA or VASP, particularly documented in terms of policies and adequate technical training. Also, there must be an adequate system for obtaining blockchain analytical tools that can aid law enforcement agencies in their investigations. Additionally, there needs to be a development of IT infrastructures to properly secure and ensure that all VASPs are well galvanised to protect customers assets. Also, Government facilities must be equipped with the necessities to seize virtual assets under government wallets. Most importantly, there must be staff with the adequate knowledge and expertise to facilitate the enforcement and management of these intrinsic systems.

Risks Exposure to the Caribbean of inadequate administration and regulations of the Virtual Assets

While VAs are primarily used for lawful purposes, they have also been utilised for illicit activities. Some examples of large-scale fraud, theft, ML, and other crimes using VAs have resulted in unlawful gains totalling millions of dollars. In 2022, for example, two siblings were accused in the United States of $124 million bitcoin fraud.[36] In addition, the Bahamas-based exchange FTX and its sister trading house, Alameda Research, in 2023 went bankrupt after a run-on deposit revealed an initially estimated US$8 billion shortfall in the crypto asset exchange's accounts.[37]

The precise degree of VA misuse throughout the world is unknown. However, it appears to be lower in volume and frequency than misuse of traditional financial services.

Figure 2: Financial Integrity Risk in Transfers of VAs



Source: Nadine Schwarz, *Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (1)Some Legal and practical Considerations* (FinTech Notes Volume 2021 Issue 002 (2021) < Virtual Assets and Anti-Money Laundering and Combating the Financing of Terrorism (1): Some Legal and Practical Considerations (imf.org) > accessed 13 June 2024.

The most prevalent kinds of fraud in the Caribbean, according to the Global Financial Integrity Report on Financial Fraud in the Caribbean are advance fee frauds, notably lottery/prize scams, online shopping scams, and romance scams, as well as pyramid and Ponzi schemes.[38] It is crucial to emphasise, however, that the abuse of VAs is not insignificant and is rapidly expanding.

The IMF's two Fintech Notes highlight several characteristics of VAs that make them potentially appealing to criminals in the Caribbean, raising concerns for consumer protection and financial stability. Key vulnerabilities include the inherent anonymity afforded by features like mixers and non-face-to-face transactions, further compounded by incomplete AML/CFT regulations in the region. The decentralised and fragmented nature of VA services across jurisdictions further complicates efforts to prevent illegal activities like

36 Reuters, 'US Charges Two Siblings In $124 Million Cryptocurrency Fraud' *CNN Business* (9 March 2022) < US Charges Two Siblings In $124 Million Cryptocurrency Fraud | CNN Business > accessed 14 June 2024.

37 Matt Egan and Allison Morrow 'FTX Founder Indicted On Eight Criminal Charges Including Fraud And Conspiracy' *CNN Business* (New York,13 December 2022) < www.cnn.com/2022/12/13/business/sam-bankman-fried-charges/index.html > accessed 14 June 2024.

38 Channing Mavrellis, 'Financial Fraud in the Caribbean'- (Global Financial Integrity, 14 December 2022) < Financial Fraud in the Caribbean - Global Financial Integrity (gfintegrity.org) > accessed 14 June 2024.

money laundering and terrorist financing. This underscores the urgent need for comprehensive regulations and regional collaboration to mitigate these risks in the Caribbean.

Ultimately, these factors pose significant challenges/ risk to the Caribbean jurisdictions. However, digital money was conceptualised and created for peer-to-peer transactions, hence VAs is distinguished by a "peer-to-peer electronic cash system" designed to eliminate the need for middlemen. Nonetheless, the region must re-establish control to ensure that consumer protection and regional financial stability is well maintained.

Furthermore, in the absence of AML/CFT/CPF restrictions, the use of VAs with anonymity-enhancing characteristics, together with the other variables outlined above, creates a perfect storm with potentially considerable ML/TF/PF risks.

What are the implications to the Caribbean if the jurisdictions are unable to meet/ comply with these international standards?

There are political, economic, social, and legal implications that a jurisdiction may face if the country is unable to meet these international standards. If a jurisdiction is non-compliant, they are placed on a "grey or blacklist" for global publication and graded for its lack commitment to the international rules. Furthermore, foreign governments and financial institutions use these public documents to decide their future engagement in the country's financial trading activities.[39]

According to FATF publications, Caribbean jurisdictions on the "grey list" for Increased Monitoring - 24 February 2023[40] are Barbados, Cayman Islands, Haiti, Jamaica, and Panama. In addition, on 14 February 2023, the OECD released non-cooperative nations that include the Caribbean islands of Anguilla, Bahamas, British Virgin Islands, Panama, Trinidad and Tobago, Turks & Caicos, and US Virgin Islands. In addition, Montserrat, Dominica, Aruba, and Curacao are cooperative but have outstanding obligations.[41]

The Multifaceted Impact of Implementing AML/CFT/CPF Regulations

Implementing robust AML/CFT/CPF regulations carries significant political, economic, social, and legal implications for Caribbean nations.

Politically, adhering to international standards requires sizable human resource investments for frequent reporting obligations, potentially exposing governments to criticism from opposition parties if compliance falls short. Public governance and fiscal policies may undergo realignment as new strategic directions emerge. Additionally, published jurisdiction assessments could reveal national shortcomings, impacting a country's reputation on the global stage.

Economically, Caribbean nations are heavily rely on external financing and technical support. Unfavourable reviews from the FATF and OECD forums could prompt funding agencies and foreign businesses to withdraw and can create difficulties with accessing corresponding banking services. Furthermore, negative ratings might influence other global institutions like Standard & Poors, potentially triggering stricter assessments and limitations on international collaboration. Moreover, foreign nations might impose sanctions or restrict membership involvement based on these reviews.

Socially, concerns about non-compliance and potential infiltration by illegal actors might lead to stricter travel

39 United Nations, 'Barbados Prime Minister Mottley Calls for Overhaul of Unfair, Outdated Global Finance System' (*UN News*, 22 September 2022) < Barbados Prime Minister Mottley calls for overhaul of unfair, outdated global finance system | UN News > accessed 14 June 2024.

40 FATF, 'Jurisdictions under Increased Monitoring - 24 February 2023' (*FATF*, 24 February 2023) < Jurisdictions under Increased Monitoring - 24 February 2023 (fatf-gafi.org) > accessed 14 June 2024.

41 Council of the European Union, 'EU list of non-cooperative jurisdictions for tax purposes' < EU list of non-cooperative jurisdictions for tax purposes - Consilium (europa.eu) > accessed 14 June 2024.

regulations globally. Businesses and individuals could face increased scrutiny for suspicious transactions as AML/CFT/CPF controls are strengthened, potentially hindering economic activity, personal transactions, and ease of travel.

Legally, significant international pressure will be exerted to update existing laws and harmonise them with international standards. New regulatory bodies and frameworks might be established to ensure tax compliance and best practices. Additionally, international bodies could place jurisdictions under enhanced monitoring, demanding legislative changes within their domestic legal frameworks.

Navigating these multifaceted implications requires careful consideration and strategic planning to ensure compliance while minimising negative impacts on various sectors and stakeholders within Caribbean nations.

However, the Caribbean's greatest problem for non-compliance is the possibility of **de-risking.**[42] As we are aware, the Caribbean Region is heavily dependent on trade.[43] Also, remittances are often utilised by lower-class members of society who are subject to excessive fees. To send wire transfers or cross-border transactions, we must be financially integrated. Being removed from the corresponding banking relationships will prohibit the flow of currency of the country – drastically impacting the jurisdiction economic performance. This was seen in several of the countries across the Caribbean, blacklisted because of the failure to comply with OECD Tax Guidelines and FATF Recommendations. The most recent incident of such was Trinidad and Tobago Embassy where the bank account was close in Belgium[44]. See **Figure 3** below.

What should the Caribbean do to overcome the disadvantages which may arise from non-compliance/ non-cooperative of these international standards?

For more than half a century, CARICOM has been grappling with the challenge of establishing a unified market economy, known as the Caribbean Single Market Economy (CSME). Consequently, the Caribbean region exhibits significant fragmentation across various aspects of its economies, lacking a cohesive central authority and unity among its various members, and imposition of numerous constraints to the free flow of capital. The dependence on foreign currencies has resulted in a lack of liquidity. Moreover, the absence of institutional integration within CARICOM, coupled with limitations on regional resources and capacity to implement a CSME, presents significant challenges.

The advent of the digital age offers the Caribbean region a unique chance to address certain inherent risks and disconnects. By leveraging this opportunity, the region can explore various benefits that can help bridge financial constraints and establish an alternative mechanism for the actions that may be taken by the international arena for the regions slow pace of compliance to the international obligations and at the same time boost regional integration.

In order to achieve this objective, it is imperative to establish clear regional directives for fintech operations pertaining to digital currency and assets within the region. Creating a business-friendly atmosphere that prioritises the safety and security of its users.

The ultimate objective is to include the financially excluded: The Caribbean region presents a significant challenge in this regard, as many citizens lack the necessary means to provide customer identification and

42 iWitness News < www. iwnsvg.com > accessed 14 June 2024.

43 UNCTAD, 'More Than 100 Countries Depend On Commodity Exports' (*UNCTAD NEWS*, 8 September 2021) < More than 100 countries depend on commodity exports | UNCTAD > accessed 14 June 2024.

44 Ryan Hamilton-Davis, Trinidad and Tobago Embasssy in Belgium Forced to Change Banks (*Trinidad and Tobago Newsday,* 25 February 2023) < Trinidad and Tobago Embassy in Belgium forced to change banks - Trinidad and Tobago Newsday > accessed 14 June 2024.

possess insufficient financial literacy.[45] The potential development of a novel digital currency has the capacity to foster financial inclusivity, enhance transaction recording for improved financial management and boost regional productivity.

However, the regulatory framework must still seek to be in harmony to manage the regulations of these structures, in accordance with the OECD Guidelines and FATF Recommendations including data uses and consideration of all the relevant parties' requirements. Also, the development of all the essential resources and infrastructure to render it user-friendly and reliable in a regional public space.

The objective is to facilitate seamless trade within the region and explore alternative global settlements as a means of mitigating the impact of de-risking, both regionally and globally.

The solution for CARICOM

What is a CBDC?

Central Bank Digital Currency (CBDC is a digital form of a country's official currency issued and regulated by the central bank. It operates on digital ledger technology, such as blockchain (decentralised) or a centralised digital platform, and aims to provide a secure, efficient, and inclusive means of conducting transactions. It simply means it is the digital currency of the jurisdictional currency, with the trust of the central bank backing the value of the currency denounce. [46]

CBDCs within the Caribbean Region

Numerous countries across the globe and within the Caribbean are currently investigating the potential implementation of CBDCs.[47] It is important to note that the definition and framework of virtual assets by FATF and OECD specifically exclude digital representations of fiat currencies, securities, and other assets that are already covered by other FATF standards and OECD CARF.

There are eleven launched projects and eighteen Pilot projects for this new form of digital currency exchange around the world, according to Central Bank Digital Currency Tracker, 2022. Some Caribbean islands have taken a proactive approach to this new form of digital currency exchange by developing pilot initiatives to investigate the new form of digital currency exchange within their jurisdiction.

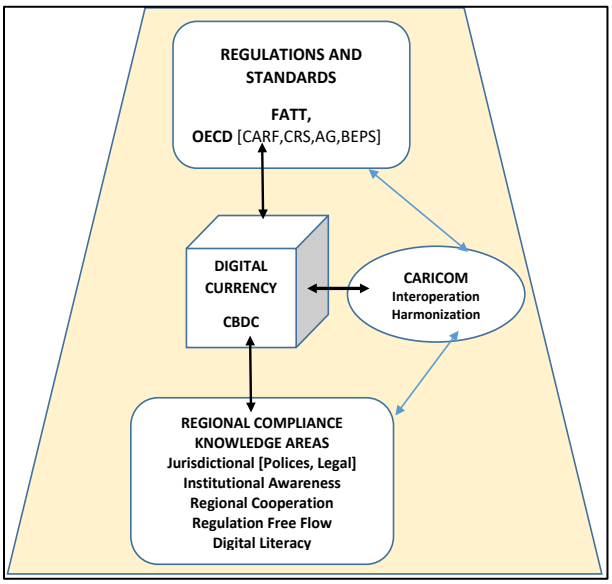
In the Caribbean, several countries are actively exploring and implementing digital currencies. The Eastern Caribbean Central Bank (ECCB), serving eight nations in the Eastern Caribbean Currency Union (ECCU), launched a pilot project for "DCash" in 2021, making them the first currency union central bank to issue digital cash. Similarly, the Central Bank of The Bahamas became the first Caribbean country to fully deploy a digital currency nationwide with the "Sand Dollar" in 2020. Following suit, the Jamaica Central Bank launched "JAM-DEX", Jamaica's Digital Currency, through the Lynk App in 2022, aiming to revolutionise financial transactions with a safer, more secure, and efficient alternative. These initiatives highlight the growing interest and potential of digital currencies in the Caribbean, paving the way for future developments in the region's financial landscape.

45 Henry Mooney 'Finance for Firms: Options for Improving Access and Inclusion' (2022) Volume 11, Issue 2 Caribbean Economics Quarterly < https://doi.org/10.18235/0004392 > accessed 14 June 2024.

46 Bank of England, 'What is Central Bank Digital Currency?' (*Bank of England*, 7 February 2023) < www.bankofengland.co.uk/explainers/what-is-a-central-bank-digital-currency > accessed 14 June 2024.

47 Becky, 'The Rise of Crypto: Countries with Their Own CBDCs' (*Coin Insider,* 29 February 2024) < https://www.coininsider.com/the-rise-of-crypto-countries-with-their-own-cbdcs/ > accessed 14 June 2024.

Figure 4: CBDC overarching policy



Source: Deron Boyce, 'The Virtual Absence of Regional Administration of Virtual Assets in the Caribbean as it pertains to the OECD tax Transparency Guidelines' (University of the West Indies, Cave Hill Campus 20th Annual Caribbean Commercial Law Workshop, Miami, Florida, July - 25 2023)

Regional Implementation

It is imperative that the Central Banks within the region collaborate and devise a comprehensive strategy in response to the introduction of a **CARICOM regional policy**. It is essential that we commence utilising alternative means of settlement for the purpose of regional transactions, rather than relying solely on the international currencies. Central banks must setup a settlement mechanism that adheres to the CARICOM's central policy. This policy must offer enhanced system of control as a benchmark.

The transition towards digital currency in Caribbean jurisdictions is not a mere speculation, but a tangible reality that will materialise with or without the consensus of CARICOM. It is critical however that CARICOM takes proactive measures to establish a comprehensive framework for the adoption of **ONE digital currency within the region**. Take charge as the forefront figure in the current shift towards a new paradigm of currency exchange. The OECS has surpassed CARICOM in various forms of connectivity and holds the title of being the world's first country union to introduce a digital pilot currency, DCash.

Our economies are primarily driven by remittances. Although we commend OECS Dcash, it is worth noting that all other jurisdictions in the region are implementing autonomous modifications that can only be used within their borders and it's restricted from cross-border commerce within the region or globally. It is vital that we explore a regional approach to establish an optimal trade mechanism and promote financial inclusivity.

Overcome Legal Siloes

To establish a secure cyber environment for e-commerce transactions, it is essential to adopt a comprehensive approach to legal integration.

Although it is acknowledged that each nation will enact laws based on unique factors such as socioeconomic policies, it is imperative to emphasise the significance of regional collaboration. The need for updates will differ from case to case and will necessitate several steps. It is advisable to incorporate common principles and standards in the establishment of our regional legal framework concerning virtual assets, along with the handling of cross-border data in the regional legal platforms. From the development of overarching laws pertaining to FinTechs, Virtual Assets, and e-commerce to the establishment of omnibus legal frameworks (payment system legislation, virtual assets, cybercrime, data protection, cross-border data flows, competition, consumer protection, electronic transactions, electronic payments, electronic transferable records secure transactions, taxation, and dispute resolutions).[48] Establish concurrent legislation implementation plans to effectively bring together all necessary stakeholders.

48UNCITRAL, < www.uncitral.un.org > accessed 14 June 2024.

Regional Political Will

In order to promote financial inclusion and equal opportunities, as well as facilitate the development of trade, it is imperative that political will is accompanied by a unified voice throughout the region. This will ensure that legal reforms and policies are implemented to support regional digital economies. Additionally, mechanisms such as digital IDs and digital payments should be enabled, and physical obstacles to trade should be addressed to close any existing gaps.

Regulations Free Flow Implementation

In order to fully actualise the concept proposed, it is imperative that we establish suitable regulations that facilitate seamless cross-border data transfers throughout the region. The transfer of data across borders is a fundamental aspect of digital technology. Cross-border data transfer is an essential component of international commerce transactions, without which such transactions would be nearly impossible.

Governments and citizens alike have expressed apprehension over the impact of data collection and usage, often without the consent of the individuals concerned, due to the extensive cross-border exchange of information.

The emergence of cross-border data flow regulations has been a response to the need to achieve legitimate public policy objectives. These objectives include ensuring privacy and personal data protection, facilitating access to information for audit purposes, promoting national security, and supporting the development of domestic digital industries, among others. Furthermore, there should be the development of a regional beneficial ownership database platform that stores and share seamless updates around the region for selective departments sensitive collection. However, data protection laws within the Caribbean impose varying degrees of restrictions on cross-border data transfers, there will need to be amendments to mandate sharing to this cause.

Operational Regional Cooperation Effectiveness

Effective collaboration between nations is crucial due to the exceptional mobility of VAs. For the exchange of information and cooperation, it is imperative to establish a clear legal foundation. In some cases, conventional methods such as mutual legal assistance (MLA) requests may prove to be inadequate in a virtual environment due to their slow progress. In order to promote tax transparency and combat financial crimes, it is imperative for the region to establish a regional policy framework that facilitates the exchange of information and enables the identification of originators and beneficial owners.

Notwithstanding the absence of formal information platforms, it may be advantageous to enhance informal cooperation channels with diverse authorities, including but not limited to Law Enforcement Agencies (LEAs), Financial Intelligence Units (FIUs), Prosecutors, and Tax Authorities. These entities possess the capacity to promptly take conservatory measures, such as freezing or seizing wallets.

Develop Regional Digital Competencies and Financial Literacy

The Caribbean has the potential to become a vibrant digital hub, but challenges like mistrust and lack of preparedness remain. Dismantling these barriers and building trust are crucial for an inclusive and prosperous digital future.

Firstly, **robust digital financial literacy programs** are essential to combat mistrust and empower individuals facing the potential anxieties associated with technological shifts. Equipping the workforce for this new reality necessitates frameworks for **digital skill training and change management**, ensuring a smooth and inclusive transition.

Additionally, fostering a **socially conscious and tolerant digital society** demands actively promoting understanding and inclusivity among all citizens, regardless of background. By embracing diversity and

creating a welcoming digital environment, we ensure everyone can participate and benefit. Empowering businesses is also key, through **capacity building initiatives** that enable them to effectively adopt and leverage **business technologies**, driving economic growth across the region.

Building a responsible digital ecosystem requires cultivating **social consciousness and acceptance within e-commerce platforms**. This promotes ethical engagement and fosters consumer trust in online transactions. Additionally, unlocking the full potential of innovation hinges on **open data policies** that encourage the development of valuable applications, enriching the digital landscape.

Finally, ensuring trust in the digital sphere necessitates **addressing concerns about customer protection, redress, and dispute resolution**. By proactively addressing these anxieties, we can build confidence in digital solutions and pave the way for a more inclusive and prosperous future for all.

By implementing these multifaceted strategies, the Caribbean can chart a course towards a digital future that is not only technologically advanced, but also inclusive, equitable, and empowering for all its citizens.

CARICOM may approach the paradigm in two distinct ways.

Interoperability OR Harmonisation

There is no one-size-fits-all solution; each country must address the situation according to its own unique circumstances. Their own economic circumstance and policy orientation. However, with this new digital space, CARICOM is finally able to leave a significant imprint on the region by testing a pilot currency that, if executed well, has the potential to forge deeper integration among the region.

Let's not endorse harmonisation or standardisation of laws across the region, but we can embrace common principles in the development of the legal framework – not identical, but sufficiently broad to allow trade and information to flourish.

However, it must be acknowledged that, for the first time in history, value may be transmitted from peer to peer without the backing of regulated corporations.

The idea is to ensure there is greater integration of regional development and at the same time fight the criminal elements of financial crimes.

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Combatting non-consensual intimate imagery in the Commonwealth Caribbean: Overcoming Legislative Gaps with Creative Approaches

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Abstract: *Non-consensual intimate imagery ("NCII"), the non-consensual sharing of sexually explicit images or videos of a person, has emerged as a pressing issue in the Commonwealth Caribbean, necessitating effective strategies to address this digital abuse. This paper explores the challenges faced by Commonwealth Caribbean nations in prosecuting perpetrators of NCII and highlights innovative approaches, taken by courts through old common law and civil law actions grounded in defamation and breach of confidence to fill the gaps left by inadequate legislative interventions.*

The paper begins by presenting an overview of NCII, its evolution in the Caribbean and its psychological, emotional and financial impact on victims. It explores existing domestic violence legislation as well as electronic crime legislation which is still in its infancy in the region, and it highlights the need for comprehensive legal frameworks that address the issue specifically and aid in its prevention.

Moreover, the paper acknowledges and interweaves the unique sociocultural context of the Caribbean islands, characterised by close-knit communities and conservative values. In such an environment, individuals, particularly women, may encounter difficulties in the recovery process. The social stigma associated with NCII, combined with cultural barriers and a lack of access to support services, can exacerbate and do little to alleviate the challenges faced by victims seeking justice.

In conclusion, the pressing issue of NCII in the Caribbean demands urgent action. While getting creative with existing laws has thus far provided some redress for victims of NCII, targeted and comprehensive legislation is required to protect those most vulnerable to the ripple effects caused by the distribution of NCII.

Keywords*: Non-consensual intimate imagery – Revenge porn – Commonwealth Caribbean – Remedies – Online abuse – Trust and safety*

Introduction

The decision to put the World Wide Web into the public domain over 25 years ago has proven to be one of the most transformative events in human history. Accessibility to the internet has facilitated technological and societal advancement, revolutionising communication and human interaction and driving globalisation. While the internet has brought immeasurable benefits, creating a space for information sharing, and community building, it has also provided fertile ground for nefarious activities, and bad actors, who have created intricate underworlds of exploitation, usually directed at vulnerable groups.[1] One

1 Katja Weckström, 'Liability for Trademark Infringement for Internet Service Providers' (2010) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633389 > accessed 18 June 2024 .

such activity is the distribution of Non-Consensual Intimate Imagery ("NCII"). NCII distribution can be described as the act of distributing photos or videos depicting individuals in sexually suggestive or explicit circumstances without their consent.[2] It is a global issue with long-term effects, as these images can be stored and circulated in perpetuity by perpetrators.

This paper aims to explore the evolution of NCII in the Commonwealth Caribbean, shedding light on what it entails, its far-reaching implications and why it is particularly troubling in a Caribbean context. With a dearth of specialised legislation, inadequate law enforcement response, and insufficient community education, individuals, particularly women and girls, are left vulnerable to this form of cyber exploitation. This paper will examine the existing legislative schemes in Trinidad & Tobago, Saint Lucia, and Jamaica as well as the creative approaches the courts have employed to deal with cases of NCII while also exploring how these efforts, while commendable, may be insufficient to address the unique challenges posed by this phenomenon.

Finally, this paper aims to shed some light on the considerations to be borne in mind by legislators to ensure that a comprehensive statutory framework is put in place. It will also reflect on other solutions which may complement this legislative framework, while simultaneously considering Caribbean-specific cultural nuances and resource constraints, and the ever-evolving nature of this digital threat.

NCII and its Evolution in the Caribbean

The widespread adoption of smartphones and online social platforms has made it easy for individuals across the world to exchange messages containing sexual content, particularly explicit images and videos.[3] This has been no different in the Caribbean and the technological revolution has brought about an increase in this practice in the region, particularly among young people who are often more receptive to emerging technology.[4] The unfortunate consequence of such a practice is the inevitable release of imagery which may have only been intended for a private audience. This phenomenon came to be known as, and is still commonly referred to as 'revenge porn'. This term stemmed from the original understanding of the phenomenon, which was associated with and limited to romantic or sexual partnerships, where one partner sought to humiliate or embarrass the other. Scholars have however sought to move away from this term, acknowledging that there may be a whole host of motivations for releasing intimate imagery, including financial gain, notoriety, amusement, sexual gratification,[5] sexual entitlement, aggrieved entitlement and the possession of dark personality traits.[6] Furthermore, by focusing on the distribution of intimate imagery within the context of personal relationships, responsibility is confined only to the initial image distributor, rather than acknowledging the reality that widespread circulation of images can often be attributed to secondary distributors.[7] Thus, terms such as NCII and 'image-based sexual abuse' have gained popularity in the academic community.

In the Caribbean context, the distribution of NCII is particularly concerning. Caribbean communities are notoriously close-knit and conservative. When a victim's intimate images are released, these spread rapidly through the society reaching friends, family, coworkers, employers and members of the Caribbean diaspora. As smartphones and social media platforms have made sharing content remarkably effortless, the sharing of intimate imagery occurs with surprising ease among

2 Jolien Beyens and Eva Lievens, 'A Legal Perspective on the Non-Consensual Dissemination of Sexual Images: Identifying Strengths and Weaknesses of Legislation in the US, UK and Belgium' (2016) 47 International Journal of Law, Crime and Justice 31.

3 This practice is commonly known as sexting; Rafaela B.R. Silva and others, 'Sexting: Adaptation of Sexual Behavior to Modern Technologies' (2016) 64 Computers in Human Behavior 747.

4 Ibid.

5 Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37 Oxford Journal of Legal Studies 534.

6 V. Karasavva and A. Forth 'Personality, Attitudinal, and Demographic Predictors of Non-Consensual Dissemination of Intimate Images' (2021) 37 Journal of Interpersonal Violence NP19265.

7 Ibid.

friends or within group chats as if it were just another mundane topic of conversation. In the face of an obvious lacuna in information and statistics on this particular topic in the region, a small survey of just over 200 participants was conducted to establish a baseline understanding of the prevalence of NCII distribution in the various islands.[8] A staggering 60% of these participants reported having received unsolicited NCII at some point or another, signalling just how quickly these images spread when they reach the public domain.

While the thoughtless distribution of persons' intimate imagery is troubling enough, some persons have had their images posted on well-known pornography sites, some even under their full name, which can be revealed by a simple Google search. An even more disturbing trend has emerged in Trinidad and Tobago whereby websites dedicated to posting the intimate imagery of locals are popping up faster than they can be taken down. The Humanitarian Foundation for Positive Social Change ("the Humanitarian Foundation"),[9] an organisation which actively assists victims of NCII in Trinidad & Tobago, has reported that upon the non-consensual distribution of a person's intimate imagery, or its posting on one of the websites in question, a demand sometimes arises for more content from that particular person which has led to the creation of "deep fakes". Deep fakes are algorithmically synthesised material wherein the face of a person is superimposed onto another body.[10] This content is usually pornographic and victims of NCII are forced to relive their victimhood and face further embarrassment upon the circulation of deep fakes using their faces. The Humanitarian Foundation has also reported the exchange of NCII becoming somewhat transactional, moving beyond our traditional understanding of NCII, as these images are traded and auctioned in designated Whatsapp and Telegram groups. It appears that once a victim's images are released, they remain in cyberspace being shared, manipulated and replicated in perpetuity.

NCII is a phenomenon which disproportionately affects women and girls[11] and the effects are devastating and enduring. Approximately one quarter of survey participants reported being victims themselves and 66% of participants reported personally knowing someone who has been a victim. Female victims often face backlash upon the distribution of their intimate imagery and are blamed for taking and sharing the images in the first place.[12] This is particularly so in the Caribbean where conversations surrounding sexuality are still considered taboo to a certain extent and persons hold relatively conservative views. Thus, victims, particularly women, often struggle to reintegrate into society and rebuild their reputation.

Survey participants reported having experienced or personally knowing someone who experienced the following: 52% - ostracised by friends and family; 11% - lost or were not considered for a job; 46% - faced public ridicule; 20% - been broken up with; 25% - been expelled or suspended from school; 57% - had imagery redistributed or recirculated years later. These victims face serious repercussions in both their personal and professional lives.[13] They may suffer from severe depression,[14] psychological stress consistent with post-traumatic stress disorder[15] and they face serious difficulty

8 The authors conducted an online survey shared virtually with participants in Trinidad and Tobago, Jamaica, Saint Lucia and St Vincent and the Grenadines in August 2023.

9 Interview with Ms. Shamira Sooklal the President and Director of the Humanitarian Foundation for Positive Social Change (a non-governmental organisation based in Trinidad and Tobago that actively combats the distribution of non-consensual intimate imagery) (via zoom, 21st June 2023).

10 Vasileia Karasavva and Aalia Noorbhai, 'The Real Threat of Deepfake Pornography: A Review of Canadian Policy' (2021) 24 Cyberpsychology, Behavior, and Social Networking 203.

11 Seth Fallik and others, 'Revenge Porn: A Critical Content Analysis of the Nation's Laws and Reflection upon Social Science Research' (2022) 23 Journal of Criminology, Criminal Justice, Law & Society 1.

12 Ibid.

13 Jessica Magaldi, Jonathan Sales and John Paul, 'Revenge Porn: The Name Doesn't Do Nonconsensual Pornography Justice and the Remedies Don't Offer the Victims Enough Justice' (2020) 98 Oregon Law Review.

14 Ibid.

15 Samantha Bates, 'Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors' (2016) 12 Feminist Criminology 22.

finding future employment.[16] However, evidence of the prevalence of NCII is largely anecdotal and comes from personal accounts, individual surveys, the research of NGOs and exposés done by news outlets.[17] This is due to a lack of data collection on this particular issue, fuelled by low levels of reporting. Only 13% of survey participants claimed to have reported or known someone who has reported NCII to the police. This will be explored in greater detail below. Nonetheless, it is evident that the distribution of NCII is a serious problem plaguing the Caribbean community, particularly Caribbean women. Perpetrators very rarely face social or legal consequences and this underscores the urgent need to examine the existing legal framework and its effectiveness in addressing NCII in the region.

Existing Legislative Schemes and Creative Approaches to Addressing NCII

Trinidad and Tobago

In Trinidad and Tobago, there are several pieces of legislation which regulate technology and its use amongst its citizens. These include the **Computer Misuse Act**,[18] the **Offences Against the Person Act**,[19] the **Domestic Violence (Amendment) Act**[20] ("the DVA"), and the **Children Act**.[21] However, none of these expressly penalise or criminalise the distribution of NCII.

The DVA is the only statute which makes reference to the dissemination of intimate images through electronic means. It does so through a recently expanded definition of 'emotional or psychological abuse' to include 'disseminating intimate images of the applicant or a child of the applicant electronically or by any other means'. However, the only remedy or penalty available under the DVA for the dissemination of intimate images is the grant of a protection order. This is received upon application by the victim/applicant before the court. Under the DVA, the perpetrator does not face any consequences for the initial dissemination of the applicant's intimate imagery, and the act of disseminating an applicant's intimate imagery without consent attracts no criminal penalty. A perpetrator only faces liability or consequences if they breach the protection order obtained by the applicant. Further, the DVA when read as a whole appears not to contemplate the distribution of NCII outside of the context of an intimate relationship. Relief is only open to the victim if they share one of the classes of relationships covered under the DVA, all of which are personal and immediate relationships. It therefore would not adequately cover the vast and ever-changing motivations behind the dissemination of NCII, which have expanded beyond intimate and personal relationships. As such the DVA would be inadequate to comprehensively treat with and provide redress in situations where intimate images are being circulated or distributed by third parties without the consent of victims.

In the case of ***Therese Ho v Lendl Simmons***,[22] Justice Frank Seepersad handed down a groundbreaking decision in which a victim of NCII, particularly 'revenge porn' was awarded compensatory damages against the person who released her intimate imagery and was granted an injunction to prohibit him from further disseminating that imagery. In that case, the parties were engaged in an affair during which time Therese sent several intimate images and videos to Lendl. When the relationship came to an end, Therese informed Lendl's significant other about the affair and in retaliation, he sent the intimate images and videos to his friends, Therese's friends and the father of Therese's daughter. The judge noted at paragraphs 35 and 36 that:

> 35. It is unfortunate that as a society we have not been proactive and that we are burdened with so many archaic laws that predate our independence.

16 Elizabeth Ryan, 'Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults' (2010) 96 Iowa Law Review 357.

17 Khamarie Rogdriguez, 'Revenge Porn Victims Powerless' *Trinidad Express* (Trinidad, June 4 2023) < https://trinidadexpress.com/news/local/revenge-porn-victims-powerless/article_8707f124-027d-11ee-b3db-47ebfe0afc19.html. > accessed 18 June 2024.

18 Chap. 11:17 of the Laws of the Republic of Trinidad and Tobago.

19 Chap. 11:08 of the Laws of the Republic of Trinidad and Tobago.

20 Act No.18 of 2020.

21 Chap. 46:01 of the Laws of the Republic of Trinidad and Tobago.

22 CV2014-01949.

> The impact of social media and its consequent effect on our individual and collective privacy has to be acknowledged and addressed. There is a tendency for persons to hide behind the perceived anonymity that comes from using a 'username' and/or a user profile while sitting behind a computer screen or when using a [hand held] device to engage in offensive, hurtful, divisive and destructive discourse. These persons may feel that they are empowered but their actions can infringe upon the rights of others with the aggrieved persons having no recourse.
>
> 36. Online conversations and the dissemination of information over the internet initiate an [open ended] forum. The internet is a comprehensive and cohesive database and there is really no anonymity in relation to the use of same. Photographs uploaded unto the internet can be retrieved forever. The impact upon an individual's privacy is tremendous and the absence of clear and cohesive legislation to protect our citizens' privacy and to punish those who violate the rights of others, can cause us to descend into a bottomless pit of anarchy…

The judge found that Lendl disseminated Therese's imagery with the intent to inflict mental and emotional harm and he made the following comments at paragraphs 46 and 47 of the case:

> 46. The behaviour of the Defendant cannot be condoned and demonstrated a flagrant disregard for the feelings, emotion and dignity of the Claimant with whom he shared sexual relations. The Court was alarmed by the manner in which the Defendant viewed the Claimant as an object and his statement as contained in the messages that "she was just a 'f--k' " is unacceptable. The treatment of women as mere objects of pleasure is offensive, derogatory, antiquated, has no place in a civilised society and is indicative of the general lack of respect.
>
> 47. In this society women are often treated as second class citizens and as being inferior to their male counterparts but the reality is that they are excelling in all facets of national life and they are achieving greater academic success than many of their male counterparts. It is rather unfortunate that a young and talented cricketer like the Defendant behaved in such a manner. Upon the shoulders of those who hold positions of power, prestige and publicity there rests an onerous responsibility to adhere to the highest standards of moral and civilised conduct especially since the nation's children look towards them to set the standard of acceptable conduct. As a society we have to undertake a critical review, reprioritise and refocus. The objectification of women continues to be viewed as being culturally acceptable as is evident in our soca and chutney music. We must ask ourselves the question, "how are we to build a developed nation when we encourage and celebrate disrespect?" Respect for individuals regardless of gender, ethnicity, sexual orientation, for the law and for authority, must define the way we live and interact with each other.

In considering what legal redress Therese could avail herself of, he noted that there were no local laws which would have been of much assistance, whether civil or criminal. He also noted, in quoting Kodilinye,[23] that there is no developed jurisdiction of the tort of misuse of private information in the Caribbean and therefore no action could be founded on the failure to respect the privacy of a person. Thus, he had to turn to the equitable doctrine of breach of confidence. In order to successfully make out a claim for breach of confidence, the claimant must show that: (i) the information must have the necessary quality of confidence i.e., it must not be public knowledge or property; (ii) there must have been an obligation of

23 Gilbert Kodilinye and others, *Commonwealth Caribbean Tort Law* (5th Edn, Routledge Taylor & Francis Group 2015) 453-454.

confidence in the circumstances under which the information was imparted; and (iii) there must have been an unauthorised use of that information by the party communicating it to the detriment of the confider.

It was easy to arrive at a finding of breach of confidence in this case as intimate imagery is inherently private and confidential. The parties were in a private sexual relationship and therefore there was an obligation of confidence. Finally, the distribution of the intimate imagery was unauthorised and was to Therese's detriment. Accordingly, she was given a compensatory award of TTD$150,000.00 (approx. US$22,124.52) inclusive of aggravated damages. While this case marked a victory for victims of NCII and set a precedent for similar cases moving forward, it is limited in its application and is not sufficient in and of itself to provide relief for all victims.

First, this case was unique in that the perpetrator was a renowned cricketer and the case garnered significant public attention. The victim in this case was also very vocal about the incident and was willing to conduct interviews with news stations, all of which contributed to the case receiving due attention from the public and the judiciary alike. This is not the case for most victims as in most cases, the perpetrator is unlikely to be someone of public renown, nor is the victim likely to be willing to go public with such an incident. Although Therese was successful in court, it was at the cost of her name becoming a household name in Trinidad and Tobago at the time and at the cost of her images being further circulated. Now, a mere Google search of her name will reveal the entire ordeal, and that digital footprint will likely never be erased.

Furthermore, the doctrine of breach of confidence, though applicable in this case, is unlikely to have widespread impact to address other forms of NCII. A relationship of trust and confidence must have existed between the parties before one can allege that their confidence has been breached. While this may be utilised in the context of intimate relationships, when third parties become involved and the relationship between them and the victim becomes too remote, this remedy is unlikely to provide redress. Thus, the absence of targeted legislation leaves many victims with no recompense, and no deterrents are in place to restrain potential perpetrators.

Jamaica

The legislative position regarding the distribution of NCII is certainly more advanced in Jamaica than in Trinidad & Tobago, though it possesses its own limitations. Section 9 (1) and (2) of the **Cybercrimes Act**[24] provides as follows:

> (1) A person commits an offence if that person —
>
> (a) uses a computer to send to another person any data (whether in the form of a message or otherwise) that is obscene, constitutes a threat, or is menacing in nature; and
>
> (b) intends to cause or is reckless as to whether the sending of the data causes annoyance, inconvenience, distress, or anxiety to that person or any other person.
>
> (2) An offence is committed under subsection (1) regardless of whether the actual recipient of the data is or is not the person to whom the offender intended the data to be sent.

This section provides an avenue whereby charges can be laid against a perpetrator of NCII and cases have been successfully prosecuted under it. The most famous of these cases was the one between Donovan Powell and Darieth Chisolm. Darieth Chisolm is an Emmy Award winning television personality and former NBC News anchor who was involved in an intimate relationship with a Jamaican man by the name of Donovan Powell. During their relationship, she was living with him in Jamaica and when she ended their relationship, he sent her threatening messages and created a website where he posted nude photos and videos of her which he took without her

24 Act 31 of 2015.

knowledge.[25] Charges were laid under section 9 of the **Cybercrimes Act** and he pleaded guilty to three counts of malicious communication. He was sentenced to two terms of 12 months' imprisonment at hard labour on two of the counts, with the sentences to run concurrently and on the third he was ordered to pay a fine of JMD$1,000,000.00 (approx. US$6,474.65) or serve four months' imprisonment in default of payment. This term of imprisonment of four months was to run consecutively to the sentences of 12 months.[26] This sentence was eventually shortened on appeal and he was sentenced to two terms of 6 months' imprisonment on the first two counts and the fine of JMD$1,000,000.00 on the third count was upheld.[27] This still represented a victory for the victim, Darieth Chisolm, who remained vocal on social media and in the news about her battle for justice. She has since gone on to found *'*50 Shades of Silence*'*, a global movement aimed at advocating for victims of the non-consensual distribution of intimate imagery and which advocates for stricter laws and tougher enforcement for cyber sexual crimes.

Some parallels can be drawn between this case and the case of ***Therese Ho***. Although these victims ultimately found justice through the legal system, their journey was marred by the painful necessity of going public, and they were often forced to relive their victimhood in the public eye. This additional burden of having to share such personal and intimate details serves as a reminder of the challenges faced by victims of NCII highlighting the need for greater empathy, support, and privacy protections for victims throughout the legal process.

Furthermore, while the **Cybercrimes Act** may be able to provide justice for some victims, as it did for Darieth Chisolm, section 9 is still limited in its application. The Office of the Director of Public Prosecutions has called for a standalone section in the Act to deal specifically with NCII.[28] They noted that the requirement of an intention to cause harm has created a high threshold to ground a conviction. They believe that the specialised section should make it an offence to publish intimate imagery without consent, instead of requiring proof that they were released with the intention of causing harm. They further commented that the section makes it an offence to 'send' certain data but does not define the term. Persons often upload images to websites and it is unclear whether this situation is captured by the section. For these reasons, more all-encompassing legislation is required to ensure that all perpetrators can be prosecuted under the legislation.

Saint Lucia

Section 15 of the **Computer Misuse Act**[29] is written in similar terms to the Jamaican legislation and provides as follows:

> (1) A person shall not use a computer to send a message, letter, electronic communication or article of any description that—
>
> (a) is indecent or obscene;
>
> (b) constitutes a threat; or
>
> (c) is menacing in character,
>
> with the intention to cause or being reckless as to whether he or she causes annoyance, inconvenience, distress or anxiety to the recipient

25 Hannah Lynn, 'Former WPXI Anchor Darieth Chisolm Wins Revenge Porn Case in Jamaican Court' *Pittsburgh City Paper* (23 July 2019) < https://www.pghcitypaper.com/news/former-wpxi-anchor-darieth-chisolm-wins-revenge-porn-case-in-jamaican-court-15479072#:~:text=Two%20years%20after%20her%20revenge,Cybercrimes%20Act%2C%20according%20to%20Jamaican > accessed 18 June 2024.

26 'J'can Man Receives 1-Year Sentence, $1-Mil Fine for Revenge Porn Involving Former News Anchor' *Nationwide Newsnet*, (Jamaica, 25 November 2019) < https://nationwideradiojm.com/jcan-man-receives-1-year-sentence-1-mil-fine-for-breach-of-cybercrimes-act/# > accessed 18 June 2024.

27 Alicia Dunkley-Willis, 'Revenge Porn Convict's Sentence Reduced' *Jamaica Observer*, (Jamaica, 26 March 2021 < https://www.jamaicaobserver.com/2021/03/26/revenge-porn-convicts-sentence-reduced/ > accessed 18 June 2024.

28 Edmond Campbell 'Call for Revenge Porn to Be Standalone Offence' *The Gleaner* (Jamaica, 4 June 2021).

29 Cap. 8.14 of the Revised Laws of Saint Lucia.

> or to any other person to whom he or she intends it or its contents to be communicated.
>
> (2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 months or both and in the case of a subsequent conviction, to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 6 months or both.

This section faces the same limitations as the Jamaican legislation in that there is a requirement of intent or recklessness to ground liability. However, police in Saint Lucia have warned[30] that NCII distribution is a crime and can be prosecuted under section 313 of the **Criminal Code**[31] as libel. The section provides:

> (1) A person commits the offence of libel who, by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, whether living or dead, either negligently or with intent to defame that other person.

This section provides an avenue whereby a conviction may be secured against someone who has distributed NCII. Though it contains a requirement for intent to defame or negligence as to whether the distribution would be defamatory, this may be a lower threshold than an intent to distress or cause harm. There is a presumption that when a victim's intimate images are released into the society their reputation will be damaged,[32] and by sharing them a perpetrator intends or is at least negligent as to whether the victim will be defamed. It is always open to a perpetrator to plead any of the defences to libel, the most popular of which is likely to be 'truth' or 'justification'. Images are, for all intents and purposes 'true' and may even have been taken by the victim themself. However, a defence to criminal libel is more onerous than in proceedings for civil libel. The defendants have to prepare their defence and bear the brunt of the proceedings in pleading justification.[33] This is further compounded by section 326 of the **Criminal Code**, which requires a defendant to show not only that the defamatory matter published was true but that it was for the public benefit. This would be an almost insurmountable hurdle in a case of NCII distribution. Accordingly, this may be an avenue through which perpetrators of NCII may be prosecuted, even where there is no relationship with the victim and where there might not have been any clear motive to cause harm.

Proposed Approaches to Combat the Distribution of NCII in the Caribbean

While there have been commendable efforts by the courts as well as a demonstrated willingness by police to lay charges where legislation allows, many victims are still kept out of the doors of the courts if the circumstances of their case do not fall within the narrow confines of existing legislation or case law, highlighting the need for considerable legal reform.

Criminal Legislation

The implementation of comprehensive legislation is perhaps one of the biggest and most effective steps a country can make to combat the distribution of NCII. Such a legislative framework would serve to prosecute perpetrators, act as a deterrent to future perpetrators and to provide justice to victims. Broad-brush legislation or legislation which does not specifically contemplate NCII distribution and all of its nuances is often constrained in its application.[34] There are a number of considerations

30 'Saint Lucia Police Want To Go After Perpetrators Of Revenge Porn' *Saint Lucia News Online* (Saint Lucia, 21 February 2019) < Saint Lucia police want to go after perpetrators of revenge porn (rssing.com) > accessed 20 June 2024.

31 Cap. 3.01 of the Revised Laws of Saint Lucia.

32 Suzie Dunn and Alessia Petricone-Westwood, 'More Than 'Revenge Porn': Civil Remedies for the Non-Consensual Distribution of Intimate Images' (CCLA 38th Civil Litigation Conference, Fairmont Tremblant Canada, 16 November 2018 CanLIIDocs 10789, < https://canlii.ca/t/sqt c> accessed 18 June 2024.

33 Gleaves v Deakin [1980] AC 477.

34 Clare McGlynn and Erika Rackley (n 5).

that need to be borne in mind by legislators to ensure that any legislation enacted is not too broad, too narrow or too burdensome, and that it effectively addresses the problem they are seeking to curtail.

In order to be comprehensive and cover all circumstances of NCII distribution, criminal legislators must bear in mind that: definition clauses should be included to clarify the meaning of certain terms such as "distribution" and "non-consensual", or any other terms which, on interpretation, may limit the scope of the section; sections should clearly outline the elements of the offence i.e. knowingly distributing sexually explicit imagery of an identifiable person knowing that, that person has not consented to such distribution;[35] as scholars move away from the term 'revenge porn' and the motives behind NCII distribution have been found to have evolved beyond revenge, legislation ought not to include any requirement for proof of intent to embarrass or cause harm;[36] and legislation should not be so narrowly drafted as to preclude prosecution for the distribution of printed forms of intimate media[37] or prosecution for the creation of "deep fakes" or artificially generated intimate images of an identifiable person.

Grenada stands out within the region as having some of the most targeted criminal legislation for addressing NCII. Section 10 of the **Electronic Crimes Act, 2013** provides as follows:

> (1) A person who, knowingly or without lawful excuse or justification, captures, publishes or transmits the image of a private area of a person without his or her consent, under circumstances violating the privacy of that person, commits an offence and is liable on summary conviction to a fine not exceeding two hundred thousand dollars or to a term of imprisonment not exceeding three years or to both."
>
> (2) For the purposes of this section–
>
> (a) "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons;
>
> (b) "capture" with respect to an image, means to videotape, photograph, film or record by any means;
>
> (c) "private area" means the naked or undergarment clad genitals, pubic area, buttocks or female breast;
>
> (d) "publishes" means reproduction in the printed or electronic form and making it available for the public;
>
> (e) "under circumstances violating privacy" means circumstances in which a person can have a reasonable expectation that–
>
> (i) he or she could disrobe in privacy, without being concerned that an image or his or her private area was being captured; or
>
> (ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

This section does not suffer from the burdensome requirement for an intent to cause harm like those which exist in many of the other Caribbean countries. Moreover, it encompasses an extensive array of definitions that not only fortify and widen its scope but also enable the prosecution of a wide range of NCII cases, extending beyond 'revenge porn.' In doing so, it establishes a commendable precedent that could serve as a model for other nations in the region.

Civil Remedies

Although NCII distribution is an issue predominantly dealt with in the criminal courts, there has been an uptick

35 Mary Anne Franks, 'Drafting an Effective "Revenge Porn" Law: A Guide for Legislators' (2015) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823 > accessed 18 June 2024.

36 Ibid.

37 Ibid.

in the number of victims seeking civil and compensatory redress in different parts of the world. This was seen in the ***Therese Ho*** case mentioned above. It has been suggested that such civil and compensatory relief may be more beneficial to a victim as it can provide them with the resources they need to rebuild their lives.[38] In ***FGX v Gaunt***,[39] Thornton J noted that the case before her, which dealt with compensatory relief for what she termed 'image-based abuse' was thought to be the first of its kind to come before the civil courts in England and Wales. She found that the defendant had taken naked images of the claimant while in the shower and while she was sleeping, and that he uploaded these images onto pornographic websites accompanied by a photograph of her face. As a result, the claimant suffered from anxiety and depressive disorder and chronic post-traumatic stress disorder. She lost trust in people and became reclusive, to the extent of changing her job and refraining from personal relationships. She assessed the quantum of damages on the basis of separate and distinctive torts – the intentional infliction of injury and the misuse of private information. She awarded damages for pain, suffering and loss of amenities in the sum of £60,000, special damages in the sum of £37,041.61 to cover her medical expenses and £4,416.20 for future treatment.

In the civil claims for NCII a common cause of action appears to be that of breach of confidence. The issues and limitations surrounding claims for breach of confidence have been ventilated above, however the tort of misuse of private information may be an avenue whereby a victim can seek civil redress. Kodilinye[40] noted that there is no developed jurisprudence of the tort of misuse of private information in the Caribbean, however it may cover situations not covered by the doctrine of breach of confidence.

In the United Kingdom, courts have historically refused to recognise and develop the tort of invasion of privacy or misuse of private information. Courts have expressed in cases such as ***R v Khan (Sultan)***[41] that it is not the role of the court to legislate in this area of law. In ***Wainwright v Home Office***,[42] a trial judge held that a strip search by prison officers of a young boy where his genitals and his foreskin were pulled back in search of drugs, was an invasion of privacy in accordance with the European Convention on Human Rights 1950. However, the UK Court of Appeal and the House of Lords disapproved of the position that humiliation and distress was tortious at common law. The House of Lords in ***Wainwright v Home Office*** held that there was no tort of invasion of privacy and that there was a difference between 'identifying privacy as a value that underlay the existence of the rule of law… and privacy as a principle of law itself.' However, the recent decision of ***Google Inc v Vidal-Hall and others***,[43] may signal a relaxing of the UK Court's strict approach on the tort of misuse of private information. In this case, the court stated that :

> ...[I]n the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort **for the purposes of service out the jurisdiction**. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise.[44]

While the court was willing to recognise the tort, it was only willing to do so for the purposes of service out of the jurisdiction. Whether or not the tort of misuse of private information can be extended without such proviso or even extended to NCII is left to be determined.

38 Clare McGlynn and Erika Rackley (n 5).
39 [2023] EWHC 419 (KB).
40 Kodilinye and others (n 23)
41 [1997] A.C. 558, [1996] UKHL 14.
42 [2003] UKHL 53.
43 [2015] EWCA Civ 311.
44 Ibid (emphasis added).

What is clear is that the reluctance to acknowledge this tort both in the UK and in the Caribbean context, as seen in ***Therese Ho,*** comes from the age-old belief and understanding that judges do not make law. As a consequence, there is only so far that judicial creativity can extend. Ultimately, this is where Parliament would have to specifically provide legislative alternatives so that actions can be maintained between private individuals for the dissemination of NCII.

Constitutional Remedies

In the absence of jurisprudence on the tort of misuse of private information in the Caribbean, Kodilinye[45] has proffered that horizontal creative arguments can be made that the interpretation of various fundamental rights provisions in Caribbean constitutions, can protect the misuse of citizens' private information. Further, there may be positive obligations on states to ensure that laws are in place for the protection of their citizens against the actions of other private citizens.

In Trinidad and Tobago, the Humanitarian Foundation together with an anonymised claimant, have made such an argument in their recent filing before the Supreme Court of Trinidad and Tobago[46] seeking *inter alia* a declaration that the State infringed their right to respect for private and family life for failing to put mechanisms in place and allocating sufficient resources to ensure their reports were investigated.

The right to privacy exists in Commonwealth Caribbean constitutions however, there may be nuances in how each is framed and worded. For example, in Trinidad and Tobago, the right to privacy is termed as 'the right of the individual to respect for his private and family life' while in Saint Lucia it is termed 'protection for his or her family life or his or her personal privacy, the privacy of his or her home and other property…'.[47] However, the right is termed, it is only available against the state and its organs and actors. Further, these rights are interpreted negatively.

In the Eastern Caribbean case of ***Jovil Williams et al v Attorney General of Christopher and Nevis et al***,[48] the High Court of St. Kitts and Nevis heard a case involving NCII and had to determine whether the victims' rights to privacy had been infringed by the state's actions in the dissemination of the NCII.

In ***Jovil Williams***, the second claimant had been detained by the St. Kitts and Nevis police and had been assisting them with an investigation into an alleged robbery. While at the police station, the police officers confiscated and searched the second claimant's phone, finding a video of an intimate sexual encounter between the first and second claimant. In this video, the first claimant's entire nude body had been featured as well as their face, while only the second claimant's genitals were visible. The police officers on duty without the consent of either of the claimants edited and disseminated the said video into the public domain via the use of telecommunication devices and the internet. The claimants, aggrieved by the actions of the police officers, brought a claim against the State of St. Kitts and Nevis, contending that sections 3, 8 & 9 of the St. Kitts & Nevis Constitution expressly granted them protection for their personal privacy, the privacy of their property and from deprivation of property without compensation and that the actions of the police officers had infringed these rights. Williams J was of the view that alternative means of legal redress were not adequate in the circumstances and that the State infringed their constitutional rights to privacy and protection from arbitrary search. Williams J at paragraphs 59 and 67 of the judgment stated:

> 59. I am of the view that alternative means of legal redress are not adequate in the circumstances. The conduct of the Police officers

45 Kodilinye and others (n 23).

46 Khamarie Rodriguez, (n 17).

47 Section 1(c) of the Constitution of Saint Lucia, Cap. 1.01 of the Revised Laws of Saint Lucia.

48 In the matter of Sections 3, 8 and 9 of the Constitution of Saint Christopher and Nevis And In the matter of an application by the Claimants Jovil Williams and Jason Campbell for Declarations, Damages and other relief alleging a breach of their rights under Section 3, 8 and 9 of the Constitution and for redress pursuant to Section 18 of the Constitution; Jovil Williams and another v Attorney General of St. Christopher and Nevis and another, [2016] ECSCJ No. 37.

> was occasioned with the deliberate intent of causing embarrassment, distress, and humiliation to the Claimants, and it is therefore necessary to include in the award of compensation an appropriate quantum for Aggravated Damages for publication on the Internet a forum of unquantifiable users.
>
> While the Police officers may have lawfully apprehended the 2nd Claimant they had no authority to search the 2nd Claimant's mobile phone without the appropriate warrant, and in so doing, **infringed his constitutional rights to privacy and protection from arbitrary search**. The Claimants are also entitled to Exemplary Damages for the unlawful and unconstitutional acts of the Police in seeking cheap thrills.
>
> …67. This Court hereby declares that the claimants' fundamental rights to privacy and property as guaranteed by Sections 3, 8 and 9 of the Constitution have been infringed by the named Police officers attached to the Charlestown Police Station when they unlawfully searched, viewed, downloaded, disseminated or cause to be disseminated the claimants' sex tape, which was the claimants' private property.[49]

Additionally, Williams J was satisfied on the evidence that it was appropriate to award both claimants compensation for 'significant embarrassment, anxiety, and distress' as a result of the dissemination of the video by the police. He as such awarded the first claimant EC$350,094.00 (approx. US$129,542.10) and awarded the second claimant EC$150,000.00 (approx. US$55,503.13).

While the judgment of Williams J may provide hope to victims of NCII that the right to privacy can be extended to protect against the dissemination of NCII by the State and its actors, it gives no indication as to whether this right can be interpreted positively - whether the state has a duty to create laws and conduct investigations so as to protect victims of NCII. Of course Caribbean Constitutions have long been held to be living instruments, capable of growth and development which should over time meet new social, political and historical realities unimagined by its framers,[50] therefore a positive imagining of this right may be possible.[51]

Defamation

It is also open to victims to seek redress on the basis of defamation in the civil courts; however this is an approach that is still in its infancy across the world[52] likely due to the challenges associated with successfully making out such a claim. A successful claim was however made out in the Dominican High Court case of ***Marina Marshall v Lenisha Augustine et al***.[53] In that case, the claimant was an employee of Dominica Electricity Services Limited and a contestant in the Miss Dominica Carnival Pageant. As part of the publicity for the pageant, a number of photographs were taken of her and were spread widely through Dominica. An email then began to be circulated among her coworkers containing an image of a woman in a sexually explicit position, with the claimant's face superimposed on that image. The email contained a caption suggesting that she was a 'sallop'. This is a creole word which loosely translates to 'sexually degenerate or whore'.[54] This led to the claimant having to withdraw from the Carnival Pageant and to her being terminated by her employer. Her subsequent efforts to gain employment were unsuccessful for some time. The court found that the email and attachments were in fact and in law defamatory to the claimant and that she had been 'outrageously defamed', and she was accordingly awarded damages in the sum of EC$525,000.00 (approx. US$194,260.97) inclusive of general damages, aggravated damages and exemplary damages.

While this was quite a momentous victory for the claimant, particularly at the time it was decided in 2009,

49 Ibid (emphasis added).
50 Dickson J, in Hunter v Southam Inc [1984] 2 SCR 145, 155.
51 Boyce and Another v AG Barbados [2004] UKPC 32.
52 Suzie Dunn and Alessia Petricone-Westwood (n 32).
53 DOMHCV2001/0318 (delivered 23rd September 2009, unreported).
54 Ibid.

the circumstances were unique. As the claimant was a contestant in a national pageant, she had garnered some renown and had developed a reputation to be protected.[55] Such a response is not likely in a case where a victim is not of similar renown or does not have a good reputation within their community.[56] Furthermore, this case dealt with a situation where the imagery shared of the victim was not authentic and was digitally manipulated to display her in explicit positions. Therefore, it was not open to the defendants to mount a defence of truth or justification. The additional commentary in the email imputing sexual immorality further strengthened the claim for defamation and the contention that the email was defamatory. This may be an appropriate remedy in cases where deepfakes have been created. However, in cases where actual intimate imagery of victims is shared, particularly where no commentary is attached, it may be more challenging to make out a civil case for defamation, especially where the defendant relies on the defence of truth.[57]

In the absence of criminal legislation, or even as a complement to criminal proceedings, victims may attempt to seek redress in the civil courts. Damages may prove to be a valuable remedy to assist in cases where victims have lost employment and are thrust into the employment market after their images have been circulated in our small societies. It may also provide welcome compensation for pain and suffering and emotional distress caused as a result of the ordeal. Furthermore, victims may seek out injunctive relief in the form of mandatory[58] or prohibitory injunctions which direct perpetrators to remove published intimate imagery and prevent them from further circulating said intimate imagery. These civil remedies are likely to go a long way in compensating victims and in safeguarding them from further violations.

Technology and Specialised Cyber Crime Units

Results from the survey revealed that only 13% of participants either reported or knew someone who has reported instances of NCII. Regrettably, those who did report their experiences to law enforcement agencies often faced discouraging setbacks. They have lamented that their complaints were not treated seriously, with officers either taking their statements and subsequently shelving the matter or advising that attempting to pursue the case would be a 'waste of time'. It is understood that Caribbean law enforcement agencies often grapple with resource constraints, both in terms of finances and manpower, causing them to direct their resources to the most pressing matters. It is also understood that in those countries where legislation is tenuous or non-existent, it may very well be futile to attempt to pursue cases of NCII when it is unlikely that a conviction could ever be made. However, this type of response to a victim seeking to report NCII does not appear to be unique to the Caribbean and there have been reports of victims being blamed by police for taking and sharing the intimate images in the first place,[59] pointing to the general perception of NCII and the women who report it. The lack of any robust criminal justice response has allowed this practice of NCII distribution to continue unchecked and with little to no repercussions for perpetrators.[60]

However, upon the enactment of appropriate legislation, cyber crime units will be required to provide the technical expertise required to investigate and prosecute cases of NCII distribution effectively. Law enforcement, particularly those units designated to deal with cyber crimes, should have specialised and ongoing training to

55 Jason Haynes, 'Judicial Approaches to Combating "Revenge Porn": A Multi-Jurisdictional Perspective' (2018) 44 Commonwealth Law Bulletin 400.

56 Ibid.

57 Suzie Dunn and Alessia Petricone-Westwood (n 32).

58 Ibid.

59 Tegan S. Starr and Tiffany Lavis, 'Perceptions of Revenge Pornography and Victim Blame' (2018) 12 International Journal of Cyber Criminology < https://www.cybercrimejournal.com/pdf/Starr&Lewisvol12issue2IJCC2018.pdf > accessed 18 June 2024.

60 Michael Salter M, 'Responding to Revenge Porn: Gender, Justice and Online Legal Impunity' (Whose Justice? Conflicted Approaches to Crime and Conflict, University of Western Sydney, Sydney, September 27 2013) < https://www.researchgate.net/publication/294787472_Responding_to_revenge_porn_Gender_justice_and_online_legal_impunity > accessed 18 June 2024.

handle reports and cases of NCII distribution and to deal with the ever-evolving technology which facilitates this distribution. Specialised training should equip law enforcement professionals with the knowledge and soft skills needed to sympathise with victims, conduct thorough investigations, pinpoint perpetrators and gather the digital evidence required for legal action. The effective gathering of evidence will strengthen prosecutors' cases and increase the likelihood of convictions in cases of NCII.

These units cannot operate without the necessary software and technological infrastructure. Data recovery software, decryption tools, advanced algorithms and reporting systems are just some of the systems that can be integrated to identify and remove explicit content, diminishing the risk of further victimisation. These units may also be uniquely placed to collaborate with social media platforms to streamline the process of removing NCII and preventing its re-upload. The Humanitarian Foundation, in consultations with Meta and other social media platforms, was informed that the algorithms put in place by those platforms can usually only identify and remove NCII when thousands of reports are made to them. This is not practical in the Caribbean where population sizes are small and the population is not particularly sympathetic to victims of NCII distribution. Furthermore, the intimate imagery would have to be viewed by thousands of people in order for them to make reports, thus further re-victimising and traumatising the victim. Law enforcement, particularly cyber-crime units, can establish point persons or help-desks to take reports from citizens, to then escalate said reports and liaise with the social media platforms directly to advocate for the removal of the intimate images.

Public Education & Awareness

The implementation of the aforementioned solutions will undoubtedly make a significant impact in both prosecuting and preventing cases of NCII distribution. However, they must be complemented by a shift in the traditional and conservative mindset surrounding NCII. Public education and awareness campaigns can bring this topic to the forefront, dispelling misconceptions, and dispelling the culture of victim-blaming that often surrounds these incidents. Furthermore, this is a phenomenon particularly prevalent among young people and it is crucial that they be targeted in these efforts. The incorporation of sex education, digital literacy and consent education into school curricula will go a long way in teaching teenagers and young adults the importance of consent, respecting others' boundaries online and the consequences of NCII distribution for both victims and perpetrators. In the fight against NCII distribution, it is imperative for members of the community to understand NCII and the life-changing impact it can have on victims. With heightened public awareness and understanding of the issue, society can shift its focus from blaming the victim to providing them with the necessary support to cope with their situation,[61] all while fostering a culture that unequivocally condemns such actions. There should also be a focus on the establishment of support programs providing victims with the help that they need and informing them of and facilitating access to resources and relief. This cultural shift will be crucial in generating a collective demand for legislative and state intervention, paving the way for more stringent enforcement and comprehensive policies to combat NCII distribution in the region.

Conclusion

NCII in the Caribbean is a grave and prevalent issue which attracts an inadequate social response. The profound and enduring repercussions on the lives of victims underscore the urgency for comprehensive action. The proposed solutions hold promise for effecting substantial change in the lives of victims and future victims and being formidable deterrents against potential perpetrators. These solutions must work in tandem with each other in order to provide a more complete approach to address the distribution of NCII; an approach which marries both legal and social creativity.

61 Tegan S. Starr and Tiffany Lavis (n 59).

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Carbon Taxation in Trinidad and Tobago: Our Current Mooring

River Yarna

***Abstract**: In an era of environmental uncertainty, understanding carbon taxation can be necessary to understand where that jurisdiction can put it to use. Carbon taxation can be used to fund mitigation and conservation efforts, minimise carbon intensive actions and guide overall behaviour. This article seeks to explain carbon taxation generally and within the context of Trinidad and Tobago, and three existing instruments which can be transitioned to incorporating carbon prices. Incorporating carbon prices and introducing carbon tax instruments will need to answer the issues of increased compliance and equity costs and behavioural impacts and reactions. The jurisdiction will also have to assess and anticipate the effects of neighbouring nations implementing carbon taxation regimes, such as the challenge of carbon leakage.*

***Keywords**: Carbon Taxation—Carbon Pricing—Trinidad and Tobago—Climate Change—Carbon Emissions—Taxation*

Introduction

Recently, the universal challenge of climate change has become an increasingly pressing matter. Global governments and policymakers have recognised the issues on paper since the adoption of the various United Nations (UN) protocols and agreements, particularly the Paris Agreement, to which Trinidad and Tobago is party. The Agreement charges us with the duties of mitigation and economy-wide reduction,[1] conservation and enhancement of carbon sinks[2] and recognises the burden on national funds and financial resources,[3] all of which are addressed by carbon tax policies, either as a source of revenue or behavioural effects. Anecdotally, it is only lately that the general population is beginning to feel the effects of climate change. It has been noted that each new year will break previous heat records.[4] The resident reader can recall the heat experienced during the second half of 2023,[5] and previous heavy rainfall and flooding.[6] Not only has land-based life faced changing conditions because of climate change, but our ocean life has also experienced difficulty, particularly reefs in Tobago.[7] The islands are two of many within the region. It is expected that the entire West Indies is having the same challenges. The government is simultaneously confronted with these conditions and the objective of creating policy to fund mitigation and conservation efforts, as well as guide behaviour away from environmentally detrimental actions, both of which can be achieved through taxation.

[1] United Nations Framework Convention on Climate Change: Paris Agreement (adopted 12 December 2015, Paris, France) (UNPA), art 4.
[2] UNPA, art 5.
[3] UNPA art 9.
[4] Trinidad and Tobago Weather Center, 'Heat Records Fall for 2023 as Scorching Temperatures Continue Across T&T' (*Climate News*, 19 September 2023) <https://ttweathercenter.com/2023/09/19/heat-records-fall-for-2023-as-scorching-temperatures-continue-across-tt/> accessed 17 October 2023.
[5] ibid.
[6] Carolyn Kissoon and Sandhya Santoo, 'Catastrophic Floods, and it Could Get Worse' (*Daily Express*, 20 October 2018) <https://trinidadexpress.com/news/local/catastrophic-floods-and-it-could-get-worse/article_5b4f05a4-d460-11e8-9bdc-e773330eabd5.html> accessed 17 October 2023.
[7] Institute of Marine Affairs, 'Tobago's Reefs Are on Their Third Consecutive Year of Coral Bleaching' (*News, Updates B&ERP*, 28 October 2022) <https://www.ima.gov.tt/2022/10/28/tobagos-reefs-are-on-their-third-consecutive-year-of-coral-bleaching/> accessed 17 October 2023.

The Use of Taxes to Manage Externalities

Within economics, the concept of externalities is a crucial underlying principle for carbon taxation.[8] It follows that production processes create externalities that are either costs or benefits with private or social areas of effect.[9] Simply, it is a by-product or consequence of production. Related to these externalities is the concept of a Pigouvian tax, structured by according to the principles of Arthur Pigou. These taxes target externalities by assigning a cost to the non-tangible (at least in accounting records) social cost.[10] Developing from this, carbon taxes assign a monetary value to the negative greenhouse gas externalities created by production or service processes. The relationship between tax policy and human behaviour cannot be overstated. In fact, the idea of economic distortion has been documented and recognised as a byproduct of tax policy.[11] It follows that economic actors within a system will take positions only explainable by the presence of a tax incentive or disincentive.[12] Carbon taxation seizes upon this effect to produce the action required to mitigate Greenhouse Gas emissions and, by extension, mitigate the continued effect of human-driven factors contributing to climate change. In essence, carbon taxation seeks, all things being equal, to make certain behaviours more expensive to dissuade actors from pursuing those behaviours.[13] It must be mentioned that carbon taxation should not only be defined by their tax bases, but also the use of funds.[14] One may argue that an excise tax on fuel is a sufficient carbon tax. However, one needs to assess how the revenue generated from that levy is utilised. A tax acts as a form of wealth transfer. As such, a carbon tax should, in law, dictate that the desired cash flow is redirected towards encouraging green transitions or mitigating the potential undesired regressive effects of a carbon tax regime.[15]

The Form of Carbon Taxation

Carbon taxation is one of the many policy instruments conceived to combat climate change. Before a carbon tax is created and levied, a carbon pricing mechanism must be developed and utilized within a jurisdiction, before a tax is levied, there must be something to levy the tax on, i.e., the tax base.[16] Carbon pricing is the general method for establishing that tax base. Policymakers may choose one of two approaches: the Fuel Approach, and the Emissions Approach.[17] The Fuel Approach is a measure of consumption.[18] Through this approach in its crudest form, the jurisdiction levies an excise tax on fuel, adding on the final price at the end of that fuel supply chain.[19] The Emissions Approach is a measure of production, particularly the various greenhouse gasses emitted during a production process.[20] This approach requires a method of measuring the emissions from a facility and then requiring a payment based on the price established by the carbon pricing mechanism multiplied by the volume of emissions.[21] Both of these methodologies base themselves off of a carbon pricing metric related to a fuel type contributing to the volume of greenhouse gases which negatively impacts on our atmosphere. As such, the levies paid according to the carbon-priced bases are what are defined as carbon taxes.

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[8] Janet E Milne and Mikael Skou Andersen (eds), *Handbook of Research on Environmental Taxation* (Part 1 Introduction to Environmental Taxation Concepts and Research, Edward Elgar Publishing Limited 15-19.

[9] ibid.

[10] ibid.

[11] Andrew Chamberlain, 'What Does "Economic Distortion" Look Like?' (*Tax Foundation*, 18 December 2006) <https://taxfoundation.org/blog/what-does-economic-distortion-look/> accessed 17 October 2023.

[12] ibid.

[13] Milne and Andersen (n 8) 15.

[14] United Nations Department of Economic and Social Affairs, *United Nations Handbook on Carbon Taxation for Developing Countries* (1st edn, United Nations 2021) 154; Janet E Milne, 'How Durable is a Lockbox for Carbon Tax Revenue?' (2019) 17 PTR 105, 111.

[15] ibid.

[16] Tax Foundation, 'Tax Base' (*TaxEDU*) <https://taxfoundation.org/taxedu/glossary/tax-base/> accessed 17 October 2023.

[17] United Nations (n 14) 79-100.

[18] United Nations (n 14) 79-91.

[19] United Nations (n 14) 91-100.

[20] United Nations (n 14) 91, 94-95.

[21] United Nations (n 14) 65.

Existing Environmental Taxes in Trinidad and Tobago

The UN recognises that carbon taxes can be classed as a type of Environmental Tax.[22] An environmental tax is described as a burden on products or activities that are environmentally harmful, or a benefit to activities that are environmentally beneficial,[23] with polluters paying and costs being abated respectively. Examining some of Trinidad and Tobago's tax regimes within the confines of this definition, one may find that there are various environmental taxes levied. According to the UN's guide, a carbon tax can develop from an existing tax regime. In order to ensure that tax revenues from environmental taxes and carbon taxes are used for climate change mitigation efforts, it is not unreasonable to advocate for the establishment of a Carbon Fund, mirroring the function of the Green Fund[24] and the Environmental Fund[25] in its organisation, dedicated towards carbon mitigation projects.

In assessing individual tax incentives, the nation's Income Tax Act chapter 75:01 of the Laws of the Repuclic of Trinidad and Tobago (ITA) allows for two simple environmental credits against one's income. These are the credits for the installation of solar panels[26] on homes or buildings and Compressed Natural Gas (CNG) kits within one's own vehicles.[27] The solar panel credit is an incentive to property owners and businesses who file under the ITA. Green energy generation has been discussed at length, in the interest of brevity for this article, they are clean. The credit for CNG retrofitting of vehicles is also an undeniable incentive for the same groups towards reducing their carbon footprint. CNG combustion has been shown to be a fuel that generates substantially less carbon emissions than gasoline and diesel. CNG engines, although less powerful than a gasoline or diesel, is a lighter fuel and is able to power smaller commercial and personal vehicles,[28] making it a feasible alternative to traditional combustion for smaller vehicles in smaller urban areas.[29] Additionally, the 150% wear and tear allowance[30] on renewable energy equipment has been widely discussed and promoted by local ministries and firms. Evidently, demand for these pieces of equipment simply must increase, the legislation is already in place and is adequate.

Within the Miscellaneous Taxes Act 1963 Chapter 77:01 of the Laws of the Republic of Trinidad and Tobago (MTA), the jurisdiction levies the Green Fund Levy (GFL).[31] The GFL was established to service the Green Fund, an account managed by the Ministry of Finance and an advisory committee[32] separate from Tax revenues, set at a rate of 0.3%[33] of gross sales or receipts during a calendar year.[34] Interestingly, this tax is payable by all corporate bodies and businesses registered with the Board of Inland Revenue regardless of activity type so long as sales and receipts are positive.[35] In fact, comparing it to the Business Levy and the Corporate Income Tax, the GFL is a guaranteed revenue stream. The purpose of the GFL is what may classify it as an environmental tax. The Green Fund is intended to financially assist organizations that are engaged in environmental activities which include remediation, reforestation and education or public awareness.[36] Broadly, this should allow the revenue to be dedicated towards organisations engaged in climate change mitigation projects, such as the maintenance of forests and ocean ecosystems which may serve as carbon

[22] United Nations (n 13) 1.
[23] Milne and Andersen (n 8) 20.
[24] Miscellaneous Taxes Act 1963 Chapter 77:01 of the Laws of the Republic of Trinidad and Tobago (MTA), ss 64-69.
[25] Environmental Management Act 2000 Chapter 35:05 of the Laws of the Republic of Trinidad and Tobago (EMA), Part 7.
[26] Income Tax Act Chapter 1938 75:01 of the Laws of the Republic of Trinidad and Tobago (ITA), s 48M.
[27] ITA 1938, s 48L.
[28] Muhammad Imran Khan, Tabassum Yasmin and Abdul Shakoor, 'Technical Overview of Compressed Natural Gas (CNG) as a Transportation Fuel' (2015) 51 RSER 785.
[29] ibid.
[30] ITA 1938 s 11 (1) (bd).
[31] MTA 1963 ss 61-69.
[32] MTA 1963 s 65.
[33] MTA 1963 s 62 (1).
[34] MTA 1963 s 62 (2).
[35] Corporation Tax Act 1966 Chapter 75:02 of the Laws of the Republic of Trinidad and Tobago (CTA), business are exempted under s 3A, of note are the exempt income 3A(c) and income threshold 3A(f).
[36] MTA s 64.

sinks.[37] The fund has amassed up to TTD$8 billion—a considerable amount of money.[38] As to its current use, 29 projects have been funded using nearly TTD$408 million.[39] The writer sees no need to readapt this Levy as a carbon tax, as it serves an environmental purpose. However, there is value in its structure. In order to balance the interests of the energy companies and maintain the competition of Trinidad and Tobago,[40] a Carbon Levy can be introduced to the same magnitude as the Green Fund Levy, payable at all levels of activity. This way, revenue can be directed to a Carbon Fund that can be used for projects which mitigate the effects of climate change, should goals not be met by 2030. Considering the low amount of revenue generated attributed to the low rate, this may be seen as a long-term contingency plan as opposed to a tax to guide behaviour.

Candidate 1: Engine Size Custom Duties

One of the most convertible existing Environmental Taxes levied in Trinidad and Tobago is the Customs Duty on vehicles based on engine capacity. The engine capacity tax is one of several taxes levied through customs duties on purchasing a personal vehicle in Trinidad and Tobago. This duty is levied by the Customs Act,[41] particularly under Chapter 8, and has increasing rates for the size of engine and oil displacement capacity. Following its implementation, the tax has been subject to various parliamentary discourses and has been amended several times to accommodate the purchases of hybrids and electric vehicles.[42] Within this debate, one assumes that the tax was implemented in order to curb excessive depletion of the nation's foreign exchange reserves. This assumption can most certainly be reinforced by a cursory glance at the Trade figures for car imports. A simple review shows that Trinidad and Tobago imports at least US$70 million worth of vehicles from Japan.[43] The Ministry of Planning and Development has noted that the person to car ratio is almost 1:1; a considerable ratio.[44] The writer will refrain from commenting on whether this tax has achieved its goal in minimising foreign exchange leakage and decreasing purchase volume. Rather, the inadvertent goal of decreasing average engine capacity on the nation's roads can be evidenced in the shifting of trade and vehicle purchases from European and American cars to the tremendous increase in Asian car imports.[45] There is a demonstrable relation between engine capacity and emissions. Based on data from Canada, the smaller the engine and the less cylinders, the less Carbon emissions (g/km) are generated by the vehicles.[46] Only recently have the hybrid and electric models been entering the market and selling. In 2022 the Customs Act, Motor Vehicles and Road Traffic Act and Value Added Tax Act were amended to accommodate the purchases of hybrid and electric vehicles,[47] a tax incentive to individuals. From the standpoint of assessing the individual's carbon footprint and contribution to national Green House Gas (GHG) emissions, the fact that the engine-size-tax has inadvertently driven individuals away from buying high-capacity engines with more cylinders towards smaller, less polluting engines stands as counterproductive to

[37] Emilia Jankowska and others, 'Climate Benefits from Establishing Marine Protected Areas Targeted at Blue Carbon Solutions' (2022) 119 Proceedings of the National Academy of Sciences.

[38] Ministry of Planning and Development, 'What it Takes to Tap Into $8b Green Fund' (2023) <https://planning.gov.tt/content/what-it-takes-tap-8b-green-fund> accessed 17 October 2023.

[39] ibid.

[40] Kevin Ramnarine, 'A Review of Trinidad and Tobago's Electricity Sector and PPA Process' (PPA Watch, Energy Growth Hub 2023) 5.

[41] Customs Act 1938 Chapter 78:01 of the Laws of the Republic of Trinidad and Tobago (CA).

[42] CA 1938 Chapter 87, heading 87.03.

[43] United Nations 'UN Comtrade' (*United Nations*) <https://comtradeplus.un.org/> accessed 29 October 2023, HS Commodity Codes: 8703, Reporter: Japan, Partner: Trinidad and Tobago, Trade Flow: Export, Periods: 2016-2022.

[44] Ministry of Planning and Development, 'First Biennial Update Report of the Republic of Trinidad and Tobago to the United Nations Framework Convention on Climate Change' (Government of Trinidad and Tobago, 2021), 27.

[45] UN Comtrade (n 43).

[46] United Kingdom Department for Transport, 'New Car Fuel Consumption & Emission Figures' (*Vehicle Certification Agency*, 8 November 2022) < https://www.vehicle-certification-agency.gov.uk/fuel-consumption-co2/fuel-consumption-guide/ > accessed 29 October 2023.

[47] Motor Vehicles and Road Traffic (Amendment to Fourth Schedule) Order 2022, LN 109/2022; Value Added Tax (Amendment to Schedule 2) Order 2022, LN 110/2022; Customs (Remittance of Customs Duty) Order 2022, LN 111/2022.

Carbon Emissions Reductions. The tax was meant to limit foreign exchange leakage, and possibly to reduce car sizes, but has unfortunately not regulated the amount of these small cars. While imports of large-capacity vehicles have decreased, what has occurred instead is an explosion in volume of small capacity vehicles on the road. Furthermore, these vehicles have less stringent economic controls owing to the European Union's emissions standards for vehicles[48] not applying for the most purchased manufacturers. Within this framing the market is dominated by innumerable low capacity and high emission cars, which are continuously imported and consumed in the same way as any other good, having a considerably negative impact on national carbon emissions and personal carbon footprints. Subsequently, while individual carbon footprints are decreased, the sheer volume of vehicles on the road counteracts the effect of having smaller engines. Of course, the heat generated by the mass of vehicles is considerable, especially when accounting for idling in several hours of traffic every working day.[49] However, in the interest of maintaining utmost tax equity for a population that is burdened with the morning and evening commute, attempting to price and tax congestion will be an incredibly regressive and unpopular policy, such as the reaction to the current tolling attempt in New York City,[50] on top of being expensive to implement and maintain. To rebase this tax, it is possible that the rates and definitions of engines can be reworked to apply their expected emissions or carbon consumption by that engine over the average warranty period. With this method, legislation will need a simple review of rates to increase the taxes on all non-hybrid engines, while at the same time keeping and reducing taxes on hybrids and electric vehicles. Further adding in a provision requiring that the levied amounts are paid into the aforementioned Carbon Fund will encourage those managers to fund electric and hybrid vehicle infrastructure, as well as continued general public transport development to eventually wean the population off of personal vehicles.

Candidate 2: Carbon Added Tax

Currently, Trinidad and Tobago makes use of indirect taxation through the Value Added Tax Act 1989 Chapter 75:06 of the Laws of the Republic of Trinidad and Tobago (VAT), a goods and sales tax levied on goods and services provided for consumption within the country at all points along the supply chain.[51] While it would take time to identify specific goods and services that are harmful to the environment, looking at what is exempted or zero-rated can provide answers as to whether that classification must be changed or whether certain carbon-intensive goods are already included. Within the VAT Act, a list of exempted[52] and zero-rated supplies and services are listed in Schedule 2.[53] It is important to note that the majority of the zero-rated goods and services are typical essential goods. While Trinidad and Tobago has a considerable amount of local production, the materials and resources required to facilitate that production are nearly all imported. Notably, unprocessed foodstuffs are zero-rated.[54] To adapt the VAT to a Carbon Priced consumption tax would require a shifting of resources and possible reclassification or specification of what goods are to be taxed. In fact, the concept of a Carbon-Added-Tax (CAT) is not a new concept. In 2015, a report was published by CE Delft[55] describing a tax structured in the

[48] Regulation (EU) 2019/631 of 17 April 2019 Setting CO2 Emission Performance Standards for New Passenger Cars and for New Light Commercial Vehicles, and Repealing Regulations (EC) No 443/2009 and (EU) No 510/2011 [2019] OJ L111/13 .

49 ECLAC Caribbean, 'Trinidad and Tobago Commuters Spend One Month of Life in Traffic Every Year ECLAC Study Shows in the Caribbean' (*United Nations in the Caribbean*, 22 January 2024) < https://caribbean.un.org/en/258509-trinidad-and-tobago-commuters-spend-one-month-life-traffic-every-year-eclac-study-shows > accessed 17 February 2024.

50 Amanda L Gordon and Michelle Kaske, 'NYC's $23 Congestion Charge Stirs Debate in Every Neighborhood' (*Bloomberg.com*, 5 October 2023) < https://www.bloomberg.com/features/2023-new-york-traffic-congestion-prices/ > accessed 29 October 2023

[51] Value Added Tax Act 1989 Chapter 75:06 of the Laws of the Republic of Trinidad and Tobago (VAT), ss 4 & 6-8.

[52] VAT 1989, sched 1.

[53] VAT 1989, s 8.

[54] VAT 1989, sched 2.

[55] Sander de Bruyn, Marnix Koopman and Rober Vergeer, 'Carbon Added Tax as an Alternative Climate Policy Instrument' (2015) CE Delft < Carbon Added Tax as an alternative climate policy instrument - CE Delft - EN >accessed 21 June 2024.

same way as a Value-Added-Tax,[56] one that recognises that carbon emissions are added at each point along the supply and production chains.[57] However, the CAT will inevitably fail in equity where the VAT fails the same, in that the burden will be borne by the end-consumer and an extensive regime of exemptions and a reclamation method would be required in order to alleviate the impacts of the Tax.[58] Furthermore, the ability to refund and balance out CAT generated would not have the intended effect of influencing behaviour towards less carbon-intensive undertakings. Despite this, the CAT does envelope specific supplies and services that are carbon-intensive.[59] Additionally, by swapping the VAT to a CAT, policymakers will be able to contribute to the Carbon Fund through revenue generated by the levy towards green initiatives while alleviating the impacts of both this tax and other carbon policies.

Candidate 3: Fuel Subsidies

As it relates to Trinidad and Tobago, the most pertinent and far-reaching in terms of effects on the populace and impact on Carbon Tax regressivity is the fuel subsidy entities within the jurisdiction. Fuel and electricity subsidies lower the cost of fossil fuels and energy,[60] this has the effect of redistributing the wealth generated by the nation's energy industry, making almost everything cheaper.[61] The UN recognises that fuel subsidies play a considerable role in encouraging carbon-intensive behaviour.[62] With these instruments in place, consumer behaviour encourages inefficient consumption of fuels and producers engage in energy intensive processes. Furthermore, the International Monetary Fund has recognised that an average of 2% of our GDP is spent on maintaining this subsidy[63] On the other hand, local fuel subsidies allowed us to develop and maintain a manufacturing base and level of industrialisation,[64] as energy was cheaper. However, the over-reliance on this revenue has stifled investment in diversification, let alone renewable energy infrastructure.[65] In order to guide behaviour towards less carbon-intense habits and processes, the fuel subsidy will need to be lowered as much as possible, removed and potentially reversed with the implementation of a fuel tax.[66] Basing the carbon tax on fuel consumption is the simplest method of implementing a carbon tax,[67] measuring directly against fuel type and paid in proportion to consumption.[68] The removal of fossil fuel subsidies across the Middle East and North Africa has been forecasted to reduce Carbon Dioxide emissions by 36%,[69] a considerable reduction. However, unwinding the fuel subsidy will be a difficult task, but legislatively efficient owing to the annual review of taxes and fiscal policy with each budget. All that is required for this is a simple lowering of numbers. Fuel subsidies, debatably, are a progressive instrument,[70] as the cost of living and operation for everyone is lowered. While it may be argued that only the largest consumers and highest incomes benefit as they can consume even more for less,[71] one cannot overlook that the cost of living for the general public is lowered. Furthermore, unwinding the fuel subsidy is a political gamble, a conversation that will not be commented on in this article.

Where do we need to be?

The Paris Agreement requires the jurisdiction to reduce emissions by 15% from power generation, transport and industry by 2030,[72] as well as a reduction of public

[56] ibid 20.
[57] ibid 19.
[58] United Nations (n 14), 154.
[59] de Bruyn (n 55), 22.
[60] United Nations (n 14), 177.
[61] International Monetary Fund Western Hemisphere Department (IMF), 'Fuel Subsidies in Trinidad and Tobago: Fiscal, Distributional, and Environmental Impacts' [2016] 205 IMF Staff Country Reports.
[62] United Nations (n 14), 177.
[63] IMF (n 61).
[64] Karen de Montbrun, Trinidad and Tobago Oil Centenary Book (Chapter on 'Creating a Hybrid Economy: Oil and Manufacturing in Trinidad and Tobago' Official Centenary publication of the Ministry of Energy and Energy Industries 2009) 172.
[65] For instance, the considerations on solar panels were only introduced in 2011.
[66] United Nations (n 14) 179.
[67] United Nations (n 19).
[68] ibid.
[69] United Nations (n 14) 184.
[70] IMF (n 61).
[71] IMF (n 61).
[72] Ministry of Planning and Development (n 44), 53-55.

transportation emissions by 30%.[73] As noted by the Inter-American Institute for Cooperation on Agriculture, for Trinidad and Tobago to meet obligations under the Paris Agreement, US$2 billion is required.[74] According to Trinidad and Tobago's first Biennial Update Report in 2021, the government has set its sights on low carbon development and increasing sustainability.[75] To achieve this, Trinidad and Tobago has developed an NDC implementation plan[76] and a National Environmental Policy[77] beforehand. The Environmental Authority of Trinidad and Tobago has already been charged under law with the duty of monitoring environmental compliance,[78] though only with respect to activity granted environmental certificates.[79] Furthermore, the Environmental Authority of Trinidad and Tobago is charged with recordkeeping and monitoring requirements of pollutants.[80] While the former duty is specified, the latter should be extendable to nationwide monitoring and reporting of GHG emissions. While this is simple to advocate for on paper, the realities will impart an increased compliance and operating costs on the national budget. Though to remedy this issue of costs, the Carbon Fund may partially, or even wholly, subsidize these activities. Of course, the changes that need to occur in Trinidad and Tobago goes beyond Tax Policy and through to governance in other areas. Discussion on the justification of these policies will have to be subsequently explored, as the Taxes themselves carry issues of compliance expenses by the emitter and monitor, the tax regime's equivalent compliance obligations, just transition and the possible litigation that will follow from these rules.

Possible Problems

Globally, the discussion on Carbon Taxes has been lengthy and extensive, the most pressing issue identified is Carbon Leakage, where mitigation actions by one country may cause an increase in Carbon Emissions in a related or nearby country since production has been reallocated by market actors to the less stringent jurisdiction.[81] Within the realm of possibility, Trinidad and Tobago may face this problem on both fronts: local production may leave for less stringent jurisdictions, or our jurisdiction may become a "Carbon Tax Haven" for receiving reallocated production. The problem of losing producers can be a possible extension of the increased environmental compliance costs with other policies, and the overall increased costs inevitably caused by the levying of Carbon Taxes.[82] Legislators will have to pace the rollout of these policies slowly to offer market actors time to adapt to the conceived compliance rules and economies. To compensate for this, the European Commission Taxation and Customs Union introduced the Carbon Border Adjustment Mechanism[83] which prices carbon emissions on goods and services entering the European Union (EU). It follows that mitigation in the exporting country will lead to a lower CBAM on their EU-bound goods. On the one hand, this may be a CARICOM solution as opposed to one for a single nation, especially as the Paris Agreement requires parties to take effects on neighbouring nations into consideration.[84] On the other hand, becoming a Carbon Tax Haven is hardly a welcome outcome of the global push towards carbon tax. The effects of emissions, especially their increases, need not be restated.

[73] ibid.

[74] Inter-American Institute for Cooperation on Agriculture (IICA), 'NDC Scoping Report for 9 Caribbean Countries: Policy Analysis' (IICA, 2022), 67 and 149.

[75] Ministry of Planning and Development (n 44), 56.

[76] ibid.

[77] Ministry of Planning and Development, 'National Environmental Policy (NEP) T&T 2018' (Government of Trinidad and Tobago, 2018).

[78] EMA 2000 s 37.

[79] EMA 2000 s 35.

[80] EMA 2000 s 47.

[81] 'Fourth Assessment Report' (*IPCC*) < https://www.ipcc.ch/assessment-report/ar4 /> accessed 17 October 2023, 11.7.2.

[82] Particularly the above discussion on fuel subsidies.

[83] 'Carbon Border Adjustment Mechanism' (*Taxation and Customs Union*) <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en> accessed 17 October 2023.

[84] UNPA art 15.

The cost of transition[85] and equity issues will also need to be addressed. Regionally, Trinidad and Tobago owes a duty to the rest of the Caribbean, having the highest emissions per capita in the region,[86] to reduce them. The idea of just transition can not only be applied to international inequality between developed and developing nations,[87] but also between our polluting jurisdiction and the rest of the Caribbean, applying a greater differentiated responsibility, requiring a greater effort to both reduce for our own environment as well as those of our neighbours.

Conclusion

Climate Change mitigation through tackling the national greenhouse gas emissions volume is a necessary aim for the jurisdiction in order to both accomplish goals set in international agreements and avoid the harmful effects of changes to our atmosphere. Carbon Taxation is an effective policy method that can both make polluters pay and fund mitigation efforts. Furthermore, induced behaviour owing to the tax burdens can guide the population towards less carbon-intensive behaviour. While the jurisdiction can develop these policies independently, we can possibly benefit from converting or structuring along the lines of existing environmental tax policies, such as the engine size customs duty, the VAT and Green Fund Levy. In this process, the jurisdiction will also have to accommodate equity considerations, as well as inevitable effects on compliance and public perception. It is hoped that as developed nations create and refine their Carbon Regimes that the region will move to adapting them locally. Once implemented will hopefully prove to be an effective policy to mitigate Trinidad and Tobago's contribution to human factors of climate change.

[85] IICA (n 74).

[86] 'CO2 Emissions (Metric Tons per Capita)' (*World Bank Open Data*) <https://data.worldbank.org/indicator/EN.ATM.CO2E.PC?view=map > accessed 29 October 2023.

[87] Raphael J Heffron and Darren McCauley, 'What is the "Just Transition"?' (2018) 88 Geoforum 74.

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

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

Keywords*: right to healthy environment, constitutionalisation*

Takeaways from the Case

Socio-economic backdrop

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

Cue the respondents

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

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

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

("ExxonMobil") cannot shrug off its responsibility to bear clean-up costs for any oil spills as a result of its drilling off the coast of Guyana, and that by failing to provide liability insurance for clean-up costs, as well as for remediation and damage for any ensuing oil spills, the oil company was in breach of the conditions of the environmental permit[3] granted to it. Similarly, the Environmental Protection Agency, a named respondent in the case and the issuing authority of environmental permits and the statutory authority established under the Environment Protection Act[4] with responsibility to ensure, 'the management, conservation, protection and improvement of the environment'[5] as well as, 'the prevention or control of pollution'[6] has a concomitant obligation to ensure that these conditions are met. Being carried in the undercurrent is the statutory authority's obligation to uphold and execute its mandate ultimately with a view to promoting the right to a healthy environment.

Golden opportunity?

While the ruling of the High Court in *Collins and Whyte* shed light on the rights discourse only peripherally, it presents an optimal opportunity for the appellate bench which will soon see the matter argued before it, to frontally endorse and emphasise the promotion and protection of rights as a matter of 'grave importance of national significance'. As Guyana's apex court reiterated in one of its more recent judgments,[7] legislation should not be interpreted only with a view to achieving the objectives of the legislation but to achieve alignment with, 'fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions.'[8] For this reason, 'legislation must be interpreted so as to effectuate the protection it is intended to offer'.[9]

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

To what extent are state authorities obliged to protect the interests of the citizenry? Justice Kissoon in *Collins and Whyte* characterised the Environmental Protection Agency as 'derelict, pliant and submissive' on account of its failure to enforce compliance of the issued environmental permit. This does not bode well especially since the State, vicariously through its agencies, entities and authorities hold prime responsibility for respecting, promoting and protecting human rights.[11] This taken together with the devastating effects any future oil spills can have not only on Guyana but the wider Caribbean, as ExxonMobil's own environmental impact statement[12] disclosed- the ecology, the livelihood and overall life of

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

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

5 Ibid.

6 Ibid.

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

8 Ibid. [67]

9 Ibid [68].

10 Center for International Environmental Law, 'Guyanese Citizens File Climate Case Claiming Massive Offshore Oil Project is Unconstitutional' (*Centre for International Environmental Law Press Room,* 21 May 2021) < https://www.ciel.org/news/guyana-consitutional-court-case-oil-and-gas/> accessed 23 September 2023.

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

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

the people in the region- compellingly emphasise why a rights-based approach has ripened in Guyana. Providing formidable buttress are the Maastricht Principles on the Human Rights of Future Generations[13] which clarifies the developing law and affirms States' present obligations, namely, to all people, whether present or generations to come, and concomitantly, States' obligation to respect future generations, taking account of conduct which they 'ought reasonably to foresee, will create or contribute to, a substantial risk of violations of the human rights of future generations'.14 Independent of guiding principles, it can be argued that Guyana's constitutional provision on the environment in itself has enough substance to stand on its own and contains an endorsement of the principle of intergenerational equity insofar as it obliges the State to 'protect the environment, for the benefit of present and future generations…'[15]

Consequence of a preference for judicial review

It is notable that in utilising judicial review actions, as was employed in *Collins and Whyte* and in subsequent cases[16], there is the statutory requirement for the applicants to firstly establish *locus standi* to initiate the judicial review action, in accordance with the requirements of Guyana's Judicial Review Act.[17] The success of the applicants in *Collins and Whyte* as citizens of Guyana on a matter of public interest of environmental concern was similarly endorsed by a more recent judgment of the High Court[18]. Incidentally, the latter case also involved the same respondents. Engaging a rights approach, allows for the foregoing of the "standing threshold", allowing citizens to seek protection of their fundamental rights protected under the Constitution, the right to a healthy environment being no exception.

The Legal Landscape of the Right to a Healthy Environment

International Origins

Professor David Boyd[19], UN Special Rapporteur on Human Rights and the Environment enunciated that while the right to a healthy environment was never part of the international bill of rights[20] as embodied in International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the remarkable origin story of the right to a healthy environment, however, is that the right had formed part of the constitutions of over 150 countries[21] even before the adoption by the UN Human Rights Council's 2021 resolution[22] of 'the right to a clean, healthy and sustainable environment as a human right that

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

14 Ibid, [16].

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

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

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

18 *Radzick and Hughes* (n 17).

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

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

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

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

is important for the enjoyment of human rights'. The subsequent passage of a UN General Assembly resolution[23] recognising the right is an implicit endorsement of the centrality of the right to human existence. This signified the culmination of the right to a healthy environment since its initial appearance on the international forum in 1972. Notwithstanding, the Declaration of the United Nations Conference of the Human Environment[24] ("Stockholm Declaration") that 'man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being', this ambitious enunciation remained only aspirational in nature.

Constitutional amendment and its symbolism

Guyana is one of the countries which opted to constitutionalise the right to environment before international recognition of the same, and this was done as part and parcel of its 2003 constitutional amendments.[25] This milestone marked the metamorphosis of the rights its previous aspirational nature to its present justiciable manifestation. The right to a healthy environment is enunciated as one of the fundamental rights of individuals by virtue of article 149J of the Constitution.[26] Applying the rationale that it is not obligatory that states constitutionalise the right, such a move indicates a deliberate interest of the State in protecting this quintessential aspect of life- the environment – by elevating it to the status of fundamental right.[27] As Rodriguez-Garavito,[28] pioneer in human rights and climate change strategic litigation has illuminated, a critical ingredient of human rights and climate change litigation, which is similarly applicable to human rights and environment cases generally without issue, is the constitutional encapsulation of the requisite right. Pursuant to article 149J (1), 'Everyone has the rights to an environment that is not harmful to his or her health and well-being'.

Additionally, what is of critical note is that section (2) of article 149J of the Constitution of Guyana places a positive obligation on the State 'to protect the environment for the benefit of present and future generations, through reasonable legislative and other measures' to *inter alia,* prevent pollution and ecological degradation. What this means is that, in keeping with article 154A(1), such rights 'shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of government'. However, since the right has been accorded constitutional thrust, there has been a malaise to implement the right to a healthy environment. This is because, as Adam Chilton and Mila Versteeg[29] concede, constitutionalisation is not the ultimate resolve to a rights implementation deficit. In fact, notwithstanding the presence of a right in a state's

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

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

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

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

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

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

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

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

Corporate Accountability

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

Conclusion

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

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

31 UNDP (n 27), 10.

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

33 United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (HR/PUB/11/04, United Nations Human Rights Office of the High Commissioner 2011) < https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf > accessed 22 September 2023.

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

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

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Preserving Caribbean Legal Documents: The Importance of Preservation Management in the Alma Jordan Library's West Indiana Special Collection Division

Elliott Alan Nedd

Abstract: *The article emphasises the importance of preservation management (PM) for archival collections in Libraries, Archives, and Museums (LAMs), particularly the West Indiana and Special Collection Division (WISC) of the Alma Jordan Library (AJL) at the University of the West Indies (The UWI). The collection houses unique collections that offer valuable insights into constitutional law evolution in West Indian societies. Despite PM principles, challenges faced by agents of deterioration, such as fire, water, pollutants, temperature, and mould, pose threats. The study suggests prioritising, developing, and implementing a comprehensive preservation policy and PM program to ensure long-term sustainability and availability for research and education. The article highlights the importance of preservation awareness weeks (PAWs) in promoting preservation programs for LAMs institutions, to ensure the long-term preservation and availability of archival collections. These programs cover disaster planning, binding repair, conservation treatment, staff education, care, handling, housekeeping, environmental conditions, and digitisation. It emphasises the need for policies and plans to ensure efficient management and protection of cultural heritage items, contributing to LAM's goals. The article spotlights the importance of effective communication and collaboration among stakeholders, including donors, curators, conservators, and researchers, for successful preservation policies and plans. It recommends regular training and education programs to ensure everyone understands their roles in preserving cultural heritage items and complying with regulations. While the full scope of the WISC cannot be discussed in detail, the researcher seeks to highlight the uniqueness of some legal collections within the West Indian repository and underlines how PM are critical for the long-term sustainability and availability of these valuable materials for research and educational purposes.*

Keywords: *Preservation management, collection management, special collection, university library, West Indian history, primary sources, Libraries, Archives, and Museums (LAMs)*

Introduction

Libraries, Archives, and Museums (LAMs) are responsible for collecting, organising, and distributing various materials, although the specific items may vary, and professional practices may differ. Nevertheless, these institutions share a significant overlap in their functions. Both institutions and users can benefit by working together rather than operating independently.[1]

The West Indiana and Special Collection Division (WISC) of the Alma Jordan Library (AJL) at the University of the West Indies (UWI) provides unique primary sources of information to researchers on West Indian societies. Preserving these collections within the UWI is paramount as the collection holds a wealth of historical and cultural significance, further augmented by the inclusion of essential legal documents and records that are crucial for understanding and researching the evolution of constitutional development in the Caribbean.

1 'OCLC Research' < OCLC Research > accessed 19 June 2024.

To incorporate Special Collections into the teaching and learning process, the WISC Division has collaborated with faculty members at the St. Augustine campus to host small seminars where students can learn about primary sources and their utilisation in coursework. The preservation and management of these special collections are critical in ensuring their long-term sustainability and continued availability for research and educational purposes.[2]

Preservation Management (PM) encompasses the systematic and deliberate allocation of human and financial resources and the implementation of activities, to ensure the perpetual accessibility and durability of library materials in a manner that aligns with the objectives of a specific institution.[3] Despite the principles and practices of PM, challenges still exist in preserving and safeguarding valuable materials. Organisations must implement and continuously improve effective strategies to overcome these challenges. This requires prioritising the development and implementation of robust preservation programs and safeguarding measures. A typical preservation program comprises disaster planning, binding and book repair, conservation treatment, staff and user education and training, care and handling, housekeeping, monitoring environmental conditions, and digitisation. To ensure the durability of the collection and the achievement of LAM goals, policies and plans should be developed within each component to ensure the efficient management and protection of cultural heritage collections. All stakeholders, including staff of each department and clients who utilise the materials, are responsible for the preservation of the content and complying with policies, procedures and guidelines governing the activities. The way materials are treated will directly impact their functional longevity, making it crucial to strike a balance between protection and accessibility.

The Historical Significance of Collections within the West Indian Division

The WISC Division plays a significant role in archiving regional history and by extension aspires to serve as a repository of great significance for research on topics relating to the West Indies. Gathering, preserving, and making accessible items that originate in, are created by, or are about the West Indies and the West Indian diaspora are the organisation's main objectives.[4] The WISC Division supports both internal and external researchers from both home and abroad, including students, faculty, and staff at the UWI.

The Division consists of heritage collections and historical law collections, where english is the primary language of the collections, and its use is governed by specific guidelines. The WISC Division contains one hundred and sixty-four special collections, inclusive of papers of Prime Minister Dr. Eric Williams, Nobel Laureate, Derek Walcott, photographs, postcards, paintings, manuscripts, personal papers, archival material, newspapers, undergraduate final-year projects, and rare books. The Division's special collections are distinguished from the library's general holdings due to their rarity, uniqueness, physical form, content, depth of subject coverage, and other special significances. Therefore, special care is given in terms of housing, security, management, cataloguing, handling, consultation, preservation, and conservation. When personal papers are donated, they contribute to the preservation of cultural heritage and ensure that future generations have access to diverse primary sources for research. The institution creates a comprehensive

2 'Teaching with Special Collections' (The Alma Jordan Library) < https://libraries.sta.uwi.edu/ajl/index.php/caribbean-resources/60-teaching-with-special-collections > accessed 19 June 2024.

3 Dunstan Newman and Tereza A. Richards, 'Preservation Awareness Week: The Experience of the University of the West Indies Mona Library, Jamaica' (2015) 3 Caribbean Library Journal 49 < https://journals.sta.uwi.edu/clj/papers/vol3/04.Dunstan-Richards.pdf > accessed 19 June 2024.

4 'West Indiana and Special Collections' (The Alma Jordan Library) < https://libraries.sta.uwi.edu/ajl/index.php/caribbean-resources/west-indiana > accessed 27 September 2023.

collection for researchers and scholars interested in exploring the Caribbean region's history and culture.[5]

Conservation meets Preservation

Conservation and restoration are crucial techniques in the preservation of library and archival resources. Without these practices, valuable and irreplaceable materials would deteriorate over time, resulting in the loss of important historical and cultural information. Conservation involves slowing down the decay process and restoring items to a usable state, ensuring that they can be accessed and studied by future generations. Restoration, on the other hand, focuses on repairing degraded or damaged works, bringing them back to their original condition, and preserving their integrity.[6] When these techniques are combined, LAMs safeguard against information loss and ensure the longevity of entire collections.

To ensure the preservation of collections, it is essential to avoid overcrowded conditions, which can lead to increased pressure and stress on materials, causing them to become misshapen or damaged. Improper shelving can result in materials being stacked too tightly, leading to warping, or bending. Additionally, mishandling materials can cause tears, creases, or other physical damage. Using low-quality shelving can result in materials being exposed to harmful chemicals or unstable conditions. Similarly, using non-damaging bookends can help prevent materials from sliding or falling thereby reducing the risk of damage.[7] Sufficient ventilation and relative humidity are essential for preventing the growth of mould. Materials become susceptible to mould growth and becoming musty, both of which can be difficult to remove and can cause further degradation. The risk of moisture damage is increased when goods are stored against walls.

Mould Remediation

Mould prevention requires effective environmental management to prevent growth-promoting factors. Organic materials absorb more moisture, making them susceptible to mould formation in environments with high relative humidity (RH). Mould risk increases when RH exceeds 65%. Reduced moisture content and humidity can prolong mould growth. Anoxic conditions, temperatures below 10°C, and high humidity can kill mould. Chemical fungicides and fumigants are not recommended due to their low effectiveness, potential toxicity, and potential harm to collection objects, and they do not address the root causes of inadequate environmental management or structural flaws.[8] A monitoring plan is essential for preserving rare collections at WISC, where the focus should be placed on temperature, humidity, and other factors affecting deterioration. Investing in environmental monitors and data loggers is also crucial as outbreaks in collections can lead to irreversible damage if not properly addressed. Mould can deteriorate paper, books, and other materials, causing staining, discoloration, warping, and even structural damage. In addition, mould can release spores that can cause health problems for individuals exposed to them, such as allergies, respiratory issues, and even infections.[9] Therefore, it is crucial to recognise the risks associated with mould exposure and take appropriate precautions to ensure the safety of all involved.

The mould remediation project (2020) within the Science and Agriculture Division of the AJL utilised the High-Efficiency Particulate Air (HEPA) Sandwich Method. This method involves cleaning and treating contaminated

5 'Donate Your Collection' (The Alma Jordan Library) <https://libraries.sta.uwi.edu/ajl/index.php/caribbean-resources/45-how-to-donate-your-collection> accessed 27 September 2023.

6 Ibid.

7 Hui Chen and others, 'Roots of Mold Problems and Humidity Control Measures in Institutional Buildings with Pre-Existing Mold Condition' (Proceedings of the Fourteenth Symposium on Improving Building Systems in Hot and Humid Climates, Richardson Texas 2004) < https://oaktrust.library.tamu.edu/bitstream/handle/1969.1/4605/ESL-HH-04-05-07.pdf?sequence=4 > accessed 19 June 2024.

8 Robert E. Child, formerly Head of Conservation at the National Museum Wales.

9 ibid.

items using HEPA filters, which are capable of trapping tiny mould spores and preventing their spread. The volunteers carefully followed the established protocol, ensuring that all affected items were properly cleaned and treated. After completing the project, the team successfully sanitised 12,994 mould-infested items, effectively halting the spread of mould and preserving the collection. The WISC Division is also facing a major problem with mould in its dissertation collection. The division has been struggling to establish a remediation program for sanitising affected materials and shelving. To address this issue, discussions and plans are in process amongst the heads of the department and management. Similarly, Mona's Law Branch Library has taken steps to address mould issues by utilising the University's PAC Unit, which provides mould eradication services. These examples highlight the proactive measures other institutions took to combat mould growth and can serve as models for effective mould remediation strategies.

Preservation Shift of Special Holdings and University Archives

The 1970s saw a shift in preservation activities, including scientific research, method development, education, and preservation programs. The 1980s highlighted deterioration, changing perceptions, and promotion of professional associations like the International Federation of Library Association and Institutions (IFLA) Preservation and Conservation (PAC) programs. Previously, preservation was seen as routine, specialised lab-based rebinding, and restoration. Hence, research in the past focused on paper characteristics and decomposition.

There was a change in focus in the 1990s towards technology, learning opportunities, and preservation management. With the advent of digital technology came worries about digital preservation, including the possibility of data loss or corruption, the inability to grant access to digital objects, and the expensive expense of extracting or replacing data from out-of-date systems. However, it took some time for these issues to be understood before digital preservation management was considered essential for long-term access.[10]

The last decade of the 20th century saw the rapid development of digital technology, which led to these profound shifts. According to Gorman and Shep, digital technologies provide heritage organisations such as the WISC with important potential and support and promote preservation by giving them a potent new tool to complement the ones already in place.[11] Affordably priced technology, infrastructure, governance, teamwork, intellectual property protection, sufficient funding, and continuous sustainability training are all necessary for sustainable institutions.[12] Consequently, digital libraries have been established to improve the accessibility and preservation of data. The benefits of digitalisation include improved efficiency in accessing information, enhanced accuracy of research, and improved quality of digital preservation. Image enhancement services can further enhance the value of legacy document archives by improving the quality of scanned images. Online research is a more efficient method than traditional hard-copy research, as it slows down the deterioration of physical records over time. Additionally, digitalisation enables remote access to historical information and revolutionises the way researchers conduct their work.[13]

10 Maja Krtalić and Damir Hasenay, 'Exploring a Framework for Comprehensive and Successful Preservation Management in Libraries' (2012) 68 The Journal of Documentation, 353 < https://www.proquest.com/docview/1008637582?parentSessionId=JTKNMX0OQdSorSme4SnfDM38IUcNAJ0NuswDam3uNPo%3D&pq-origsite=primo&accountid=45039&sourcetype=Scholarly%20Journals > accessed 19 June 2024.

11 G. E Gorman and Sydney J,. Shep (eds) *Preservation Management for Libraries, Archives, and Museum* (Facet Publishing 2006).

12 Shamin Renwick, 'Caribbean Digital Library Initiatives in the Twenty-First Century: The Digital Library of the Caribbean' (2011) Alexandria, 22(1), 1 < https://doi.org/10.7227/ALX.22.1.2 > accessed 19 June 2024.

13 'Digitization of Historical Documents: The Planning & the Process', (*Revolution Data Systems*) , https://www.revolutiondatasystems.com/blog/digitization-of-historical-documents-the-planning-the-process#:~:text=The%20process%20of%20digitization%20of%20historical%20documents&text=The%20basic%20steps%20of%20this,Prepping%20documents%20for%20scanning > accessed 19 June 2024.

Special Holdings and University Archives require a full-time conservator to oversee the preservation of paper-based holdings, including legal judgments of supreme courts, law reports, legal reference manuscripts, and other important documents. Staff members are trained to handle these items with care and prevent damage from hazards such as light, dust, mould, temperature changes, and humidity. They also collaborate with digital preservation specialists to ensure the long-term preservation of these valuable collections. Protecting historical materials from environmental factors extends their longevity.[14]

Preservation Policy and Strategies Employed by AJL

A preservation policy serves as a means of safeguarding materials within libraries and archives, outlining the rationale behind the preservation efforts, the intended goals, and the duration of the preservation measures. This policy differs from a preservation strategy, which focuses on the management of tools and skills to prevent damage and decay. [15] The purpose of a policy is to define the institution's objectives and responsibility for the long-term preservation of its collections. The concept and practice of preventive care is a fundamental goal of this policy. This research revealed that the AJL does not currently have a physical preservation policy, however, efforts are underway to address this issue. Nevertheless, conservation efforts, reformatting, and digitisation have been practiced at various levels to preserve WISC materials. Digitisation works have been accomplished among WISC theses collection and media content. Practices have been in place to address the selection of materials, development of metadata, and standards and specifications for digitisation. However, there is room for improvement in the areas of handling, treatment, and storage. The bindery and conservation units play a crucial role in the preservation and collection of materials, by providing specialised repair and restoration services. The unit employs techniques such as bookbinding and paper mending to ensure the longevity of fragile items. Until 2011, before the advent of digitisation, the Main Library viewed microforms as an alternative to bulky expensive print materials. Consequently, staff were trained, and a unit was established to convert materials into microfilms. The Guardian Gazette is one such project now housed in the WISC Division. The AJL's official transition to digitisation capabilities occurred on September 23, 2008, with the inauguration of the Digital Library Services Center (DLSC). The establishment of the DLSC was made possible through a donation of TTD $100,000 generously provided by Mrs. Irma E. Goldstraw, former librarian at the UWI Campus Libraries at St. Augustine. The first to be digitally preserved was a collection of 100 photographs from the Michael Goldberg Collection, a 5,000-card collection from 1872 to 1995. Additionally, the historical recordings of the Caribbean Service on the British Broadcasting Corporation (BBC) are among its most notable achievements. [16] This achievement paves the way for future digitisation projects within the library.

Legal documents that are unique to the WISC repository

The Social Sciences Division of the AJL boasts an extensive collection of legal materials, including law reports, journals, statutes, reference materials, textbooks, and procedural materials. Additionally, the Division houses the South Campus catalogue, but the WISC Division is home to historical legal documents dating back to the colonial era. These materials provide valuable insights into the development of Caribbean legal systems and the impact of colonialism on legal principles. Researchers may utilise these primary sources to understand the evolution of laws and their enforcement, shedding light on the social and political dynamics of the region. The preservation of cultural heritage within the West Indian community through the collection of legal

14 Brandon Harris, 'The Evolution of Why Digitization of Historical Documents Is Important' (*Smooth Solutions) < the-evolution-of-why-digitization-of-historical-documents-is-important . accessed June 19 2024.*

15 G. E Gorman & Sydney J Shep (n 11) 19.

16 'UWI Main Library Launches the Digital Library Services Centre' (*University of the West Indies, St. Augustine Campus News,* 8 Octobwr 2008) < https://sta.uwi.edu/news/releases/release.asp?id=182 > accessed 19 June 2024.

materials is also of utmost importance, as these documents often contain information about traditional customs, indigenous practices, and local governance structures.[17]

The AJL Special Collections repository maintains a total of 164 collections. A search done on the Archives Space public interface using the search term 'West Indies law' yielded 47 records, which include various historical legal documents such as bills, deeds, government calendars, estates, collections, records, coup documents, and journals. Three law-related collections were physically examined and researched, and a brief history is listed to emphasise the importance of preserving and managing such unique resources due to their exceptional value and relevance to the study of law in the Caribbean region. These resources provide invaluable insights into the legal landscape of the West Indies region. It should be noted that these collections are presently in their original, bound, file, and documented formats from their inception. The first collection comprises bound volumes and is a comprehensive compilation of Caribbean law-related documents, including records, bills, deeds, and trading acts.

J.D. Sellier and Co. Records

J.D. Sellier and Co., established in 1882 by Jean-Baptiste Denis Sellier, is a law firm of great antiquity in Trinidad and Tobago. With a team of twenty attorneys-at-law, the firm offers a broad range of legal services, including real estate, corporate, intellectual property, litigation, mergers and acquisitions, admiralty and shipping law, tax law, banking and finance, and energy. A vast array of documents related to property transactions are also available in the collection, such as title documents, statutory declarations, cadastral sheets, and certificates for property owners. These are of utmost importance to individuals seeking to buy, sell, or lease property in the Caribbean. Furthermore, the collection also comprises specific documents related to Texaco employees, including reduced-rate loan facilities and leases for property rentals. The fonds consists of bound volumes related to land transactions in Trinidad and Tobago. The fonds includes Caroni Deeds (1965 - 1996), Texaco Deeds (1964 - 1996), Texaco Titles (1958 - 1987), Notes of Title (1843 - 1964), Deeds (1956 - 1975), Titles (1958 - 1986), Supreme Court Proceedings – Probate (1896 - 1934) and Probate Proceedings (1944 - 1969). Probate documents.[18]

Wooding/Fraser Papers

Sir Hugh Wooding, born in Trinidad and Tobago in 1904, was a prominent lawyer and politician. He was Trinidad and Tobago's first native-born Chief Justice in 1962 and later became the Chancellor of The UWI and Chairman of the Constitutional Reform Commission. The collection was in the possession of Professor Selwyn Ryan who was Sir Hugh Wooding's biographer. Professor Ryan donated it to The Main Library, The University of the West Indies, in 1992. The collection primarily consists of correspondence between two legal jurists (Sir Hugh Wooding & H. Aubrey Frazer) discussing legal and other issues, providing insight into their lives, as well as the social and political life in both societies.[19]

In 1997, the then-head of the WISC Division, Ms. Kathleen Helenese Paul, created a guide for this collection of papers titled "Among Legal Friends." The collection consists of 183 items spanning the period from 1891 to 1988 and includes letters exchanged between Wooding and Frazer, as well as various personalities in the community, in the form of memorabilia and newspaper clippings. The guide was introduced with a foreword by Professor Selwyn Ryan. The collection comprises letters that convey the discord between black civil servants and the colonial government during 1891-88. Furthermore, it includes original documents that highlight the level of racial tensions that existed in Guyana during the early 1960's. The transcript of tape interviews between H. Aubrey Frazer and Professor Selwyn Ryan provides

17 West Indiana and Special Collection (n 4).

18 Archives Space Public Interface (The Alma Jordan Library University of the West indies St. Augustine Campus) < ArchivesSpace Public Interface | ArchivesSpace Public Interface (uwi.edu) > accessed 20 June 2024.

19 Ibid.

extensive information on Wooding's work at the law court, his campaign for the establishment of a law school, and his profound impact as the Chief Justice. The works contained within this collection offer a unique perspective on the social and political climate of the sixties through their commentary on events as they unfolded. As such, they are of great value to legal scholars seeking to understand the texture of that era.[20]

Muslimeen Coup Documents 1990-94

The Jamaat-al-Muslimeen Coup attempt led by Abu Baku on July 27, 1990, sought to topple Trinidad and Tobago's government under the ruling party, National Alliance for Reconstruction (NAR). The documents on the Muslimeen Coup of 1990-94, which were donated by Mr. Ralston Nelson in 1999, comprise court records, affidavits, newspaper clippings, notes of evidence, inquiries, charges, merchant insurance compensation claims, transcripts of radio and television broadcasts, and a record of Privy Council hearings against the Jamaat-al-Muslimeen members. These materials cover a wide range of topics related to the coup attempt, including the details of those who lost their companies because of the failed coup, and the information on those who were involved in looting and destruction. This collection serves as a valuable resource for researchers and individuals interested in understanding the events leading up to the attempted coup and its aftermath.[21]

Preserving historical legal documents, such as the three collections mentioned in this paper, is of utmost importance for gaining a deeper understanding of the evolution of the law and society. These documents offer invaluable insights into the legal practices, customs, and beliefs of past generations and provide a unique perspective on the lives of ordinary people and their interactions with the law. Preservation of these documents allows researchers to delve into the past and uncover the roots of our current legal system. Furthermore, historical legal documents serve as reminders of the progress society has made in terms of justice and equality. This allows for the identification of areas that require attention and improvements. Furthermore, these documents demonstrate the importance of preserving and protecting the rule of law and highlight the consequences of a society without a fair and just legal system. In addition to their historical significance, these documents provide valuable resources for shaping future legislation.

Strategies Employed by LAMs in Promoting Preservation Management

Special Collections utilise digitisation, conservation, and secure storage strategies to safeguard collections. These processes include reducing physical handling through digitisation, preventing deterioration through conservation methods, and implementing strict security measures to protect valuable documents from theft or unauthorised handling. Although such measures may be costly for archival collections, it is essential to note that countries with limited resources and infrastructure have successfully implemented and sustained preservation efforts.

The Georgetown University Law Library (1986) implemented a condition survey of its collection. This was conducted to evaluate the condition of the books and to develop a preservation plan. The study found that 71% of the library's collection is in good condition, with 26% requiring repairs. However, many books require care due to dissolving paper, indicating intrinsic fragility. It was estimated that 25% of volumes are too fragile for everyday use, and 12% cannot be bound using standard techniques. Additionally, 3% cannot be restored due to large text portions. It was found that the implementation of PM practices at GU Law Library created preservation awareness and assisted library officials in determining the appropriate amount of funding to be allocated for the collection’s upkeep and the technical staff required to

20 Kathleen Helenese-Paul, *Among Legal Friends: A Guide to the Papers of the Late Honourable Sir Hugh Wooding and the Late H. Aubrey Fraser* (University Libraries, University of the West Indies 1997).

21 Archives Space Public Interface (n 18).

repair the damaged materials. The survey's findings revealed that a significant portion of the collection consists of valuable yet fragile early 19th-century law texts. This would require investments in climate-controlled storage facilities, professional conservators, and digitisation technologies to preserve these texts for future generations.[22]

Similar issues exist throughout the Caribbean, where LAMs have acknowledged the necessity of implementing fundamental preservation program components. In some developing nations, community-based initiatives have utilised low-cost technology, local expertise, and grassroots collaboration to overcome financial constraints and ensure the long-term viability of preservation programs. For example, The UWI Mona Library held its first Preservation Awareness Week (PAW) in April 2014, to promote the library's preservation program. The event targeted the Mona Campus community, such as library personnel, faculty, students, and the Excelsior Community College, for basic book repairs. As efforts progressed, the Mona Library presented its 2nd Preservation Awareness Week from April 11 to 15, 2016, under the theme, "Transition," highlighting various aspects of preservation management. In April 2018, the Mona Library held its third biennial PAW with a focus on promoting the longevity of all materials. The event's opening on day one was subtheme "Conservation meets Preservation". The participants took part in various presentations, demonstrations, and viewing of exhibitions. These implementations were part of the library's 2012-2017/2017-2022 Strategic Plan and received support from librarians. Additionally, plans are on the way for a preservation awareness symposium in October 2023 with the theme: "Mapping our Future in Uncertain Times." High on the agenda for discussion would be the creation of a regional preservation awareness association.

Crossroad Trends: Challenges of Preservation Management

A common challenge faced by archival collections such as the WISC is the limited funding available for PM activities. Without sufficient financial resources, it is difficult to implement effective strategies for long-term preservation of the collection. Additionally, the collection may lack specialised staff with expertise in preservation techniques, which could further hinder the preservation efforts. Also, the lack of proper storage facilities and environmental controls could pose a risk to the physical condition of the materials. Addressing these challenges and finding solutions is crucial for ensuring the sustainability and accessibility of the collection. [23]

Collaboration with other campuses and regional library associations is crucial for the successful implementation of preservation awareness and the development of preservation management programs. Working together, libraries can share resources, expertise, and best practices, leading to more effective preservation efforts. For example, collaborating with other campuses can allow for the pooling of human and financial resources, making it easier to organise and sustain PAW. Similarly, collaboration with regional library associations can provide access to a wider network of professionals and organisations, allowing for the exchange of ideas and knowledge on preservation strategies and methods.[24]

The National Gallery of Jamaica (NGJ) is a prime example of an organisation that has benefited from collaborative efforts in resolving financial and training difficulties. As the largest and oldest public art museum in the Anglophone Caribbean, NGJ has addressed concerns such as infrastructure, staffing, and training by forming partnerships with external organisations to generate revenue. This approach of combining resources, expertise, and abilities has proven effective in overcoming obstacles and achieving common goals.

22 Linda Nainis and Laura A. Bedard, 'Preservation Book Survey in an Academic Law Library' (1986) 78 Law Libray Journal 243, 258.

23 American Library Association Preservation Policy 2001.

24 'Preservation Training | Mona Library' (*Mona Library*) < www.mona.uwi.edu/library/preservation-training > accessed 10 October 2023.

Partnerships with consulates in Jamaica, the United States, and Spain have made grant funds and conservation training programs available. These collaborations have also received funding from institutions such as Yunan Provincial Archives, the Central Academy of Cultural Administration in Beijing, China, and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).[25]

Recommendations

The preservation of library and archival collections is a crucial aspect that institutions must fully comprehend. At the Alma Jordan Library (AJL) substantial investments have been made to ensure the proper storage and handling of its collections, such as the establishment of a compact storage facility on Carmody Road, St. Augustine. However, there is always room for improvement. To further enhance the preservation efforts, additional investments should be made in specialized climate control systems to maintain optimal temperature and humidity levels, as well as the purchase of archival-quality storage materials and strict handling protocols to minimize the risk of damage during retrieval and use. Moreover, it is recommended that a mandatory training program in preservation and conservation (PAC) be implemented for all levels of technical staff at the AJL. This training will equip staff members with the necessary knowledge and skills to handle library and archival materials properly, including understanding appropriate storage conditions, handling techniques, and conservation methods.

Proper training is imperative for conducting mould remediation procedures. Such training ensures that individuals involved in the project are familiar with the appropriate methods and protocols for handling and treating mould-infested items. This training covers identifying different types of moulds, employing proper cleaning techniques, and using personal protective equipment (PPE) to minimize the risk of exposure. By offering comprehensive training, institutions can guarantee that the remediation process will be executed effectively and securely, minimizing the risk of further harm to library collections, and safeguarding the health of the individuals involved. Undertaking in-house remediation projects, such as the one carried out by the Science and Agriculture Division of the AJL in 2020, can result in considerable cost savings for institutions. By utilizing volunteers and internal resources, management can avoid the expenses associated with hiring external contractors. These savings can then be directed toward other essential areas, such as additional training, acquiring improved storage conditions, or implementing preventive measures to reduce the likelihood of future mould outbreaks. By prioritizing in-house remediation projects, institutions can allocate their limited funding more efficiently and address multiple aspects of collection care and preservation.

The development of a preservation policy that aligns with a preservation management program, guided by preservation principles, would be an asset for the AJL. This would ensure that preservation efforts are guided by best practices and industry standards, resulting in more effective and efficient preservation strategies. By having a clearly defined preservation policy, the AJL can prioritize its preservation efforts, allocate resources effectively, and make informed decisions on conservation priorities. Additionally, the alignment with a preservation management program would provide a framework for ongoing assessment and improvement of preservation practices, ensuring that the AJL remains at the forefront of library and archival preservation. The establishment of a Conservation Laboratory (PAC) would further enhance the library's capabilities in preserving its collections. The PAC would serve as a dedicated space for specialized conservation treatments, such as paper repair, bookbinding, and digital preservation. Having a dedicated laboratory would allow the AJL to address specific preservation needs and perform more advanced conservation techniques that may not be feasible within the existing Bindery and Conservation Department. Additionally, the PAC could serve as a center for research

25 Ms. Shanice, Martin, Mona Library: Preservation Awareness Week October 26, 2023.

and collaboration, attracting conservation experts and institutions such as Mona and NALIS to share experiences and expertise.

Conclusion

Caribbean libraries play a crucial role in collecting and preserving resources that document the unique histories of the different populations in the region. In addition to this, they make these resources accessible to the public. The Mona Library in Jamaica is a regional pioneer in this field. Many libraries, such as the AJL at the St. Augustine Campus, have recognized their preservation responsibility and have been actively gathering original data and creating materials through oral history programs. The DLSC at the AJL has been instrumental in preserving and organizing the University's intellectual output. By digitizing and reformatting collections of paper, cassettes, theses, and recordings, the DLSC ensures that valuable resources are accessible and preserved for future generations. This not only assists campus research but also contributes to the wider academic community by making these resources available to scholars worldwide.

For LAMs to fulfill their mission of providing global access to pertinent information regarding the Caribbean, libraries and academic institutions are cooperating to share resources, expertise, and funding. This collaboration enables them to offer comprehensive knowledge of the region to a worldwide audience and to ensure a deeper understanding of its history. However, the high costs associated with digitization remain a significant obstacle, necessitating continued collaboration and the sharing of resources. It has been established that various techniques can be used to preserve archival collections while ensuring their physical integrity and making them accessible to future generations. The implementation of a preservation policy by the WISC Division that aligns with these strategies will ensure that the institution's collections are diverse and reflect the different cultures and histories of the region. Providing ongoing education and training for staff and visitors will foster a sense of responsibility and understanding towards cultural artifacts, ultimately leading to a greater appreciation and awareness of their preservation and significance in our shared heritage.

The importance of the American Library Association's (ALA) model was highlighted by the outcomes of Mona's PAW pilot project. In addition to protecting cultural heritage and guaranteeing dependable and useful access, the ALA preservation strategy seeks to advance education and guarantee information access. It is clear from the evaluation of PAW's preparation, execution, and launch that the initiatives were effective in achieving their main aims. The occasion also helped the library achieve its goal of becoming known as a national and regional leader in preservation. Not only did PAW get excellent reviews, but it also has the potential to become an annual event because of the strategic alliances it built both inside and outside the institution. Collaboration between other campuses and local library groups is essential to a preservation management program's development and effectiveness. To preserve the durability and integrity of its holdings, AJL's WISC needs an efficient PM policy. To guarantee that priceless library materials are safeguarded and maintained for use and education by future generations, preservation management is essential. Careful preparation is necessary for preservation, and this planning must be founded on the institution's mission statement as well as defined principles. A complete understanding of the collection, facility, and institution's activities is required to translate the mission statement and preservation policies into workable strategies. This may be accomplished through a comprehensive preservation assessment. This evaluation establishes a baseline for the current situation, allowing for the analysis of changes and the tracking of their effects over time. Frequent evaluations are also the cornerstone for creating long-term preservation and emergency strategies. Furthermore, this article emphasizes the significance of preserving rare law collections in the Caribbean. The preservation of collections at the WISC not only contributes to the preservation of the region's cultural heritage but also promotes a deeper understanding of the legal systems and traditions in the Caribbean. They are also intrinsically part of the local, national, and global documentary legacies.

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

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

Introduction/Salutations

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

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

A peaceful hike in the Amazon

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

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

1 Christopher Nolan, *Batman Begins* (Warner Brothers 2005).

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

Scars of history-The Dualism of the Law

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

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

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

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

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

Communal peace systems

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

2 Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021) 56.
3 ibid.
4 Don Robotham, '"The Notorious Riot": The Socio-Economic and Political Bases of Paul Bogle's Revolt' 1981 Institute of Social and Economic Research (The University of the West Indies, Mona, Jamaica) Working Paper 28, 67.
5 [1918] AC 557.
6 ibid.

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

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

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

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

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

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

7 See The Constitution of the Republic of Trinidad and Tobago, preamble.

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

Who are we?

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

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

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

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

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

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

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

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

10 UNHRC 'Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance' (2010) UN Doc A/HRC/15/21, [275].

> degenerates into squealing demands for me, me, me.[11]

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

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

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

It is in fact warfare imbedded within the genetic code of law. In Port of Spain, recently, a Claimant looks to me in exasperation "I'm sorry Sir Judge with all due respect, I will get no justice here unless that man, the Defendant, feels the full brunt of the law, he needs to be punished." Several injunctions, several applications for contempt later, the relationship between these parties are no better and the complaints to the police and to every level of our courts from the Magistrates Court to the Court of Appeal to enforce the law continues unabated…no justice here. In San Fernando, a Claimant seeking to preserve his right to possession to a parcel of land against the State files one witness statement, but has no corroborating evidence, no expert evidence. Despite the holes in his testimony shown up at the trial, no doubt crushed under the heel of brutish cross examination, he turns to the Court and whelps "But Sir, this is my mother's land and her father's land before her. It's been with us for years since indentureship. If I knew you wanted evidence, I would have brought the whole village today". In response, the claim is dismissed, a heritage gone unacknowledged, no justice here…In a society's quest for retribution a man is held in remand for years, victims subject to re-victimisation, no justice here….What I see before me that passes for justice are individual cries for dominance, quest for revenge, search for retribution and an insensitivity to the lived experience the real dimensions of the other.

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

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

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

The Search for Peace

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

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

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

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

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

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

> 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.[16]

Even though this report treats with peace through a macroeconomic lens, at its core are lessons for our legal systems that as an institution which sets the boundaries of acceptable human conduct, there is a need to focus on peace-making initiatives. The time to do so is now when the development of peace is at a critical low in our society.

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

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

> [. . .] finding solutions to these unprecedented challenges requires fundamentally new ways of thinking.
>
> Without peace, it will not be possible to achieve the levels of trust, cooperation or inclusiveness necessary to solve these challenges. Much less to empower international and local institutions responsible for addressing them. Therefore, peace is the essential prerequisite for the survival of humanity in the 21st century.

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

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

16 ibid.

17 Institute for Economics & Peace, *Global Peace Index 2023: Measuring Peace in a Complex World* (Institute for Economics & Peace 2023) chap 5 <http://visionofhumanity.org/reports> accessed 3 June 2024.

18 ibid.

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

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

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

Peace Jurisprudence

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

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

Therapeutic Jurisprudence

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

Therapeutic Jurisprudence emphasises notions of catharsis and empathy.

Restorative Justice

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

According to Umbreit:

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

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

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

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

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

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

Problem Solving Courts

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

Mediation and Judicial Settlement Conferencing ("JSC")

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

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

Collaborative Lawyering

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

> As a problem solver who is creative [. . .] [y]ou try to locate the best possible resolution for your client [. . .]. [Y]ou search for solutions that might benefit both sides and therefore might be acceptable for settlement. You develop a collaborative relationship with the other side and mediator [. . .]. [Y]ou advocate your client's interests instead of legal positions, listen attentively and proactively [. . .]. You avoid derailing the search [. . .]. Enduring solutions, whether inventive or not, are likely because both sides work together to fashion tailored solutions that each side fully understands, can live with, and knows how to implement.[24]

Peace Jurisprudence in action

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

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

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

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

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

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

26 [1964] AC 1129.

> taxpayer who play no part in the commission of the wrong which is being sought to correct. It is in short a question of public policy. To what extent retributive justice served by an award of exemplary damages should give way to distributive or restorative justice as an element of punishment. It is in fact an attempt to make such awards no longer anomalous but congruent to the concept of distributive theories of social justice and correctional theory.
>
> [. . .]
>
> 140. As a matter of policy, for a small society witnessing unprecedented levels of violence and crime, every effort must not be spared in ensuring that our prisons are not a breeding ground for further violent and aggressive behaviour. The violence that are bred within those walls quite easily spill out. The degree of institutional violence is a direct product of prison conditions and how the State operates its prisons. To prevent abuse "the use of force must be controlled through clear policies, meaningful and constant supervision of all use of force, timely and truthful reporting of all use of force, accurate and unbiased investigation into excessive use of force, consistent imposition of progressive and proportional discipline when excessive force is used", restorative justice programmes to restore balance in the relationship between inmates and prison officers and to deescalate levels of hostility.[27]

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.[28]

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

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

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

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.

27 CV 2016-00029 (High Court, Trinidad and Tobago).
28 ibid [14].
29 *Pan Trinbago Inc v The National Carnival Commission of Trinidad and Tobago* CV2017-00468 (High Court, Trinidad and Tobago).

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

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

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

In this peace jurisprudence construct, the law is a healing profession and you are endowed with an ethic of care. It is a picture of a different lawyer from the traditional view of what pertains in the Caribbean legal adversarial system. Your clients are not interested in litigation but on human solutions for human problems and we must rethink not only the adversarial model of dispute resolution but the role, function and purpose of the Caribbean attorney. Are we in a profession that destroys or heals? Should we not place a premium on the therapeutic effect of the law on human activity?

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

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

The Agenda- The Blueprint

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

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

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

31 ibid 69.

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

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

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

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

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

Let me sketch a blueprint as it were.

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

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

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

- Make ADR a mandatory component of the law school curriculum.
- Convert your advocacy courses into mediation advocacy and collaborative dialogue courses.
- Institutionalise peace jurisprudence as an approach to legal education. We have begun this experiment at the HWLS with a Peace Jurisprudence Clinic, a "healing hub" of the law school curriculum. In this hub, students will be exposed to the synergies of therapeutic jurisprudence, restorative justice, holistic lawyering, psychology, emotional dialogue exchange, relationship building. This will take the form of both lectures and practical workshops. The students will be presented with dynamic case scenarios which will train them to recognize and address the important issues of their disputes in connecting the underlying emotions of the parties. In developing a humanistic approach to their legal career, the students will learn to appreciate the importance of achieving peace within their clients and themselves so that they are able to make peace with the eventual outcome of their disputes. In this pursuit of a peaceful outcome, there is no victor and loser. There is only an amicable solution which is beneficial to all parties.
- Work with the Law Association of Trinidad and Tobago and the Judiciary in developing The Peace Project- A project designed to build awareness of dialogue and collaboration, to map our conflict and to design appropriate conflict design systems for national, international and regional disputes.
- Create Post sentencing and Post Judgment Clinics where you can assist those in need to understand and negotiate their future after decisions have been made impacting their lives.
- Use of technology and development of Online ADR skills.
- Declare your communities in which your law school operates as Zones of Peace and open dialogue with your community, listen to the voices of need and continuously engage in a recalibration to ensure that your courses, your curriculum, your approach aligns with human justice. Ensure that the needs of your unique communities can be fed back into your legal education.

Conclusion-what will you do?

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

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

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

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

What you do tomorrow will define you and us all.