



A Judicial Initiative on Human Trafficking...: The Critical Role of Judiciaries in Tackling a Global Problem

The Honourable Mr Justice Peter Jamadar,
Judge of the Caribbean Court of Justice

**CJJI CHRI Virtual Session to mark World Day Against Trafficking in
Persons**

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The Commonwealth Judicial Education Institute (CJJI) became an independent parallel official Commonwealth NGO in 1998. It is incorporated as a Charity under the laws of Nova Scotia, Canada. The work of the Institute is carried out throughout the world in cooperation with local and regional judges' and magistrates' associations and bodies.

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-profit, non-partisan, international non-governmental organisation working in the area of human rights. In 1987, several Commonwealth professional associations founded CHRI, since there was little focus on human rights within the association of 53 nations although the Commonwealth provided member countries the basis of shared common legal system.

Remarks

By

The Honourable Mr Justice Peter Jamadar, Judge of the Caribbean Court of Justice,

on the occasion of

The CJEI CHRI Virtual Session to mark World Day Against Trafficking in Persons

30 July 2021

A Judicial Education Initiative on Human Trafficking, Forced Labour, and other Contemporary Forms of Slavery: The Critical Role of Judiciaries in Tackling a Global Problem.

Background Paper (Presented), Justice Peter Jamadar:¹

Why is this issue important for judges?

Reviewing key jurisprudence and principles for adjudicative processes.

Caribbean-international perspectives.

Preamble²

Did you know ...

That the Commonwealth is made up of 54 member countries.

Did you know... you know...

1 in 150 persons in the Commonwealth is living in contemporary forms of slavery, such as forced labour, trafficking, or other exploitative conditions.

Did you know...

¹ Acknowledgements to Sneh Aurora and Laurissa Pena for research and editorial assistance, and to Elron Elahie and Shail Pooransingh for reviewing the drafts and offering their comments. Justice Peter Jamadar is a judge of the Caribbean Court of Justice.

² Data taken from, Eradicating Modern Slavery: An Assessment of Commonwealth governments' progress on achieving SDG Target 8.7. Copyright © 2020. Commonwealth Human Rights Initiative. If SDG Target 8.7 is to be achieved by 2030, the Commonwealth must take action to eradicate this most grievous of human rights abuses.

Only 24 Commonwealth countries have laws which recognise that victims of human trafficking or exploitation should not be prosecuted or punished for crimes they may have committed under coercion.

Did you know ...

Only 31 Commonwealth countries have criminalised commercial child sexual exploitation.

Did you know ...

An estimated 40% of the 40.3 million people living in modern slavery reside in Commonwealth countries. This represents about 15.7 million men, women, and children in forced labour, forced marriage, and human trafficking.

Did you know ...

1 in every 130 women and girls globally is currently trapped in modern slavery. An estimated 29 million women and girls are victims of modern slavery.³

Key Points

Judicial officers play a critical role in upholding and securing the rights of human trafficking victims, as well as in determining the guilt and punishment of perpetrators.

Trafficking in human beings, and issues of forced labour, sexual exploitation, and child exploitation, are multi-faceted inter-territorial crimes and events.

Adjudication of such cases requires an understanding of the complexities and unique dynamics between perpetrators and victims/survivors, the various forms, and nuances of exploitation to be taken into account, and the ever evolving domestic and international legal frameworks, evidentiary issues, and jurisprudential principles.

Judicial officers have a particular responsibility around this issue because they are often one of the primary powers when it comes to trial procedures, determinations of guilt, and sentencing; all of which are deeply intertwined in good practices for protecting victims/survivors of contemporary forms of slavery.

³ See, <https://www.walkfree.org/news/2020/global-campaign-turns-spotlight-on-women-and-girls-in-modern-slavery/>

Judicial officers have a key role in upholding human rights, ensuring fair and inclusive procedures, imposing proportionate penalties for perpetrators, recognising the non-punishment principle for victims/survivors, and shielding individuals from revictimization during the trial process and in relation to outcomes.

Introduction

I was born in Trinidad, an early Spanish and then British Caribbean colony. I have lived and worked in the Caribbean for most of my life. These lands are the ancestral lands of mainly two Amerindian First Peoples, the Arawakans and Caribans, and archaeological research has yielded human artefacts and presence dating to 5000 BCE⁴. I acknowledge these First Peoples and their lands. And affirm, with remorse, that they were also among some of the first victims of post-Columbian slavery and exploitation.

The Atlantic slave trade began in the mid-1660s. It involved the forced taking, transportation, and exploitation of human labour. In 1807 the British Government declared the African Trans-Atlantic slave trade illegal. Legal Emancipation of enslaved Africans in the British West Indian colonies occurred in 1834.⁵ Due to consequential acute labour shortages on the plantations, legally emancipated Africans became sources of indentured labour (contract-bound labour, usually enforceable by criminal sanction), and from 1837 mainly Indian and Chinese indentured persons also became the main source of cheap and forced human labour in Caribbean colonial territories. Indeed, British Indian Indentureship continued until the 1920s.⁶

These Caribbean events were neither limited to British colonies, nor to the Caribbean. The perverse ideologies that supported these inhumane practices, included a) legal systems operating under capitalist driven rule by law, b) immoral and systemic (institutionalised) patriarchal, racist, and classist cultures, and c) systemic othering, objectification, and commodification of human beings. Unsurprisingly, exploitation, misuse, abuse, and disregard were considered both rationally justifiable and ‘morally’ acceptable – permissible and permitted under the law.

⁴ The discovery of ‘Banwari Man’, at Banwari Trace, in South Trinidad.

⁵ Officially on the 1st August 1834.

⁶ It was abolished on the 1st January 1920.

In Caribbean spaces, these historical practices of overt ‘chattel’ slavery, human trafficking, and forced labour are woven into the fabric, cultures, and psyches of regional peoples. The trauma, injustice, and inhumanity of these experiences – and their consequences, persist.⁷

Indeed, today, as we meet in recognition of **World Day Against Trafficking in Persons**, these very practices, morphed to suit modern perversions, are globally rampant, and increasingly so.⁸

Contemporary Example of a Modern Form of Slavery

In October 2006, a young woman (MM) was brought into the UK from an African country and entered a contract of employment. Between 2006 and 2010 she was made to work long hours (almost 24 hours a day), under-fed, hardly paid, not allowed to leave her hosts premises on her own, had little contact with her family in Africa, and any conversations she had were listened to and even recorded. Sounds fanciful?

The matter reached the courts. The Court of Appeal⁹ had to interpret section 4 (1) of the UK Asylum and Immigration Act 2004, which made it an offence, among other things, to arrange or facilitate the entry into the United Kingdom of an individual with the intention to exploit that individual in the United Kingdom.

The Court of Appeal had this to say (at paragraphs 39, 41 and 42):

The essence of the concept of ‘slavery’ is treating someone as belonging to oneself, by exercising some power over that person as one might over an animal or an object...

⁷ Forced sexual exploitation, commercial sexual exploitation of children, and the exploitation of migrant and undocumented workers remain major concerns in the Americas region, including for Commonwealth countries. The Caribbean, with open unsecured borders and economies heavily reliant on tourism, represents opportunities for undocumented migrants seeking employment as well as a destination for sex tourism, including the commercial sexual exploitation of children. Child sex tourism in the Caribbean results in the exploitation of numerous children each year. Data taken from, Eradicating Modern Slavery: An Assessment of Commonwealth governments’ progress on achieving SDG Target 8.7. Copyright © 2020.

⁸ Did you know... 1 in 150 persons in the Commonwealth is living in contemporary forms of slavery, such as forced labour, trafficking, or other exploitative conditions. Did you know... Only 24 Commonwealth countries have laws which recognise that victims of human trafficking or exploitation should not be prosecuted or punished for crimes they may have committed under coercion. Did you know ... An estimated 40% of the 40.3 million people living in modern slavery reside in Commonwealth countries. This represents about 15.7 million men, women, and children in forced labour, forced marriage, and human trafficking. Did you know ... Only 31 Commonwealth countries have criminalised commercial child sexual exploitation. Did you know ... 1 in every 130 women and girls globally is currently trapped in modern slavery. An estimated 29 million women and girls are victims of modern slavery. Data taken from, Eradicating Modern Slavery: An Assessment of Commonwealth governments’ progress on achieving SDG Target 8.7. Copyright © 2020. Commonwealth Human Rights Initiative; and from, <https://www.walkfree.org/news/2020/global-campaign-turns-spotlight-on-women-and-girls-in-modern-slavery/>

⁹ *R. v SK* [2011] 2 Cr. App. R. 34. The conviction was quashed as the trial judge focused too much on the economics of the relationship and failed to apply the proper test that set out the core elements of section 4.1 (slavery, servitude of forced or compulsory labour).

Nor should the concepts be seen as archaic. To dismiss ‘slavery’ as being merely reminiscent of an era remote from contemporary life in the United Kingdom is wrong. In the modern world exploitation can and does take place, in many different forms. Perhaps the most obvious is that in which one human being is treated by another as an object under his or her control for a sexual purpose...

Where ‘forced or compulsory labour’ is concerned ... It can be direct; it can also be indirect. Constraint can be mental or physical. It can be imposed by force of circumstances.

Academic Insight

Professor Christopher McCrudden (*Professor of Human Rights and Equality Law, Queen’s University Belfast*), makes this important observation:¹⁰

The modern (legal) view of slavery takes the idea of legal ownership and views it as wrong because of the deeper meaning that it has: that it reduces humans to mere objects, and is thus fundamentally inconsistent with their humanity. History plays an important role in persuading the courts to come to that conclusion. But recent human rights courts (and the Court of Appeal) get it right, I think, in focusing on the essential wrong, rather than on the legal form in which that wrongness was encapsulated, however much that may have been the focus of attention of the abolitionists.

It’s 2021, what can we do?

In 2021, 214 years from the cessation of the Trans-Atlantic slave trade, contemporary forms of modern-day slavery are prevalent and thriving, both in former colonies and globally.

We all need to be concerned!

Judicial officers are not excepted. Indeed, they have pivotal roles to play in the mitigation, amelioration, and eradication of these modern forms of slavery, forced labour, and human trafficking. They are after all, one of the primary powers when it comes to trial procedures, determinations of guilt, and sentencing; all of which are deeply intertwined in good practices for protecting victims of contemporary forms of slavery.

¹⁰ In, Slavery and the Constitutional Role of Judges, UK Constitutional Law Association, Nov. 2, 2011.

Article 1 of the 1926 Slavery Convention, defined slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’ Its terms were shaped by context, and thus by prevailing historical circumstances.¹¹ The language is contractual - ‘right of ownership’, informed by the dominant form of chattel slavery, and shaped by existing ideologies.

Viewed through modern constitutional lenses and in post-colonial contexts, a critical interrogation of this almost 100-year-old colonial era treaty may reveal the true potential of the roles and capacities of judicial officers in relation to contemporary forms of slavery. A potential un-shackled by both history and ‘tabulated legalisms.’¹²

What in truth is ‘slavery’ in our times? What are the values and principles that should inform a contemporary reimagining of these heinous practices, and the normative legal standards that should adjudicate its occurrences?

A Rights Centric, Rule of Law Approach

In Caribbean jurisdictions, written constitutions are normative in the post-colonial era. This is true for most, if not all, independent Commonwealth States. Typically, these Caribbean constitutions contain three seminal provisions: sovereignty, supremacy, and human rights clauses. Significantly, these constitutions create a regime of constitutional supremacy (compared to parliamentary sovereignty, which prevails in the UK). As well, and often in preambular constitutive intent-creating clauses, these constitutions declare that certain core values and principles govern the interpretation and application of all laws and executive actions; that is to say, they are supreme (the supremacy principle).¹³

These values-principles include the inherent dignity and freedom of all persons, fundamental equality, and the rule of law. The first two have their roots in Article 1 of the 1948 Universal Declaration of Human Rights. They are of indisputable centrality to democratic life and governance, and as well to international cooperation and comity. The third, as a feature of liberal

¹¹ Its long title describes it as the: Convention to Suppress the Slave Trade and Slavery. It was an international treaty created under the auspices of the League of Nations. It was first signed on the 25th of September 1926 and came into effect on the 9th March, 1927.

¹² *Marin v The Queen* [2021] C CJ 6 (AJ) [31- 33]; *McEwan and others v The Attorney General of Guyana* [2018] C CJ 30 (AJ)

¹³ Section 1 Constitution of Barbados; Section 2 Constitution of Trinidad and Tobago; Section 8 Constitution of the Co-operative Republic of Guyana; Section 2 Constitution of Belize.

democratic ideology, recognises the distinction between ‘rule by law’ and rule of law; and the inclusion of human rights as integral to the rule of law.¹⁴ In a democracy where the constitution is supreme, the Judiciary, as an arm of the State, is also obliged to align its functions and evaluative decision making with these principles.¹⁵

The combined effect of the supremacy principle, taken in a rule of law context, is that all laws and governmental actions must be rule of law compliant. As well, that the approaches of courts to adjudication should prioritize this approach (the paramountcy principle). For our purposes, this means that the inherent dignity and worth, the freedom, and the unequivocal equality of all persons are constitutionally presumed inviolable (subject of course to lawful exceptions). These values must be protected as well as secured. They are therefore always, constitutionally, relevant considerations in adjudication.

The jurisprudential implications for contemporary forms of slavery may already be evident. Courts and judicial officers are obliged to orient themselves around these values – both procedurally and substantively. This is what a rights-centric, rule of law approach to our work requires of us.

Judges and judicial officers are the guardians of constitutional values. This is a fourth seminal principle of Caribbean and Commonwealth constitutionalism. It arises in part out of the universal principle of the independence of the Judiciary, but more fundamentally from the basic deep structure and principles of constitutive constitutional underpinnings.¹⁶ The effect is that, in broad and general terms, judges and judicial officers have a duty and responsibility to ensure that

¹⁴Lord Bingham, 'The Rule of Law' [(2007)] 66(1) Cambridge LJ 67-85 [77] “The rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental”; *Marin v The Queen* [2021] CCI 6 (AJ) Constitutions are rights centric and therefore to uphold the rule of law human rights must be accounted for. At paragraph [98] the Court stated “*Further, such an analysis reveals constitutionally how section 6 (2) (protection of law provisions) is nestled in section 3 (a) (bill of rights provisions), and both within the rule of law, and within the basic deep structure values of the Constitution, like interlocking holons.*”

¹⁵ *Belize International Services Ltd v The Attorney General of Belize* [2020] CCI 9 (AJ) [301]. The Court stated: “*To this extent they, (features, principles and values that underpin the Constitution) together, form the essential foundation, framework, and superstructure of Belizean constitutionalism. They are discoverable. And, until changed legitimately, they are non-negotiable. Moreover, they form and inform the standards and lenses through which, generally, all governmental, legislative, executive, and public administrative actions are to be judged and held accountable.*” See also, Jamadar JCCJ, *Explorations into the Rule of Law, Crossing the Rubicon: The Development of the Rule of Law as a Ground of Review of Legislative and Executive Action*, CAJO News, Issue 12, p 69, at www.thecajo.org

¹⁶ *Nervais and Severin v The Queen* [2018] CCI 19 (AJ) at [59] - “*With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law, and that the judiciary is independent.*”. See also, *Collymore v Attorney-General of Trinidad and Tobago* (1967) 12 WIR 5, at p. 9. Wooding C.J. reiterated that Caribbean courts were the guardians of the constitution and of constitutional supremacy.

constitutional values are upheld, and that judicial, legislative, and executive actions are aligned with these values.

Judges are therefore under a constitutional imperative to act. Sitting on our hands, or turning a blind eye, or even getting too bogged down in ‘legalisms’, may simply not be options in the context of contemporary forms of slavery when viewed through the principles of constitutional supremacy and human rights paramountcy.

Indeed, a salient and unavoidable question that arises for judicial officers, is how does one achieve the constitutional imperative of substantive equality – equity (as compared to formal equality) throughout court proceedings and in outcomes, for victims/survivors of human trafficking, forced slavery, and contemporary forms of slavery?¹⁷

Practical Implications

Considering this and drawing on the writings and analysis of others,¹⁸ there are nine judicial approaches that can be of assistance:

1. Situational Awareness;
2. Intersectionality;
3. Use of the Non-Punishment Principle;
4. Procedural Fairness;
5. Avoiding Secondary Victimization;
6. Alignment with International Law and Practice;
7. Post-colonial approaches to the interpretation and development of law;
8. Mindful Judging; and
9. Judicial humility, compassion, and concern.

¹⁷ The 2020 Code of Judicial Conduct of the Caribbean Court of Justice defines equality as, ‘the right of every individual to an equal opportunity to make the most of their lives, talents, and ambitions, and not to be unfairly disadvantaged or discriminated against in relation thereto. It recognises that rights, entitlements, opportunities, and access are not equally enjoyed across society and is aimed towards equitably redressing these inequalities so as to affirm the equal and inherent dignity and value of all persons.’

¹⁸Brewer, M, OSCE International Conference, The Critical Role of the Judiciary in Combating Trafficking in Human Beings. (2019) <<https://www.gardencourtchambers.co.uk/news/what-role-do-judges-have-in-the-fight-against-human-trafficking-michelle-brewer-delivers-key-note-at-osce-international-conference>> accessed July 27, 2021.

In pragmatic terms, to adopt the expression of Michelle Brewer in her November 2019 keynote address on *The Critical Role of the Judiciary in Combating Trafficking in Human Beings*, judicial officers may reimagine their roles under these heads.

Situational Awareness and Intersectionality

This speaks to the recognition, understanding, and awareness that a matter may present itself as a straightforward case, when in reality it involves intersecting and other influencing considerations. The nature of human trafficking, how and why humans are trafficked and who is trafficked (currently there is an overwhelming and disproportionate number of women and children)¹⁹, is constantly changing; contemporary forms of slavery are shifting, changing forms, yet fundamentally the same. Judicial officers who operate in a closed-minded way, within the four-corners of a case, can miss the existence and impact of contemporary forms of slavery in those cases.

The case of *R v L*²⁰, a 2013 decision of the UK Court of Appeal, exemplifies the value of this approach. The Defendant was prosecuted and convicted for the cultivation of cannabis on a cannabis farm. The Court of Appeal recognizing that the Defendant was a child victim/survivor of human trafficking, quashed the conviction.

Indeed, the *Anti-Trafficking Training Material for Judges and Prosecutors Handbook*²¹, recommends that Judges must be sensitive enough to be able to identify a potential victim/survivor of human trafficking. Those victims/survivors are sometimes unaware of their possible victim status as exploitation and abuse may be normative. Those victims/survivors may also be fearful of state authorities. Perpetrators often use a victim's/ survivor's immigration status; their economic and other discriminating and debilitating conditions, a) to create fear in the victims/survivors; and b) to manipulate and control them.

Non-Punishment Principle²²

¹⁹ Walk Free Report, *Stacked Odds*, 2020, at <https://www.walkfree.org>.

²⁰ [2014] 1 All ER 113.

²¹ International Centre for Migration Policy Development, *Anti-Trafficking Training Material for Judges and Prosecutors Handbook* (International Centre for Migration Policy Development 2006).

²² See, *Implementation of the non-punishment principle*, UN General Assembly, Human Rights Council, 47th Session, 21st June -9th July 2021. From the Summary - 'The principle of non-punishment constitutes the cornerstone of an effective protection of the rights of victims of trafficking.' At [18] - 'The principle of non-punishment of victims of trafficking is critical to the recognition of trafficking in persons as a serious human rights

R v L²³ is also instructive in its articulation of the non-punishment principle. In the words of the Chief Justice:

What, however, is clearly established, ..., is that when there is evidence that victims of trafficking have been involved in criminal activities, the investigation, and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity. The reasoning is not always spelled out, and perhaps we should do so now. The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.

What emerges is a holistic approach, that considers the wider context and life situations of an accused. And as well, one that includes the investigative and prosecutorial arms of the State. All done with a curious adjudicative sensitivity to and an awareness of whether an accused is a victim of human trafficking, forced labour, and/or any contemporary forms of slavery.

Care needs to be taken to ensure that a right balance is struck between convicting criminals and shielding individuals from revictimization during both the trial process and outcomes. The public interest is served by both of these policy approaches. The non-punishment principle is in service of a ‘both-and’ approach (rather than an ‘either-or’ approach). It is aligned with a rule of law ideology that gives paramountcy to human rights.

Procedural Fairness

It is well established that ensuring procedural fairness throughout court proceedings enhances just outcomes and increases public trust and confidence in the administration of justice. Indigenous research in the Caribbean has confirmed this and has articulated nine essential elements of procedural fairness.²⁴ Two central elements of procedural fairness in Caribbean spaces are: voice

violation. Punishment of a victim marks a rupture with the commitments made by States to recognize the priority of victims’ rights to assistance, protection and effective remedies. At its core, the non-punishment principle is aimed at ensuring that a victim of trafficking is not punished for unlawful acts committed as a consequence of trafficking.’

²³Ibid (n 16) [13]

²⁴ Peter Jamadar and Elron Elahie, *Proceeding Fairly Report on The Extent To Which Elements Of Procedural Fairness Exist In The Court Systems Of The Judiciary Of The Republic Of Trinidad And Tobago* (Judicial Education Institute of Trinidad and Tobago 2018). Nine elements of procedural fairness were articulated. These are: voice, understanding, respectful treatment, neutrality, trustworthy authorities, accountability, availability

and inclusivity. That is, ensuring that court users have a voice, can actively participate in, and are meaningfully included throughout proceedings. These approaches lend themselves to facilitating the effective participation of accused persons, who may also be victims of human trafficking, forced labour, and forms of contemporary slavery. Vital, and otherwise unknown or unknowable, information can be discovered. Situational awareness in turn allows a judicial officer to be sensitive to the intersectionality and effects of contemporary forms of slavery in any case.

Michelle Brewer makes the point that having in mind certain factors – called ‘clusters’, are a useful tool in understanding the intersecting vulnerability of a victim who is before the court. Procedural fairness approaches are facilitative of these. These factors are:

1. Individual vulnerability
2. Familial vulnerability
3. Socio-economic vulnerability
4. Structural vulnerability
5. Situational vulnerability

For example, imagine a child victim/survivor who is living with a mental illness, with little formal education, from a fragmented family, and impoverished circumstances, who is transported and coerced to live as a sex-worker, under the charge of persons who exercise power and control over them, in a foreign country, and who is not a native language speaker. Charged with say, prostitution.

By facilitating voice and inclusivity, including receiving victim impact statements,²⁵ judicial officers can better discover and adjudicate appropriately cases of human trafficking. Through such fact and context sensitive approaches, cluster information can be obtained, and then considered at all stages of proceedings – from charge to sentence, in criminal proceedings.

of amenities, access to information, and inclusivity. See also the decision of the Court of Appeal of Trinidad and Tobago, *Ayers-Caesar v BS*, Civ App No 252 of 2015 (TT), [37].

²⁵ *Linton Pompey v The Director of Public Prosecutors* [2020] CCJ 7 [112, 117-125]. At [120] the Court stated: “It gives a victim a voice, and in so doing gives recognition to the inherent dignity and value of a victim’s personhood, and as well, to a victim’s role (albeit limited) in determining what may be an appropriate sentence. Thus, a victim participates throughout a criminal matter, at the trial with respect to the determination of innocence or guilt, and then if required, at the sentencing stage in relation to what a judge may, in the independent exercise of their judicial discretion, determine to be a proper sentence.”

These approaches are appropriate in all court proceedings, including civil and employment cases. Indeed, they are relevant because contemporary forms of slavery manifest in all domains.

Avoiding Secondary Victimization

Building upon the above, particularly on procedural fairness requirements that include understanding, respectful treatment, availability of amenities, and access to information, judicial officers must be careful to avoid secondary victimization caused by court proceedings in relation to victims/survivors of modern-day slavery.

According to the Anti-Trafficking Training Material for Judges and Prosecutors Handbook,²⁶ Judges should put all measures in place to eliminate security risks to the victim and manage the victim’s psychological trauma and stress. Judges should treat the victim with compassion, fairness, respect, and dignity and encourage and arrange special support for the victim.

Examples given of such measures include:

- a. Explaining the nature of the proceedings to victims in understandable terms;
- b. Arranging for victims to be under the care of an established NGO;
- c. Allowing victims to be accompanied to Court by a person they trust;
- d. Ensuring access to translation services;
- e. Ensuring access to competent experts to deal with trauma; and
- f. Putting mechanisms in place to prevent intimidation and confrontation with a perpetrator, such as allowing victim testimony via video link.

Judges should also closely monitor the types of interrogation and cross examination questions allowed to be put to the victim/survivor and the length of cross examination. Great care must be taken, so that questions concerning “private and sexual life, the victim’s consent to prosecution or trafficking, and questions merely aimed at discrediting the witness”²⁷ are not casually allowed.

²⁶ *ibid* (n 17)

²⁷ *Ibid* (n17) [5.1]

Alignments with International Law and Practice

Judicial officers also need to situate themselves (whether in dualist or monist traditions) in the context of their roles in a global community. Having a sense of local, regional, and international realities is vitally important. This is necessary because modern slavery is a multi-faceted cross-border global phenomenon.

In the Caribbean, courts are approaching the interpretation and application of law to ensure, as far as is reasonable, that their approaches are aligned with State international treaty obligations.²⁸ Judicial officers are therefore required to be aware of these treaties and how the content of their State's obligations may impact proceedings before them.²⁹ It is an area often neglected, especially in jurisdictions where dualist positions to international law prevail (if treaties are not incorporated into domestic law, they are ineffective and non-justiciable). Modern jurisprudential trends are towards alignment. This approach is even more pressing in cases of contemporary forms of slavery, because of the multi-faceted and inter-territorial, even inter-continental, nature of the phenomenon.

Post-colonial Approaches to the Interpretation and Development of Law

One important consideration for judicial officers is what research and interpretative methodologies are apt in this context.³⁰ Article 1 of the 1926 Slavery Convention, defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' How should Article 1 be interrogated in 2021.

²⁸ The Maya Leaders Alliance and others v The Attorney General of Belize [2015] CCJ 15 (AJ); The Attorney General of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ); McEwan and others v The Attorney General of Guyana [2018] CCJ 30 (AJ)

²⁹ Article 5 of the Palermo Protocol, a supplement to the UN Convention against Transnational Organized Crime (2000) requires States to criminalize human trafficking, attempted trafficking, and any other international participation or organization in a trafficking scheme. The International Labour Organization (ILO) Forced Labour Convention (Convention No. 29 of 1930) defines forced or compulsory labour.

The ILO Abolition of Forced Labour Convention (Convention No.105 of 1957) requires States to take effective measures to abolish forced or compulsory labour. The Slavery Convention (1926) defines slavery. The UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) requires States to punish any person who "procures, entices, or leads away, for purposes of prostitution, another person, even with the consent of that person", "exploits the prostitution of another person, even with the consent of that person" (Article 1), or runs a brothel or rents accommodations for prostitution purposes (Article 2). It also prescribes procedures for combating international traffic for the purpose of prostitution, including extradition of offenders. The International Covenant on Civil and Political Rights (1966) prohibits practices directly related to trafficking. The Convention of the Elimination of All Forms of Discrimination against Women (1979) requires States to suppress all forms of trafficking in women. The Convention on the Rights of the Child (1989) prohibits the trafficking of children. The Optional Protocol to the Convention on the Sale of Children, Child Prostitution, and Child Pornography (2002) provides States with detailed requirements to end sexual exploitation and abuse of children. ILO, Worst Forms of Child Labour Convention (Convention No. 182 of 1999) which commits States to taking immediate measure to prohibit and eliminate the worst forms of Child Labour.

³⁰ Marin v The Queen [2021] CCJ 6 (AJ)

In a foundational judgment delivered in June 2021, the Caribbean Court of Justice³¹ in *Marin v The Queen*,³² outlined its approaches to constitutional interpretation. One of a cluster of ‘ideological approaches’ is the use of interpretations that ‘are consciously independently developmental’.³³ In this regard, the court explained this approach as follows:³⁴

Applying a consciously anti-colonial interrogative approach to analysis is part of this developmental approach. It is an approach that considers a law’s colonial antecedents and purposes and asks whether in light of these it is still constitutionally vires and legitimate.

Framed in a positive way, it is an approach that encompasses an independent (and postcolonial) developmental ideology and hermeneutic to Caribbean constitutionalism. One that recognizes that law and legal structures are historically contingent.

What is apparent is that colonial understandings of slavery and legal principles developed in relation to it in those times need to be carefully and rigorously scrutinized. The reason being its obvious historical settings and underpinnings.

Contemporary judicial officers need to be acutely aware of these precedential limitations. And to be independent and creative enough to ensure the development and use of appropriate procedural and substantive approaches to cases in which elements of modern slavery are present. The non-punishment principle is one such development. No doubt others will be developed on a case-by-case basis and in response to rights centric approaches in this area of the law.

Mindful Judging

Mindful judging requires judicial officers to adopt a 360-degree internal and external view of court proceedings and court relationships. This approach places an enhanced and specific focus on not only the substance of a case, but also on behaviours, the environment, and communications in the court room (and courthouse). Mindful judging offers judicial officers an opportunity to understand how victims/survivors may be impacted by judicial proceedings.

³¹ The indigenous Apex Court for the Caribbean region that functions as both a municipal court of last resort and an international court vested with original, compulsory and exclusive jurisdiction in respect of the interpretation and application of the Revised Treaty of Chaguaramas.

³² *Ibid* (n25)

³³ *Ibid* (n25) [32]

³⁴ *Ibid* (n25) [32, fn. 39]

In Caribbean spaces, for example, judicial officers are required to become aware of whether there are factors which may influence ‘rites of domination’³⁵, and more generally whether there are incidences of power and control and of manipulation at play, that operate to intimidate, silence, and re-victimise. For victims/survivors who have notably endured trauma (which can be both immediate and long-term), the judicial environment can reinforce unequal power relations that negatively impact on the victim/survivor’s safety and comfort, impact their levels of trust, and their capacity to meaningfully participate in proceedings. Mindful judging thus gives rise to enhanced degrees of courtroom consciousness that may otherwise be overlooked on account of familiarity.

In more concrete terms, this kind of judicial mindfulness may be described as:

‘... the ability to be fully present to what is happening at every moment in relation to all relevant considerations in the context of court proceedings ..., with an attitude of openness and receptivity (non-judgementally), and with the intention to deal with each case fairly, effectively, and according to the evidence, the law, and the Constitution (purposively).’³⁶

Judicial Humility, Compassion, and Concern³⁷

Victims/survivors of human trafficking have already suffered trauma, exploitation, dehumanization. They enter court systems disadvantaged. Their core human rights to dignity, respect, and equality have already been compromised. Achieving substantive equality for them may necessitate appropriate differential treatment.

In this context, judicial humility is a necessity. It is an antidote to the hubris that judicial officers can be prone to develop following appointment; otherwise known as judicial arrogance, it creates a limiting and closed-minded approach to matters and court-users. Judicial humility begins when judicial officers give up their need to be right, be in control, have power over, and the

³⁵ Mindie Lazarus-Black, *The Rites of Domination: Practice, Process, and Structure in Lower Courts*, *American Ethnologist*, Vol. 24, No. 3 (Aug., 1997), pp. 628-651.

³⁶ Peter Jamadar and Kamla Braithwaite, *Exploring the Role of the CPR Judge*, pp 62-63 (Judicial Education Institute of Trinidad and Tobago 2017).

³⁷ Peter Jamadar and Kamla Braithwaite, *Exploring the Role of the CPR Judge*, pp 63-64 (Judicial Education Institute of Trinidad and Tobago 2017). ‘**Judicial Humility** is premised on the insight that, whereas we often assume that we see things as they are, we actually ‘see’ things as they appear to us. This insight, about the inherent subjective element in all perception, is equally true in relation to interpretation.’ ‘**Judicial Compassion** is a rational, jurisprudential, cultural, and societal sensitivity for the well-being of both people and the law as they intersect in the context of (court proceedings).’

predisposition to be judgmental (including their identification with these mindsets as part of their judicial personas).

Judicial humility leads to genuine attitudes of openness and receptivity. And consequently, to judicial compassion and concern. Indeed, these three judicial attitudes may be exactly what victims/survivors of contemporary forms of slavery are both entitled to and need.

Some Preliminary Conclusions

In 2008, in *Koraou v Niger*³⁸ the ECOWAS Community Court of Justice (of the Economic Community of West African States), held that Hadijatou Koraou was a victim of slavery for the nine years she was held by her master, and that the state of Niger was liable for its failure to deal adequately with this form of slavery, awarding her about US\$ 20,000. Niger had denied that Ms Koraou was a slave, asserting that she had 'lived in a more or less happy marital relationship' with her 'master'.

What were the core facts? In 1996, aged 12, Ms Koraou was sold for a sum of money in the context of wahiya,³⁹ a practice obtaining in the Republic of Niger, which consists of acquiring a young girl, generally under the conditions of servitude, for her to serve both as domestic servant and concubine. The person to whom she was sold, an older male, was known as her 'master'.⁴⁰

For about nine years, Ms Koraou served in the house of her 'master', carrying out all sorts of domestic duties and serving as a concubine for him. She had to endure forced sex and was a victim of repeated acts of violence.⁴¹ In 2005 Ms Koraou was issued a certificate of emancipation, but her 'master' refused to allow her to leave. In 2006 Ms Koraou commenced court proceedings seeking her freedom.

In rejecting the State's argument, the ECOWAS Community Court explained:

Even with the provision of square meals, adequate clothing and comfortable shelter, a slave still remains a slave if he is illegally deprived of his freedom through force or

³⁸ (2008) AHRLR 182 (ECOWAS, 2008); ECW/CCJ/APP/0808.

³⁹ See, *Wahaya: Domestic and Sexual Slavery in Niger*, A Report by Galy Kadir Abdelkader and Moussa Zangaou; <https://www.antislavery.org/wp-content/uploads/2018/10/Wahaya-report.pdf>

⁴⁰ *Ibid* (n30) [8] and [9].

⁴¹ *Ibid* (n30) [11] and [12]

constraint. All evidence of ill treatment may be erased, hunger may be forgotten, as well as beatings and other acts of cruelty, but the acknowledged fact about slavery remains, that is to say, forced labour without compensation. There is nothing like goodwill slavery. Even when tempered with humane treatment, involuntary servitude is still slavery.⁴²

And further:

... the moral element in reducing a person to slavery resides ... in the intention ... to exercise the attributes of the right of ownership over the applicant, even so, after the document of emancipation had been made. Consequently, there is no doubt that (Ms Koraou) was held in slavery ...⁴³

Notice the tensions between the 1926 colonial concept of ‘rights of ownership’ and the more open and modern ideas of a) ‘forced labour’ and b) ‘involuntary servitude’ as definitive of contemporary forms of slavery. As well, notice the greater focus on intent, and less on form – ‘the moral element in reducing a person to slavery resides ... in the intention ...’ of the person exercising the power and control over another. And finally, notice the unequivocal disownment of ‘humane treatment’ as mitigatory or exculpatory in this area.

A full-blown rights centric approach that seeks to recognise and empower human dignity, freedom, equality, and respect may invite the jurisprudential consideration of consent as fundamental. Democracy is built upon consensus; it is birthed in the consent of the governed. The fundamental nature of slavery is the antithesis of consent; it lies in coercion. Indeed, within ideas of ‘ownership’, ‘forced’, ‘involuntary’ in relation to notions of slavery, is an absence of full and true consent, and a presence of coercion. However, dignity, freedom, equality, and respect are enabled in a context of consent.

Such a rights centric approach may also invite a more robust interpretation and application of the constitutional principle and value of equality, understood as substantive equality. The effect of which would be to ensure that the standards of treatment, deference, and facility afforded to victims/survivors of modern slavery meet both the procedural and substantive thresholds set by

⁴² Ibid (n30) [79]

⁴³ Ibid (n30) [80]

this principle. A generous and purposive application of the principle of equality can bear much fruit in this area.

Final Thoughts: A Call to Action.

There is much to think about. And there is much to be done. And we, as judicial officers, are the ones called upon to think and to do.

We have the tools. Are we up to the task?

For thousands of innocent and vulnerable lives, for hundreds of communities and families, we are their only hope.

Now is the time to act!

