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# The Constitutional Limits of Anti-Trafficking Norms in the Commonwealth Caribbean

*Dr Jason Haynes*

## Abstract

Trafficking in persons is a crime and a human rights violation that affects most states across the globe, including those in the Commonwealth Caribbean. Therefore, in the last twenty years, governments have rushed to enact anti-trafficking laws with a level of alacrity the international community has never seen before. While the enactment of these laws is both necessary and desirable, some have pushed the limits of what is constitutionally permissible in a free and democratic society. This article demonstrates that some of the prosecution provisions of anti-trafficking norms enacted by Caribbean governments have encroached or threaten to encroach upon the constitutional rights of accused persons. It concludes that unconstitutional provisions of regional anti-trafficking laws need to be addressed by regional governments as a matter of urgency, as they can potentially be challenged by traffickers with the result being that, if successfully challenged, traffickers may escape liability for crimes they have committed on mere technicalities.

**Keywords:** traffickers, rule of law, separation of powers, constitutionality, fair trial, Caribbean

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## Introduction

Trafficking in persons is a criminal activity which thrives in situations of poverty, social and political instability, corruption, disenfranchisement, and discrimination with far-reaching implications for both individuals and

societies.<sup>1</sup> Its effects are felt in all countries across the globe, including those in the Commonwealth Caribbean.<sup>2</sup> Whether operating alone or as part of an enterprise, traffickers typically capitalise upon individual and societal vulnerabilities to recruit, transport, threaten, or coerce people into situations of exploitation.<sup>3</sup> In the Commonwealth Caribbean, these persons are principally subject to sexual exploitation, forced labour, and servitude.<sup>4</sup>

In response to external pressures arising from the threat of sanction via the United States *Trafficking in Persons* reports,<sup>5</sup> Caribbean governments enacted *sui generis* anti-trafficking legislation<sup>6</sup> that prohibits trafficking in persons. Kempadoo argues that ‘the Trafficking in Persons (TIP) report (...) has the most direct influence on the region because it has more “teeth” than the UN Protocol.’<sup>7</sup> Likewise, in Adair’s view,

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<sup>1</sup> A P Mano, ‘An Innovative Approach to Sex Trafficking Research: The methodological advancement of Attride-Stirling’s thematic network analysis’, *International Annals of Criminology*, vol. 55, issue 1, 2017, pp. 40–59, <https://doi.org/10.1017/cri.2017.4>.

<sup>2</sup> M John, ‘A Critical Approach to Understanding Human Trafficking in the Caribbean’, *The International Journal of Human Rights*, vol. 24, issue 10, 2020, pp. 1666–1680, <https://doi.org/10.1080/13642987.2020.1762577>.

<sup>3</sup> J Haynes, *Caribbean Anti-Trafficking Law and Practice*, Bloomsbury Publishing, London, 2019, chapter 6; see also: K Cruz, J O’Connell Davidson, and J Sanchez Taylor, ‘Tourism and Sexual Violence and Exploitation in Jamaica: Contesting the “trafficking and modern slavery” frame’, *Journal of the British Academy*, vol. 7, issue s1, 2019, pp. 191–216, <https://doi.org/10.5871/jba/007s1.191>.

<sup>4</sup> K Kempadoo, ‘The War on Human Trafficking in the Caribbean’, *Race & Class*, vol. 49, issue 2, 2007, pp. 79–85, <https://doi.org/10.1177/03063968070490020602>.

<sup>5</sup> K Adair, ‘Human Trafficking Legislation in the Commonwealth Caribbean: Effective or effected’, in DS Berry and T Robinson (eds.), *Transitions in Caribbean Law: Lawmaking constitutionalism and the confluence of national and international law*, Caribbean Law Publishing, Kingston, 2013.

<sup>6</sup> Antigua and Barbuda *Trafficking in Persons (Prevention) Act* 2010 (Act 12/2010); Bahamas *Trafficking in Persons (Prevention and Suppression) Act* 2008; Barbados *Trafficking in Persons Prevention Act* 2016; Belize *Trafficking in Persons (Prohibition) Act* 2013; Dominica *Transnational Organized Crime (Prevention and Control) Act* 2013; Grenada *Prevention of Trafficking in Persons Act* 2014; Guyana *Combating of Trafficking in Persons Act* 2005 (Act 2/2005); Jamaica *Trafficking in Persons (Prevention, Suppression and Punishment) Act* 2007; St Kitts and Nevis *Trafficking in Persons (Prevention) Act* 2008 (Act/32 2008); St Lucia *Counter-Trafficking Act* 2010 (Act 7/2010); St Vincent and the Grenadines *Prevention of Trafficking in Persons Act* 2011; Trinidad and Tobago *Trafficking in Persons Act* 2011 (Act 14/2011).

<sup>7</sup> Kempadoo.

The exercise of US hegemony, through its blacklisting and sanctioning process under the United States TVPA [Victims of Trafficking and Violence Protection Act] 2000, is the single most powerful stimulant in effecting the introduction of statutory regimes against human trafficking in the region. To satisfy the US' minimum requirements, the Acts transplanted the Palermo Protocol and the Convention Against Transnational Crime. There was no meaningful assessment of the phenomenon in the Caribbean, an essential pre-requisite for good law making. Further, the interaction between the domestic legislative process and international standards in these countries resulted in statutes that are not tailored for the Caribbean region. Rather, they embody carbon copies of the international standards, with their peculiarities and deficiencies.<sup>8</sup>

These pieces of domestic legislation now criminalise trafficking in persons along the internationally prescribed definition consisting of the 'acts', 'means', and 'purpose'; stipulate stringent penalties; and prescribe a range of other measures aimed at confiscating the proceeds of the crime, and forfeiting the instrumentalities used in the commission of the offense. Recent legislation has also introduced judge-only trafficking trials, and even gone as far as prescribing the use of witness anonymity orders and related special measures in trafficking in persons cases. Amidst the ambience of self-congratulation, widespread international praise, and public appreciation of these measures, there has been very little said about the extent to which some of the prosecution provisions of regional anti-trafficking laws are compatible with the constitutional rights of accused persons. Drawing on a comparative analysis of Commonwealth Caribbean anti-trafficking legislation, which I completed for the monograph *Caribbean Anti-Trafficking Law and Practice* (Bloomsbury Publishing) in 2019,<sup>9</sup> in this paper, I argue that, as a result of the region's rushed implementation of provisions on prosecutions, the constitutional rights of accused persons have been or are likely to be encroached upon. I conclude that several of the prosecution provisions are incompatible with not only the implied constitutional norms of supremacy of the constitution, separation of powers, and the rule of law, but also the fair trial rights of accused persons.

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<sup>8</sup> Haynes, chapter 6.

<sup>9</sup> *Ibid.* Chapter 2 of the monograph outlines the methodology used for selecting the relevant laws and cases analysed in this paper.

## Background and Context

The twelve independent Commonwealth Caribbean countries with which this article is concerned<sup>10</sup> have legal systems that are, in general, based on the English Legal System. Guyana and St Lucia represent slightly nuanced legal traditions in that, in the case of the former, there is a strong Roman–Dutch legal heritage that complements its common law tradition, while, in the case of the latter, remnants of the French civil law legal tradition operate alongside the common law. However, the legal nuances in Guyana and St Lucia are largely inconsequential given that anti-trafficking legislation in both countries closely aligns with the English legislative tradition.

As constitutional democracies, Commonwealth Caribbean countries adhere to the supremacy of the constitution (as opposed to parliamentary supremacy) and the doctrine of separation of powers. With respect to human trafficking, this means that the responsibility for devising and enforcing policy lies with the executive and the mandate to enact legislation with the legislature, while the judiciary, as an independent arm of the state, is charged with the responsibility of applying anti-trafficking law to individual cases. Because the respective territories and islands also adhere to the rule of law, anti-trafficking laws must necessarily be free from vagueness and uncertainty, and comply with myriad constitutional norms, including the right to a fair trial.

The Judicial Committee of the Privy Council (JCPC) is the highest appellate Court for the majority of the independent Commonwealth Caribbean countries, with the exception of Barbados, Belize, Dominica, and Guyana, whose final appellate court is the Caribbean Court of Justice (CCJ), with headquarters in Trinidad and Tobago. In most cases, however, the majority of trafficking cases, unless appealed, will either be adjudicated upon in the magistrate’s court, which is at the lowest end of the hierarchy of courts, or, more commonly, in the High Court, which is positioned just below the Court of Appeal.

Each of the independent Commonwealth Caribbean jurisdictions has a written constitution which contains a supremacy clause,<sup>11</sup> as well as a Bill of Rights section which, generally, begins with a preamble that speaks to due process of the law or protection of the law. While a number of older cases from the JCPC

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<sup>10</sup> Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Trinidad and Tobago.

<sup>11</sup> For example, section 1 of Barbados’ constitution: ‘This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.’

suggested that the preamble is merely aspirational and therefore not intended to confer justiciable rights,<sup>12</sup> the CCJ, in a landmark judgment rendered recently, *Nervais and Severin v The Queen*,<sup>13</sup> arrived at the conclusion that protection of the law, a phrase mentioned in the preamble of Barbados' constitution, is indeed justiciable. The court eschewed a narrow interpretation of this provision. Relying on the dicta of Wit JCCJ in *A-G v Joseph and Boyce*,<sup>14</sup> the court considered that 'the right to protection of law requires therefore not only law of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. It also requires the availability of effective remedies.'<sup>15</sup>

The court in *Nervais* further noted that the protection of the law or due process is an inherent part of the concept of the rule of law, and that therefore,

no person, not even the Queen or her Governor-General, is above the law. [The rule of law] further imbues the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and the arbitrary exercise of power. It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive 'due process of law' and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect.<sup>16</sup>

In short, then, according to the CCJ in *Nervais*, 'protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.'<sup>17</sup>

Apart from the rule of law, another important principle of Commonwealth Caribbean constitutionalism, which, as discussed below, may be infringed by some of the prosecution provisions of anti-trafficking laws, is the doctrine of separation of powers, which, according to the CCJ, envisages a separation between the

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<sup>12</sup> See, generally: T Robinson, A Bulkan and A Saunders, *Fundamentals of Caribbean Constitutional Law*, Sweet & Maxwell, 2015.

<sup>13</sup> [2018] CCJ 19 (AJ).

<sup>14</sup> [2006] CCJ 3 (AJ).

<sup>15</sup> *Nervais* (n 6) [44].

<sup>16</sup> *Ibid.*, [20].

<sup>17</sup> *Ibid.*, [45].

legislative, judicial, and executive branches of government.<sup>18</sup> Furthermore, apart from the rule of law and separation of powers, some of the prosecution provisions of regional anti-trafficking laws encroach or have the potential to encroach upon a number of expressly enumerated rights of accused persons, namely:

- Protection of right to life;
- Protection of right to personal liberty;
- Protection from inhuman treatment;
- Protection from deprivation of property;
- Protection against arbitrary search or entry;
- Protection of law; and
- Protection of freedom of movement.

While these rights are not absolute, any limitations imposed in respect of the exercise of these rights must be reasonably required or demonstrably justified in a free and democratic society. Courts will subject the measures pursued by said law to the test of whether they serve a legitimate aim; are rationally connected to the aim they seek to achieve; are proportionate; and strike a fair balance between the rights of the accused in question and the countervailing interests of the state.<sup>19</sup> The test of proportionality is assessed by reference to what is necessary and least restrictive in the circumstances.

## The Constitutionality of Anti-Trafficking Laws

A review of Caribbean anti-trafficking legislation does not reveal reversals of burden of proof, the imposition of the death penalty, high thresholds for obtaining bail, presumption of guilt rather than innocence, nor infringements of the right to practice one's profession or occupation. However, as I detail later, some pieces of regional anti-trafficking legislation include imprisonment for remainder of a perpetrator's life and hefty fines.

In what follows, I interrogate the ways in which some of the prosecution provisions of regional anti-trafficking laws encroach or threaten to encroach upon the prescribed fair trial rights of accused persons.

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<sup>18</sup> The CCJ, in *BCB Holdings Limited and The Belize Bank Limited v The Attorney General of Belize* [2013] CCJ 5 (AJ).

<sup>19</sup> *Benjamin v Minister of Information and Broadcasting* [2001] 1 WLR1040.

*Anti-Trafficking Offenses and the Rule of Law*

The obligation to criminalise trafficking in persons is expressly provided for in a number of international instruments, including the UN Trafficking Protocol,<sup>20</sup> the American Convention on Human Rights,<sup>21</sup> the Convention on the Rights of the Child,<sup>22</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>23</sup> In this context, as intimated above, several Commonwealth Caribbean states have enacted specific legislation aimed at criminalising human trafficking and related practices.

The domestic anti-trafficking legislation in the Commonwealth Caribbean is largely compliant with international law insofar as the definition of human trafficking is concerned. The respective countries' TIP legislation prohibits the *acts* of recruitment, transportation, transfer, harbouring, or receipt of persons where they are engaged in by *means* of threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power, the abuse of a position of vulnerability, or the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the *purpose* of exploitation.

Although 'exploitation' is not exhaustively defined in most regional jurisdictions, there are some, such as Belize,<sup>24</sup> The Bahamas,<sup>25</sup> and Guyana,<sup>26</sup> whose legislation uses exhaustive language to define 'exploitation'. The use of the phrase 'exploitation means' instead of 'exploitation includes' in these three countries effectively means that although traditional forms of exploitation, such as slavery and practices similar to slavery, forced labour, servitude, sexual exploitation, or exploitation of the prostitution of others, and the illicit removal of organs are accounted for, uncertainty arises as to whether their legislation is meant to cover the evolving dynamics of human trafficking, including the trafficking of persons for exploitation in criminal activities, such as the cultivation and production of cannabis, the trafficking for the purpose of obtaining welfare

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<sup>20</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime* (Trafficking Protocol), 15 November 2000, Art. 5(1).

<sup>21</sup> *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, Art. 6.

<sup>22</sup> *UN Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Art. 6.

<sup>23</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Art. 6.

<sup>24</sup> s 2 Belize TIP Act.

<sup>25</sup> s 2 Bahamas TIP Act.

<sup>26</sup> s 2(e) Guyana TIP Act.



benefits, and trafficking of children for the purposes of adoption,<sup>27</sup> among others. Notwithstanding this, however, it appears that the legislation in countries like Antigua and Barbuda, and Trinidad and Tobago, expressly contemplate ‘any illegality activity’<sup>28</sup> and the ‘transport of illegal items’,<sup>29</sup> respectively. Trinidad and Tobago’s anti-trafficking legislation also contains a nuanced form of exploitation, namely trafficking for ‘ritual purposes’, which is defined in section 3 of the TIP Act to mean the use of a victim or the victim’s body parts or blood for the conduct of spiritual, religious, or occult practices or such other ceremonies and rituals.

There have been no judicial challenges in the region on the narrow question of whether the criminalisation provisions contained in the respective pieces of legislation are unconstitutional. In other jurisdictions like Canada, the argument has been raised, albeit unsuccessfully, that, in attempting to criminalise human trafficking, the legislature had enacted vague and over-broad provisions that lack the necessary quality of legal certainty, thereby contravening the rule of law. In the Ontario Supreme Court case of *R v D’Souza*,<sup>30</sup> the defendant contended that because the Criminal Code of Canada did not define certain terminology used in respect of human trafficking, it should be struck down for being unconstitutional. The Court, however, adopted a pragmatic approach, finding that:

It is not at all unusual for a criminal offence to include terminology that is not defined by the legislators. We rely upon the courts, with input from litigators and counsel, in an adversarial process, to interpret the meaning of certain words and to decide whether a given accused’s conduct falls within the scope of the offence in question.<sup>31</sup>

The Court then addressed the question of whether the terms used in the impugned legislation, which are similar to those used in Commonwealth Caribbean anti-trafficking legislation, were unduly complicated such that they were uncertain. To this question, the Court’s response was that:

The words used have common, ordinary meanings that are generally well known to the citizenry. In the simplest language possible, ‘recruit’ means to enlist or get someone involved.

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<sup>27</sup> Note that this is covered by s 12 of the Belize TIP Act.

<sup>28</sup> s 2 Antigua and Barbuda TIP Act.

<sup>29</sup> s 2 Trinidad and Tobago TIP Act.

<sup>30</sup> *R v D’Souza* 2016 ONSC 2749.

<sup>31</sup> *Ibid.*, [141].

‘Transport’ means to take from A to B. ‘Transfer’ means to hand over. ‘Receive’ means to take or accept. ‘Hold’ means to keep or maintain. ‘Conceal’ means to hide or keep secret. ‘Harbour’ means to shelter. To exercise ‘control, direction or influence over’ means to affect. To ‘facilitate’ something means to make it easier. ‘Benefit’ means an advantage or gain.<sup>32</sup>

Aside from confirming that, once the essential elements of human trafficking are ascertainable in advance, there can be no argument that the principles of fundamental justice are compromised,<sup>33</sup> the Court also found, quite instructively, that ‘it is relevant but not necessary that the complainant felt exploited or that s/he was, in fact, exploited’.<sup>34</sup> In short, once there is sufficient evidence that goes to establishing the ‘acts’ and ‘means’ element, proof only of an attendant intention to engage in exploitation is required.

While, on the facts of *R v D’Souza*, the court did not find that a constitutional breach was established by the claimant, the court’s dicta on the rule of law and its relation to anti-trafficking laws is instructive. The court noted that if anti-trafficking laws are impermissibly vague, they will effectively ‘mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted or punished for an act or omission that is not clearly prohibited by a valid law.’<sup>35</sup> It accepted that it is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time they commit the act; that is, ‘the essential elements of the crime must be ascertainable in advance.’<sup>36</sup>

Although extant Commonwealth Caribbean anti-trafficking laws do not appear to encroach upon the requirements of the rule of law, since they clearly stipulate what conduct will constitute trafficking in persons, the *R v D’Souza* case reminds us that if and when regional legislators are seeking to amend or enact new anti-trafficking laws in future, they must ensure that the constitutional requirements of certainty, predictability, and clarity are fully complied with. It will also be interesting to see how Caribbean courts treat controversial aspects of the ‘means’ element, namely ‘abuse of a position of vulnerability’. Notably, this issue did not

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<sup>32</sup> *Ibid.*, [146].

<sup>33</sup> *Ibid.*, [34].

<sup>34</sup> *Ibid.*, [130]; see also s 19(a) Antigua and Barbuda TIP Act; s 14(a)–(b) Grenada TIP Act; s 12(a)–(b) Turks and Caicos TIP Ordinance.

<sup>35</sup> *R v D’Souza* (n 25) [35].

<sup>36</sup> *Ibid.*

arise in *R v D'Souza*, but arose in the Dutch Supreme Court case of *LJN*.<sup>37</sup> In that case, six Chinese irregular migrants, desperate for work and afraid of being discovered by authorities, approached a Chinese restaurant owner. They were provided accommodation and work that paid well below the statutory minimum wage. The District Court initially ruled that the claimants' situation did not constitute an 'abuse of a position of vulnerability' because this term implies that the perpetrator takes the initiative, whereas, on the facts, it was the victims who had taken the initiative by begging the restaurant manager for a job. The Court of Appeal upheld this decision, noting that 'abuse of a vulnerable position' requires a certain initiative and positive action on the part of the perpetrator, thereby resulting in weaker or vulnerable position of the victims being consciously abused. The case was appealed to the Supreme Court, which took the view that it was not necessary for the perpetrator to take initiative. It also disagreed with the lower court that the perpetrator must 'intentionally abuse' the vulnerable position of the victims. The Supreme Court held that 'conditional intent' is sufficient; that is, it is enough that the perpetrator was aware of the state of affairs that must be assumed to give rise to power or a vulnerable position.<sup>38</sup>

Moreover, it will certainly be interesting to see whether Caribbean courts adopt a broad interpretation of 'exploitation' since regional legislation uses the phrase, 'exploitation includes, at a minimum ...', or a narrow approach such as in the recent English decision of *The Queen on the application of Y v Secretary of State for the Home Department*,<sup>39</sup> a case in which the Court refused to regard kidnapping as a form of exploitation.

#### *Mode of Trial, Sentencing, and the Supremacy of the Constitution*

In general, the anti-trafficking legislation of the respective independent Commonwealth Caribbean jurisdictions imposes sentences in respect of persons who have been convicted of trafficking-related offenses that are robust, ranging from five years' imprisonment in the case of St Lucia to life imprisonment in the case of Barbados. Although, in some cases, these sentences are augmented by, or can be substituted for, fines, in general, the sanctions are not only consistent with the penalties imposed for similar offences in countries like the United Kingdom, but also appear to be commensurate with the seriousness of trafficking-related

<sup>37</sup> Supreme Court, 27 October 2009, LJN: B17099408.

<sup>38</sup> A T Gallagher and M McAdam, *Abuse of a Position of Vulnerability and Other Means' Within the Definition of Trafficking in Persons*, Issue Paper, United Nations Office on Drugs and Crime, Vienna, 2013, p. 34.

<sup>39</sup> [2021] EWHC 2155.

offences.<sup>40</sup> Indeed, in an Antiguan High Court case, *Cheryl Thompson v The Attorney General of Antigua and Barbuda*,<sup>41</sup> the Court rejected the argument made by a Jamaican businesswoman, who was charged with the trafficking of women for sexual exploitation in her nightclub, that the penalty provisions in Antigua and Barbuda's TIP Act were in breach of the rule of law in that they were 'arbitrary, intimidatory or unreasonable'. Instead, the Court held that:

[T]he penalties set out in these sections are expressed in terms of the maximum sentence, the trial Judge would have the discretion to tailor the sentence to meet the justice of each case. The provisions provide penalties designed to deter those who may be inclined to commit such offenses.<sup>42</sup>

While the robust nature of existing penalties prescribed for trafficking-related offences does not appear to offend the rule of law, the fact that hefty penalties may be imposed by magistrates, as opposed to High Court judges, in some Caribbean jurisdictions seemingly offends the principle of constitutional supremacy. In this connection, in the Antigua Eastern Caribbean Supreme Court case of *Cheryl Thompson*,<sup>43</sup> the question arose as to the constitutionality of various provisions of Antigua and Barbuda's TIP Act, which purported to confer summary jurisdiction to magistrates to impose sentences of up to 25 years on persons convicted of trafficking-related offences. The claimant argued that the maximum periods of imprisonment that could have been imposed under the TIP Act by magistrates were in excess of the maximum period of imprisonment that magistrates could impose under the Misuse of Drugs Act and similar Acts, and that, in any event, the sentencing powers conferred on the magistrates' court by the TIP Act were without precedent in any other democratic common law jurisdiction. The claimant contended that the jurisdiction that the Supreme Court has traditionally exercised in imposing severe sentences of imprisonment had effectively been altered by the TIP Act in a manner that was unconstitutional.

In finding for the claimant, the Court held that trafficking-related offences are serious offences, and that, although these offences were relatively new to the statute books of Antigua and Barbuda, Parliament considered the offences so serious as to provide penalties for their violation that are comparable to life

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<sup>40</sup> Note that Article 2(b) of the UN *Convention on Transnational Organized Crime* defines 'serious crime' as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.

<sup>41</sup> *Cheryl Thompson v The Attorney General of Antigua and Barbuda* ANUHCV 2011/0830.

<sup>42</sup> *Ibid.*, [36].

<sup>43</sup> *Ibid.*

sentences. In this regard, the Court had no doubt that the trial of these serious criminal offences formed a significant part of the jurisdiction that has historically characterised the High Court. To this end, the Court concluded that the provisions of the TIP Act were in conflict with section 47 of the Constitution (which specifies the manner in which Parliament could lawfully alter the Constitution). Having regard to section 2 of the Constitution (the supremacy clause), the Court held that the impugned provisions were inconsistent with the Constitution, and that, accordingly, the Constitution had to prevail. As such, the TIP provisions were, to the extent of the inconsistency, rendered void. Citing the now infamous Commonwealth Caribbean constitutional case of *Hinds and Others v The Queen*,<sup>44</sup> the Court concluded that:

[I]f the jurisdiction to try these offenses were to remain with the Magistrates Court, the individual citizen could be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.<sup>45</sup>

Against the backdrop of this judgment, Antiguan and Barbudan legislators were forced to enact the *Trafficking in Persons (Prevention) (Amendment) Act 2015*,<sup>46</sup> which amended sections 15–18 and 21–27(4) of the main TIP Act so that they now confer jurisdiction on the High Court, rather than the magistrates' court, to impose severe sanctions for trafficking-related offences.

In Grenada, some of the existing penalty provisions raise similar concerns in that they purport to confer summary jurisdiction on magistrates to impose sanctions of up to 20 years' imprisonment on persons convicted of trafficking-related offences in a manner that is arguably unconstitutional. By way of example, section 16 of Grenada's TIP Act empowers magistrates to impose a sentence of 20 years' imprisonment in respect of a person convicted of making, obtaining, giving, or possessing fraudulent travel documents for the purpose of committing a trafficking offence. In the same vein, sections 18 and 20 respectively purport to confer jurisdiction on magistrates to impose a sentence of 20 years' imprisonment for the offences of knowingly leasing or sub-leasing one's house or room or building for the purposes of facilitating trafficking or publishing or advertising

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<sup>44</sup> *Hinds and Others v The Queen* (1975) 24 WIR 326 (PC).

<sup>45</sup> *Cheryl Thompson v The Attorney General of Antigua and Barbuda* (n 46) [46].

<sup>46</sup> Act 13/2015.

or broadcasting material that promotes trafficking and harbouring or interfering with the arrest of a trafficker. Because of the constitutional implications of these provisions, Grenadian legislators are well advised to amend these provisions as a matter of urgency, in order to avoid the exigencies of constitutional litigation.

*Mandatory Minimum Sentences and the Guarantee Against Inhuman and Degrading Treatment*

Another issue with which legislators in The Bahamas, Guyana, and Trinidad and Tobago must contend is the question of the constitutionality of the mandatory minimum sentences imposed by their respective TIP Acts in relation to persons convicted of certain trafficking-related offences. For example, under section 3 of The Bahamas TIP Act, where the offence of human trafficking is found to have been committed, a magistrate, on summary conviction, may impose a term of imprisonment of *not less* than three years and no more than five years, while a judge is obliged to impose *not less* than five years on conviction on information.<sup>47</sup> Similarly, under section 3 of the Guyana TIP Act, a term of imprisonment of *not less* than three years and not more than five years is contemplated for human trafficking on summary conviction, and *not less* than five years' imprisonment on indictment. Meanwhile, in Trinidad and Tobago, under sections 16 and 17 of their TIP Act, a term of *not less* than 15 years' imprisonment is contemplated for the trafficking of an adult, while *not less* than 20 years' imprisonment is contemplated under section 18 for child trafficking.

Although these provisions have not been challenged to date in regional courts, similar mandatory minimum sentencing provisions found in other legislation have been challenged in Commonwealth Caribbean courts for being inconsistent with the guarantee against cruel and unusual punishment. This issue arose in *Attorney General of Belize v. Zuniga*<sup>48</sup> a case in which the CCJ considered a pre-emptive challenge to the mandatory minimum penalty prescribed by a Belizean law even before there was a conviction under this law. In this connection, the court was called upon to assess whether the mandatory minimum punishment set out in the law would be grossly disproportionate in its application to likely offenders. The court explained that it would not wait for an actual case to arise before it could realistically consider whether these penalties were indeed grossly disproportionate. It noted that the Constitution fully entitles a litigant with appropriate standing not to await the full brunt upon him of a measure whose unconstitutionality is looming on the horizon.

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<sup>47</sup> The expression 'on information' in relation to trial or conviction refers to proceedings in the Supreme Court before judge and jury. See *The Attorney General v Hall* [2016] UKPC 28.

<sup>48</sup> [2014] CCJ 2 (A.J.)

While the court did not find that mandatory minimum sentences are *per se* unconstitutional, it did note that:

It is a vital precept of just penal laws that the punishment should fit the crime. The courts, which have their own responsibility to protect human rights and uphold the rule of law will always examine mandatory or mandatory minimum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime.<sup>49</sup>

(...) a mandatory penalty unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person. This is precisely one of the circumstances that justifies a court to regard a severe mandatory penalty as being grossly disproportionate and hence inhumane.<sup>50</sup>

In short, the court was concerned that mandatory minimum sentences deprive it of an opportunity to tailor the punishment to fit the crime. In this connection, if the mandatory minimum sentence bears no reasonable relation to the scale of penalties imposed by other domestic legislation for far more serious offences, they will be deemed by the court as arbitrary, and thus characterised as being grossly disproportionate, inhumane, and therefore unconstitutional.

The key message from the CCJ appears to be that mandatory minimum sentences, such as those imposed by some of the region's anti-trafficking legislation, are open to constitutional challenge on the ground that they may constitute an arbitrary restriction on liberty or represent inhuman and degrading punishment, a right which is expressly provided for in the relevant constitutions.<sup>51</sup>

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<sup>49</sup> *Ibid.*, [61].

<sup>50</sup> *Ibid.*

<sup>51</sup> s 17(1) The Bahamas Constitution; s 141(1) Guyana Constitution; s 5(2)(b) Trinidad and Tobago Constitution.

*Forfeiture of Assets and the Guarantee Against the Deprivation of Property without Compensation*

Commonwealth Caribbean anti-trafficking laws,<sup>52</sup> Proceeds of Crime Acts, and anti-money laundering legislation<sup>53</sup> provide for the forfeiture or confiscation of assets linked to trafficking-related offences. More specifically, the respective TIP Acts typically empower prosecutors to apply to the court for a forfeiture order in respect of the property, including money, valuables, and other movable or immovable property, of a person convicted of a trafficking-related offence that was used or obtained in the course of the offence and any benefit gained from the proceeds of the offence. Where such an order is granted, this property is forfeited to the Crown, from which, *inter alia*, restitution might be paid to trafficked persons.

The question of the constitutionality of the forfeiture provision contained in Antigua's TIP Act arose for consideration in the case of *Cheryl Thompson v The Attorney General of Antigua and Barbuda* discussed earlier. Here, the claimant, who was convicted of trafficking women for the purpose of sexual exploitation, argued that the forfeiture provision had the effect of compulsorily depriving her of her property, in contravention of section 9 of Antigua's Constitution which provides that no property shall be compulsorily taken possession of or acquired, except for public use and on payment of fair compensation within a reasonable time. However, section 9(4)(a)(ii) of the Constitution appeared to justify the acquisition of such property in the following terms:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section –

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right

(ii) by way of penalty for breach of the law or forfeiture in consequence of breach of the law.

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<sup>52</sup> s 37 Antigua and Barbuda TIP Act; s 7 Bahamas TIP Act; s 10 Barbados TIP Act; s 37 Belize TIP Act; s 38 Grenada TIP Act; s 7 Guyana TIP Act; s 7 St Kitts and Nevis TIP Act; s 9 St Lucia TIP Act; s 12 St Vincent and the Grenadines TIP Act; s 24 Trinidad and Tobago TIP Act.

<sup>53</sup> s 7, schedule 1 Bahamas *Proceeds of Crime Act*, 2018; s 2, schedule (3) Grenada *Proceeds of Crime Act* (Act 6/2012); s 2, schedule 2 Guyana *Anti-Money Laundering Act* 2009; schedule 2(16) Jamaica *Proceeds of Crime Act* 2007; ss 3 and 41 St Kitts and Nevis *Proceeds of Crime Act*, CAP 4:28; s 3, schedule (22) St Lucia *Proceeds of Crime Act*, CAP 3:04; s 16(1)(a) schedule 7(3) St Vincent and the Grenadines *Proceeds of Crime Act* 2013; s 2, schedule 2(3) Trinidad and Tobago *Proceeds of Crime Act*, CAP 11:27.



In rejecting the claimant's submission and finding that the forfeiture provision did not offend section 9 of the Constitution, the Court concluded that:

Section 9 of the Constitution clearly contemplates the existence of statutes dealing with the taking of possession of property, interest or right by way of forfeiture in consequence of breach of the law. *Such provisions are not inconsistent with or in contravention of section 9 (1) as long as the provision is reasonably justifiable in a democratic society.* No allegation has been made that the provision is not reasonably justifiable in Antigua and Barbuda.

The court adopts the reasoning of Kerr, LCJ and find that *the forfeiture proceedings in the Act are akin to the asset recovery proceeding and are civil in nature.* Its primary purpose is to recover proceeds of crime; it is not to punish in the sense normally entailed in a criminal sanction. Furthermore, even if the proceedings are to be regarded as imposing a penalty, this is not sufficient to classify the proceedings as criminal for purposes of section 15 of the Constitution, which section provides certain protection for a person 'charged with a criminal offence'. Accordingly, the court finds that *the forfeiture provisions of the Act do not violate sections 9 or 15 of the Constitution.*<sup>54</sup>

It seems, therefore, that the civil forfeiture provisions of regional anti-trafficking legislation are likely to be constitutional.

#### *Trial by a Judge Alone and the Right to a Fair Trial*

High Court proceedings, in most countries in the region, take place before a judge (arbiter of the law) and a panel of jurors (trier of facts). The exception to this general approach in relation to human trafficking is Jamaica, which in 2018 amended its *Trafficking in Persons (Prevention, Suppression and Punishment) Act* by inserting section 4(10)(b), which now provides that where a person is charged with human trafficking, they shall be tried before a judge of the circuit court *without* a jury. This amendment was passed against the backdrop of a retrial which was ordered in the case of *R v Hermalinda Parker et al.*,<sup>55</sup> in circumstances where, at the end of that trial, the jury returned a unanimous 'not guilty' verdict, but it was later revealed that, in fact, three jurors had voted 'guilty' and the other three 'not guilty'. The Office of the Director of Public Prosecutions expressed that the irregularity inherent with jury trials was a symptom of issues faced in the

<sup>54</sup> *Cheryl Thompson v The Attorney General of Antigua and Barbuda* [54], (emphasis added).

<sup>55</sup> *R v Hermalinda Parker et al.* HCC 126/11.

prosecution of complex cases involving criminal networks, gangs, and trafficking cases that expose jurors and witnesses to a high risk of intimidation and influence, and therefore recommended that such matters should be tried before a judge alone in the circuit court.<sup>56</sup> Opposition Senator Lambert Brown expressed concern with the proposed amendment, noting that the law should not be changed just because of one unfortunate case and that in any event, there was no evidence that a judge-only trial would lead to more convictions. In addition, he argued, the amendment would ‘rob citizens of their right to a trial by their peers’.<sup>57</sup> Senator Brown’s concerns not only raise procedural questions, but constitutional questions, namely the extent to which it is constitutionally permissible for a trafficking case to be decided upon by a judge alone without the assistance of a panel of jurors. An interesting point to note in this connection is that from as far back as 1980, the Judicial Committee of the Privy Council had already ruled in *Trevor Stone v The Queen* that constitutional provisions ‘do not confer any entrenched right to trial by jury for criminal offences’.<sup>58</sup>

In short, although Jamaica’s decision to amend its TIP Act to require trial by a judge alone in respect of trafficking cases appears to be out of the norm, it is certainly not an isolated approach, and, having regard to the *Trevor Stone* case, cannot be regarded as unconstitutional.

#### *Witness Anonymity and the Right to a Fair Trial*

In small jurisdictions like the Commonwealth Caribbean, criminality, including human trafficking, is quickly becoming sophisticated through, among others, the operation of organised criminal groups. A persistent challenge faced by the criminal justice system is ensuring the safety of witnesses who are fearful that their cooperation with the police and prosecuting authorities will lead to reprisals from accused persons or their associates. Although, as pointed out by Lord Bingham in *R v Davis*,<sup>59</sup> the problem of witness intimidation is not new, it is nonetheless, as he aptly recognised, a serious problem, which necessitates ‘urgent attention by Parliament’.<sup>60</sup> Parliamentary intervention in the Caribbean was necessary because, as pointed out by Lord Rodger in *R v Davis*, although ‘the common law is capable of developing to meet new challenges’, it has, unfortunately, not ‘responded to

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<sup>56</sup> ‘House Approves Amendments to Trafficking in Persons Act’, *Jamaica Observer*, 2 February 2018, [https://www.jamaicaobserver.com/latestnews/House\\_approves\\_amendments\\_to\\_Trafficking\\_in\\_Persons\\_Act](https://www.jamaicaobserver.com/latestnews/House_approves_amendments_to_Trafficking_in_Persons_Act).

<sup>57</sup> ‘Senate passes Trafficking in Persons Act’, *Jamaica Gleaner*, 24 February 2018, <https://jamaica-gleaner.com/article/news/20180224/senate-passes-trafficking-persons-act>.

<sup>58</sup> *Trevor Stone v The Queen* Privy Council Appeal No 11 of 1979.

<sup>59</sup> *R v Davis* [2008] UKHL 36.

<sup>60</sup> *Ibid.*, [27].

the challenge [of witness intimidation] at any time over the last few hundred years by allowing witnesses to give their evidence under conditions of anonymity<sup>61</sup>

Several Commonwealth Caribbean countries have passed witness anonymity legislation in the last two decades, which raise important constitutional questions related to the right to a fair trial.<sup>62</sup> One of the main differences between the applicable witness anonymity legislation in Antigua and Barbuda, Dominica, and St Vincent and the Grenadines, on the one hand, and that which exists in St Kitts and Nevis, on the other, is the fact the latter contains a specific safeguard inuring to the fair trial of the defendant, while the others do not. St Kitts and Nevis' Witness Anonymity provision reads,

Section 20 (3) Nothing in this section authorises the court to require –

(a) the witness to be screened to such an extent that the witness cannot be seen by –

(i) the judge or other members of the court (if any);

(ii) the jury (if there is one); or

(iii) any interpreter or other person appointed by the court to assist the witness;

(b) the witness's voice to be modulated to such an extent that the witness's natural voice cannot be heard by any persons within paragraph (a)(i) to (iii).

Antigua and Barbuda, Dominica, and St Vincent and the Grenadines' witness anonymity legislations do not contain these safeguards, and thus raise questions as to their constitutionality. The Bahamian case of *Bruce Colebrooke v R*<sup>63</sup> is instructive in this regard. In that case, contrary to section 11 of the *Criminal Evidence (Witness Anonymity) Act*, 'Alpha', the anonymous witness, was allowed to give his evidence without the appellant, or the judge or jury being able to see him. On appeal, the appellant argued, and the Court accepted, that the judge erred in law when she

<sup>61</sup> *Ibid.*, [44].

<sup>62</sup> s 15(2)(e) Antigua and Barbuda Constitution; s 20(2)(e) The Bahamas Constitution; s 18(2)(e) Barbados Constitution; s 8(2)(e) Dominica Constitution; s 8(2)(e) Grenada Constitution; s 144(2)(e) Guyana Constitution; s 16(6)(d) Jamaica Charter of Rights and Fundamental Freedoms 2011; s 10(2)(e) St Kitts and Nevis Constitution; s 8(2)(e) Constitution of St Lucia; s 8(2)(e) St Vincent and the Grenadines Constitution; s 5(2)(h) Trinidad and Tobago Constitution.

<sup>63</sup> *Bruce Colebrooke v R* SCCrimApp No 151 of 2015.

allowed Alpha to testify while completely screened from herself and the jury. In finding that this was a material irregularity substantially affecting the merits of the case, the Court of Appeal opined that:

It must be remembered that the jury will be required to assess the truthfulness or otherwise of a witness from the demeanour of such witness while he testifies. Thus, it is crucial that the jury have the opportunity to observe the witness as he gives his evidence.

(...) any conditions put in place by Parliament ostensibly to ensure fairness to the accused while allowing a deviation from the accepted procedure should be strictly observed by the Court. Inasmuch as a party must be able to ask questions of a witness which go to the witness' credit, it is an important part of such questioning to see how the witness reacts to the various questions posed, for example, does he flinch or get fidgety when a particular line of questioning is pursued.

It must be borne in mind that the power to order that a witness testify anonymously goes contrary to the normal procedure whereby a witness' identity is known to all of the participants in the trial. That enables the opposing side to question the witness on any possible animus or interest the witness may have which motivates the evidence given so the jury can properly evaluate the quality and reliability of the evidence.<sup>64</sup>

It seems that once appropriate fair trial safeguards are respected, witness anonymity orders are not *per se* unconstitutional, as explained in *Attorney General v Leroy Smith and Tony Smith*:

[A]lthough the Anonymity Statutes have amended the common law in relation to the appearance of witnesses at trials, with proper safeguards to ensure fair proceedings built into the legislation, as in the case of the *Anonymity Act*, they are not in breach of Article 20(1) of the Constitution which guarantees a fair trial to a person accused of a crime.<sup>65</sup>

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<sup>64</sup> *Ibid.*, [25-27].

<sup>65</sup> SCCrApp No 95 of 2014 [31].

## Conclusion

This article has argued that although the passage of anti-trafficking legislation in the Commonwealth Caribbean is a welcome development, such legislations, because of their rushed implementation resulting from the United States' threat of sanctions, should not escape scrutiny because they raise important constitutional questions. Specifically, this article has contended that some of the prosecution provisions of anti-trafficking laws encroach or threaten to encroach upon established constitutional norms relating to the supremacy of the constitution, separation of powers, and the rule of law, which embody the accused's right to a fair trial. It concludes that the legislature and, more importantly, the courts, have an important role to play in safeguarding the constitutional rights of those accused of trafficking-related offenses. It is important that the issues discussed here are addressed as a matter of urgency as they have the potential to work to the advantage of traffickers who may escape liability, even if on a technicality, if relevant provisions of anti-trafficking laws are struck down as being unconstitutional by courts subsequent to their conviction.

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