



# A UK Perspective on Human Trafficking: Aspects of the Modern Slavery Act 2015

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## Introduction

Human trafficking and slavery are crimes proscribed by domestic and international law. Attempts to regulate this area of the criminal law invariably involve command and control systems of regulation. This includes arrangements for prevention, detection and control that engage with the main prosecution authorities including the police and courts. In many instances detection is difficult, if not impossible, and this leaves the authorities the problem of how to protect victims. In addition to the criminal law, regulatory systems may also be used to address the economic and social aspects of human trafficking. In that context, Terrence Daintith makes an important distinction between *imperium* based on command and control by government and *dominium*, the use of wealth to regulate an activity through economic sanctions.[1] Human trafficking has predominantly involved command and control forms of regulation and because of its criminal nature this has been based around detecting offenders and finding mechanisms of control. Opening human trafficking and slavery to other forms of regulation beyond the criminal law is beginning in the UK. The UK, for example, has attempted to provide economic regulation such as minimum wage controls and the licensing of Gangmasters in a twin track approach to deter crime but also to address the need to protect victims. This has proved to be complicated involving inter-State co-operation and asylum controls. There are overpowering reasons for strengthening different forms of non-penal regulation. The corporate dimension of human trafficking involving the exploitation of workers throughout the world largely for the benefit of western consumers is a case in point. Regulating multi-national corporations is an important part of prevention and deterrence of human trafficking. Public opinion is a vital element in economic regulation. The human tragedy and suffering of many victims has gained some degree of public concern and there is undoubtedly public empathy with victims of trafficking. This is an important aspect of seeking effective social control that is harnessing public opinion to assist in the prevention and detection of a serious crime. Tackling the economics of human trafficking requires financial controls as well as incentives to prevent trafficking taking place. The breadth of what constitutes human trafficking or slavery is wide, making it hard to disaggregate the different approaches required for effective regulation and prevention.

This paper provides an outline and assessment of the main provisions of the Modern Slavery Act 2015 and argues that the interests of victims need to be given priority when interpreting and applying the legislation. The Act should be interpreted as a beginning – not an end in itself. Criminal law is only one part of the approach. Changing public opinion to support strategies to prevent, detect and deter modern slavery is important and necessary. The Act should be viewed as setting a framework for the future that needs to be re-visited in the light of practical experience. The importance of economic regulation of the exploitation of the slave trade suggests that joining up the various techniques available under the Modern Slavery Act with financial and corrupt practices is essential.[2] As experience of the working of the new legislation develops, it will be possible to identify more clearly the strengths and weaknesses of the legislation.

Important lessons from the UK legislative experience emerge as the Bill was heavily amended during its passage into law. The absence of political consensus on how to address human trafficking led to weaknesses in the policy-making and legislative process and the original Bill was much less effective than the final legislation. Even so some opportunities were missed to address some important issues. The Act fails to articulate that the protection of victims and their interests are paramount and should be given the highest priority when interpreting the legislation. There are continuing tensions between law enforcement responses involving the criminal law and attempts to protect victims. Achieving both protection and enforcement creates major challenges for the authorities. The criminalisation of a problem may also make it inherently more difficult to solve and the victim may be hard to protect within the criminal justice system. The Act gives victims statutory protection where there is evidence that victims are placed under pressure to undertake criminal acts but it remains to be seen how

effective this will prove to be. Victims may struggle with the language and may fear the authorities intervening in their case because of the possibility of deportation, ill treatment or criminal prosecution. Strengthening the penalties for trafficking and human slavery may act as a deterrent against slave traders but it may also raise the stakes and make economic regulation difficult to achieve. Repatriation is also an important aspect of victim support. The new Act does not address this issue with repatriation remaining a major problem. The Act leaves much to be resolved such as the lack of an absolute legal right for overseas domestic workers to escape tied contracts and obtain a new contract that does not put in doubt their visa arrangements. Parliamentary debate on overseas domestic workers and the use of tied employment contracts provides a revealing insight into the issues associated with human trafficking and the political sensitivities of their resolution.[3] During the passage of the Bill, there were many attempts to create a climate of fear associated with illegal immigrants. One example is the use of viral emails sent to Members of Parliament throughout the debate on the Bill, making false claims about the financial benefits being given to illegal immigrants. This led to the unprecedented publication of a House of Commons Library Paper to members of Parliament addressing the use of viral emails and the false information they contained.[4]

The main outline of the paper is as follows. We begin with the role of the criminal law that proscribes slavery and human trafficking. The Modern Slavery Act 2015 is examined in outline with attention being given to the victim's defence, the role of the new Anti-trafficking Commissioner, the protection of overseas domestic workers and the future direction of regulation. How the Act might be interpreted to give priority to the protection of victims is explained.

### **Human Trafficking in Context**

Human trafficking covers a widely defined range of activities under the general heading of human slavery, servitude and forced or compulsory labour. The exploitation of the victim is at the centre of the definition of human trafficking. It may involve deception, coercion, abuse of power or abuse of someone's vulnerability. There are many related motivations including sexual exploitation, removal of organs, securing various services by force, threat or deception and also the exploitation of children and vulnerable people. Young people are trafficked so that they can be exploited domestically or economically. There are a variety of situations where victims are taken into forced labour and where victims are forced to pay off debts and the debts are passed down to their children. There are examples where victims are made to undertake work against their will with long hours for little or no pay, which are subject to verbal or physical threats of violence against themselves or their families. The scale of such abuse includes exploitation in the areas of food packaging, the agricultural sector and mining as well as tarmacking and a wide variety of work in the hospitality industry. There is also a wide range of sexual exploitation linked to the sex industry. Estimates vary as to the extent of the problem but the Home Office in 2008 and 2009 estimated that there are at least 4,000 victims of sexual exploitation in the UK.[5] There are related crimes associated with criminality such as drugs and pickpocketing. Finally there is the use of victims in exploitative situations such as domestic work in private households for little or no pay and with limitations on the victims' freedom.

Attempts to detect and deter human trafficking have invariably required the use of the criminal law and this has involved a wide variety of legislative responses. The range of offences reflects the diverse range of activities as well as the way in which legislation has been forthcoming to address each sector. Human Trafficking in the UK is hard to quantify. Estimates are based on information drawn from official statistics. The Inter-departmental Ministerial Group in October 2013 suggested that annually there were 1,168 victims of human trafficking, but more worryingly there appeared to be an incremental increase of 25%. The majority were females (786). Most were adults but there were 371 children. Civil unrest and wars contribute to the problem as well as famine and poverty. Nigeria, Romania and Albanian are some of the main areas where trafficking occurs. Romania, China and parts of the Middle East also come high up on trafficking. Syria is also a source of trafficking today.[6]

An accurate assessment of the extent of human trafficking is difficult. The International Labour Organisation has collected statistics and estimates: almost 21 million are victims of forced labour, many exploited by private individuals as well as enterprises. There is also a category of 2 million related to State or rebel groups. It is estimated that 4.5 million are victims of forced sexual exploitation. States where trafficking is most prevalent are: Mauritania, Haiti, Pakistan, India, Nepal, Moldova, Benin, Cote d'Ivoire, The Gambia and Gabon. The alarming trend is that human trafficking is increasing and the likelihood is that current global instability will lead to further increases. Attempts by the authorities to address human trafficking are likely to require resources and political commitment beyond the term of office of any single government.

### **The criminal law and other regulatory techniques in the regulation of human trafficking**

The breadth of the criminal law in England and Wales applicable to human trafficking is most striking. Trafficking for sexual exploitation is an offence under the Sexual Offences Act 2003. Trafficking for any exploitation such as slavery, forced labour, or organ removal is an offence under the Asylum and Immigration (Treatment of

Claimants etc.) Act 2004. The law has also been extended to apply to offences committed abroad by UK nationals and offences committed by foreign nationals in the UK.[7] Various forms of slavery including servitude, forced and compulsory labour are criminal offences under the Coroners and Justice Act 2009.[8]

The Modern Slavery Act falls into the category of maintaining a strong emphasis on the criminal law and framing the human trafficking problem in terms of making criminal prosecution possible. The UK has also attempted to regulate human trafficking through economic methods. The minimum wage regulated by the Low Pay Commission is intended to provide a legal framework for a minimum wage that is enforceable. Adopting this approach has the potential of making it more difficult to exploit workers. In terms of human trafficking, however, it may drive the traffickers underground to avoid detection and surveillance. The detection and prevention of abuse requires large resources and this may not be easy to find under the present economic circumstances.

Public pressure and concern about gangmasters led to the setting up of the Gangmasters Licensing Authority under the Gangmasters (Licensing) Act 2004. This was aimed at agriculture, horticulture and shellfish gathering and is an attempt to ensure that employment standards are being met. This is employment-focused and has the potential to address some long-standing exploitation in particular sectors of activity. Section 55 of the Modern Slavery Act provides that the Secretary of State must undertake a review of the legislation and report to Parliament.

An important strategy in prevention and deterrence is linked to monitoring to attempt to prevent human trafficking in the first place. Various UK organisations are engaged in this activity. The UK Human Trafficking Centre was set up in 2005 and is integrated into the National Crime Agency (NCA). There are also co-ordination groups and the EU Directive on human trafficking requires Member States to put in place a national rapporteur on trafficking that is undertaken by the Inter-departmental Ministerial Group.

The UK also set up the National Referral Mechanism (NRM) in 2009. This is a UK obligation intended to assist victims under the Council of Europe Convention on trafficking in human beings. A person who the authorities has reasonable grounds to believe is subject to human trafficking is entitled to a 45-day recovery period and can receive support services. This is known as the National Referral Mechanism and is the subject of a Government review that reported in November 2014.[9]

Outside official agencies there are numerous charities including the Salvation Army that are engaged in supporting victims. Since July 2011, the Salvation Army has managed the Government's Adult Human Trafficking Victim Care contract. There is an on-going pilot scheme that includes the use of child trafficking advocates. The pilot scheme has been the basis for including Child trafficking advocates in the Modern Slavery Bill. This is a promising development, and one that might assist in giving children support when they need it most. Equally important is the emerging analysis that places trafficking at the centre of a human rights focus. A focus on rights tends to cross many of the sectorial boundaries. A human rights focus allows priorities to be set and sends a message that protecting victims should be considered when crimes are being defined and prosecutions taken. Trafficking is exploitative of the weak, the vulnerable and the less articulate. Despite these factors or because of them, the UNCHR has been less successful than many hoped in advancing the protection of victims. The lead role for trafficking appears to have fallen to the UN Crime Commission and this has led the way in mapping the terms of the subject. The multi-disciplinary nature of the challenge should not be underestimated and its complexity is often off-putting even for the most astute lawyer. Tackling the financial rewards of human trafficking includes identifying criminal activity and recovering assets based on trafficking. The Proceeds of Crime Act 2002 allows the seizure of assets that are the result of illegal activities and crime. Prosecutions are also possible through the Crown Prosecution Service. The Home Office may also seize assets and on a 50:50 split share the profits from the seizure with police, local authorities and other agencies. This is a clever and innovative approach combining criminal sanctions with economic consequences.

Prostitution is often involved in human trafficking and this raises the question of whether it should be illegal to pay for sex. The Sexual Offences Act 2003 amended by the Policing and Crime Act 2009 introduces a new offence. It is illegal to pay for the sexual services of a prostitute who is subject to force, coercion or deception. The sexual Offences Act 2003 also makes it illegal to pay for the sexual services of a child. The Policing and Crime Act 2009 also makes it an offence to solicit a prostitute in a public place or to cause, or incite prostitution for gain.

The very low numbers of criminal convictions for trafficking between 2005 and 2011 provide ample evidence of the challenges facing the authorities. In 2005 there were no successful prosecutions for exploitation and only 12 for trafficking involving sexual exploitation. In 2011 there were still no successful prosecutions for exploitation and only 8 successful prosecutions for trafficking for sexual exploitation.[10] Overall the number of prosecutions for specific forms of exploitation involving domestic servitude or labour exploitation, including children, was only 116. The reasons for the failure to have an effective prosecution of trafficking offences is

indicative of the problems in finding evidence and uncovering the facts surrounding trafficking in general. It may more generally question the wisdom of making the criminal law the main focus of the new legislation.

## **The Modern Slavery Act 2015**

### ***The passage of the Bill: the parliamentary and constitutional context***

At the outset it is necessary to outline the main features of the UK's legislative system. The UK has a bicameral chamber, an elected House of Commons (currently 650 members) and an appointed House of Lords (currently 784 eligible members). Public Bills are subject to three readings in each House before Royal Assent. The Modern Slavery Act was also subject to pre-legislative scrutiny. This is a relatively new innovation in providing a form of scrutiny through the involvement of a parliamentary committee that is intended to improve the general quality of legislation and, in theory, smooth the passage of the Act through Parliament. The Committee provides an in-depth report and assessment of the relevant Act and this provides a basis for discussion through the various stages of parliamentary debate. The result of the Committee's scrutiny is intended to give better transparency and raise the subsequent parliamentary standard of debate as well as give greater clarity on some of the technical policy issues. In the case of the Modern Slavery Act, the subsequent debate revealed large areas of disagreement between the Government and MPs. There were many amendments and revisions to the Act, including through the debates in the House of Lords some important changes relating to overseas domestic workers.

### ***A general overview and synopsis of the Act***

The Modern Slavery Act[11] has a very broad remit and is composed of seven distinct parts. Parts 1-3 provide for criminal offences, prevention orders, maritime enforcement and various orders relating to slavery and trafficking. Most important is that the legislation provides for an increase in penalties to life imprisonment for the main trafficking and slavery offences. The Act is also reforming by introducing the following changes:

- The introduction of two new civil preventative orders the Slavery and Trafficking Prevention Order and the Slavery and Trafficking Risk Order;
- New maritime enforcement powers in relation to ships;
- The setting up of a new Independent Anti-Slavery Commissioner;
- New victim support measures, including a statutory defence for victims and special measures for witnesses protections and civil legal aid;
- New disclosure powers to access information from businesses.

Pre-legislative scrutiny was undertaken by a Joint Committee of both Houses chaired by Frank Field MP, vice-chair of the Human Trafficking Foundation and a member of the Advisory Council for Social Justice. The committee took extensive evidence, as part of a general consultation process, and published its findings on 16th December 2013, *Establishing Britain as a world leader in the fight against modern slavery: report of the Modern Slavery Act Evidence Review*. The Joint Committee also received evidence from the Inter-departmental Ministerial Group on Human Trafficking, as part of the obligations under the *EU Directive on preventing and combatting trafficking in human beings and protecting its victims*.

Some preliminary observations are important. The Act proved more controversial than was expected, attracting extensive debate and analysis during its passage. Originally the Act was intended to create a new regime to address human trafficking. The new offences included were slavery of children and adults; child exploitation; child trafficking, and trafficking and facilitating the commission of an offence of modern slavery. The Government rejected attempts to tackle the supply chain between the traffickers and the businesses through more robust intervention and the use of the criminal law. Instead the Government preferred to set up better collaboration with businesses to tackle abuse and favoured better annual reporting responsibilities. The previous government set up a protection for anyone for whom the authorities have "reasonable grounds" to believe has been trafficked to be entitled to a 45-day reflection and recovery period during which they can access services such as those provided by the Salvation Army.[12] This is set to continue.

The Government accepted some of the recommendations on the role of the Anti-Slavery Commissioner and introduced a statutory defence for victims of trafficking. Perhaps the setting up of the Anti-Slavery Commission is the most important step advanced in the Act. Independence in the office is a key part of its functioning effectively. Proceeds of crime was also the subject of intense debate and proposals to ensure that crime was traced and assets seized were not all accepted. Prostitution and its links with trafficking led to acrimonious arguments about what should be legal and whether payment for sex should be made an offence. The issue of criminalisation was not easy to resolve, but the Opposition amendment to review the links between the sex trade and human trafficking were defeated. There was also considerable debate about

the Gangmasters Licensing Authority and attempts to extend its remit beyond the three sectors, agriculture, horticulture and shellfish proved unsuccessful in the debate on the Act. Instead a review is to be carried out within one year of the Act's passage.

### ***Criminal law***

Part 1 of the Modern Slavery Act 2015 provides for penalties for slavery, human trafficking and exploitation. The offences are all widely drawn and supplement the existing criminal law. There are tougher penalties up to life imprisonment and related confiscation of property and goods. Sections 1 and 2 of the Act create specific offences of slavery or forced compulsory labour as well as human trafficking offences. There is also a definition of exploitation and the offence of human trafficking may be committed outside UK territory but remain subject to trial in the UK if the person is a UK national. Non UK nationals are subject to trial in the UK if the offences are committed in the UK. The breadth of the offences is widely drawn to allow a large discretion in criminal prosecution. The terms of the criminal law are quite vague, such as section 3 containing the meaning of exploitation "...where something is done to or in respect of the person that includes a wide range of offences relating to sexual exploitation or securing services or the commission of any related offence".

### ***The Independent Anti-slavery Commissioner***

The Independent Anti-Slavery Commissioner is established under part 4 of the Act with statutory powers that encourage good practice for the prevention, detection, investigation and prosecution of offences under the Act. There was considerable debate about the remit and independence of the Commissioner. Various models of regulatory independence were considered such as the independent Reviewer of Terrorism Legislation, the Chief Inspector of Borders and Immigration and the Children's Commissioner.

A number of issues on the independence of the Commissioner were discussed, including the terms of appointment process and procedures. A Lords amendment provided budget independence and powers to appointment staff and establish its own range of expertise. This is a welcome development as budgetary independence is an important pre-requisite of functional and operational autonomy. There is also an important duty on various public authorities to co-operate with the Commissioner and any reasonable and practical request to do so must be considered by the public body (section 43 of the Modern Slavery Act).

Accountability of the Commissioner is achieved through a number of Parliamentary procedures and practices:

- An annual report to Parliament including a strategic plan;
- Oversight by select committee;
- Responses to proposals from the select committee;
- Scrutiny in Parliament through Opposition Day debate; Back-bench debate or Westminster Hall debates.

Section 41 (7) of the Act allows the Secretary of State to direct the Commissioner to omit from any report before publication matters that the Secretary of State considers:

- Would be against the interests of national security;
- Might prejudice the safety of any person in England and Wales or;
- Might prejudice the investigation or prosecution of an offence under the law of England and Wales.

Section 42 makes similar restrictions for publication of annual reports and strategic plans. Similar powers to restrict publication exist for Scotland, Wales and Northern Ireland. There is also an important approval power vested in the Secretary of State for the approval of strategic plans to be undertaken by the Commissioner. Vesting such powers in the relevant Secretary of State raises the question of how the "independence" of the office of the Anti-Slavery Commissioner will be respected and upheld. One possibility is for a House of Commons select committee to take a pro-active oversight of the work of the Commissioner and this would secure an appropriate channel for debate and oversight.

There is also a restriction on the Commissioner from exercising any functions in relation to an individual case, but this does not prevent considering individual cases and drawing conclusions from such cases (section 44).

The appointment of a new Independent Commissioner offers considerable scope for developing networks and best practice. This would enable a wide range of expertise to be brought together and if a proactive approach is adopted the Commissioner "model" might be followed throughout EU member states as well as internationally. Developing informal and formal relations will ultimately determine the success of the Commissioner.

### ***The Victim's defence and protection of victims***

The use of the criminal law is problematical – especially if the victim is implicated in the criminal activity itself. This raises the question as to what extent does a victim of human trafficking have a defence against a criminal offence. Very often victims are difficult to separate from the offenders who manage trafficking. Last year the Court of Appeal provided guidance to the lower courts on the question of how to treat victims of human trafficking and how to avoid prosecution. Some general guidance is provided in the leading case of *Rave L* [2014] *Criminal Law Review* 150 [2014] 1 All ER 113, a case that involved co-joined consideration of four unrelated cases some general guidance is provided. The main issue is how child victims should be treated when they are caught up in criminal activities. The question is partly to do with the role of the police and the Director of Public Prosecutions. It is also to do with how the courts should treat such cases. The court considered that there is a strong case for recognising some form of victim immunity. This is not, however, a task that a court is able to direct, the discretion rests with the Director of Prosecutions. There remains a defence available to the victim of trafficking and the matter of victim protection is paramount. Some guidelines relating to prosecution discretion and the victim's defence are available at the *Attorney General's Reference No 3 of 2000* [2001] UKHL 53 and [2002] Cr. App. R. 29 (p. 360)

Interpreting the guidelines and establishing whether or not a "victim" is in fact a victim for the purposes of protection is, in the first instance, largely determined by the police or other front-line agencies. Similarly the age of the victim is almost always difficult to determine and requires evidence from the police, medical experts and related specialist experts. The UK Human Trafficking Centre has established some reputation in immigration cases and their expertise is invaluable and should be consulted. Determining the age of a victim has to be determined by facts and is a matter for the court, appropriately informed by specialist expertise. The Court of Appeal is robust in its view that protecting the victim is paramount but not always definitive in every case. In such cases there is clearly a distinction between the practical application of rules and their theoretical consideration in the form of judicial guidance offered by the courts. There is also a knowledge "gap". The UK courts have only recently begun to take into account the full extent of "victim" exploitation in criminal activities associated with human trafficking. Their role is partly because of the application of Article 26 of the Council of Europe Convention Against Trafficking in Human Beings and partly because of the creation of clearer guidance from the Crown Prosecution Service and greater discussion in the media. The Court of Appeal has set out some helpful guidance in the form of the steps required when considering prosecution which must include the following questions to determine whether there is a victim of human trafficking or slavery involved:

- Has the defendant been trafficked within the meaning of the Council of Europe Trafficking Convention on the EU Trafficking Directive?
- Was the defendant recruited, transported, transferred, harboured or received for the purpose of exploitation, such as forced labour or services, sexual exploitation, criminal activities or the removal of organs?
- If so, is there evidence that the exploitation was achieved or intended to be achieved through the use of coercive means? Or is it possible that the defendant at the time of the exploitation was a child, defined as being under 18 years of age, making coercion irrelevant?
- Does the defendant's status as a trafficked victim protect from prosecution for the offence charged?
- Is the requisite causal connection between the trafficking and the offence charged established?
- If so, does the court agree with the decision to prosecute?

The complexity of the above guidance and the difficulty of ensuring compliance leaves many uncertainties in determining whether someone is a victim, one of the important. The question of how to ascertain who is a victim will remain uncertain.

The Modern Slavery Act incorporates the victim's defence into a statutory form of the defence. Part 5 of the Modern Slavery Act provides a statutory protection to victims of slavery or trafficking and also extends to special measures for witnesses in criminal proceedings and the grant of civil legal aid to slavery victims. These are welcome developments that should provide victim protection from penalties and ensure the non-prosecution of victims. It also sends an important message regarding the need to identify victims in the first place and so ensure that protection begins at the earliest possible time. This is also consistent with the Trafficking Directive and has the support of the UNHCR, who would prefer the Act adopt a holistic approach to protection by advancing a clear policy to combat victim abuse through measures to establish the trust and confidence of those being trafficked. Once victims are under protection it is unlikely that they will be victimised and subject to re-trafficking. The main problem is that criminal law is often not the best solution in many cases, as it is frequently difficult to enforce when there is an underlying need for victim protection. A separation between the criminal law and protecting victims has been slow in coming and remains challenging.

### ***Independent Child Trafficking Advocates***

Section 48 of the Modern Slavery Act 2015 empowers the Secretary of State to establish Independent Child Trafficking advocates. The advocates are intended to advance “the best interests” of the child victim. This is an important development in the legislation and recognises that the victim’s interests should be overriding. The advocates are expected to represent the interests of the child in accessing services and become a focal link between various agencies and professionals. Allowing child victims a “voice” is very important, especially when vulnerable children are involved. In the debate on the Bill, one issue that proved problematic was how “independent” the advocates might be when confronted with criminal cases that may not always be taken in the interests or for the protection of the child, but primarily to prosecute. Indeed, how legally independent would such advocates be from local authorities and other statutory bodies? Unlike advocates appointed by a court, the independent child trafficking advocate is promoted by the Secretary of State. Regulations are promised, setting out the arrangements for the appointment and independence of the advocates. Despite some vagueness and uncertainty over their exact role and functions there is considerable potential for independent child advocates to take a lead role in advancing the interest of the victim and ensuring that victims are protected. This part of the legislation may prove to have the most potential to bring about changes in the protection of victims. However, the independence of the advocates is critical to their success.

### ***Overseas domestic workers***

One of the most contentious issues in debate was the visa arrangements for domestic workers. On average there are around 16,000 domestic migrant visas issued annually. In 2012 the Coalition government introduced a system of tied visas whereby the employee (the domestic worker) was bound to one employer and if they left employment with that one employer their visa would be forfeited. In the analysis offered by many organisations domestic workers, in common with many sectors, are unduly vulnerable and susceptible to exploitation with little obvious solution. Large sections of tied workers report bad treatment, abuse or at the minimum long hours of work with low pay. In the Commons debate on the Act, the plight of domestic workers was the subject of a division, which the Government won by the narrowest of margins, that rejected any change in the visa arrangement. In February 2015, the Government announced a review of the visa arrangements of overseas domestic workers<sup>[13]</sup> to be undertaken by James Ewins and to be concluded by June 2015. The review is to consider the appropriate steps needed to protect overseas domestic workers consistent with immigration considerations and victim protection.

A significant advance came from a Lords amendment that was intended to give overseas domestic workers the ability to change employment while in the UK. This was linked to a right to renew their visas for up to 12 months as well as the right to a temporary three-month visa to allow a visitor to live in the UK and seek alternative employment to domestic work. The Government was opposed to this amendment and tabled an amended version that would restrict employment to domestic work in a private household and allowing a change of employer. The Home Secretary would be given pro-active powers to settle guidance and take enforcement action to ensure no breach of visa conditions or overstaying their time in the country. The matter was debated on 25th March 2015 in the House of Commons and the Lord’s amendment was defeated. <sup>[14]</sup> The various differences of opinions and debates, however, resulted in section 53 of the Act. This is a broadly discretionary section leaving the power with the Secretary of State to issue guidance on the visa and immigration arrangements for overseas domestic workers that will be the subject to further consultation and review in the light of the Ewins report.

The debate about overseas domestic visas is indicative of the problem of attempting to combine two approaches to human trafficking – namely criminal sanctions to regulate visa misuse and at the same time the protection of victims.

This is an area that illustrates very clearly the problem for the Government of attempting to maintain the integrity of the visa system as well as protecting victims. It is common ground that migrant domestic workers are particularly vulnerable to abuse, and for many years the visa system provided minimum protection.<sup>[15]</sup> Evidence collected by the Home Affairs Committee showed that victims who are “owned” by the traffickers best described a wide variety of abusive practices. Often the job arrangements were exploitative and day-to-day life effectively under the control of the employer. Poor regulation of the minimum wage left many workers economically dependent on their employer. The Committee considered that the ability of the employee to change employment was “the single most important issue” in preventing forced labour and preventing abuse. Even though the visa arrangements had been accepted as compliant with human rights and the International Labour Organization (ILO) best practice at that time, there was evidence from a wide range of international sources that abuse was prevalent. The system of visas was effectively unable to satisfactorily address arrangements to counteract abusive employment of migrant overseas domestic workers. In June 2011 the ILO adopted a more robust Convention on Domestic Workers. The new Convention requires that domestic

workers must have the same basic labour rights as other workers including hours of service, rest and holidays, as well as clear information on terms and conditions of employment.

The Modern Slavery Act prompted the Government to identify safeguards on domestic migrant workers. Broadly these include the following:

- Employers have to prove to immigration officers that they have a pre-existing employment relationship with their domestic worker, including documents such as pay slips;
- Victims have access to the National Referral Mechanism and protection from the authorities;
- Various organisations are able to access a number of organisations who can help including the police, the Pay and Work Rights Helpline and Employment Tribunals.

Regulating overseas domestic workers includes general visa conditions set by the Home Office that include a contract of employment being issued; employment with their employer for 12 months, a letter informing workers of their rights. However, in the specific case of overseas domestic workers there is no need for a pre-existing employment relationship nor is there a need to establish that there is a previous relationship of 12 months or more.

There are currently no statistics on the operation of the National Referral Mechanism by overseas domestic workers. Curiously there is considerable evidence that diplomatic missions are increasingly the subject of criticism of their treatment of overseas domestic workers. Recently, the Court of Appeal has ruled that State immunity claimed by diplomats does not allow derogation of the rights of overseas domestic workers, including the right to an employment contract.

The plight of overseas domestic workers is the subject of research undertaken by Human Rights Watch and Kalayaan, an independent pressure group with expertise in this area. Their findings, based on various surveys undertaken over the past few years, are as follows. Migrant workers tied to their employment are twice as likely to be abused as those that were not. The conditions of many migrant domestic workers included lack of privacy, the need to share rooms and long working hours as well as poor pay. Almost two thirds of cases referred to the National Referral Mechanism were in tied contracts of employment.

The operation of the criminal law is particularly problematic. In many cases victims may seek protection from enforcement action by the authorities but leave them even more vulnerable to violence or threats. There is a strong case for allowing a change of contract for overseas domestic workers but the government argues that if overseas domestic workers were allowed to change employer, this might encourage moving from one abusive employment arrangement to another, making it more difficult for the authorities to track victims and offer them protection. Victims of trafficking should be encouraged to seek help from the authorities rather than be allowed to change employer. The Government's stance has support from the police.

### ***Enforcement powers in relation to ships***

Increasingly trafficking involves ships used in the slave trade. Many ships do not have any nationality and seek protection within international waters on the high seas. Tracking ships suspected of the involvement in the slave trade is an important part of prevention and detection. New powers are intended to provide the necessary arrangements to tackle this aspect of the slave trade.

### ***Prevention orders***

Part 2 of the Modern Slavery Act provides for slavery and trafficking prevention orders as well as risk orders. The new orders are a form of monitoring and surveillance device to ensure that the police may regularly keep an oversight of risk and take precautionary measures. Fines may be imposed for any breach of an order. They are part of the judicial process and are subject to application by the authorities, namely the Director General of the National Crime Agency or the immigration authorities. The orders are aimed at prevention and risk assessment. Their operational use is that once victims are identified it is possible to give judicial protection through the application of the orders.

### ***Corporate supply chains***

The original Bill did not address the problem of corporate supply chains, despite their importance to the prevention of slavery. In the debate on the Bill, it was broadly accepted that the company supply chain was the most important aspect of addressing modern slavery and that the Bill should include this aspect of the problem. The requirement to have quoted companies report on the impact of their supply chains on social, economic and human rights issues connected with slavery was considered an essential aid towards prevention and deterrence. After much debate it was agreed that a new clause requiring corporate organisations to publish a "slavery and human trafficking statement" for each financial year should be introduced. This is a general



responsibility and might well fall short of what is required when the details of the statement are insufficient. If so, then they would need to provide an understanding of how the law might be improved and enforced. One of the roles of the Independent Anti-Slavery Commissioner is to monitor and report on the various statements on an annual basis. Part 6 and section 54 of the Modern Slavery Act provide for some transparency in supply chains. Commercial organisations are required to prepare an annual slavery and human trafficking statement. This includes the steps an organisation is taking, including information and transparency on the risk of human trafficking, and the statement must be approved by the Board of Directors. The Secretary of State may make regulations to approve the statement and ensure that it is effective. There are discretionary powers to make further amendments through the regulations.

It remains to be seen how this aspect of the legislation will be effective. Regulating supply chains is critical to the success of anti-trafficking and slavery initiatives.

### **Repatriation and International Law**

There are a variety of regulations under international law that the UK has to be compliant with. The Trafficking Protocol<sup>[16]</sup> defines in international law the term “trafficking” for the first time. The role of international law in this regard is a welcome development. It signals the responsibility of the State on human trafficking and this has strengthened the determination of many States to adopt their own laws or provide additional forms of protection that go beyond the requirements of international law. In this area of international law, however, it is always better not to expect too much. The Trafficking Protocol provides a broad all- embracing definition and criminal offences for practices across States as well as within the State itself.

The UNCHR has a responsibility to protect refugees, asylum seekers, internally displaced people, stateless persons and others and ensure that they do not fall victim to human trafficking. This includes the principle that vulnerable people should not be repatriated. The issue of repatriation is at the centre of the attempts under international law to address trafficking.

The terms of the 1951 Convention, international human rights law and the European Charter of Fundamental Rights are all applicable to the victims of trafficking. Protecting victims from repatriation may take several forms. There is a general obligation to protect victims but often a difficulty in combining this protection with asylum seekers, and the interplay between the two is challenging. States are strong in their protection of national borders. Victims forcibly repatriated run the risk of being trafficked. There are competing principles – the entitlement to return and the principle of *non-refoulement*. Victims of trafficking are entitled to State protection and even remedies, but this is often difficult to achieve. Permanent residency for victims is a potential solution, but this is difficult to take forward as the prior requirement is to be able to identify victims. Trafficked victims are often regularly returned to their own country and may run the risk of being re-trafficked. Such cases may be regarded as a result of failed returned policies. There is a clear dissonance between legal theory and practice. The country of destination of the victims bears the highest burden to protect victims. This includes identification, family tracing and undertaking the necessary documentation. The complexity of the problem relates to organisation and bureaucracy. Even third countries may be involved if the country of origin is un-cooperative.

The international legal arrangements are by their nature highly dependent on member states and a positive interpretation of their remit. The terms of the Protocol on trafficking are vague. Repatriation is based on an assumption that it “shall preferably be voluntary”. This may mean that the repatriating State has few legal responsibilities. Countries of origin are also expected to accept the returned citizen without delay but with regard for their safety. This includes documentation and arrangements for verification of nationality. There is also a further expectation that countries will co-operate and treat the standards under the Protocol as a minimum that may be improved upon. Repatriation should only be undertaken with the “rights, safety and dignity” that are consistent with the needs of victims and their protection. There are various UN Trafficking Principles and Guidelines that emphasise safety and that there is a legal basis for citizenship in the returning country. Assessing the risk involved in any repatriation is difficult when there is civil unrest or disruption within the country. The UN Protocol requires that there is a positive obligation upon Government to ensure that there is no danger of retaliation or threat to the victim of trafficking. The right to return is therefore protected, but that protection is hard to oversee and enforce. It is clear that arbitrary detention or arrest would be against the protocol and violate the victim’s rights.

### **Conclusions**

Human trafficking is a complex and multi-disciplinary problem. It operates, often undiscovered, deep within the hidden economy and across frontiers and countries with relatively little obstruction. It is trans-boundary, trans-national and readily becomes embedded within the economy and social structure of a society. Its economic benefits often outweigh any risks and set substantial boundaries for deterrence and detection strategies

Knowledge about the extent of human trafficking is one of the most fundamental challenges facing this area of law and policy. More information and well-informed media reports are needed to keep the issues in the public domain. Protecting victims through the asylum process and their human rights is possible, and may give rise to victim protection through the legal process. However, the human rights approach has serious limitations in terms of being able to gain access to legal advice and lawyers.

Human rights are also subject to considerable debate and their observance is difficult to guarantee. One of the real dangers of human rights is that they may be subject to reversal should the UK decide to abolish the Human Rights Act or remove the UK from the European Convention on Human Rights. This would measurably reduce the available protection for vulnerable victims.

The Modern Slavery Act 2015 is an innovative legislative initiative. However, it has limitations, not least because politicians are often susceptible to the belief that legislation provides a solution and once enacted the problem will disappear. Viewed as a regulatory problem, modern slavery is a complex problem that will require close attention over the coming years. The intensity of the problem and its growing importance based on economic and financial factors make its solution beyond the application of the criminal law or even effective regulation. It will require time to assess proposed solutions. The Modern Slavery Act is an important legislative first step. It tackles the problem of human trafficking through two approaches simultaneously – strengthening the criminal law and providing victim support. It is not always possible to see the two approaches working consistently. It is likely that the success or failure of the legislation will be judged on whether there is an increase in criminal prosecutions. The operation of the criminal law, however, may not ultimately prevent human trafficking or protect victims. Instead the legislation should be judged on the criteria of whether victims are better protected. Priorities need to be set and established to achieve this end. The newly created position of an Independent Anti-Slavery Commissioner is an important milestone in addressing the problems of human trafficking. Linked to the Commissioner's role is the potential for developing long-lasting global networks that will assist in intelligence gathering and developing strategic approaches to prevention, detection and control. The potential for the Commissioner to develop suitable strategies and networks should be supported throughout civil society, the Church and social workers. In addition setting up child trafficking advocates is a major achievement because it provides support at the level of vulnerable children. This may provide reliable information and allow multi-agency co-operation at the most important level of engagement with the problem.

Policymaking and future strategy will depend on the success of the Commissioner and the willingness to engage with institutions, voluntary organisations and pressure groups. A key aim must be to encourage pro-active measures to support engaging with victims and ensuring that support and care are available. The challenges set by the overseas domestic worker highlights the problems of the twin track approach adopted in the Act addressing the criminal law as well as attempting to provide victims support. Reconciling these approaches will require careful judgement and a fine balance to be drawn between conflicting values. Engaging with victims is likely to reveal their vulnerability and addressing their needs may mean giving greater priority to their safeguarding than to the enforcement and sanction of the criminal law. The Modern Slavery Act opens up an on-going debate that is likely to need careful review as the evidence accumulates. The Act sets an agenda that has the potential to re-define the approach to human trafficking that might possibly become a model of its kind for other countries. Adequate resources and political support are essential if the legislation is to be effective. Successive generations of victims will not be satisfied by anything less.

[1] T.C. Daintith, "Legal Analysis of Economic Policy" (1982) 9 *Journal of Law and Society* 191-224 at p. 211, T.C. Daintith "Regulation by Contract: The New Prerogative" [1979] 32 *Current Legal Problems* 41-64. Generally see: A. Ogus, *Regulation*, Oxford: Oxford University Press 1994 and M. Cave, M. Lodge, *Understanding Regulation*, 2nd edition, Oxford: Oxford University Press, 2012.

[2] T. Prosser, *The Economic Constitution*, Oxford: Oxford University Press, 2014.

[3] See House of Commons Library: *Modern Slavery Bill: Progress of the Bill* SN/HA/7006 (13 March 2015) and also Lords Amendments to the Bill, 5 March 2015 Explanatory Notes Session 2014-15.

[4] See House of Commons Library, *Viral emails protesting about financial assistance for illegal immigrants/refugees living in Britain*. SN05621 (26 March 2015).

[5] Generally see: House of Commons Library Note: *Human Trafficking: UK Responses* SN/HA/4324 (13 January 2014). Home Office, Regulatory Impact Assessment of Ratification of the Council of European Convention on Action against Trafficking in Human Beings, 6 October 2008 and also see the Home Affairs Committee, *The Trade in Human beings: Human Trafficking in the UK*, 6 May 2009 HC 23-1 2008-09.

[6] See: House of Commons Library: *Human trafficking: UK responses* SN/HA/4324 (13 January 2014).

[7] The Protection of Freedoms Act 2012 amended the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc.) Act 2003.

[8] There are similar offences in Scotland and various related offences.

[9] The Modern Slavery Act 2015 provides for a statutory framework relating to guidance on how to operate a national referral mechanism to support and identify victims. This is a form of “soft law” regulation, namely trying to discover the extent of the problem of trafficking and then addressing this aspect of the problem. In the UK there is an on-going review of the NRM process amidst concerns that the system was failing. Linked to the use of the NRM are related issues regarding visas and establishing the confidence of victims.

[10] HL Deb 25 July 2012 cWA 165. Also see: House of Commons Library: *Human Trafficking: UK responses* SN/HA/ 4324 (13 January 2014).

[11] The Act mainly applies to England and Wales. There are ongoing discussions for Wales and Northern Ireland.

[12] House of Commons Library, *Human Trafficking: UK responses* SN/HA/4324 (13 January 2014) p. 9.

[13] The terms of reference of the review include whether the arrangements for issuing Overseas Domestic Workers are effective in protecting victims from abuse and whether there is any evidence that the terms of the visa, including the link to the specified employer, have led to the trafficking or slavery of domestic workers; whether the policies and processes for (i) identifying and (ii) providing support to victims of modern slavery amongst those who entered the country on an Overseas Domestic Workers Visa are effective, including whether there are any barriers to access to support which need to be addressed. The Review should take account of the recent review of the National Referral Mechanism, but look specifically at the issue of access by holders of Overseas Domestic Workers visas; whether the policies and processes for pursuing those accused of perpetrating modern slavery offences against those on an Overseas Domestic Workers Visa are effective; the need to maintain the integrity of the immigration system.

[14] House of Commons Library calls to change migrant domestic visa conditions SN/HA/4786 (18 March 2015).

[15] Home Affairs Committee, *The Trade in Human Beings: Human Trafficking in the UK* HC 23-1 (14 May 2009).

[16] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the UN Convention against Transnational Organised Crime UN Doc A/45/49 Vol. 1 2001 agreed November 2000 and entered into force December 25 2003. Hereinafter the Trafficking Protocol.