



The Modern Slavery Act 2015: Evaluating the Effect

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It is a pleasure to follow Baroness Butler-Sloss and Judge Prince. They have outlined the provisions of the Modern Slavery Act. My purpose is not to address what is in the Act, but rather the need to have in place a means of evaluating legislative measures once enacted. That is particularly salient in the case of the Modern Slavery Act. We cannot tackle modern slavery without a legal base. You, as judges, cannot act without such a base. Prosecutors can only prosecute what is prohibited by law. You depend on the law being fit for purpose.

Legislators seek to give effect to what they want to achieve through the words of a legislative act, but they cannot know for certain what effect the measure will have. There may be problems of interpretation if the language is couched in general rather than specific terms. As one distinguished British judge, Lord Rodger of Earlsferry, observed, if Parliament in the UK states the principles behind the legislation in general terms, 'the courts might not always be able to interpret those principles so clearly as to determine with precision and consistency which cases should be held to fall within and which fall outside its scope'.^[1] Some measures do not work out as intended: the meaning may be benign, but the wording may be deficient. Some measures may prove disastrous, others may simply have little or no effect. Even if the wording is clear, there may be problems with resources for enforcement.

As the introductory text to this summit observed, 'One question without an adequate answer that keeps coming up in our meetings is: how many human traffickers, pimps, and drug traffickers are caught and how many ill-gotten gains have been confiscated and directed towards former victims and society?'

To be apprehended and to have ill-gotten gains confiscated, there has to be a legal base, but that legal base needs to be precise and the extent to which the law achieves what it is intended to needs to be assessed. A United Kingdom Act passed in 2000 – the Powers of Criminal Courts (Sentencing) Act – made it possible to provide reparation to victims, but the number of reparation orders made in human trafficking and slavery cases by 2015 was low. On the face of it, the Act was not achieving what legislators intended it to achieve.

For many legislators, and this has certainly tended to be the case in the United Kingdom, success in legislative terms has been measured in terms of getting a measure on to the statute book. The success is getting it passed. It is not measured in terms of whether it achieves what it was intended to achieve. The legislative process has thus tended to end with Royal Assent being given to a Bill.

That has changed in recent years, with recognition that measures need to be assessed once they are in force. There has thus been some move to look at implementation, indeed to see the legislative process as more than the deliberation and assent accorded to a measure by the legislature, and to view it instead as a three-stage process: the pre-legislative, the legislative, and the post-legislative stages. There has been attention given to looking at measures in draft, before they are formally submitted to Parliament, and to assessing whether they have achieved their purpose when they are in force.

This more holistic approach has applied especially in respect of the Modern Slavery Act enacted last year. As John McEldowney said in his opening comments to this summit, and Baroness Butler-Sloss has reiterated, the Act is the first of its kind in Europe. Given that the Act is the first of its kind, it is especially important to ensure it achieves what it is intended to achieve.

There are two problems particular to the measure:

First, the very fact that it is the first of its kind. If the Act is to be an exemplar, we need to get it right, but we have nothing against which to test it.

Secondly, the nature of the problem makes it difficult to assess the effectiveness of the measure. As the Impact Assessment for the Modern Slavery Bill noted 'Modern slavery is a largely hidden crime'.^[2] There is the difficulty of defining the subject and no way of knowing the full extent of the problem. We can get fairly objective data on crimes like murder, but for the extent of modern slavery we rely on estimates, depending of course on how we define the term and what therefore constitutes an offence.

It is crucial, therefore, to evaluate the effects of the Act once it has had an opportunity to bed in. To quote the Impact Assessment again, modern slavery 'requires a clear focus from Government through both legislative and non-legislative measures to ensure an effective response'.^[3] But how do we know if the response has

been effective? The policy objective of the Modern Slavery Act is to reduce the incidence of human trafficking and modern slavery in the UK. The issue is not the objective, but determining whether it has been achieved.

As Home Secretary Theresa May said at the Third Reading of the Modern Slavery Bill, 'if it is to be implemented effectively we need concerted effort from all those involved'.^[4] Enactment, then, is a necessary but not sufficient condition. One of the motivations for the introduction of the Bill was what was identified as an 'unduly lenient sentence regime'.^[5] But what mechanism is in place to determine that the Modern Slavery Act is being enforced effectively, indeed that the provisions are clear and are proving enforceable?

Given the importance and complexity of the issue, the Modern Slavery Bill was preceded by an evidence-based study of the problem and this was followed by pre-legislative scrutiny. There was a Modern Slavery Bill Evidence Review Panel, chaired by MP Frank Field – who attended one of the previous summits held here – which took evidence from experts ahead of publication of the Bill. This was followed by the appointment of a Joint Committee of both Houses of Parliament to examine the draft Bill. There was thus a dedicated and extended attempt to ensure that the Bill was crafted effectively in order to address the mischief it was intended to address and indeed identified the mischief itself.

The next step, now that the Act is on the statute book, is to determine if it is achieving what it is intended to achieve. That is the key message I wish to convey. **It is important not only to enact clear law to combat modern slavery, but also to put in place a mechanism for checking that it is achieving its purpose and, if it is not achieving its purpose, identifying what changes need to be made.**

In the United Kingdom, we have the mechanism now in the form of post-legislative review, introduced in 2008. Under this, most Acts of Parliament are reviewed three to five years after enactment by the sponsoring Government Department to determine if they have achieved their intended purpose. The Modern Slavery Act will thus be reviewed some time between 2018 and 2020 by the relevant Government Department, in this case the Home Office, and the review published.

The post-legislative reviews undertaken by Government Department are sent to departmental select committees – that is, permanent investigative committees – in the House of Commons, which may then choose to undertake their own inquiries in the light of the reviews.

Because of competing demands on their time, few select committees undertake post-legislative reviews. However, the House of Lords has begun a practice of each year selecting certain Acts of Parliament and appointing *ad hoc* committees to review them and assess whether they have achieved what they were intended to achieve. The House has had committees examining legislation dealing with the adoption of children,^[6] public inquiries,^[7] mental health,^[8] extradition, ^[9] and disability.^[10] The value of such inquiries is that they are thorough (each covers one parliamentary session, in effect one year), result in published reports (embodying evidence and recommendations), and are undertaken by members of the House with particular experience or expertise relevant to the subject. For example, Baroness Butler-Sloss, former President of the Family Division of the High Court, chaired the one on adoption.

The Modern Slavery Act would be an ideal candidate for post-legislative review by the House of Lords and I would hope that the House will appoint such a committee once the Act has had time to take effect. This will complement the review undertaken by the Home Office and will enable the House of Lords to draw on experts in the field.

It will be valuable to see how the first Act of this kind – the Modern Slavery Act – is being implemented and the extent to which it is achieving its intended goals, and the extent to which it needs to be amended in the light of developments.

However, my purpose is not primarily to draw attention to this eventuality, but rather to emphasise the importance of having in place a mechanism for review, ideally a regular review, of law to combat modern slavery. To repeat my point, enacting law is necessary, but it is not sufficient. Is the law achieving what it is intended to achieve? How do you know if it is? What are the standards by which you are measuring success?

Can the law be improved?

I conclude by recommending not only that nations have in place mechanisms for assessing the effectiveness of laws against modern slavery, but also share with one another what those mechanisms are. Passing law to combat modern slavery is the start of the process to tackle the mischief. As is clear from this summit, it is not the end of the process.

[1] Lord Rodger of Earlsferry, 'The Form and Language of Legislation', in D. Feldman (ed), *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013), p. 77.

- [2] Modern Slavery Bill, Impact Assessment (IA), 30/10/2014, p. 1.
- [3] Modern Slavery Bill, Impact Assessment (IA), 30/10/2014, p. 1.
- [4] *HC Hansard*, 4 November 2014, col. 790.
- [5] HM Government, *Report of the Internal Review of Human Trafficking Legislation*, May 2012, p. 4.
- [6] Select Committee on Adoption Legislation, House of Lords, *Adoption: Pre-Legislative Scrutiny*, 1st Report, Session 2012-13, HL Paper 94; *Adoption: Post-Legislative Scrutiny*, 2nd Report, Session 2012-13, HL Paper 127.
- [7] Select Committee on the Inquiries Act 2005, House of Lords, *The Inquiries Act 2005: post-legislative scrutiny*, Session 2013-14, HL Paper 143.
- [8] Select Committee on the Mental Capacity Act 2005, House of Lords, *Mental Capacity Act 2005: post-legislative scrutiny*, Session 2013-14, HL Paper 139.
- [9] Select Committee on Extradition Law, House of Lords, *The European Arrest Warrant Opt-in*, 1st Report, Session 2014-15, HL Paper 63; *Extradition: UK law and practice*, 2nd Report, Session 2014-15, HL Paper 136.
- [10] Select Committee on the Equality Act 2010 and Disability, House of Lords, *The Equality Act 2010: the impact on disabled people*, Session 2015-16, HL Paper 117.