

Bonavero REPORTS

1/2024 | 1 FEBRUARY 2024

The non-punishment principle and its implementation in the UK

Proceedings from 'Different
perspectives on the non-punishment
principle' workshop, University of
Oxford, October 2023

Dr Alicia Heys, Dr Maayan Niezna



Bonavero
Institute
of Human
Rights





ABOUT US

The Bonavero Institute of Human Rights is a research institute within the Faculty of Law at the University of Oxford. It is dedicated to fostering world-class research and scholarship in human rights law, to promoting public engagement in and understanding of human rights issues, and to building valuable conversations and collaborations between human rights scholars and human rights practitioners. Since opening in October 2017, the Institute has been housed in a new building at Mansfield College. The Institute's home at Mansfield is central to its identity as inclusive and welcoming and is an important factor in the Institute's ability to attract scholars and to host important symposia and conferences. The Bonavero Institute seeks to ensure that the research is of contemporary relevance and value to the promotion and protection of human rights.

As part of its mission, the Institute has nurtured a vibrant community of graduate students, hosted outstanding scholars of law and other disciplines, and collaborated with practitioners engaged in the most pressing contemporary human rights issues around the world. The Bonavero Institute adopts a broad definition of human rights law to include international human rights law and practice, domestic human rights, the rule of law, constitutionalism, and democracy.

The Bonavero Reports Series is a key outlet for the scholarship produced at the Institute. It presents cutting-edge research in a straightforward and policy-ready manner, and aims to be a valuable source of information for scholars, practitioners, judges, and policymakers alike on pressing topics of the current human rights agenda. For more information, please visit our website.

The Wilberforce Institute is a research institute at the University of Hull, committed to studying slavery and exploitation in all its forms, from historical to contemporary. Our mission is to produce high quality and innovative research on slavery, and we regard history as a lens through which to study contemporary issues.

As a community of researchers and practitioners, we are committed to disciplinary excellence and to interdisciplinary research and action that will



benefit society on a national and international level. We collaborate with academic partners, non-governmental organisations, museums, and businesses, and we act as a forum for academic discourse and interaction on slavery past and present.

We aim to maximise the benefits of research by advancing fundamental knowledge of slavery and emancipation, contributing to better public policy, social cohesion, community identity, education, the arts and the heritage sector.



UNIVERSITY OF HULL | **WILBERFORCE INSTITUTE**

This project was funded by the [Modern Slavery and Human Rights Policy and Evidence Centre \(Modern Slavery PEC\)](#), which in turn is funded and supported by the UK Arts and Humanities Research Council (AHRC). The views expressed in this report are those of the authors and not necessarily of the Modern Slavery and Human Rights Policy and Evidence Centre or the Arts and Humanities Research Council.

The Modern Slavery PEC was created by the investment of public funding to enhance understanding of modern slavery and transform the effectiveness of law and policies designed to address it. The Centre funds and co-creates high quality research with a focus on policy impact, and brings together academics, policymakers, businesses, civil society, survivors and the public on a scale not seen before in the UK to collaborate on solving this global challenge.

The Centre is a consortium of six academic organisations led by the Bingham Centre for the Rule of Law and is funded by the Art and Humanities Research Council (AHRC) on behalf of UK Research and Innovation (UKRI). Read more about the Modern Slavery PEC at www.modernslaverypec.org.

MODERN SLAVERY & HUMAN RIGHTS | **POLICY & EVIDENCE CENTRE**

Led by the Bingham Centre



AUTHORS' BIOGRAPHICAL NOTES

This report reflects a joint effort of the participants of the 'Different perspectives on the non-punishment principle' workshop that took place at the University of Oxford in October 2023. The participants who contributed to this report include researchers in law, criminology, human geography, and social work, and practitioners including police officers, representatives from UK and international NGOs, barristers, solicitors, and social workers.

The report was written by Alicia Heys and Maayan Niezna based on contributions from all the workshop participants.

Dr Alicia Heys

Dr Alicia Heys is a Lecturer in Modern Slavery at the Wilberforce Institute at the University of Hull, and a Research Fellow for the Modern Slavery and Human Rights Policy and Evidence Centre. Her research focuses on issues of agency, policy, and the legal enforcement of modern slavery and human trafficking.

Dr Maayan Niezna

Dr Maayan Niezna is a Lecturer at the University of Liverpool School of Law and Social Justice. Before joining the School, she was a Postdoctoral Research Fellow in Modern Slavery and Human Rights at the Bonavero Institute of Human Rights, University of Oxford. Her research focuses on trafficking for labour exploitation, the regulation of labour migration, and the rights of non-citizens.



OVERVIEW

The non-punishment principle reflects the understanding that victims of trafficking and slavery might be compelled to commit unlawful activities, and it prioritises the protection and rehabilitation of victims of trafficking and modern slavery over their prosecution. The principle is recognised in international law,¹ and the UK developed a statutory defence under Section 45 (s45) of the Modern Slavery Act 2015 ('MSA') to comply with it.² The purpose of s45 is to protect victims of modern slavery from being punished for offences they have been compelled to commit (for victims aged 18 or over), or which they committed as a direct consequence (for victims aged under 18) of having been a victim of relevant slavery or exploitation. s45 aims to protect victims of modern slavery or human trafficking from prosecution when they had no choice but to commit an unlawful act because of their situation of exploitation, however, it does not confer a blanket immunity and there are over 100 offences (listed in schedule 4 of the Modern Slavery Act), for which the defence cannot be applied.

Addressing the crucial intersection of criminal law enforcement and human rights, this document provides a summary of a workshop which took place at the University of Oxford in October 2023, co-hosted by the Bonavero Institute of Human Rights, and the Wilberforce Institute (University of Hull). The workshop was attended by 20 researchers and practitioners working on aspects of modern slavery and human rights relevant to different aspects of the non-punishment principle.³ The remainder of the document outlines the key points of discussion highlighted by the participants.

¹ Office of the High Commissioner for Human Rights (OHCHR) 'Recommended Principles and Guidelines on Human Rights and Human Trafficking', Principle 7, Guideline 2.5, Guideline 4.5; Council of Europe Convention on Action against Trafficking in Human Beings, Art. 26.

² The Modern Slavery Act, and within it s45, applies to England and Wales. Similar provisions are found in Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) (s22). In Scotland, the Lord Advocate's Instructions for Non-Prosecution of Victims Of Human Trafficking, published in 2016 and issued under Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015, state 'a strong presumption against prosecution' of victims compelled to commit offences due to their trafficking.

³ Participants from police, barristers and solicitors, social workers, and academics, with conversations held under Chatham House rules.



The different issues and concerns raised during the workshop reflected five key themes. First, the participants identified there was insufficient knowledge and awareness of the non-punishment principle and its meaning. Second, there are problems with the application and implementation of the principle, and procedures for victims of modern slavery are often unclear and inadequate. Third, the treatment of victims as criminals by the Criminal Justice System has a serious impact on victims who need better support. Fourth, participants identified migrants as a particularly vulnerable group, and noted the way migration enforcement policies produce vulnerability to exploitation, push migrants into illegality, and deter them from seeking assistance. Finally, another specific type of exploitation noted by the participants was that of county lines, where solutions within the criminal justice system are insufficient, and a more constructive approach is needed. We discuss these themes in order.

1. Lack of knowledge

Law enforcement and judiciary systems often remain unaware or insufficiently informed about the non-punishment principle concerning victims of human trafficking and modern slavery who are compelled to commit crimes. This lack of awareness can be attributed to several factors. Firstly, the concept of non-punishment for victims who have been compelled into criminal activities is relatively new and still evolving in its application within legal frameworks.⁴ Secondly, there is an inherent challenge in shifting the traditional perspective of law enforcement from viewing individuals solely as offenders to recognising them also as victims, especially in complex cases of human trafficking and modern slavery. Additionally, there is often a focus on the offence committed and its seriousness, rather than the compelling features which resulted in the person committing the offence. The types of crimes that victims are often forced to commit, such as drug-related offences or immigration violations, are usually high on the government's agenda for prosecution, which further complicates the recognition and application of the non-punishment principle in these cases. In December 2023, the House of Commons Home Affairs Select Committee

⁴ See for example a recent study on the 'Implementation of the Non-punishment Principle among ASEAN Member States' (2022), https://www.aseanact.org/wp-content/uploads/2022/04/Non-Punishment_print_smallsize.pdf



published its enquiry into Human Trafficking in the UK.⁵ It highlights that there is a lack of understanding and consistent application of s45 to trafficked persons who have been compelled to commit offences, with many victims being prosecuted and convicted of offences for which they were entitled to the s45 statutory defence. Workshop participants discussed at length the continued misconceptions of law enforcement, prosecutors, and judges who sometimes give a guilty verdict while noting that the accused were victims of slavery. Concerns were raised that notions of the ‘ideal victim’⁶ continue to infiltrate professional and public understandings of victimhood, where individuals may not be recognised as victims if they do not appear as weak, passive, and lacking agency.

While accepting that policy recommendations are usually heavy on calls for more training, participants agreed that this is fundamental to improve knowledge, and thus responses, to victims of modern slavery who have been compelled to commit crimes. Initially, there is a requirement for basic training on what modern slavery is and how it presents, in order to increase the likelihood of victims being identified in the first instance. This must occur before further training on the non-punishment principle, rulings from the European Court of Human Rights (ECHR) and the application of s45. It is also fundamental that law enforcement agencies, lawyers, and judges receive training on bias in decision-making, particularly around perceptions of the ‘ideal’ or ‘deserving’ victim in comparison to the reality that victims may present in hugely different ways. Further discussion and research also needs to be undertaken to identify best practice examples from defence lawyers on s45 which can then be developed for wider dissemination within the above-mentioned training.

In a very practical sense, little is known about how s45 is applied in practice, as no quantitative data is gathered on its use; there is no reporting on how often it is used; who suggests it is being used; the characteristics of the defendant

⁵ House of Commons Home Affairs Select Committee. Human Trafficking First Report of Session 2023-24. <https://committees.parliament.uk/publications/42482/documents/211207/default/>

⁶ N Christie, ‘The Ideal Victim’ in E Fattah (ed), *From crime policy to victim policy: reorienting the justice system*. (Palgrave Macmillan, Basingstoke 1986), pp. 17–30.



employing it; or its rates of success.⁷ Despite this lack of data, and thus lack of knowledge around the use of s45, claims continue to be made that s45 is being abused by criminals who raise it as a way to avoid prosecution. Workshop participants agreed that the collection and collation of quantitative data on the use of s45 is important and would allow for more accurate scrutiny as to whether the defence is being abused. The collection of s45 data was a recommendation in the 2019 review of the Modern Slavery Act, but has yet to have been implemented.⁸

Participants also discussed the need for research from the perspective of survivors of slavery and trafficking on their interactions with the criminal justice system. Such research will lead to a better understanding of survivors' needs and lived experiences in order to improve practice to best meet those needs.

2. Lack of appropriate procedures

The legal safeguards and procedures for victims of modern slavery are inadequate and are not clear enough on the scope and substance of the non-punishment principle. Participants discussed the term 'non-punishment' and whether it is the best term to frame the issue. Some suggested employing the term 'non-liability' to recognise a broader underlying principle, and to prohibit punishment beyond the criminal context (through administrative proceedings, immigration, denial of citizenship etc.).⁹ Others considered 'liability' to reflect a legal notion of responsibility that does not apply to victims. Others thought this would require a completely different framework and a significant change not just in domestic but also international law, and suggested 'non-penalisation' may be a better term. A related suggestion was to explore broadening the statutory defence or introducing statutory guidance to better reflect international frameworks and cover non-criminal penalties. Such guidance may apply beyond

⁷ Office of the Independent Anti-Slavery Commissioner. The Modern Slavery Act 2015 Statutory Defence: A call for evidence October 2020) <https://www.antislaverycommissioner.co.uk/media/1478/the-modern-slavery-act-2015-statutory-defence-call-for-evidence.pdf>

⁸ F Field, M Miller and E Butler-Sloss, Independent Review of the Modern Slavery Act 2015: Final Report) (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf

⁹ Denial of citizenship is particularly relevant when the offences are terrorism-related; administrative sanctions may be particularly relevant to migrants.



the criminal context. Prosecution guidelines would also need to ensure appropriate consideration of victim agency and blameworthiness across different exploitation types, reflecting the comments noted above.

Participants also identified other practical problems with the implementation of s45, its applications, limitations, and execution. The exclusion of defence lawyers from the list of National Referral Mechanism first responders was raised as one issue, as well as the need to adopt guidelines as to how new organisations may apply to become first responders.

3. Support for victims

Significant discussion was undertaken on the impact that the Criminal Justice System has on victims who are treated as criminals. Factors such as childhood trauma and adverse childhood experiences often intertwine, creating an environment of vulnerability to exploitation which especially impacts minorities (e.g. in the context of County Lines,¹⁰ racialised, young black men, groomed into this form of exploitation).

Participants identified the need to provide better support to victims at different times. Some NGO representatives highlighted the need to support people and enable them access to the NRM system. Early identification of victims is necessary, in order to avoid punishment as well as to ensure they receive appropriate protection and support. In criminal procedures where the suspect might have been a victim of trafficking or slavery, participants highlighted that delays should be reduced, and various defences considered, whether s45, duress, self-defence or other, related to the individual's circumstances. While some participants emphasised the need to improve protection in cases where the defendants have a s45 defence, others emphasised that victim support services should be available to all victims. Participants highlighted the current lack of support for confirmed trafficking victims after NRM decisions and of long-term independent advocacy and support for survivors with some participants suggesting trauma-informed, multi-agency practices that involve the health and medical service sector. The

¹⁰ See section 5 below.



easing of the burden of evidence for trafficking victims was raised by some participants as a valuable model for applying the non-punishment principle.

Some participants suggested that schedule 4 of the Modern Slavery Act and especially the terrorism-related offences within it do not properly account for the processes of (online) grooming and radicalisation. These are forms of harm that require adequate understanding of the recruitment process and suitable rehabilitation and protection.¹¹ Others highlighted that in the context of the Nationality and Borders Act, even people who were not convicted of terrorism-related offences might be considered a threat to Public Order and therefore disqualified from protection.¹²

4. Crime, migration policy and modern slavery

While there was some disagreement among participants concerning the framing of the relationship between migration policy and modern slavery,¹³ there was a strong agreement among participants that there is a significant problem in the way migration enforcement policies actively produce vulnerability to exploitation. Migrants' limited rights and protections can compel them to enter precarious work with risks of exploitation and they can also find themselves being pushed towards deemed 'illegal' work¹⁴. Compounding this is a culture of disbelief permeating from the asylum sector into the modern slavery sector, with risks that victims are too scared to approach authorities for protection.¹⁵ Some participants highlighted the role of the increasingly 'hostile environment' in combination with a disinclination to uphold decent labouring conditions for all workers, regardless

¹¹ In relation to children and young people, see J Reeves, E Soutar, S Green and T Crowther, 'Children and Young People's Vulnerabilities to Grooming' in S Çetinkaya (ed) *Contemporary Perspective on Child Psychology and Education* (IntechOpen, 2018).

¹² Nationality and Borders Act 2022 s63.

¹³ Some framed the context as one of 'racialised border violence'; others referred to 'anti-immigration rhetoric' applicable to both documented and undocumented workers.

¹⁴ K Kubacki, N Szablewska, D Siemieniako and L Brennan 'Vulnerable Communities and Behaviour Change: A Case of Modern Slavery in Supply Chains' in L Brennan et al. (eds), *Beyond the Dark Arts: Advancing Marketing and Communication Theory and Practice*. (World Scientific Publishing, Singapore 2023), pp. 167-190.

¹⁵ As some participants suggested, culture of disbelief may also impact British citizens in some contexts, such as county lines.



of legal status.¹⁶ Some suggested the hostile environment must be replaced with an evidence-based policy that is compliant with international law.

A related concern expressed by many participants was a growing emphasis on 'immigration crime', and a tendency to include modern slavery in this category, or subject modern slavery to migration control measures. Examples given included the New Plan for Immigration and the inclusion of modern slavery responses within the Nationality and Borders Act;¹⁷ the Illegal Migration Act denying victims of modern slavery access to protection or asylum claims;¹⁸ the transfer of the modern slavery brief from the minister responsible for safeguarding into the brief of the immigration minister under 'illegal immigration and asylum', and claims around modern slavery claims used to 'game the system'.¹⁹ Participants expressed grave concerns over people meeting the definitions of victims of trafficking and slavery and yet excluded from protection under recent legislation, and argued this legislation does not allow respect to the non-punishment principle. Some emphasised the need to separate responses to modern slavery from migration policies that aim to reduce immigration.

Some participants suggested that even if applied correctly, the non-punishment principle is inherently narrow and limited to those meeting the high threshold of trafficking. The law around trafficking and modern slavery creates exceptions to be addressed, while protections from lesser forms of exploitation are eroded. Many vulnerable migrants in precarious situations or those working illegally may be exploited without meeting this threshold. If only those recognised as victims of trafficking are protected and others are deported, there would remain a chilling effect preventing vulnerable people from complaining, especially as vulnerable migrants are not in a position to determine the odds they will be recognised as victims under the NRM. To encourage victims to seek protection and support,

¹⁶ In this context, some participants emphasised the costs of the 'hostile environment policy' and its failure to reduce net migration. On the costs of the Hostile environment see e.g. Refugee Action 'Costility: The Cost of Hostility' <https://www.refugee-action.org.uk/costility/>.

¹⁷ Part 5.

¹⁸ S 22-25.

¹⁹ See e.g. Emily Dugan 'Watchdog disputes Braverman's claim modern slavery laws being 'gamed' The Guardian 9 October 2022 <https://www.theguardian.com/uk-news/2022/oct/09/watchdog-disputes-bravermans-claim-migrants-gaming-slavery-laws>



victims coerced or deceived into situations of exploitation not amounting to trafficking should also be protected, and training should be developed for defence lawyers to properly understand the immigration consequences of advising victims to plead guilty to offences they committed whilst being exploited.

There were some disagreements among participants regarding undocumented migrants' access to the labour market. Some argued for the creation of lawful channels for migration and work, including for those seeking asylum, as well as enforcement of labour standards irrespective of workers' legal status. Some suggested amnesty for irregular migrants. Others argued these proposals are too far from the core of the non-punishment principle, and even if desirable in theory are not politically realistic.

5. County lines

One of the specific types of exploitation discussed was that of county lines - the transportation of illegal drugs between locations, usually from major cities into smaller towns and rural areas. Several participants work with victims of this type of exploitation, which often involves minors or vulnerable people to deliver drugs. They emphasised that defences within the criminal procedure are insufficient. A more constructive and cost-effective approach to addressing youth offenders involved in drug selling would be to redirect funding towards comprehensive youth programmes. These programmes should focus on preventative measures, such as engaging children in educational and recreational activities, providing them with safe spaces, and offering counselling and support services. Such an approach not only helps keep children off the streets and away from the influence of gangs but also addresses the root causes of their involvement in illicit activities. Participants suggested that investing in these preventative strategies would not only reduce the long-term financial burden on the state associated with legal proceedings and potential incarceration but also foster a more rehabilitative and supportive environment for at-risk youth. This shift in focus from punitive measures to preventive and rehabilitative care can lead to more sustainable and positive outcomes for both the individuals involved and the community at large.



Concluding remarks

This document provides a summary of a one-day workshop attended by 20 academics and professionals working in various fields relating to the non-punishment principle. While the purpose of the workshop was not to focus entirely on the UK's implementation of the non-punishment principle, there was significant consideration of this topic. The resulting discussions highlighted a number of key areas of concern and led to a number of suggestions, as outlined above, for improvement in order for the UK to uphold its international obligations, as well as to best meet the needs of victims of modern slavery and human trafficking.



Resources for further reading:

- Alicia Heys, '[The UK's Statutory Defence for Victims of Modern Slavery and Its Narrow Understanding of Victimhood](#)' [2023] *The Journal of Criminal Law* 00220183231179181.
- La Strada International '[The Non-Punishment Principle: Explanatory Brief](#)' (2023)
- Marija Jovanovic, '[The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance](#)' (2017) 1 *Journal of Trafficking and Human Exploitation* 41.
- Marija Jovanovic and Maayan Niezna. '[The non-punishment principle set out in Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings](#)'. *Council of Europe study*, September 2023
- Nogah Ofer, '[Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law](#)' (2019) 11 *Journal of Human Rights Practice*, 486
- Ryszard Wilson Piotrowicz and Liliana Sorrentino, '[Human Trafficking and the Emergence of the Non-Punishment Principle](#)' (2016) 16 *Human Rights Law Review* 669.