Beyond Legal Illusions: How the Law perpetuates modern slavery and exploitation.

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Abstract

Slavery and human trafficking are two of the most grave and inhumane violations of human rights. Although these are criminalised offences worldwide, they continue to exist and corrupt the lives of thousands of individuals annually. An estimated 50 million people were experiencing modern slavery on any given day in 2021, representing an increase of 10 million since 2016.[90] Therefore, it is evident that criminalisation is and will never be enough to tackle this issue. This article will address the UK's Modern Slavery Act (MSA),[91] and how, despite the acclamations, this piece of legislation is inherently weak. The act overlooks the significant role that big businesses play in the development of exploitation, constructing slavery as a problem, albeit a grossly horrific one. Still, it remains a singular problem and fails to provide any functional solution that addresses the systemic cause. The issue of underdeveloped legislation within this area is not only apparent in the UK. This article will touch on legislation operating in the USA jurisdiction, discussing the various issues and negative implications that the Alien Tort Statute[92] has caused for victims of exploitation. However, one of the most prevailing areas in which the law has created a precarious situation for those who are

[90] Walk Free, 'Global estimates of modern slavery' (2022) < https://www.walkfree.org/reports/global-estimates-of-modern-slavery-2022/> accessed 24 September 2025.
[91] Modern Slavery Act 2015
[92] 28 U.S.C.A § 1350

victims of slavery and exploitation is through temporary migrant worker programmes (TMWPs).

Introduction

Over the last decades, the issue of exploitation and modern slavery has become the focus of many government agendas and legislation initiatives worldwide.[93] The various attempts by the law to address these issues have borne little fruit, and in more ways than one have highlighted a lack of political will to address the systemic factors that enable exploitation.[94] This article will discuss the law's attempts to address the issue, including legislation and the errors in judgment that have been encountered. The law has struggled to track the transformations of the problem, and through their inaction, they have arguably permitted the re-emergence of these crimes. I will also discuss in detail temporary migrant worker programs, both how they perpetuate exploitation and the underlying tones of transatlantic slavery within this system. These programmes are set up, overseen, and operated in accordance with the law, yet a blind eye is willingly turned to the corruption within this system. TMWPs are manufacturing victims of forced labour and modern slavery daily, yet this remains overlooked due to the appealing facade that these programmes are helping generate a flourishing economy. Ultimately, for reasons briefly stated above, the law and legal structures are complicit in the

[93] Janie A. Chuang, 'Exploitation Creep and The Unmaking of Human Trafficking Law' (2014) 108(4) The American Journal of International Law 609.
[94] Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) MLR.

persistence of human trafficking and modern slavery, despite their attempts to remain carefully veiled. Overall, this paper will analyse, through the broader lens of social justice, whether the law is a solution or a further tool that enables injustice within the world of exploitation.

The Modern Slavery Act 2015: Inherent weaknesses and recommendations to improve

Firstly, the law poses no less of a problem due to a weak statutory framework. The UK Parliament introduced the Modern Slavery Act in 2015,[95] and it was the first piece of legislation to address 'slavery' as opposed to 'human trafficking.'[96] At the time of the enactment, Theresa May described this as a "historic milestone"; her speech was grandiose, painted this legislation as a sure force to be reckoned with and voiced a commitment to the eradication of human trafficking.[97] However, as time has progressed, we have witnessed this act coming apart at the seams. In 2017, the National Audit Office published a highly critical report of the UK response to modern slavery.[98] This report found that the strategies set out by the MSA were overall weak, incoherent, and lacking

[95] The Modern Slavery Act 2015
[96] Alien Tort Statute, 28 U.S.C.A § 1350
[97] Home Office, 'Historic Law to end Modern Slavery passed' (Gov.uk, 26 March 2015) < https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed> accessed 3 December 2024.
[98] National Audit Office, 'Reducing modern slavery'(nao.og.uk 12 December 2017) < https://www.nao.org.uk/wp-content/uploads/2017/12/Reducing-Modern-Slavery.pdf> accessed 3 December 2024.

clear direction as to how to achieve an honest reduction in slavery in the UK. A notable finding from this report was that the Home Office does not monitor compliance for how businesses report what they are doing to prevent human trafficking within their supply chains.

Under the MSA, the UK government had introduced a requirement that companies with a turnover of more than £36 million annually must produce a human trafficking statement, detailing steps taken to manage the risk of modern slavery.[99] The rationale behind this was that by 'naming and shaming' big businesses, this would have a knock-on effect on their reputation, and therefore persuade companies to put adequate measures in place to tackle the issue of exploitation within supply chains.[100] The enforcement of this has been deplorable and lacking any assertion of a 'backbone' in the face of these corporate evils.[101] This requirement of businesses is not only non-binding and completely obligatory, but there are no quality checks or scrutiny of the statements released; a statement could simply consist of a business admitting to having taken no steps in preventing modern slavery.[102] As the UK's Independent Anti-Slavery

[99] The Modern Slavery Act 2015, s 54.
[100] Gary Craig, 'The UK's Modern Slavery Legislation: An Early Assessment of Progress' (2016) 5(2) Social Inclusion < https://www.cogitatiopress.com/socialinclusion/article/view/833/545> accessed 5 December 2024.
[101] Modern Slavery Act 2015, s 54(4)(b).
[102] Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (2nd edn, Cambridge University Press 2019).

Commissioner stated in 2020, "This light-touch legislation sets a low bar for compliance."[103]

A further issue with the Modern Slavery Act is that it does not propose a solution to the inherent link between Overseas Domestic Workers visas and exploitation in the workplace. There is an apparent absence of political commitment to tackle the structural factors that underpin vulnerability to exploitation.[104] Arguably, this absence reflects the true intentions of the government, as it is this monopoly over the immigration process that strengthens political agendas. A clause was inserted into the MSA which gives domestic workers, who have been formally identified as victims of trafficking, the possibility of being granted a 6-month visa that allows them to change employers.[105] This legislation "initiative" was underwhelming at best; the clause was inserted in complete ignorance of the actual situations of exploitation experienced by those with Overseas Domestic Workers visas. It is ill-considered to assume that those domestic workers who have not yet been formally recognised as victims of trafficking will have access to change employers within the time frame of 6 months.

[103] Independent Anti-Slavery Commissioner Annual Report 2019-20.

[104] Modern Slavery Act 2015

[105] ibid, s 53.

Additionally, those who are victims of workplace abuse or exploitation will be incredibly reluctant to leave a job due to the sheer power imbalance and lack of bargaining chips against the employer. Therefore, the Modern Slavery Act is far from a commendable beacon of justice. From a legal positivist perspective, 'the existence of the law is one thing; its merit or demerit is another.'[106] However, regarding the MSA, the idea that there should be a distinct separation between law and morality should be rejected. The state should assume a degree of ethical responsibility to defend against the crimes of exploitation and human trafficking. I would align my argument with a natural law perspective; the MSA cannot be seen as a public asset, it lacks integrity and arguably any sense of a moral code.[107] Fuller emphasised the need for both an internal and external morality of the law.[108] The external morality of the law relates to how the decision-maker actually applies a law, and what outcome it yields. In this sense, the objectives of the MSA (to eliminate exploitation and modern slavery in the UK) should be inseparable from the intelligibility of the act itself.

However, with respect to the various problems with the MSA which are mentioned above, we can witness the lack of alignment between the purpose of the law, and the

[106] John Austin, The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence (Weidenfeld & Nicolson 1954) 184-185.
[107] Trevor Allan, 'Why the law is what it ought to be' 2020 11(4) Jurisprudence < https://www.tandfonline.com/doi/full/10.1080/20403313.2020.1782596?casa_token=LKrjXXL9T-wAAAAA%3ANTrgNEpZKb558zNx4IvAsSo_7MLSPjK4zF5EgrU09wFJ9xL-UNoWtZFAkSHjA8pFBxL6EFmuE6c3#abstract> accessed 29 December 2024.
[108] Lon L. Fuller, 'The Morality of The Law' (Yale University Press 1964) 669.

contributions it actually makes to public governance.[109] The MSA affords much greater protection to corporate businesses and the ulterior motives of government than to the actual victims of exploitation and human trafficking within the UK. Therefore, there is a lack of substantive justice being served; the moral compass guiding the MSA is arguably imperceptible. As once stated by St. Augustine, "an unjust law is no law at all."[110] Despite this, there have been recommendations and initiatives made concerning strengthening the MSA and the UK response in general to modern slavery. For example, A Private Members' Bill was initiated by Baroness Young of Hornsey – The Modern Slavery (Transparency in Supply Chains) Bill.[111] Other countries have also taken steps to strengthen their legislation and protect victims against exploitation. For example, Switzerland has introduced mandatory due diligence obligations for companies, and in 2019, the Dutch Government adopted the "Child Labour Due Diligence Law."[112] However, despite these various attempts, the overall law in this area remains light touch. The means of modern slavery and exploitation do not remain static; perpetrators will continuously adapt their practices to evade the law. Therefore, by having in place reactive legislation, such as the MSA, rather than proactive legislation, minimal resolution can be achieved for victims.

[109] Modern Slavery Act 2015

[110] Padraig McCarthy, 'Unjust Law and False Truth' (2019) 70 (5) The Furrow < https://www.jstor.org/stable/45210232> accessed 31 December 2024.

[111] Modern Slavery (Transparency in Supply Chains) Bill [HL] Bill 57 (2017-19).

[112] The Child Labour Due Diligence Act 2019.

Weak legislative initiatives beyond the UK: The Alien Tort Statute

Moreover, legal frameworks beyond the UK have hindered efforts to secure justice in cases of slavery. Notably, the Alien Tort Statute (ATS) operates under USA jurisdiction.[113] The Alien Tort Statute was enacted as part of the Judiciary Act of 1789[114] to give federal district courts jurisdiction to hear "any civil action by an alien for a tort".[115] Unlike the Modern Slavery Act[116], this legislation does not directly address the issue of slavery; instead, it operates to allow foreign plaintiffs a remedy for violations of international law. This statute appears, on the face of it, as a facilitator of justice, providing individuals with a legitimate avenue to challenge human rights abuses. However, much like the MSA, the ATS is ineffective mainly at securing a remedy for victims, failing to control and scrutinise the actions of large corporations in international law.[117] The scope of this Act has become progressively curtailed over time, with restrictive judicial attitudes culminating in the landmark decision of *Nestlé v Doe.*[118] However, it was the long line of previous judgments that subtly foreshadowed and offered an early indication of the outcome of *Nestlé*. In the 2004 case of *Sosa v. Alvarez-Machain,*[119] the US Supreme Court laid down a judgment that "sounded the death

[113] Chuang (n 4).
[114] Federal Judiciary Act 1789
[115] Gisell Landrian, "Courthouse Doors Are Closed to Foreign Citizens for International Law Torts Committed by American Corporations' (2024) 55 Miami Inter-Am L Rev. 524.
[116] Alien Tort Statute, 28 U.S.C.A § 1350
[117] Beth Stephens, 'The Curious History of The Alien Tort Statute' (2013-2014) 89 Notre Dame Law Review 1467.
[118] *Nestle USA, Inc v Doe*, 141 S. Ct. 1931, 1935 (2021).
[119] *Sosa v Alvarez-Machain*, 542 U.S. 692, 697 (2004).

knell"[120] for the ATS and its purpose in defending human rights claims. Here, it was decided that the ATS does not create any new causes of action and that it is a "purely jurisdictional statute".[121] *Sosa* clarified that the limited circumstances in which the ATS could create private rights of action are three transboundary torts: violation of safe conduct, infringement of the rights of ambassadors and piracy.[122]

A further case that played a pivotal role in the development and application of the ATS was *Kiobel v Royal Dutch Petroleum Co.*[123] In this case, Nigerian citizens initiated action under the ATS, alleging that corporate activity played a complicit role in enabling the Nigerian Government to commit violations of international law. However, it was decided that a mere corporate presence in the United States did not meet the threshold for the ATS to be applied. It was agreed that relevant conduct must 'touch and concern' the US with sufficient force to override the presumption against extraterritorial application.[124] This outcome curtailed the scope of the ATS, further adding complexity and obscuring what was already an unsettled point of law. It is in the most recent case

[120] Carlos Manuel Vázquez, 'Sosa v Alvarez-Machain and Human Rights Claims against Corporations under the Alien Tort Statute' (2006) Georgetown Public Law and Legal Theory Research Paper No. 12-077 < https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1986&context=facpub> accessed 25 July 2025.
[121] Alien Tort Statute, 28 U.S.C.A § 1350
[122] Alien Tort Statute, 28 U.S.C.A § 1350
[123] *Kiobel v Royal Dutch Petroleum Co*., 569 U.S. 108, 111-12 (2013).
[124] ibid 124-25.

of *Nestle v Doe,*[125] where we ultimately witnessed the death of this statute.[126] In *Nestlé v Cargill*, plaintiffs filed an action under the ATS, alleging that they had been trafficked and enslaved to work on cocoa farms in the Ivory Coast. The plaintiff argued that the business relations between these large corporations and foreign farmers were essentially aiding and abetting child slavery.[127] Although no injury was sustained on US soil, these corporations should have been aware of the conditions on the cocoa farms, given their oversight of all operational decision-making. However, the US Supreme Court blocked this lawsuit, ruling that although Nestle USA and Cargill provided financing and resources to these farms, the food giants cannot be held accountable for the child slavery that occurred. This outcome was deeply unsatisfying from a human rights perspective, falling short of all expectations of justice and fairness.

The Supreme Court expanded upon the decision in *Kiobel,* deciding that not only is mere corporate activity insufficient to trigger domestic application of the ATS, but also that general corporate activity is sufficient. The court failed to define what would meet the threshold of 'corporate activity' to trigger this statute. It appears that as long as corporations do not commit these human rights violations domestically through tangible actions, the threshold will not be met, and they will not be held accountable by the

[125] Modern Slavery Act 2015

[126] Oona A. Hathaway, 'Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe: The Twists and Turns of The Alien Tort Statute' (2022) Yale Law School Public Law Research Paper Forthcoming < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4012698> accessed 12 August 2025.

[127] ibid

judicial branch. This decision has sparked outrage and prompted questions regarding not only the inherent design flaws of the ATS but also the judicial treatment of torts committed abroad. The Supreme Court was arguably naive in thinking that a situation could exist where these corporations would both financially aid and abet such atrocities, yet also have enough direct involvement to trigger the ATS.[128] This is a token of an inherent unawareness and ignorance of the complex nature of global supply chains. Nestlé, for example, has nearly 165,000 direct suppliers and approximately 695,000 individual farmers worldwide, spanning hundreds of transnational borders.[129] It is the systemic nature of these supply chains which allows for adequate protection of those with ultimate power. Supply chains create not only territorial distance, but also emotional distance, and, most importantly, a strong enough legal distance for businesspeople to walk away unaccountable and innocent for the atrocities committed in the name of their decision-making. Therefore, the Alien Tort Statute ultimately fails to protect those victims of human trafficking and slavery, demonstrating how both the legislature and judiciary remain idly by and withhold justice from those affected by such inhumane crimes.

[128] Lindsey Roberson & Johanna Lee, 'The Road To Recovery after Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability' (2021) 6 Columbia Human Rights Law Review 16 < https://hrlr.law.columbia.edu/files/2021/11/11_9-Nestle-HRLR-Online.pdf> accessed 12 August 2025.

[129] Nestle, 'Responsible Sourcing' < https://www.nestle.com/info/suppliers> accessed 13 August 2025.

However, the Supreme Court's restrictive approach to the ATS has turned academics' attention towards a different statute[130] which seeks retribution for victims of human trafficking in the US: the Trafficking Victims Protection Act (TVPA).[131] The TVPA was introduced as the first comprehensive piece of legislation to combat human trafficking and is an overall much better vehicle for human rights litigation than the ATS.[132] Unlike the ATS, the TVPA confers a cause of action for damages, and does not only refer to a court's jurisdiction. Congress has subsequently reauthorised this statute numerous times; however, the most recent reauthorization attempt has been awaiting approval from the Senate since 2024.[133] Despite this, each reauthorisation has proven to strengthen this legislation, for example, the Trafficking Victims Protection Reauthorization Act (TVPRA) (2008)[134] imposed criminal liability for those who knowingly defraud workers recruited from outside the US for their employment within the US.

Academics have contended that the TVPRA is the more promising statutory avenue and had the claimants in *Nestle*[135] relied on the TVPRA, rather than the ATS, that a better

[130] Adam J. Revello, 'The Trafficking Victims Protection Reauthorization Act (TVPRA) and civil liability for forced labor in global supply chains' (2024) 99 NYU Law Review 2186 < https://nyulawreview.org/wp-content/uploads/2024/12/99-NYU-L-Rev-2186.pdf> accessed 25 September 2025.
[131] Victims of Trafficking and Violence Protection Act 2000 US (TVPA)
[132] Curtis A. Bradley, 'The ATS, the TVPA, and the Future of International Human Rights Litigation' (2014) 108 AM Soc'y Int'L Proc 145 < https://heinonline.org/HOL/P?h=hein.journals/asilp108&i=159> accessed 29 September 2025.

[133] H.R. 5856. Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act 2023.
[134] William Wilberforce Trafficking Victims Protection Reauthorization Act 2008.
[135] ibid 29.

outcome would have been secured.[136] The TVPRA eliminates all ambiguity as to whether a corporation can be sued; it is widely accepted under the wording of this statute that corporations can be held both criminally and civilly liable.[137] Section 1595 allows survivors to sue not only those persons who forced them to work, but also "whoever knowingly benefits, or attempts or conspires to benefit" from that person's exploitation.[138] The broad use of "whoever" is understood by the Court to include all legal and natural persons; this would therefore include corporate entities. Moreover, the TVPRA is understood to allow for broader extraterritorial jurisdiction than the ATS. This is because, in addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts also have extra-territorial jurisdiction over any of the criminal provisions laid out in § 1581, § 1583, § 1584, § 1589, § 1590, and § 1591.[139] Therefore, as long as the offence did not occur prior to 2008 (the year the TVPA was amended to allow for extraterritorial jurisdiction), incidents of forced labour committed outside of the USA will fall within the scope of the TVPRA. Therefore, victims of exploitation and forced labour within the US are not at a complete loss when it comes to redressing their injustices, and the shortcomings identified in the ATS cannot underpin or reflect an entire legal system's attitude towards these crimes.

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[136] Lindsey Roberson and Johanna Lee, 'The road to recovery after Nestlé: Exploring the TVPA as a promising tool for corporate liability' (2021-2022) 6 Columbia Human Rights Law Review 1 < https://heinonline.org/HOL/P?h=hein.journals/hrlro6&i=1> accessed 30 September 2025.

[137] Jonathon S. Tonge, 'A Truck Stop Instead of Saint Peter's: The Trafficking Victims Protection Reauthorization Act Is Not Perfect, But It Solves Some of the Problems of Sosa and Kiobel' 44 Georgia Journal of International and Comparative Law 451 <https://digitalcommons.law.uga.edu/gjicl/vol44/iss2/7/> accessed. 30 September 2025.

[138] 18 U.S.C.A. § 1595.

[139] ibid 47.

However, despite the academic acclamations this legislation has received, the courts have ruled against plaintiffs in several TVPRA cases involving forced labour and global supply chains. These rulings raise questions as to the underlying judicial reasoning, arguably influenced by the courts' narrow interpretation of the statute.[140] One problematic area in particular would be the interpretation of the requirement of participation in a "venture" under § 1595.[141] The statutory definition of "venture" is "any group of two or more individuals associated in fact, whether or not a legal entity". However, Courts have opted to apply the more rigid "common enterprise" approach, one which interprets 'venture' literally and creates a more difficult standard for plaintiffs to meet.[142] This was seen in the case of *Doe v Apple*[143], where the Court considered a claim against technology giants - including Tesla, Dell and Apple – for the aiding and abetting of the use of children in the Democratic Republic of Congo's cobalt mining industry. Claimants alleged that Umicore played an intermediary role in the supply chain, as they would refine and supply the cobalt to the defendant companies. The Court decided that a global supply chain is not a 'venture', and there was no shared enterprise between these companies and their suppliers who facilitated child labour.[144] This outcome fell short of all expectations of the TVPA; what was believed to be a path forward is instead withholding justice from victims due to a stringent judicial approach.

[140] ibid 41.
[141] ibid 49.
[142] ibid 49.
[143] *Doe v Apple Inc, No 21-7135 (DC Cir 2024).*
[144] ibid 415.

The "common enterprise" definition was curtailed further in *Ratha v. Phatthana Seafood Co,*[145] a case brought by workers who were subjected to forced labour and exploitation in Thailand's seafood processing industry. In comparison to the case of *Apple,* there was no intermediary to create a degree of separation between the beneficiaries and the supplier. However, despite this direct contractual relationship, the district court ruled that in order to participate in a 'venture', the defendants needed to have taken "some action to operate or manage the venture". This introduces a standard used by the courts when interpreting the Racketeer Influenced and Corrupt Organisations (RICO) Act,[146] where operating or managing a venture would require the defendant to have directed or participated in recruitment, working conditions and employment practices. Such a narrow interpretation of this statutory framework has denied many claimants the justice they deserve, once again bolstering the argument that the law acts as more of a setback than a solution.

Temporary Migrant Worker Programmes: The parallels witnessed between government-supported systems and the transatlantic slave trade

A further way the law creates a problem for those victims of exploitation is through temporary migrant worker programs (TMWPs). The current system of immigration controls is a direct byproduct of the law, and in the view of many, a token of the law's inherent ignorance towards the nature of exploitation. It has been witnessed that

[145] R*atha v Phatthana Seafood Co Ltd, 35 F4th 1159 (9th Cir 2022).*
[146] Racketeer Influenced and Corrupt Organisations Act 1970.

"documented" and "undocumented" migrant workers are growing precariously vulnerable to workplace treatment that is akin to human trafficking by their employers.[147]

The law has been successful in disguising a pervasive power imbalance between migrant workers and their employers, presenting a pragmatic 'win-win' solution for the economy and providing a means of offering jobs to workers from underdeveloped countries who are often considered 'unskilled'. However, the buck evidently does not stop at the phantom employer, but rather the state, and more so, the law. An employer must harness their power from a source, and in this instance of TMWP's, this is legitimised through the doctrine of illegality.[148] The defining quality that is shared amongst contemporary migrants and those victim to the transatlantic slave trade is an intense desire for mobility.[149]

Historically, slave codes required that all white citizens police the movement of enslaved people. In the Barbados Slave Code of 1661, a system was introduced making

[147] Hila Shamir, The Paradox of "Legality", Temporary Migrant Workers Programs and Vulnerability to Trafficking 'in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

[148] Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) Work, Employment and Society 300.

[149] Julia O'Connell Davidson, 'The Right to Locomotion? Trafficking, Slavery and The State' in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

it mandatory for enslaved people to carry a pass when leaving their plantation.[150] Strong parallels can be witnessed between these archaic systems and modern temporary workers schemes. For example, the Kafala sponsorship system is operating in the Persian Gulf states. This is a system that coercively controls unskilled migrant workers and is characterised by oppressive power imbalances and human rights violations.[151] Under this regime, it is common for workers to have their travel documents and visas withheld by their employers. This effectively turns migrants into prisoners of their workplace. Lawmakers and the government are content being under the false guise that these temporary programs provide freedoms for migrant workers, when in fact, they deface the notion of equality of opportunity in every shape and form. John Schaar wrote that "Equality of opportunity is really a demand for an equal right" It is the idea that no individual should face barriers in achieving, and there should be a neutralisation of discrimination.[152]

The brute fact is that migrants tied to temporary work schemes possess so few bargaining chips that they will inherently struggle to have the same opportunities as 'regular' workers in the labour market. Due to the sheer amount of institutionalised

[150] Sally E. Hadden, 'Slave Patrols: Law and Violence in Virginia and the Carolinas' (2002) The American Historical Review 107 1.

[151] Rooja Bajracharya and Bandita Sijapti, 'The Kafala System and its Implications for Nepali Domestic Workers' The Centre for the Study of Labour and Mobility, Policy Brief No 1 (ceslam.org March 2012) < https://archive.ceslam.org/external-publication/571561115967> accessed 17 December 2024.

[152] John Schaar, 'Equality of Opportunity and Beyond' in J. Roland Pennock and J. W. Chapman (eds), *Nomos IX: Equality* (New York: Atherton press 1967), p 238.

uncertainty, workers cannot question their employer out of fear of dismissal or deportation. Specific state laws have gone even further by introducing binding arrangement schemes; these schemes only heighten the vulnerability of workers as they become entirely dependent on particular employers.[153] This perpetual cycle creates a permanently temporary working class, with so little legal personhood that they are unable to rectify their disempowerment.[154] This is especially the case for undocumented migrants who will face exclusion from labour laws and protection; thus, even if there is an employment contract, it is unlikely this can be enforced.[155]

Temporary Migrant Worker Programmes: A lack of intersectionality within our current judicial system

The issues surrounding the legal framework within this area are also pervasive within the judicial system. Various accounts of case law have demonstrated this, for example, the UK case of *Taiwo and Onu*.[156] Here, we saw two women who had entered the UK on domestic worker visas and faced inhumane treatment from their employers. These women were not provided with any written statement of the terms and conditions of

[153] Julia O'Connell Davidson, 'The Right to Locomotion? Trafficking, Slavery and The State' in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).

[154] Fay Faraday, 'Made in Canada, How the Law Constructs Migrant Workers' Insecurity' (metcalffoundation.com September 2012) < https://metcalffoundation.com/wp-content/uploads/2012/09/Made-in-Canada-Full-Report.pdf> accessed 23 December 2024.

[155] Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) Work, Employment and Society 300.

[156] *Taiwo v Olaigbe; Onu v Akwiwu* (2014) UKSC 31.

their employment, and their treatment violated multiple employment regulations.[157]The Employment Appeal Tribunal characterised Ms Taiwo's situation as "systemic and callous exploitation."[158]Appeals failed in this case because discrimination could not be founded upon immigration status under the Equality Act 2010, and this was dissociable from discrimination based upon nationality.[159] Baroness Hale gave the leading judgment in this case. She criticised the current law, claiming it is not adaptable enough, and Parliament may wish to redress the MSA due to its restrictive scope.[160] However, it is evident that Parliament is not the only Entity to blame; some academic commentators have also highlighted the lack of judicial resilience in this area. The court has been criticised for not adopting a more intersectional approach in construing how race can contribute to immigration vulnerability.[161] It was very evident from this case that it was not only these individuals' immigration status that caused their discrimination, but rather an intimate blend of how social status, precarity, race and cultural differences combine.[162]

[157] National Minimum Wage Act 1998; The Working Time Regulations 1998.
[158] *Taiwo (n 67).*
[159] Equality Act 2010, s 4.
[160] Modern Slavery Act 2015, s 8.

[161] Asta Zokaitye and Will Robinson Mbioh, 'Judicial Protection of Racial Injustice in Taiwo v Olaigbe: Decolonising the incomplete Story on Race and Contracting' (journals.sagepub.com 5 October 2023) < https://journals.sagepub.com/doi/10.1177/09646639231205275> accessed 23 December 2024.
[162] Devyani Prabhat, 'Lady Hale: Rights, and Righting Wrongs, In Immigration and Nationality' in R. Hunter and E. Rackley (eds), *Justice for Everyone: The Jurisprudence and Legal Lives of Brenda Hale* (Cambridge University Press 2022).

Temporary migrant workers will commonly struggle to fuse with society or have fulfilling social outlets due to a mixture of cultural differences and language barriers. Family accompaniment restrictions only make migrant workers more vulnerable and less able to form meaningful relationships in their host country.[163] Moreover, due to debt bondage, these workers may struggle to find somewhere to live, or many worker schemes will also include strict housing arrangements.[164] This was seen in the case law, Ms Taiwo was forced to share a room with her employer's children, and was not allowed any personal space.[165] However, the courts were inherently ignorant of this fact. Rather than uncovering the complex dimensions and racial social structures that comprise vulnerability caused by TMWPs, they instead view immigration status as an isolated topic that does not warrant any further deliberation. As a society, we must question this.

Many academics would point to the critical race theory of justice to construct this reasoning. This perspective suggests that justice will never be achieved through the legal framework. This is simply because the law has an innate predisposition of prejudice, and race discrimination and xenophobia are entrenched within institutional

[163] Hila Shamir, The Paradox of "Legality", Temporary Migrant Workers Programs and Vulnerability to Trafficking 'in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press 2017).
[164] Philip Martin, 'Managing Labor Migration: Temporary Worker Programmes for the 21st Century' (UN.org 21 June 2006) https://www.un.org/en/development/desa/population/events/pdf/other/turin/P07_Martin.pdf accessed 23 December 2024.
[165] *Taiwo (n 67).*

frameworks.[166] There has been a long history of racial bias within the judicial system, and alarmingly, these systems can go unscrutinised. A recent report by the University of Manchester found that '95% of the legal-professional survey respondents said that racial bias plays some role in processes of the justice system'.[167] Relating this to the case of Taiwo and Onu, Baroness Hale firmly held that no discrimination could be founded upon nationality, as there are many non-British nationals working in the UK who do not face the same vulnerability and treatment.[168] In regard to many white migrant workers from Australia, America or New Zealand, this is more than likely the case. However, once again, the law is too short-sighted to recognise the deep-rooted intertwinement of the history of Immigration law in the UK with colonialism and slavery.[169] Therefore, by adopting a decolonialised judicial approach, it is glaringly evident that race has much to do with immigration status.

The courts had also failed to recognise instances of discrimination that were arguably based on nationality. For example, it was mentioned how Ms Taiwo was spat at and mocked for her poverty and tribal scars.[170] Historically in Nigeria, tribal scars have a

[166] Linda Alcoff, 'Critical Philosophy of Race' in Edward N. Zalta and Uri Nodelman (eds), *The Stanford Encyclopaedia of Philosophy* (Fall 2023 Edition) (2021) < https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=critical-phil-race> accessed 23 December 2024.
[167] Keir Monteith KC and others, 'Racial Bias and The Bench, a response to the Judicial Diversity and Inclusion Strategy' (documents.manchester.ac.uk November 2022) < https://documents.manchester.ac.uk/display.aspx?DocID=64125> accessed 27 December 2024.
[168] *Taiwo (n 67).*

[169] Shreya Atrey, 'Structural Racism and Race Discrimination' (academic.oup.com 11 October 2021) < https://academic.oup.com/clp/article/74/1/1/6386395> accessed 27 December 2024.
[170] *Taiwo (n 67).*

rich meaning and serve as a signifier of citizenship and a specific ethnic affiliation.[171] Therefore, the mocking of such scars is clearly indicative of a racial power imbalance between Ms Taiwo and her employers, and yet the judicial system fails to account for this. Moreover, the courts failed to question Mr Olaigbe about his underlying reasons for wishing to employ someone of the same ethnicity as him (Yoruba). Due to Nigeria's diversity, there will often be internal discrimination within the community of one ethnicity.[172] Nigerian scholar Nesbitt-Ahmed produced a case study on domestic work specific to Nigeria.[173] It was found that it is commonly the employer's stereotypes surrounding a particular ethnic group that determine who is hired for a specific job type. The Supreme Court completely overlooked the Nigerian context and any indications of underlying race discrimination. It is problematic and a complete lapse of judgment that those victims of exploitation under TMWPs will not be able to find their discrimination based on their immigration status. There is a gaping deficit in the law, which has resulted in a great miscarriage of justice for the victims of such abuse.

Conclusion

[171] Tayfour Sidahmed, Albeely PhD and others, 'Ethnicity, Tribalism and Racism and its Major Doctrines in Nigeria' (semanticscholar.org June 2018) < https://www.semanticscholar.org/search?q=Ethnicity%2C%20Tribalism%20and%20Racism%20and%20its%20Major%20Doctrines%20in%20Nigeria'&sort=relevance> accessed 27 December 2024.

[172] Tayfour Sidahmed Albeely, Ahmed Tanimu Mahmoud and Aliyu Ibrahim Yahaya, 'Ethnicity, Tribalism and Racism and its Major Doctrines in Nigeria' (semanticscholar.org June 2018) < https://www.semanticscholar.org/search?q=Ethnicity%2C%20Tribalism%20and%20Racism%20and%20its%20Major%20Doctrines%20in%20Nigeria'&sort=relevance> accessed 30 December 2024.

[173] Zahrah Nesbitt-Ahmed, 'The Same, but Different: The Everyday Lives of female and Male Domestic Workers in Lagos, Nigeria' (etheses.lse.ac.uk 2016) < http://etheses.lse.ac.uk/3359/> accessed 27 December 2024.

In conclusion, the current law may propose adaptive solutions and appeal to justice. However, when evaluating the legal 'solutions' to the contemporary issues of exploitation and human trafficking, it is merely an obstacle that is manifestly eroded by 'demerit'. There should not always be a defining separation of what the law is and what the law ought to be.[174] For the law to be welcomed as a valuable asset within society, it must garner legitimacy through respecting the dignity of all those it rules over.[175] It may well be the case that the vast majority of countries have criminalised exploitation and slavery. However, this issue was never one of legal status; rather, the problem lies within the systemic structures that the law not only created but also idly stands by, granting silent approval to. The law cannot cherry-pick which forms of exploitation it wishes to shield and which forms it will conveniently ignore. For the law to be more adaptable and live up to the pedestal we want to place it upon, it should begin to take a more holistic approach and appeal to those wider aspects of social justice.

[174] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harv L Rev 593.

[175] Trevor Allan, 'Why the law is what it ought to be' (2020) 11(4) Jurisprudence < https://www.tandfonline.com/doi/full/10.1080/20403313.2020.1782596?casa_token=LKrjXXL9T-wAAAAA%3ANTrgNEpZKb558zNx4IvAsSo_7MLSPjK4zF5EgrU09wFJ9xL-UNoWtZFAkSHjA8pFBxL6EFmuE6c3#abstract> accessed 31 December 2024.