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# Combatting Human Trafficking with Reflexive Law

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Terrorism and cyber threats emphasize the urgent need to develop a transnational criminal law framework, but other pressing issues, such as the trafficking in human beings (THB) also require attention. In the absence of such an approach, THB is currently seen as a relatively low-risk/high-reward enterprise that has been embraced by organized crime syndicates with transnational reach. The predominant motivational factor for THB is obviously money, yet the money gained from THB is often reinvested in drugs and weapons trafficking or used to fund terrorism. This poses a challenge for both law enforcement and financial services generally. This essay addresses the nexus between transnational crime and the commercial world, and shows how "reflexive law" can be used as a tool of transnational economic law to date to potentially combat this complex crime.

THB does not involve "voluntary" prostitution, and can arise in circumstances similar to, but as a crime separate from, traditional slavery, human smuggling, or poor working conditions. It builds on pre-existing and pre-defined crimes of slavery, servitude, forced labor, and compulsory labor. It is also intertwined with global supply chains that use harsh and degrading working conditions—including bonded labor. While national laws address criminal law and labor conditions within our their jurisdictions, they have little effect in governing behavior outside their relevant (national) jurisdictions.

Human trafficking is more often encountered across a number of jurisdictions, these being countries of origin, transit, and destination. The same can be said about corporate global supply chains. An individual jurisdiction's laws, for example those of the EU, will not address—either directly or indirectly—behaviors or crimes that occur in third states. Corporations, or financial systems which are based, or operate, in European or EU jurisdictions, are required to meet the laws of the jurisdictions in which they are based or operate. Although an imperfect tool, reflexive law is currently being adopted by both the UK and the EU in order to gain some extraterritorial effect for their internal standards and laws.

Reflexive law attempts to make transnational businesses structure and manage their businesses in a way that complies with the laws and norms of the legislating jurisdictions in which they operate. Reflexive law shows promise, particularly in extending the reach of the command and control state into the transnational crime/ transnational business nexus. Its impact, however, needs to be effectively measured, and its provisions may need to be made more robust. Nevertheless, it has the potential to be deployed by the EU to develop its extraterritorial reach in order to combat human trafficking.

Much can be learned, not only from earlier adopters of provisions modelled on reflexive law in global supply chains, but also from evaluation of the adoption of laws modelled on reflexive law in other areas of practice such as social and environmental law. With some jurisdictions having adopted a reflexive law approach to tackling human trafficking and slavery in global supply chains—and the possibility of this approach being adopted in further jurisdictions—there is then the issue of making the reflexive law approach to regulation actually work. Provisions in three different jurisdictions are worth examining: the EU, the US State of California, and the UK.

Packaged as part of corporate social responsibility, EU Directive 2014/95/EU was enacted in order to facilitate the “disclosure of non-financial information” so as to assist in “the measuring, monitoring and managing of undertakings' performance and their impact on society,” with an eye specifically on environmental and social issues, including corruption. The intention behind the reporting mechanism—and its audit—is to require businesses to take seriously into consideration a set EU and national environmental and social objectives. Businesses are expected to modify their decision-making processes, thereby reorienting the entirety of their operations in order that the business aims to achieve outcomes which are more in line with objectives set in other EU laws and policy documents. The resulting fusion of public law—the directive—with an anticipated refocusing of internal corporate governance strategies, should lead to a change of behavior of a large number of the dominant players on the market. This should then have a knock-on effect of changing the market as a whole, with many larger companies requiring their suppliers to operate to the same high standard in order to maintain transnational supply chain integrity.

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The California law—Transparency in Supply Chains Act 2010, supplementing US federal law on human trafficking—came into effect in 2012. It required every retail seller and manufacturer doing business in this state—as defined by Californian tax law—and with annual worldwide gross receipts exceeding US $100 million to meet certain disclosure requirements. At a minimum, these were for the purposes of informing other businesses, the authorities, and consumers about the extent to which the “retail seller or manufacturer” verifies the integrity of its supply chain to be free from human trafficking and slavery, and conducts audits of suppliers, with the requirement to state if the “verification was not an independent, unannounced audit.” In addition, all materials from suppliers incorporated into their own products must be similarly certified. Further, internal corporate governance structures must include “internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.” In addition, employees and management responsible for ensuring the integrity of supply chains must be given appropriate training regarding relevant transparency laws.

The Californian Act focuses on disclosure and informing the consumer and other interested parties. The intention is that greater transparency will lead to peer and public pressure to adjust behavior. There is no requirement in the Californian Act to actually adjust corporate behavior to ensure that the supply chain is truly free of products produced by human trafficking or slavery victims. The reflexive law element would arise for companies that wish to comply with the higher standards and want to be seen to be delivering products untainted by human trafficking and slavery.

In the United Kingdom, the transparency in supply chains provisions of the Modern Slavery Act 2015 apply to the whole of the UK, but Section 54 also applies specifically to commercial organizations that supply goods or services and have a total turnover of STG £36 million. Flaws arise, however, in the context of the UK-mandated information disclosure. The issue here is not just the discovery of problems, but also how those problems are discovered. Under the Californian Act there is a requirement, in Section 3, on corporations not only to “disclose audits of their supply chains,” but also to disclose whether those “audits were unannounced and performed by an independent party.” In addition, the Californian law requires, at Section 3(c)(3), that direct supplies need to certify that materials incorporated into the product comply with slavery and human trafficking laws. This level of detail is currently missing from the provisions in Section 53 of the UK’s Modern Slavery Act 2015.

The reflexive law approach will be considered successful if it changes the way transnational corporations operate. Although it uses a mix of hard and soft law, it advocates for continued application of hard law, insisting that hard laws can be designed to encourage bargaining in the shadow of the law. In this way a mixture of public, private, hard and soft law can be deployed. Default conditions, which are missing from the UK legal provisions, need therefore to be set using hard laws in order to ensure the reorientation of transnational corporations by reflexive law mechanisms. In addition, as pointed out by Deakin and McLaughlin,[1] there is also a need for "bridging institutions" beyond the legal and enforcement framework "in which effective deliberation and participatory decision-making can occur." These bridging institutions are missing from the UK legal framework. In the context of engagement with the corporate world, the "managerialization" of law is also key, whereby in-house corporate lawyers gain leverage over their internal governance structures and can alter the course of business decision making in light of threats of liability, litigation, or reputational damage.

The EU, has yet to make any attempts to legislate in this area. Yet the approaches modelled on reflexive law being taken by the UK and the State of California are not unknown to the EU. The EU should therefore give some consideration to similarly legislating—perhaps using the concepts that underpin reflexive law—to combat human trafficking in global supply chains, while also benefiting from the experience and criticism of earlier legislative attempts by the UK and the State of California.

Notes

1. Simon Deakin & Colm McLaughlin, *Gender Inequality and Reflexive Law: The Potential for Different Regulatory Mechanisms for Making Employment Rights Effective* 25, (ESRC Ctr. for Bus. Research, U. of Cambridge, Working Paper No. 426, 2011). [https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp426.pdf](https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp426.pdf), at 6.

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