

Section 54 of the Modern Slavery Act 2015 and the Corporation

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This article will examine the relationship between modern slavery in the fashion industry's global supply chains and section 54 of The Modern Slavery Act 2015 (s. 54 MSA 2015). The aim is to demonstrate that corporate social responsibility (CSR) and accompanying transparency legislation is not the most effective form of legislation if the government truly wishes to 'establish Britain as a world leader in the fight against modern slavery'. The first section of this article frames the issue of modern slavery within the fashion industry. The second Section discusses reflexive law theory and transparency legislation with regard to s. 54 of the MSA and the Guiding Principles on Business and Human Rights (UNGPs). Section III examines the relationship between the corporation and CSR to illustrate why CSR is an ineffective mechanism for combating modern slavery in the fashion industry's global supply chains. The final section argues for corporate

criminal liability for human rights violations in global supply chains, suggesting the Bribery Act 2010 as an alternative and more effective model. This article hopes to expose CSR and reflexive law, not as law, but as neo-liberal policy making. By demonstrating that CSR is ineffective in this battle, this article aims to illustrate how it is equally ineffective in regard to all other corporate externalities; environmental, social, and ethical.

Introduction

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¹ Baroness Butler-Sloss, Rt Hon Frank Field, and Rt Hon Sir John Randall, 'Report of The Modern Slavery Bill Evidence Review' (The Modern Slavery Bill Evidence Review 2013).

and transparency legislation with regard to s. 54 of the MSA and the Guiding Principles on Business and Human Rights (UNGP). Section III examines the relationship between the corporation and CSR to illustrate why CSR is an ineffective mechanism for combating modern slavery in the fashion industry's global supply chains. The final Section argues for corporate criminal liability for human rights violations in global supply chains, suggesting the Bribery Act 2010 as an alternative and more effective model. This Article hopes to expose CSR and reflexive law, not as law, but as neo-liberal policy making. By demonstrating that CSR is ineffective in this battle, this Article aims to illustrate how it is equally ineffective in regard to all other corporate externalities; environmental, social, and ethical.

I. The Fashion Industry

Although slavery was abolished in the UK almost 200 years ago,² it remains a troublingly common practice. Globally, the International Labour Organisation estimates that 21 million people are victims of modern slavery and forced labour,³ generating an estimated \$150 billion in illegal profits every

² Genevieve LeBaron and Andreas Rühmkorf, 'The Domestic Politics of Corporate Accountability Legislation: Struggles Over The 2015 UK Modern Slavery Act' [2017] Socio-Economic Review, 1.

³ Roel Nieuwenkamp, 'Tackling Modern Slavery in Global Supply Chains' (OECD Insights Blog, 2016) <<http://oecdinsights.org/2016/03/11/tackling-modern-slavery-in-global-supply-chains/>> accessed 1 January 2018.

year.⁴ This Article focuses on human trafficking, modern slavery, and forced labour in the global supply chains of the fashion industry. Modern Slavery is defined by MSA 2015 as a term which encapsulates: slavery, servitude, and forced or compulsory labour and human trafficking.⁵

The MSA 2015 provides a useful framework to consider the effectiveness of domestic legislation in changing the abhorrent practice of modern slavery in global supply chains. In our present global economic system industries, including the fashion industry, rely heavily on global supply chains. 'In a world of 80,000 transnational corporations, ten times as many subsidiaries and countless national firms, many of which are small-and-medium-sized enterprises',⁶ the management and regulation of global supply chains which stretch across multiple jurisdictions but are effectively regulated by none⁷ is a pressing and challenging issue in the human rights story. A recent Ethical Trading Initiative survey found that 71% of companies suspect the presence of modern slavery in their

⁴ *ibid.*

⁵ Part 1 Section (1-3) MSA 2015.

⁶ 'Business and Human Rights: Further Steps towards the Operationalization of the "Protect, Respect and Remedy" Framework' (Human Rights Council 2010) A/HCR/14/27 para. 82.

⁷ Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in S Deva and D Bilchits (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) <<https://doi.org/10.1017/CBO9781139568333>> accessed 5 April 2018.

supply chains.⁸ It is unsurprising that the combination of ineffective regulation combined with global competition lends itself to an environment where human rights generally and labour rights in particular, are systemically abused.⁹

1.1 *The Anti-Sweatshop Movement*

The 1990's saw intense media criticism focused on supply chain production and abusive practices in the manufacturing process of clothing brands such as Gap and Nike.¹⁰ The attention was driven by findings of initial studies commissioned by the United States Agency for International Development in 1989 which found that Nike's suppliers in Indonesia were paying the lowest wages in the sector.¹¹ Consequently, the 'anti-sweatshop' movement peaked and international campaigns targeted at Nike and other big apparel brands¹² were launched across the United States and Europe by activist organisations.¹³ At the crux of these campaigns was the narrative that big brands and their suppliers did not respect the dignity of workers.¹⁴ People believed that governments were unwilling to, or perhaps

⁸ Nieuwenkamp (n 3).

⁹ Nolan (n 7) 148.

¹⁰ Christian Scheper, 'From Naming and Shaming to Knowing and Showing': Human Rights and The Power of Corporate Practice' (2015) 19 *The International Journal of Human Rights* 737, 743.

¹¹ *ibid* 743.

¹² *ibid* 743.

¹³ Luc Boltanski and Ève Chiapello, *The New Spirit of Capitalism* (Verso 2007) 571.

¹⁴ Scheper (n 10) 743.

incapable of, regulating global capital.¹⁵ Civil society responded with the tools it had at its disposal, the same tools it continues to use today, namely damaging information coupled with 'lifestyle politics'.¹⁶ The 'anti-sweatshop' movement demanded that corporations assume responsibility for the way in which products were produced regardless of where they were produced. The anti-sweatshop movement is still prevalent in civil society¹⁷ and remains necessary, as little change has been made in the industry.

1.2 *Labour Abuses in the Fashion Industry Supply Chain*

The fashion industry, like all global supply chains, is fragmented with thousands of actors and interests involved in its complex global production networks. For the purpose of illustration, let us imagine an item of clothing where the cotton was harvested in Uzbekistan, the material dyed in India and the final item produced in Bangladesh. Uzbekistan, one of the world's largest cotton exporters¹⁸ utilises forced and child labour under a state-controlled system, which violates the fundamental rights of millions of Uzbek citizens each year.¹⁹ Globally, the ILO estimates that 170 million children are

¹⁵ *ibid* 743.

¹⁶ Lance Bennett, 'The Uncivic Culture: Communication, Identity, and the Rise of Lifestyle Politics' (1998) 31 *PS: Political Science & Politics*, 741.

¹⁷ Examples of campaigns in this area include: Labour Behind the Label, and Clean Clothes Campaign.

¹⁸ 'Uzbekistan's Forced Labor Problem' (*Cotton campaign*, 2018). <<http://www.cottoncampaign.org/uzbekistans-forced-labor-problem.html>> accessed 14 March 2018.

¹⁹ *ibid*.

engaged in child labour to satisfy the demand of consumers in developed economies.²⁰ This unethical cotton may then travel to India where human trafficking is prevalent in the spinning and weaving stage of production. The southern Indian state of Tamil Nadu produces 65% of the country's weaving industry.²¹ Here, 'Sumangala Schemes' target vulnerable young girls from rural communities into forced labour. These girls often suffer from abuse.²² The fabric finally finds its way to a cutting and trimming factory somewhere where labour law is weak, health and safety standards are low and wages exploitatively poor.

Human rights abuses are common practice in fast fashion factories; 'poverty wages, long hours, forced overtime, unsafe working conditions, sexual, physical and verbal abuse, repression of trade unions rights, and short-term contracts are all commonplace in the industry'.²³ On the 24th April 2013, the Rana Plaza Factory collapse in Bangladesh killed over 1,170 people and injured many more.²⁴ Disasters such as Rana Plaza are not anomalies but rather systemic and representative of the

²⁰ Josephine Moulds, 'Child Labour in the Fashion Supply Chain, Where, Why and What Can Be Done' (*Labs.theguardian.com*, 2018) <<https://labs.theguardian.com/unicef-child-labour/>> accessed 11 February 2018.

²¹ 'Traffik-Free Fashion' (*STOP THE TRAFFIK*, 2018). <<https://www.stopthetraffik.org/campaign/fashion/>> accessed 7 January 2018.

²² *ibid.*

²³ 'About' (*Labour Behind the Label*, 2018) <<http://labourbehindthelabel.org/who-we-are/>> accessed 9 January 2018.

²⁴ *ibid.*

fashion industry's tangled web of subcontracting that lies behind products shielding corporations from liability. To date, it is still unclear 'exactly which fashion brands were sourcing from Rana Plaza and on what legal basis they were doing so'.²⁵ Furthermore, whilst some have admitted their own culpability, they have also suggested that many others were also involved.²⁶ It is therefore difficult from a victim's perspective to satisfy a tort action in the correct jurisdiction.²⁷

To compete with each other for corporate investment, countries keep their minimum wage extremely low so as to allow corporations to maximise profit margins and thus entice investment. This process has been labelled the 'race-to-the-bottom'.²⁸ Despite high street stores commitments to paying workers a living wage, the reality is that workers often do not earn enough money to meet basic needs of care for their

²⁵ 'Update: Brands' Responses to Tazreen and Rana Plaza Compensation Demands' (*Clean Clothes Campaign*, 2013) <<https://cleanclothes.org/news/2013/05/24/background-rana-plaza-tazreen>> accessed 3 February 2018.

²⁶ Press Association, 'Primark Offers Long-Term Compensation to Rana Plaza Factory Collapse Victims' *The Guardian* (London, 24 October 2013) <<https://www.theguardian.com/world/2013/oct/24/primark-compensation-rana-plaza-factory-collapse-bangladesh>> accessed 1 March 2018.

²⁷ Sally Wheeler, 'Global Production, CSR And Human Rights: The Courts of Public Opinion and The Social Licence To Operate' (2015) 19 *The International Journal of Human Rights* 757, 758.

²⁸ Nicholas Connolly, 'CSR Is Dead: Long Live Pigouvian Taxation' (2015) 19 *The International Journal of Human Rights* 849, 853.

families. An Asia Floor Wage Alliance study has found that there is a significant difference between the minimum wage and the living wage, finding, for example, that in Bangladesh the minimum wage represents only 18% of the living wage.²⁹ Yet such poor treatment does not, for the purposes of the Modern Slavery Act, constitute forced labour, slavery or even exploitation. The UK Government's *Transparency in Supply Chains: A Practical Guide* states:

There will be cases of exploitation that, whilst being poor labour conditions, nevertheless do not meet the threshold for modern slavery – for example, someone *may choose to work for less than the national minimum wage, or in undesirable or unsafe conditions*, perhaps for long work hours, without being forced or deceived. Such practices may not amount to modern slavery if the employee can leave freely and easily without threat to themselves or their family. Organisations do still nevertheless have a legal duty to drive out poor labour practices in their business, and *a moral duty to influence and incentivise continuous improvements in supply chains*.³⁰

It must be stated from the outset that corporations do not have any moral duties; their overriding duty is to maximise the profits of their shareholders. The Government's use of the phrase 'choose to work for less than the national minimum

²⁹ 'Living Wage is a Human Right' (*Labour Behind the Label*, 2018) <<http://labourbehindthelabel.org/campaigns/living-wage/>> accessed 14 March 2018.

³⁰ Nieuwenkamp (n 3).

wage' fundamentally ignores power structures between workers, corporations, and national governments that work in conjunction to suppress minimum wages as well as the lack of alternative options for workers. The garment industry is an important industry as it represents an opportunity to empower women globally. 'Approximately 80% of garment workers are women, aged 18-35.'³¹ Women are most likely to not be paid at all and to find themselves in situations that constitute modern slavery.³² As a major employer, the fashion industry must understand that there exists a duty of care to all workers throughout the supply chain to be free from abuse and to live a dignified existence. The fashion industry could, if required to do so by our legal systems, improve social conditions in the lives of millions of workers worldwide.

II. S.54 MSA 2015 and Transparency Legislation

The British Government introduced section 54 of the Modern Slavery Act as the 'world-leading provision for transparency in supply chains.'³³ The Home Secretary described the transparency in supply chains provision as:

A truly ground-breaking measure. It recognises the important role business can play in tackling this scourge

³¹ (n 29) accessed 14 March 2018.

³² John Kerr and John Landry, 'Pulse of The Fashion Industry' (Global Fashion Agenda & The Boston Consulting Group 2017) <http://globalfashionagenda.com/wp-content/uploads/2017/05/Pulse-of-the-Fashion-Industry_2017.pdf> accessed 12 March 2018.

³³ Butler-Sloss (n 1).

and encourages them to do more. By requiring businesses to disclose what they are doing to eliminate slavery in their supply chains, [the Government] will provide a strong incentive for businesses to take this issue seriously.³⁴

As awareness of exploitative practices in global supply chains has developed, so have calls for corporations to be accountable for the entirety of their supply chains. Consequently, new transnational initiatives have been created to encourage corporate transparency and due diligence practices. The landmark transnational initiative was the United Nations Guiding Principles for Business and Human Rights (UNGP), authored by the Special Representative on the issue of business and human rights (SRSG) John Ruggie³⁵ and endorsed by the UN Human Rights Council in 2011.³⁶ This transnational transparency legislation has been bolstered by multitudes of domestic legislation focused on labour standards in global supply chains. 'One recent study found that 55 pieces of national legislation imposing mandatory

³⁴ Elise Groulx Diggs, Catherine Meredith and Vera Padberg, 'The Modern Slavery Act 2015: Corporate Reporting Requirements to Tackle Slavery in Supply Chains | Doughty Street International' (*Doughty Street International*, 2015) <<http://www.doughtystreetinternational.com/blog/modern-slavery-act-2015-corporate-reporting-requirements-tackle-slavery-supply-chains>> accessed 8 March 2018.

³⁵ John Ruggie will be referred to as the SRSG.

³⁶ 'Overview SRSG On HR and Transnational Corporations and Other Business Enterprises' (*Ohchr.org*, 2018) <<http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx>> accessed 1 April 2018.

requirements onto companies to disclose information about labour issues in their supply chains have been passed since 2009.³⁷ Domestic legislation differs in its stringency³⁸ with, on the one hand, ‘strong laws that mandate companies to develop a due diligence plan on human rights in their supply chains, to disclose this plan and implement it’³⁹ and, on the other, ‘weak laws that merely provide statutory endorsement to existing voluntary CSR initiatives and reporting, with no penalty for non-compliance’.⁴⁰ The MSA falls into this weaker category of legislation.

2.1 *Key Aspects of The Modern Slavery Act 2015*

S. 54 MSA 2015 requires all businesses which supply goods or services, with an annual turnover of £36m or more to prepare a ‘slavery and human trafficking statement for each financial year’.⁴¹ Such a statement must highlight the action businesses have taken to ensure that slavery and human trafficking is not present in any part of its supply chain or business operations. S. 54 is non-burdensome from a business perspective as corporations can prepare a statement which states ‘that organisations have taken no such steps’.⁴²

Section 54(5) provides a list of information which an organisation ‘*may include*’ in a slavery and human trafficking statement including:

³⁷ LeBaron (n 2) 2.

³⁸ *ibid* 2.

³⁹ *ibid* 2.

⁴⁰ *ibid* 2.

⁴¹ The Modern Slavery Act 2015, s 54(4)(b).

⁴² Groulx Diggs (n 34).

- (a) the organisation's structure, its business and its supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- (f) the training about slavery and human trafficking available to its staff.⁴³

The extra-territorial reach of s. 54 is defined as any commercial organisation 'which carries on a business, or part of a business, in any part of the United Kingdom'.⁴⁴ The disclosure duty prescribed in s. 54 thereby covers not only domestic commercial organisations but also entities that have a global influence and do only part of their business in the United Kingdom.⁴⁵ By requiring businesses to publish a modern slavery statement on their website the MSA is intended to *encourage* businesses to identify and challenge slavery practices in their own supply chains.⁴⁶

⁴³ The Modern Slavery Act 2014, s 54.

⁴⁴ The Modern Slavery Act 2015, s 54(12)(a).

⁴⁵ *ibid* s 54(12)(b).

⁴⁶ Groulx Diggs (n 34).

2.2 Reflexive Law Theory

The prevalence of soft law mechanisms in the business and human rights arena, as found in s. 54 MSA and the UNGP, illustrate that the 'worldwide shift from government to governance and is marked by 'the ascendancy of a new system in which regulation is produced in a participatory fashion by public and private actors collaborating with each other'.⁴⁷ Arguments for transparency legislation are advanced by reflexive law scholars that focus primarily on the potential benefits for businesses of this kind of legislation. In *The Cogs and Wheels of Reflexive Law*, Wen asserts that because s. 54 MSA can be characterised as 'state-dictated disclosure with the aim of encouraging internal decision making and behaviour changes in commercial organizations, [it] thereby falls into the realm of this strictly-defined reflexive law.'⁴⁸

Reflexive law broadly encapsulates a model of legal intervention that is socially responsive, contextualised, and ultimately self-learning.⁴⁹ The primary method for such self-regulation is 'proceduralisation' which includes 'duties of disclosures, audits, justifications, consultations and organization of internal control process'.⁵⁰ Nolan argues that

⁴⁷ Lucio Baccaro and Valentina Mele, 'For Lack of Anything Better? International Organization and Global Corporate Codes' (2011) 89 *Public Administration* 451, 451.

⁴⁸ Shuangge Wen, 'The Cogs and Wheels of Reflexive Law – Business Disclosure under the Modern Slavery Act' (2016) 43 *Journal of Law and Society* 327, 344.

⁴⁹ *ibid* 42.

⁵⁰ Gunther Teubner, 'Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the Legal Institutionalisation of Corporate Responsibility' in Klaus G. Hopt and G. Teubner (eds),

to suggest that soft law is not law is too simplistic, as expansive use of due diligence and reporting mechanisms can ‘socially bind’ corporations to human rights, suggesting a normative value.⁵¹

Reflexive law scholars argue that it is preferable to substantive law on three key grounds. Firstly, businesses are in the best position to confront the challenges posed by globalisation as they are ‘the actors most familiar with the distinct characteristics and traits of relevant activities’.⁵² Corporations themselves are best able to tackle modern slavery in their supply chains ‘by relying on established internal networks and control devices [and] also tend to be better equipped to grapple with the transnational character of slavery’.⁵³ Secondly, scholars argue that such disclosure promotes participatory democracy, ‘primarily by creating an oversight role over all affected communities and interested stakeholders’.⁵⁴ Such mechanisms encourage participatory democracy as corporate behaviour is not only under the scrutiny of states but of NGOs, unions and other stakeholders and thus it relies heavily on ‘the marketplace to police the problem’.⁵⁵ In this vein, it may be effective in establishing its ‘bindingness to a point where compliance is widespread and

Corporate Governance and Directors’ Liabilities (De Gruyter Inc. 1985) 167.

⁵¹ *ibid.*

⁵² Wen (n 48) 348.

⁵³ *ibid* 349.

⁵⁴ *ibid* 349.

⁵⁵ Nolan (n 7) 145.

consistent'.⁵⁶ Finally, it is advanced that such legislation allows for necessary flexibility in business decision-making. It is argued that corporations are more responsive to such methods since they are non-burdensome and focuses on their proactive efforts to eradicate modern slavery. Such disclosures provide a platform as such for reputational related benefits, including, but not limited to, brand management considerations and consumer relations. From the business perspective, this is preferable to substantive law which would potentially lead to a real and fundamental shift in how business is conducted.

2.3 *Reflexive Law in the Global Arena*

In 1998 the UN Sub-Commission on the Promotion and Protection of Human Rights established the working group of Transnational Corporations and Other Business Enterprises with regard to Human Rights (the UN Norms).⁵⁷ The UN Norms attempted to create international laws that would establish various binding human rights obligations on transnational corporations. The UN norms were welcomed by NGOs, yet were met with much criticism from businesses and governments alike. Businesses did not wish to have binding international law restrict their practice.⁵⁸ Governments 'argued that they would effectively grant private corporations the status of legal subjects under international law'.⁵⁹ In a neoliberal world-view, this is unacceptable as unlike governments, which have an electoral mandate,⁶⁰

⁵⁶ *ibid* 145.

⁵⁷ *ibid* 149.

⁵⁸ *ibid* 149.

⁵⁹ *ibid* 149.

⁶⁰ Wheeler (n 27) 760.

corporations' involvement in the social world is 'fundamentally anti-democratic; corporations are, in terms of structure, largely unaccountable in the provision of societal goods'.⁶¹ The UN Norms were dismissed and the SRSG was appointed. The SRSG quickly distanced himself from the UN Norms and subsequently declared them 'dead'.⁶² The UN Norms reignited the debate on the merits of hard law versus soft mechanisms in combating corporate violations of human rights.⁶³

The formation of the UNGP is built on reflexive law and supports a softer style of regulation. The Guiding Principles developed a policy framework based on three pillars: the 'state duty to protect,' the 'corporate responsibility to respect' and 'access to remedy'.⁶⁴ The SRSG 'abandoned attempts to base corporate liability on direct obligation, focusing instead on obligations flowing through states for violations of international criminal and humanitarian law'.⁶⁵ Therefore, although the framework does not explicitly express the business-driven idea of corporate social responsibility, 'the

⁶¹ *ibid* 760.

⁶² John Ruggie, 'Remarks by John G. Ruggie', Forum on Corporate Social Responsibility (Fair Labor Association and the German Network of Business Ethics 2006) <<https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>> accessed 8 February 2018.

⁶³ Nolan (n 7) 150.

⁶⁴ Connolly (n 28) 853.

⁶⁵ Wheeler (n 27) 761.

corporate responsibility to respect clearly resembles the spirit of the CSR world'.⁶⁶ Due diligence was introduced into the framework because of growing resentments against the CSR agenda that were apparent in civil society.⁶⁷

Due diligence coupled with the necessity for victims to be able to gain access to remedy was an important combination as it closed the doors to criticism from NGOs and activist groups that disapprove of the voluntary nature of CSR.⁶⁸ The SRSG referred to the framework of the UNGP as a 'smart mix'⁶⁹ because 'of different forms of regulation which overcame the divide between voluntary and mandatory solutions'.⁷⁰ The due diligence framework encourages corporations to continue doing what they already do⁷¹ - provide information to external audiences about their practices. This occurs already because of the various certification mechanisms that exist within the CSR format which allow companies to benchmark their performance against common standards.⁷² The SRSG was successful in convincing various actors that due diligence was the appropriate way forward, 'everyone from states and

⁶⁶ Scheper (n 10) 745.

⁶⁷ *ibid* 745.

⁶⁸ *ibid* 745.

⁶⁹ Guiding Principles on Business and Human Rights - Implementing the United Nations 'Protect, Respect, And Remedy' Framework (United Nations 2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 13 March 2018, 5.

⁷⁰ Scheper (n 10) 745.

⁷¹ Surya Deva and David Bilchitz, *Human Rights Obligations of Business* (Cambridge University Press 2013) 13.

⁷² *ibid* 13.

companies to NGOs and academics started speaking the language of due diligence without fully appreciating that due diligence in commercial contexts might be very different from due diligence in the field of human rights'.⁷³ As Deva and Buhmann argue, due diligence can be viewed as a strategy to discharge the responsibility to respect human rights and also to avoid complicity.⁷⁴

Transparency legislation which encourages due diligence is the prevalent model both domestically and internationally.⁷⁵ Reflexive law scholars argue that the most effective way to tackle modern slavery in global supply chains is to trust corporations to eliminate the problem themselves. The following Section will attempt to demonstrate why this is illogical and show how such legislation is in the interest solely of the corporations.

III. Corporate Social Responsibility

The prevalence of CSR and due diligence in national and international mechanisms contrasted with the continuation of human rights violations in the fashion industry's global supply chains suggests that such legislative models are

⁷³ *ibid* 11.

⁷⁴ *ibid* 16.

⁷⁵ Baccaro and Vele (n 47) 451.

ineffective. In *The Corporation*, Joel Bakan argues this is due to the corporation's psychopathic personality, inherent in their structure, which necessitates their pathological pursuit of profit and power. He argues that CSR is representative of a corporation's psychopathic tendency to relate to others superficially. To support Bakan's argument, this Section will firstly discuss the role corporations played in the formation of transparency legislation both nationally and internationally. Secondly, in light of the current structure of corporate law, this Section argues that genuine CSR, which puts social concerns before the interests of shareholders, is immoral. Subsequently, the final Section will argue that CSR for human rights demonstrates how capitalism appropriates criticism of its norms, ultimately resulting in the corporatisation of human rights. The arguments made in Section III intend to support the argument in Section IV for corporate criminal liability for human rights violations in global supply chains.

Bakan argues that 'the corporation is a pathological institution, a dangerous possessor of the great power it wields over people and societies'.⁷⁶ The corporation is 'a legally designated 'person' designed to valorise self-interest and invalidate moral concern.'⁷⁷ In his book *The Corporation* he asks Dr. Robert Hare, a psychologist and renowned expert on psychopathy, to apply his diagnostic checklist [in italics] of psychopathic traits to corporate institutional character. The results lead to a positive diagnosis.

⁷⁶ Joel Bakan, *The Corporation* (Free Press 2005) 2.

⁷⁷ *ibid* 57.

The corporation is *irresponsible*, Dr Hare said because ‘in an attempt to satisfy the corporate goal, everybody else is put at risk.’ Corporations try to ‘*manipulate everything, including public opinion,*’ and they are *grandiose*, always insisting ‘that we’re number one, we’re the best.’ A *lack of empathy and asocial tendencies* are also key characteristics of the corporation, says Hare – ‘their behaviour indicates they don’t really concern themselves with their victims’; and corporations often *refuse to accept responsibility for their own actions and are unable to feel remorse*: ‘if [corporations] get caught [breaking the law], they pay big fines and they continue doing what they did before anyways.’⁷⁸

Finally, and importantly, Dr Hare asserts that corporations relate to others *superficially*. It is well understood in psychology that human psychopaths are known for their ability to ‘use charm as a mask to hide their dangerously self-obsessed personalities’.⁷⁹ Bakan argues that CSR can be understood as a part of this psychopathic tendency as ‘through it they can present themselves as compassionate and concerned about others, when in fact, they lack the ability to care about anyone or anything but themselves’.⁸⁰ This is evidenced in the role that corporations played in lobbying for the final formation of both the MSA and the UNGP.

⁷⁸ *ibid* 57.

⁷⁹ *ibid* 57.

⁸⁰ *ibid* 57.

3.1 Corporations and the Development of Transparency Legislation

3.1.1 Corporations' Role in the Formation of s. 54 of the MSA

Through the drafting process, corporations formed an important part of the formulation of both the MSA⁸¹ and the UNGP.⁸² As Preuss and Brown note: 'From a business perspective, the danger arises that if business does not get involved in shaping the debate it risks leaving the interpretation of human rights entirely to NGOs and IGOs'.⁸³ Governing labour standards in global supply chains is challenging, as it is difficult to establish accountability for the use of forced labour in a tangled web of supply chains. Legal liability lies first with the supplier who commits the human rights violation not the corporation. Multinationals are separate legal entities to the suppliers. *Adams v Cape Industries*,⁸⁴ established the precedent that 'vicarious liability for the corporation for the crimes and/or torts committed by the supplier' does not exist.⁸⁵ Most cases of forced labour occur in the developing world where the country in which the abuse has occurred will hear and decide the case upon the law of that country as per private international law.⁸⁶ This results in a substantial challenge for access to justice for the victims as the country in question may not have law that covers forced

⁸¹ LeBaron (n 2) 28.

⁸² Deva (n 71) 8.

⁸³ Lutz Preuss and Donna Brown, 'Business Policies on Human Rights: An Analysis Of Their Content And Prevalence Among FTSE 100 Firms' (2012) 109 *Journal of Business Ethics* 289, 290.

⁸⁴ *Adams v Cape Industries plc* [1990] BCLC 479.

⁸⁵ LeBaron (n 2) 15.

⁸⁶ *ibid* 16.

labour,⁸⁷ or it may have weak law enforcement mechanisms⁸⁸ and limited access to justice or suffer from high levels of corruption.⁸⁹

There were three policy models proposed for the MSA to address the government's response to modern slavery in global supply chains. Legislative options included: The Bribery Act Model, Companies Act Model, and California's Transparency in Supply Chains Model.⁹⁰ Had the MSA been enacted in line with the Bribery Act it would have imposed criminal liability for forced labour in supply chains and those involved in it. The introduction of such a model would have marked a dramatic shift in current liability for forced labour and required real change in business practices to avoid criminal liability.

Despite the neoliberal thinking that harder options as based on the Bribery Act or Companies Act would not be viable, LeBaron and Rühmkorf's research demonstrates that the Joint Committee was open to the harder models.⁹¹ This is supported by the precedent set by existing 'hard' corporate law in the UK in the case of bribery.⁹² Furthermore, the Draft Modern Slavery Bill suggested that 'an amendment of the Companies Act was the preferred option in the Draft Bill (referred to as 'a

⁸⁷ LeBaron (n 2) 15.

⁸⁸ *ibid* 15.

⁸⁹ *ibid* 16.

⁹⁰ *ibid* 16.

⁹¹ *ibid* 16.

⁹² The Bribery Act 2010.

proportionate and industry-supported initial step')⁹³ suggesting it was realistic for substantive law to be included in the Modern Slavery Act. However, the business community was creative in their reaction to the proposed models.⁹⁴ In the case of the MSA, this is clear as 'industry activity to displace and weaken stringent legislation took the form of lobbying *for rather than against* anti-slavery legislation'.⁹⁵ This was done by building consensus between corporations and NGOs on the effectiveness of CSR as an important first step forward.⁹⁶ Endorsement of transparency legislation by NGOs forged the way for transparency legislation to be implemented in the MSA.⁹⁷

Unfortunately, the MSA adopted the California Transparency in Supply Chains Model instead of hard law. Management studies literature on the political use of CSR demonstrates it as a corporate strategy to 'shape government policy in ways favourable to the firm'.⁹⁸ As Kaplan argues, indirect strategies such as that of CSR can be used to protect the status quo by offsetting mandatory regulation. CSR thus serves as 'institutional maintenance' as it 'stave off efforts to restrict and

⁹³ LeBaron (n 2) 19.

⁹⁴ *ibid* 22.

⁹⁵ *ibid* 7.

⁹⁶ *ibid* 7.

⁹⁷ *ibid* 23.

⁹⁸ Amy Hillman and Michael Hitt, 'Corporate Political Strategy Formulation: A Model of Approach, Participation, And Strategy Decisions' (1999) 24 *Academy of Management Review*.

change the rules of global production'.⁹⁹ As LeBaron and Rühmkorf argue, 'private labour standards do not only displace public standards by substituting for or preventing new legislation, but also by diluting the quality of new legislation and effectively privatizing it—rendering it far less stringent and 'hard' in legal terms than is frequently assumed'.¹⁰⁰ Fortunately, as will be discussed in Section IV, the failures of transparency legislation have been recognised. The UK Parliament's Joint Committee on Human Rights latest report on Human Rights and Business has urged the government to introduce new legislation which would be modelled on the Bribery Act.

3.1.2. Corporations' Role in the Formation of UNGP

Similarly in 2006 the SRSG explained that his operating principle was that of 'principled pragmatism,' a commitment to 'strengthening the promotion and protection of human rights (...) coupled with a pragmatic attachment to what works best in creating change'.¹⁰¹ The process employed illustrated 'how non-state actors such as MNCs, NGOs, and individual scholars could play an even more vital role than states in developing international law norms from the "bottom up"'.¹⁰² In the drafting of the Principles, the SRSG consulted various stakeholders such as NGOs, governments, and civil

⁹⁹ Rami Kaplan, 'Who Has Been Regulating Whom, Business or Society? The Mid-20Th-Century Institutionalization Of 'Corporate Responsibility' In The USA' (2014) 13 Socio-Economic Review 1.

¹⁰⁰ LeBaron (n 2) 9.

¹⁰¹ Wheeler (n 27) 760.

¹⁰² Deva (n 71) 8.

society organisations across five continents¹⁰³ and worked closely with transnational corporations.¹⁰⁴ Glaringly, despite the emphasis placed on consensus, the SRSG did not consult with victims of corporate crimes in the process.¹⁰⁵ The ‘bottom-up’ approach in the formation of the UNGP allowed for corporations to play an unprecedented role in deciding how international law would apply to them and allowed for businesses to negotiate for non-binding human rights standards applicable to themselves.¹⁰⁶ Deva argues that corporations’ voices were more heard than those of NGOs.¹⁰⁷

In light of the failings of the UN Norms consensus had become a goal in itself.¹⁰⁸ Due diligence was fundamental to achieving consensus between corporations and governments. Additionally, consensus was achieved by steering away from controversial issues such as positive obligations on states to regulate MNCs extraterritorially and through not formulating legally binding human rights obligations.¹⁰⁹ Consensus on the non-binding and non-burdensome soft law mechanisms was achieved. The principles have been endorsed by the UN Human Rights Council,¹¹⁰ adopted by the OECD,¹¹¹

¹⁰³ Wheeler (n 27) 760.

¹⁰⁴ *ibid* 760.

¹⁰⁵ Deva (n 71) 10.

¹⁰⁶ *ibid* 10.

¹⁰⁷ *ibid* 9.

¹⁰⁸ *ibid* 11.

¹⁰⁹ Deva (n 71) 19.

¹¹⁰ Wheeler (n 27) 760.

¹¹¹ *ibid* 760.

implemented by the EU,¹¹² and influenced the design of various standardisation mechanisms. It is against the backdrop of this consensus that 'the corporate responsibility to respect human rights quickly became a mantra-like concept in the UN'¹¹³ and in subsequent domestic legislation.¹¹⁴

To return to Bakan's argument, CSR and due diligence in both the national and international arena are the way in which corporations connect with consumers in a superficial way, presenting themselves as compassionate and concerned, when they are in fact self-interested and 'lack the ability to care about anyone or anything but themselves'.¹¹⁵

3.2 Corporations and Shareholder Maximisation

Corporations are not natural beings with unchangeable properties which inherently 'lack the ability to care about anyone or anything but themselves'.¹¹⁶ Rather, it is our laws regulating corporate institutions that have designed and embedded in corporations' psychopathic characteristics. Our laws dictate the role of shareholders and directors and stipulate what they can and what they cannot do. Corporations are the property of their shareholders and therefore their legal duty is to be concerned only with the interests of their shareholders. In a 1970 New York Times

¹¹² *ibid* 760.

¹¹³ Scheper (n 10) 745.

¹¹⁴ *ibid* 745.

¹¹⁵ Bakan (n 76) 57.

¹¹⁶ *ibid* 57.

Magazine article entitled 'The Social Responsibility of Business is to Increase Profits,' Milton Friedman argued:

In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.¹¹⁷

In his book *Capitalism and Freedom* Friedman refers to corporate social responsibility as a fundamentally subversive doctrine in a free society.¹¹⁸ Corporate directors are chosen by shareholders to serve their interests; they are the 'agents of the individuals who own the corporation (...) and his primary responsibility is to them'.¹¹⁹ In this context it is immoral for directors to pursue their own conceptions of 'social purposes' over the shareholder interests.¹²⁰ Consequently, Friedman argues that the only time when CSR can be accepted is when it is insincere.¹²¹

Bebchuck and Friedman support the corporate governance approach adopted by the UK where 'shareholder power literally defines the corporation and the shareholders' interests

¹¹⁷ Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' [1970] *The New York Times Magazine* 17.

¹¹⁸ Milton Friedman and Rose D Friedman, *Capitalism and Freedom* (40th edn, University of Chicago Press 2012) 120.

¹¹⁹ Friedman (n 118).

¹²⁰ *ibid* 129.

¹²¹ Bakan (n 76) 59.

unquestionably represent the sole legitimate aim of corporate activity'.¹²² Indeed, the UK is cited as the jurisdiction that is 'most receptive' to 'the doctrine of shareholder primacy',¹²³ as shareholders in the UK 'possess an arsenal of governance powers, coupled with express statutory regard for their interests - that would be the envy of shareholder activists anywhere, including the United States'.¹²⁴ Parliament has enshrined this understanding into statute. Section 172 of the Companies Act (2006) states that a director 'must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members [i.e. shareholders] as a whole'.¹²⁵ The understanding of the primacy of shareholders' interests is necessary for reading the rest of the Act. Bruner explains:

Although the statute does require the directors to 'have regard' for various constituencies, including employees, suppliers, customers, and even 'the community,' as well as other values (including the environment, the company's ethical reputation, and 'long term' consequences of their decisions), these various interests are expressly subordinated to the shareholders' interests.¹²⁶

¹²² Christopher M. Bruner, *Corporate Governance in the Common-Law World* (Cambridge University Press 2013) 62.

¹²³ *ibid* 29.

¹²⁴ *ibid* 29.

¹²⁵ Companies Act 2006, s 176(1).

¹²⁶ Bruner (n 122) 35.

As Bakan highlights, shareholders' interests bind directors as 'the law forbids any other motivation for their actions, whether to assist workers, improve the environment, or help consumers save money'.¹²⁷ Therefore, genuine CSR, which puts social and environmental concerns before the interests of shareholders, is effectively illegal. It is arguable that for this very reason corporations pushed for CSR instead of binding legislation. The fact that CSR in a true sense is subordinate to the maximisation of profit for the shareholders illustrates that the theory that underpins reflexive laws is that of insincere CSR. In the 1930s, businesses started to talk about CSR because many people at the time thought that corporate greed had led to the Great Depression.¹²⁸ At this time CSR was embraced by the business world because it was the best strategy at the time. CSR then, as now, was the corporate world's response to the new frontier it had crossed. 'Corporations now *govern* society, perhaps more than governments themselves do; yet ironically, it is their very power, much of which they have gained through economic globalization, that makes them vulnerable.'¹²⁹

In their pursuit of power, corporations have taken on a ruling role in society and 'as is true of any ruling institution, the corporation now attracts mistrust, fear, and demands for

¹²⁷ Bakan (n 76) 37.

¹²⁸ Archie Carroll, 'A History of Corporate Social Responsibility Concepts and Practices' in Andrew Crane (ed) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2018) 23.

¹²⁹ Bakan (n 76) 25.

accountability from an increasingly anxious public'.¹³⁰ The corporate world understands that it must present itself as socially responsible to the public to regain and maintain their trust. With the public's trust, the laws that govern corporate structure are maintained and in turn corporations may continue pursuing power and profit indiscriminately. Corporations use branding and marketing to gain the public's trust and to soften their image. In this capacity, social and environmental goals are acceptable as they are strategies to advance the interest of the company and shareholders.

3.3 The Corporatisation of Human Rights

National and international mechanisms have led to increasing CSR in corporate practice globally.¹³¹ CSR has been developed in a way so as to actively allow for companies to create and define human rights standards on their own terms and implement their definition within their own means.¹³² Scheper argues that CSR for human rights demonstrates how capitalism allows corporations to appropriate criticism of its norms, translate the very norms that shortly before served to criticise it and incorporate the translations into corporations' own regimes of practice.¹³³ In the backdrop of CSR movements, human rights discourse is understood less as a costly social standard, which decreases profits, i.e. the need to pay workers fair wages, and rather as an opportunity in which the rights discourse can be utilised as profit generation

¹³⁰ *ibid* 25.

¹³¹ Scheper (n 10) 751.

¹³² *ibid* 751.

¹³³ *ibid* 751.

discourse.¹³⁴ To this end there is a convergence of CSR and human rights,¹³⁵ as brand firms actively make human rights governable and predictable for corporate management'.¹³⁶ For this to be obtained, human rights must be 'performance visible' which in turn has led to an increase in indicators, audits and performance mechanisms.¹³⁷ What is happening is a shift from 'a command-and-control strategy of governance to collaborative, consensus-building discussion focused on problem solving and improvement'.¹³⁸ This has led to active engagement with former critics such as NGOs and the rise of standardisation tools of human rights impact and assessment. Both of these elements are necessary to 'know and show' human rights in this new world of corporatised human rights. Today, 'knowing and showing' human rights violations is arguably a commodity.¹³⁹ Thus, in the case of human rights violations, 'knowing and showing,' positive engagement on the part of business and quantified images of companies' progress serve to further the process of corporatising human rights. As Scheper writes, 'it changes the logic of the rights concept - someone is entitled to claim a right - into a tool of control over an organization's performance'.¹⁴⁰

¹³⁴ *ibid* 751.

¹³⁵ *ibid* 746.

¹³⁶ *ibid* 746.

¹³⁷ Michael Power, *The Audit Society* (Oxford University Press 1999).

¹³⁸ Scheper (n 10) 746.

¹³⁹ *ibid* 749.

¹⁴⁰ Scheper (n 10) 750.

As discussed in the first Section of this Article, the 1990s saw the peak of the anti-sweatshop movement,¹⁴¹ with server criticism being directed at brands such as Nike.¹⁴² Today, Nike has its own sustainability website,¹⁴³ its own code of conduct and defines its own targets using its leverage over suppliers in order to meet its responsibilities. It claims to be innovating the role of workers and states on its website: 'we believe that a skilled, valued and engaged workforce is key for growth and sustainability. We rely on a source base that is high performing, resilient and agile, with workers that are motivated and fairly compensated to deliver high productivity and world-class products'.¹⁴⁴ Crucially for discussion, Nike has invented and implemented its own 'Sourcing and Manufacturing Sustainability Index',¹⁴⁵ with the aim of sourcing only from factories that demonstrate commitment to workers by achieving a minimum Bronze in their index.¹⁴⁶ The tailored index for Nike is an example of how human rights commitments in global supply chains are linked to a new industry of governance that is self-monitored and regulated.

¹⁴¹ Ann Harrison and Jason Scorse, 'Multinationals and Anti-Sweatshop Activism' (2010) 100 *American Economic Review* 247, 247. <https://www.parisschoolofeconomics.eu/docs/koenig-pamina/harrisonscorse_activism.pdf> accessed 2 February 2018.

¹⁴² *ibid.*

¹⁴³ 'Sustainable Innovation' (*Nike News*, 2018) <<https://about.nike.com/pages/sustainable-innovation>> accessed 5 March 2018.

¹⁴⁴ 'Transform Manufacturing' (*Nike News*, 2018). <<https://about.nike.com/pages/transform-manufacturing>> accessed 5 April 2018.

¹⁴⁵ *ibid.*

¹⁴⁶ Scheper (n 10) 747.

'The problem of human rights becomes one of *verification of data and trust* rather than of political and juridical contestation over rights interpretation and the 'sources of indignation'.¹⁴⁷ Nike admits that many of its suppliers still do not meet *its own* corporate targets on labour standards,¹⁴⁸ yet it has received many awards for being a sustainability leader; for instance in 2006 'the company was named the top U.S. company and one of the world's top 10 in the current sustainability global reporters program ranking'.¹⁴⁹ Nike then is considered an expert in corporate human rights discourse and an example of how criticism of corporations 'contributes to the construction of the normativity that accompanies capitalism and consequently justifies it while placing constraints on it, making capitalism incorporate the values that just a short while before served to criticize it'.¹⁵⁰ This does not result in corporations changing their practice in any real way but rather allows them to translate the norms and create their own norms of practices so as to disarm criticism.

We cannot trust corporations to address social and environmental concerns through CSR because corporations are externalising machines. An externality is 'the effect of a transaction... on a third party who has not consented to, or

¹⁴⁷ *ibid* 747.

¹⁴⁸ Transform Manufacturing (n 144).

¹⁴⁹ 'Nike Named top 10 for Social Responsibility Reporting' (*Nike News*, 2006) < <https://news.nike.com/news/nike-named-top-10-for-social-responsibility-reporting> > accessed 5 April 2018.

¹⁵⁰ Scheper (n 10) 751.

played any role in the carrying out of, that transaction'.¹⁵¹ Nike understands the power of transforming the many negative social externalities of global production into positive images of showing performance.¹⁵² Yet corporations exploit for profit - this is inherent in their structural mandate. The workers who work in sweatshops across the developing world under disgraceful conditions do so because they 'are not *human beings* so much as human *resources*'.¹⁵³

Charles Kernaghan is the director of the National Labour Committee, an organisation whose goal is to stop American fashion brands and corporations from using sweatshops. Kernaghan argues that corporations are obliged, under the internal logic of the market, to use sweatshops as this maximises their profit and they are encouraged to do so due to the flexibility born from liberalised international trade laws, new communications, and transport technologies.¹⁵⁴ Kernaghan found copies of Nike's internal pricing documents when working in the Dominican Republic. The chilling calculations illustrate exactly how workers are viewed by corporations as resources, which Nike continues to exploit despite its proclaimed dedication to workers' rights.

Production of a shirt, to take one example, was broken down into twenty-two separate operations: five steps to

¹⁵¹ Ramon Mullerat, 'International Corporate Social Responsibility: The Role of Corporations' (2010) Kluwer Law International, 114.

¹⁵² Scheper (n 10) 748.

¹⁵³ Bakan (n 76) 69.

¹⁵⁴ *ibid* 69.

cut the material, eleven steps to sew the garment, six steps to attach labels, hang tags, and put the shirt in a plastic bag ready to be shipped. A time was allocated for each task, with units of ten thousandths of a second used for the breakdown. With all the units added together, the calculations demanded that each shirt take a maximum of 6.6 minutes to make - which translates into 8 cents worth of labour for a shirt Nike sells in the United States for \$22.99.¹⁵⁵

Such calculations mask the suffering and abuse inherent to sweatshops around the world.¹⁵⁶ Kernaghan's findings illustrate that, whilst corporations such as Nike may claim to be making differences in their supply chains, the extent to which their regimes actually change is largely a question of their own story-telling.

The structure of corporations in combination with privatisation and deregulation movements across the world has led to a transfer of power from government to corporations.¹⁵⁷ More and more corporations find that they are expected by the public to assume responsibility for and respect the communities and environments in which they operate.¹⁵⁸ Expecting corporations to do so on their own behalf is illogical as it goes against the structural makeup of corporations. CSR

¹⁵⁵ *ibid* 66.

¹⁵⁶ Daniel Coleman, 'Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century by Harry Braverman' (1975) *The Journal of Economic History* 647.

¹⁵⁷ Bakan (n 76) 69.

¹⁵⁸ *ibid* 69.

is 'more than just a marketing strategy, though it certainly is that. It presents corporations as responsible and accountable to society and thus purports to lend legitimacy to their new role as society's rulers.¹⁵⁹ Corporations do not have the mandate to be rulers and for this reason should be compelled by our legal systems to respect human rights. The following Section will argue that this will only be possible through the use of substantive legislation.

IV. Criminal Liability for Modern Slavery

The inherent structure of shareholder maximisation renders CSR an ineffective tool in combating modern slavery in fashion's global supply chains. It may also render other methods ineffective, as in the pursuit of profit corporations are known to break the law in the hope that they will not be caught.¹⁶⁰ Yet in light of the extreme prevalence of modern slavery it is crucial that we focus our attention on solutions that work to serve the interests of the mass population of victims rather than the interests of corporations. There may not be a single solution to the challenge of eradicating forced labour in global supply chains, but our energies are best spent on solutions that lead to real results.

The current design of the MSA does not successfully tackle the issue of modern slavery in global supply chains. Nor does it provide adequate access to remedy for victims of corporate crimes. Victims of abuse by UK companies face overwhelming

¹⁵⁹ *ibid* 25.

¹⁶⁰ *ibid* 30.

challenges in obtaining justice in the country where the abuse has occurred. 'The current criminal law regime makes prosecuting a company for criminal offences, especially those with operations across the world, very difficult, as the focus is on the identification of the directing mind of one individual, which is highly unlikely in many large companies.'¹⁶¹ Often justice will only be obtained if the victim is able to pursue claims in the multinational home state where the courts have jurisdiction over claims against the parent company.¹⁶² This is a difficult task as the doctrine of separate corporate personality only allows for the corporate veil to be pierced in extremely limited situations.¹⁶³ There is little doubt that this doctrine is utilised by companies to shield themselves from liability for the conduct of subsidiaries.¹⁶⁴ 'In the UK, the current legal framework for pursuing claims against corporations has focused on the direct causative acts and omissions of the corporation itself rather than the acts and omissions of its subsidiaries.'¹⁶⁵ Additionally, in claims against corporations there are a multitude of jurisdictional hurdles, procedural issues, and practical issues.¹⁶⁶ This is extremely problematic in the case of the fashion industry. This point was raised by the UK Parliament Joint Committee on Human Rights report:

¹⁶¹ Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability* (2016-2017, HL 153, HC 443) para 194.

¹⁶² *ibid* para 171.

¹⁶³ *ibid* para 174.

¹⁶⁴ *ibid* para 179.

¹⁶⁵ *ibid* para 174.

¹⁶⁶ *ibid* para 169.

We found this particularly pertinent in Turkey, where Syrian refugees have found themselves at risk of exploitation by unscrupulous factory owners...while UK companies may choose to remediate the situation in which, for instance a child labourer is found further down their supply chain, as a number of UK companies have done in Turkey, they cannot be held legally accountable for the actions of their suppliers in a UK court.¹⁶⁷

Victims of human rights abuses by businesses must be provided both civil remedies and criminal sanctions as both are important and yield different results.¹⁶⁸ Not all human rights violations are criminal and for this reason civil law is important. Crucially, civil law is necessary as it allows victims to pursue their claims directly and enables them to claim compensation from the offending corporation.¹⁶⁹ Punitive damages are also a way of deterring companies for behaving similarly in the future and may incentivise victims to come forward.¹⁷⁰ It is more difficult to access remedies for victims in criminal law.

Criminal law requires proof of *mens rea* which is difficult in the context of business directors. Currently, 'UK criminal law generally only applies to acts committed within the UK, excluding human rights harms committed overseas (...) the

¹⁶⁷ *ibid* para 180.

¹⁶⁸ *ibid* para 181.

¹⁶⁹ *ibid* para 182.

¹⁷⁰ *ibid* para 182.

standard of proof for criminal offences is beyond reasonable doubt, which is higher than for tort and victims do not receive a direct remedy'.¹⁷¹ Despite being more challenging, however, criminal sanctions are necessary as they facilitate change. Civil cases are often settled outside of court and do not set binding precedents in the area of business and human rights. Nor do they draw much public attention. In this regard, civil law does not have the capacity to act as a deterrent in the same way that criminal law can. Criminal law is important as it is 'the means by which serious breaches of the standards we expect as a society are punished'.¹⁷²

Section III discussed the three policy models proposed for the MSA: The Bribery Act Model, Companies Act Model and California's Transparency in Supply Chains Model.¹⁷³ Had the MSA been enacted in line with the Bribery Act it would provide 'a stringent form of home state regulation that establishes extraterritorial corporate criminal liability and includes binding public standards and sanctions for non-compliance'.¹⁷⁴ The imposition of extraterritorial criminal liability for forced labour in global supply chains of transnational corporations in their home state is important as it allows victims to access justice and overcomes the barriers discussed above. 'The approach makes it possible to prosecute

¹⁷¹ *ibid* para 183.

¹⁷² *ibid* para 184.

¹⁷³ LeBaron (n 2) 16.

¹⁷⁴ Genevieve LeBaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of The Impact of The UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 *Global Policy* 15, 16.

an individual or a company with links to the UK, regardless of where the crime occurred. In particular, the Act makes it an offence for commercial organisations which have business in the UK to fail to prevent bribery by a person associated with it.¹⁷⁵ Importantly, s. 7(2) of the Bribery Act provides a defence for a commercial organisation if it can prove that it had adequate procedures in place designed to prevent persons associated with it from undertaking such conduct.¹⁷⁶ S. 9 of the Act provides guidance about how commercial organisations can prevent bribery in their supply chains.¹⁷⁷ Guidance from the Secretary of State recommends that corporations employ due diligence mechanisms to avoid complicity, such as anti-bribery terms and conditions in supply contracts.¹⁷⁸ Alice De Jonge argues that ‘the risk of liability combined with defence of ‘appropriate procedures’ effectively forces companies to take measures aimed at preventing bribery in their supply chains’.¹⁷⁹ As the Bribery Act is directed at transnational corporations, ‘it overcomes the limits caused by the territoriality principle and the separate legal personality. Transnational corporations cannot outsource their legal responsibility for bribery in their supply chains.’¹⁸⁰

¹⁷⁵ Andreas Rühmkorf, ‘Global Sourcing through foreign subsidiaries and suppliers: challenges for Corporate Social Responsibility’ in Alice De Jonge and Roman Tomasic (eds) *Research Handbook on Transnational Corporations* (Edward Elgar Publishing 2017) 214.

¹⁷⁶ The Bribery Act 2010, s 7(2).

¹⁷⁷ *ibid* s 9.

¹⁷⁸ De Jonge (n 175) 214.

¹⁷⁹ *ibid* 214.

¹⁸⁰ *ibid* 215.

Furthermore, the Act reduced difficulties for victims as it reversed the burden of proof. The Bribery Act has been successful as 'in the last five years, the Serious Fraud Office has successfully prosecuted three British companies and 10 individuals, nine of whom were British citizens, for bribery or corruption overseas'.¹⁸¹

In the article *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK bribery Act and Modern Slavery Act on Global Supply Chain Governance*, LeBaron and Rühmkorf analyse the impact of the two distinct legislative approaches used in the MSA and The Bribery Act to explore the effects these approaches have had on corporate behaviour. They focus on twenty-five of the largest UK companies (FTSE 100 in May 2016). The key findings of the research highlight important differences between how companies' strategies differ on bribery and forced labour in regard to the way each issue is 'framed and dealt with in policy and codes of conduct'.¹⁸² The findings show that The Bribery Act was more successful in changing company behaviour as companies have clear and strict policies on bribery that are clearly communicated to the suppliers.

The Bribery Act has been successful in making bribery into a clear compliance issue, 'as evidenced by the central role it is given within legal buyer-supplier documents such as in the

¹⁸¹ 'Corruption: Written Question' (2017)
<<https://www.parliament.uk/written-questions-answers-statements/written-question/lords/2017-01-09/HL4401>> accessed 9 April 2018.

¹⁸² LeBaron (n 174) 23.

Terms and Conditions of Purchase for Suppliers and Supplier Codes of Conduct'.¹⁸³ The difference in language evidences the effect of different legislation. In comparison to 'zero tolerance' on bribery, companies use vague and aspirational language to describe their forced labour policy.¹⁸⁴ Companies are quick to say that they comply with bribery laws and 'some documents even mention the danger that the multinational enterprises that we looked at in our study will be "criminally liable" if linked to bribery'.¹⁸⁵ This research demonstrates that bribery is given a key role in reporting compared to that of modern slavery and human trafficking in regard to both the quantity and the quality of reporting:

We found that bribery is afforded a much more prominent role in company CSR and sustainability reporting. It is also more frequently specifically referenced in the other documents that we looked at (e.g. codes of conduct). For instance, Imperial Brands' code of conduct mentions bribery 12 times (starting as early as in Section 1, 'Business Integrity', and Section 4, 'Anti-Bribery and Corruption'). Forced labour is only addressed once, on page 57 out of 65.¹⁸⁶

LeBaron and Rühmkorf conclude that their 'analysis suggests a "bribery effect" in global supply chain governance'.¹⁸⁷ It is

¹⁸³ *ibid* 23.

¹⁸⁴ *ibid* 25.

¹⁸⁵ *ibid* 25.

¹⁸⁶ *ibid* 25.

¹⁸⁷ House of Lords (n 161) para 190.

clear that home state legislation that establishes criminal corporate liability and imposes due diligence requirements on companies has resulted in more fundamental changes to supply chains than that of the Modern Slavery Act and transparency legislation.

As noted earlier, latest report on Human Rights and Business has advised the government to introduce new legislation, which would be modelled on the Bribery Act. In their extensive research, they found 'the consensus among all the witnesses who supported the introduction of a criminal offence of failure to prevent human rights abuses was that it should be modelled along the same lines as section 7 of the Bribery Act'.¹⁸⁸ The committee report concludes:

We recommend that the Government should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human rights abuses for all companies, including parent companies, along the lines of the relevant provisions of the Bribery Act 2010. This would require all companies to put in place effective human rights due diligence processes (as recommended by the UN Guiding Principles), both for their subsidiaries and across their whole supply chain. The legislation should enable remedies against the parent company and other companies when abuses do occur, so civil remedies, as well as criminal remedies, must be provided. It should include a

¹⁸⁸ The Bribery Act 2010, s 7.

defence for companies where they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate that this has been done.¹⁸⁹

To obtain justice for millions of workers worldwide the report's recommendations should be implemented in full.

V. Conclusion

This work has examined the relationship between modern slavery in the fashion industry's global supply chains and s. 54 MSA. Change is necessary in the fashion industry as from seed to store abusive and exploitative practices undermine the dignity of workers worldwide. In the face of a global epidemic of modern slavery in global supply chains, it is our duty to do the utmost to ensure that such practices do not continue. CSR – which has dominated the debate nationally and internationally - will serve reputational benefits for corporations but will not bring the required measure of transformation. CSR is a function of the corporation and does not have the capacity to alter corporate behaviour as genuine CSR is effectively illegal and requires the corporation to willingly defeat itself. However, modern slavery in global supply chains is not an unchangeable reality. Distinctive legislative approaches can have real impacts. For the sake of the collective good, our laws must serve to protect victims rather than serve corporate interests. As argued in this Article, corporate criminal liability for human rights abuses in global

¹⁸⁹ Joint Committee on Human Rights (n 161) para 189.

supply chains is a necessary step in this battle. Modelling the MSA on the Bribery Act would allow victims to access justice, act as a necessary deterrent for corporations and require them to change exploitative global supply chain practices.

Yet, modelling the MSA on the Bribery Act would only be the first step. This step alone would not be enough as there should be no negative externalities, be they social, environmental or ethical, of corporate conduct. Fortunately, as Connolly writes, 'the corporation operates in a predictable way which, given appropriate policies, could be recalibrated to operate more humanely'.¹⁹⁰ He asserts that 'perhaps the corporation could be recalibrated to deliver positive rather than negative externalities which, given the physical scale and wealth of many corporations, could embed positive human rights within poor communities at a pace that is currently unimaginable'.¹⁹¹ If it is possible for us to imagine a world where corporate externalities are only positive, then it is possible for us to realise this. The challenge is in identifying and taking the necessary steps forward to make this our reality.

¹⁹⁰ Connolly (n 28) 853.

¹⁹¹ *ibid* 853.

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