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'Old' Vs. 'New' Governance Regulatory Mechanisms to Prevent Human Trafficking

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'OLD' VS. 'NEW' GOVERNANCE REGULATORY MECHANISMS TO PREVENT HUMAN TRAFFICKING

Neli Frost

Abstract

National legislation to prevent human trafficking globally reflects a commitment, perhaps a moral obligation to take foreigners' interests into account. The paper examines two types of legislation, the U.S. Trafficking Victims Protection Act (TVPA) and the California Transparency in Supply Chains Act (CTSCA), which represent different regulatory modalities. Whereas the TVPA follows the "old" model of top-down regulation, the CTSCA applies a "new" hybrid regulatory model that involves private actors in regulation. The paper evaluates the justification for both models in light of the theory of sovereign trusteeship. By comparatively analyzing the theory's application and limitations in both 'old' and 'new' governance mechanisms, the paper first explores how the trusteeship sentiment translates into legal regulation in each of these governance models, and furthermore, whether and how the involvement of transnational corporations in other-regarding regulation influences its potential to meaningfully take others' interests into account and promote global welfare.

INTRODUCTION

Although the framing of human trafficking as a legal category dates back more than a century, the growing prevalence of the phenomenon in the past few decades has triggered new national and international legal responses.[1] The most significant legal instruments developed in the last decade to combat human trafficking are the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000,[2] and the U.S. Trafficking Victims Protection Act (TVPA).[3] In addition to these international and federal pieces

[1] Legal instruments promulgated to combat human trafficking have existed for over a century. The early international conventions targeting human trafficking conceptualized this crime primarily as related to sex-trafficking of women and girls. However, with the proliferation of trafficking practices in recent decades, the crime has become a major global political concern. See Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA LAW REVIEW 76 (2012-2013).

[2] Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003).

[3] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464 (codified as amended in scattered sections of 18 U.S.C. & 22 U.S.C.) [hereinafter TVPA], *amended by* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified at 18 U.S.C. § 1595 & 22 U.S.C. § 7109(a)(2006)) [hereinafter 2003 TVPRA], Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No.

of legislation, in 2010 the California State Legislature signed into law the California Transparency in Supply Chains Act (CTSCA or the Act), also enacted to combat the forced labor and trafficking of humans.[4]

As will be detailed in this paper, these pieces of legislation could be considered to be guided by the normative rationale of *other-regardingness* as advanced by Prof. Benvenisti in his article *Sovereigns as Trustees of Humanity*.[5] Under this normative rationale, our contemporary conceptions of democracy and justice necessitate a reinterpretation of sovereignty so as to include a moral obligation to take others' interests into account.[6] This moral obligation has been internalized, in recent years, by various regulators and policymakers in both the national and international arenas.[7] However, the main context in which it has been discussed so far relates to regulatory regimes in which the sovereign state is the central regulatory agent.

Given that both pieces of legislation reach beyond national borders for the purpose of ameliorating the human rights condition of foreign victims of trafficking, they can both be understood as sheer manifestations of the trusteeship sentiment.[8] However, despite sharing this common objective, the TVPA and the CTSCA differ in the regulatory modalities through which the concept of sovereign trusteeship is manifested and implemented. Whereas the TVPA, for the most part, represents a command-and-control type of regulatory model, carried out top-down by the state, coercively enforcing its rule,[9] the CTSCA represents a new hybrid regulatory model that has been on the rise in recent years, involving private actors in the act of governance. In this

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109-164, 119 Stat. 3558 (2006) (codified in scattered sections of 18 U.S.C., 22 U.S.C. & 42 U.S.C.) [hereinafter 2005 TVPRA], and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 8 U.S.C., 18 U.S.C. & 22 U.S.C.) [hereinafter 2008 TVPRA].

[4] CAL. CIV. CODE § 1714.43 (West 2012).

[5] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107(2) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 295 (2013).

[6] *Ibid*, at 300.

[7] Benvenisti accounts for some of these examples in his article. Among these, the German constitutional court's invocation of the concept of 'federal fidelity' requiring the government to consider common welfare in decision making processes, and the World Trade Organization's policies on members' conduct when deviating from GATT obligations, obligating them to observe the principle of entitlement to an equitable share of the international supply of products. See *Ibid* at 314-316.

[8] The CTSCA, as opposed to the TVPA, does not address the practice of sex trafficking, but is targeted at specifically combating labor trafficking and forced labor that have become central to trafficking in persons.

[9] Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42(2) VANDERBILT JOURNAL OF TRANSNATIONAL LAW 501 (2009).

model the state remains a significant actor, although not in its capacity as a top-down commander, but rather as an orchestrator operating through the promotion of networks of different actors and institutions engaged in regulatory activities.[10]

As opposed to the TVPA, in which sovereigns' trusteeship obligations are implemented directly and solely by the state, the CTSCA seeks to eliminate practices of human trafficking by harnessing transnational corporations' (TNCs) practices, standard-making and resources. More specifically, by requiring corporations to report on the particular actions undertaken by them to eradicate slavery and human trafficking in their supply chains, the state fulfills its trusteeship duties through the corporate agent.

The purpose of this paper is to examine the theoretical framework of sovereign trusteeship in light of the changing structure of regulatory regimes and the recent emergence of new governance-type regulatory models. Through the comparative analysis of the two regulatory modalities represented by the TVPA and the CTSCA, the paper questions whether the rationales that underpin the trusteeship theory are realized in hybrid regulatory regimes as they are in classic regulatory models. In other words, it explores whether and how the involvement of corporations, NGOs and civil society agents in regulation, which aims to take other's interests into account, influences the potential of these policies to fulfill *other-regardingness* and promote global welfare.

What follows should not be read as questioning the notion of sovereign trusteeship from a normative perspective. Rather, the paper marks the regulatory field of human trafficking as another significant arena guided by the trusteeship sentiment, and examines the theory's application, limitations, and congruence with contemporary regulatory settings through this field. The paper proceeds as follows. Part I reviews the basic principles of Benvenisti's theory of sovereign trusteeship and examines whether and how they are applied through the TVPA and CTSCA. It will analyze the potential of each piece of legislation to serve as a venue for sovereigns to realize their obligations of *other-regardingness.* Part II moves on to examine the trusteeship theory in light of new governance theories and transnational private ordering. It will discuss the possible shortcomings of the trusteeship framework given the characteristics of

[10] *Ibid*., at 521.

contemporary transnational regulatory settings and the involvement of TNCs therein. Part III concludes.

PART I: SOVEREIGN TRUSTEESHIP IN THE CONTEXT OF HUMAN TRAFFICKING REGULATION

In his article *Sovereigns as Trustees of Humanity,* Benvenisti advances his notion of the need to adapt the concept of sovereignty under international law to the realities of a globalized world and our contemporary conceptions of democracy and justice. The present-day reality of interdependence and externalities between states and communities challenges, according to Benvenisti, the almost absolutist construction of state sovereignty characteristic of the nineteenth century, and necessitates a reinterpretation of sovereigns as agents of humanity with obligations of *other-regardingness*. Counterintuitively, perhaps, Benvenisti proposes to view these obligations as stemming from people's right to self-determination (rather than limiting it), and therefore extant and binding even when not anchored in concrete, hard-law, treaty-based obligations.[11]

Based on administrative law principles of accountability and public participation, sovereigns are morally obligated, according to this notion of trusteeship, to provide remedies that can curb the loss of individuals' ability to significantly participate in the shaping of their life opportunities.[12] This reinterpretation of sovereigns' duties towards affected others does not entail an obligation to sacrifice the interests of their own citizens. Rather, these moral obligations can be translated, according to Benvenisti, into four *minimal* legal obligations that are meant to assist sovereigns in adopting optimal policies, without imposing any considerable burdens. These minimal obligations apply to all sovereign bodies towards affected stakeholders, and include: (1) taking foreign stakeholders' interests into account, (2) providing them a voice in decision making processes, (3) doing so if it is costless to the sovereign policymaker, and (4) doing so in cases of catastrophe.[13]

Legislated for the purpose of globally enhancing human rights sensibilities, in many regards the TVPA and the CTSCA can be perceived as normatively guided by this notion of trusteeship, and as implementations of the legal obligations stemming from this sentiment. What

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[11] See Benvenisti, *supra* note 5, at 295-301.
[12] *Ibid.,* at 314.
[13] *Ibid.*

follows is a comparative examination of how this sentiment translates, in each of these pieces of legislation, into legal regulation.

The TVPA and CTSCA as Implementations of Sovereign Trusteeship

Several weeks prior to the adoption of the Palermo Protocol, the U.S. Congress passed the TVPA.[14] As human trafficking became a global concern at the turn of the century, and the U.S. a prime destination for trafficking victims, American jurists and policymakers were faced with an absence of anti-trafficking measures within their federal legal system.[15] High-profile trafficking cases adjudicated in the U.S. in the late 1990s prompted the Clinton administration to nationally address the illicit flow of persons into U.S. territories.[16] On 28 October, 2000 the TVPA was signed into law, establishing the American legal framework for combating the cross-border phenomenon of trafficking in persons.

The *raison d'être* of the TVPA being to combat a transnational crime whose victims are primarily foreign citizens, it could be argued that this is a clear example of sovereigns' realization of their obligation *to take others' interests into account*.[17] The legislation is organized around what is often referred to as the "3-P's" paradigm – Prevention, Prosecution and Protection.[18] Not only does it criminalize trafficking and trafficking-related acts, but it also provides foreign trafficked victims the possibility of obtaining residency status in the U.S., with eligibility for benefits of federal public assistance, as well as affording them a private right of action to sue their traffickers.[19] By means of these provisions, the state both internalizes the out-of-state interests of foreign victims' wellbeing, as well as giving them voice in local judicial processes.

In addition to the criminalization of trafficking and protection of foreign victims, the TVPA and its reauthorizations also establish a sanctions regime concerning American assistance to foreign countries.[20] This regime enables the U.S. government to withhold its assistance from

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[14] Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW 437 (2006).
[15] Aiko Joshi, The Face of Human Trafficking, 13 HASTINGS WOMEN'S LAW JOURNAL 31 (2002).
[16] *Ibid*, at 39; see also Chuang, *supra* note 14 at 449.
[17] TVPA, *supra* note 3 § 102.
[18] See Shamir, *supra* note 1, at 89-90.
[19] TVPA, *supra* note 3, § 107.
[20] See TVPA, *supra* note 3, § 110; see also Chuag, *supra* note 14 at 452.

those who fail to comply with minimum standards for the elimination of trafficking.[21] In order to asses states' compliance with American standards, annual reports are prepared by the U.S. State Department categorizing states' efforts to combat trafficking into three tiers of compliance. Countries which are categorized as "noncompliant" risk losing American financial support.[22]

The sanctions regime can be seen as not only fulfilling states' *minimal deliberative obligations*, but also as working to promote global welfare.[23] The purpose of the sanctions regime is to encourage foreign governments to cooperate with the minimal standards imposed by the U.S. in their combat against trafficking. Despite the threat of economic sanctions lurking in the background, the tier system – ranking countries according to their compliance with these standards – provides states with the opportunity to improve their anti-trafficking policies and practices, and to move up the tier-ladder. The Trafficking in Persons (TIP) Reports' assessments are based on data compiled by the U.S. State Department from a wide range of sources such as foreign government officials, NGOs and individuals, and they are annually published, hence meeting procedural requirements such as transparency, accountability, and basing policies on scientific assessments.[24] Moreover, during the ninety-day grace period granted to countries ranked in Tier 3, the TIP office works with the respective governments to develop action plans to achieve states' compliance. If noteworthy efforts are made to comply, sanctions will not be imposed.[25]

Serving as a stimulant for many states to join the combat against human trafficking, the TVPA and its sanctions regime thus serves as a good example of a piece of legislation that reflects the trusteeship sentiment, with the potential of promoting global welfare. Although the unilateral sanctions regime's legitimacy is contested among legal scholars,[26] the TVPA has certainly drawn worldwide attention to the trafficking problem and the need to regulate it.[27] Moreover, the TVPA has brought an increase in prosecutions and convictions of traffickers, as

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[21] See Chuang, *Ibid.*, at 439.
[22] See Shamir, *supra* note 1, at 92.
[23] See Benvenisti, *supra* note 5 at 318.
[24] See Chuang, *supra* note 14 at 452.
[25] *Ibid.*
[26] See, for example: Daphna Hacker, *Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law*, 28 HARVARD HUMAN RIGHTS JOURNAL 11 (2015).
[27] Frances P. Bernat & Tatyana Zhilina, *Trafficking in Humans: The TIP Report*, 5/6 SOCIOLOGY COMPASS 452 (2011).

well as increased benefits and services to trafficking victims, thus ameliorating human rights conditions on a global scale.[28]

Like the TVPA, the CTSCA can also be regarded as an implementation of sovereigns' obligation *to take others into account.* Having come into effect on 1 January 2012, the Act applies to all retailers and manufacturers with annual global revenues of more than $100 million that do business in California. It requires that corporations disclose information regarding the specific actions undertaken by them to eradicate slavery and human labor trafficking in their direct supply chains.[29] This information is required by the Act to be publicly posted on corporations' websites, and in the absence thereof, companies are obligated to provide consumers with a written disclosure within 30 days of receiving a written request.[30]

As the state with the most 'potential trafficking locations,'[31] California sought to raise consumer awareness of the issue of human trafficking so as to leverage societal pressures to combat the phenomenon.[32] As detailed in the Bill Analysis conducted at the Senate Judicial Committee, the stated purpose of the Act is to

> "highlight the existence of slave-labor and human trafficking throughout California and to create an opportunity for California retailers and manufacturers to demonstrate leadership in eradicating human trafficking from their supply chains."[33]

The Act is thus meant to ensure that corporations provide their consumers with information enabling them to differentiate between corporate actors according to the responsible

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[28] For example, pursuant to the mandates of the TVPA, 24 states added or amended trafficking legislation in 2003, and 39 states did so in 2004. In addition, in 2004 the number of trafficking convictions increased compared to the prior year. See Suzan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 1(2) LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 193 (2005).

[29] The information disclosed by corporations should include the extent to which companies engage in the following: (1) to what extent they evaluate and address the risks of human trafficking and slavery throughout their supply chains; (2) whether they perform supplier audits targeted at evaluating compliance with company standards concerned with eradicating trafficking; (3) whether they require their direct suppliers to certify that materials incorporated into the company's product comply with the respective legal framework addressing slavery and human trafficking in their respective countries of operation; (4) whether the corporation provides employees and management training regarding the mitigation of risks of human trafficking and slavery within the company's supply chain. CAL. CIV. CODE § 1714.43 (a)(1)(c).

[30] CAL. CIV. CODE § 1714.43 (a)(2)(b).

[31] Benjamin Thomas Greer & Jeffrey G. Davis, *Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour*, 20(1) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 55 (2016).

[32] *Ibid* at 56-57.

[33] Bill Analysis at the Senate Judiciary Committee (Senator Ellen M. Corbett, Chair, 2009-2010 Regular Session). Available at: http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651 0700/sb_657_cfa_20090420_120239_sen_comm.html

management of their supply chains and to "... reward companies that proactively work to eradicate slave-labor and human trafficking."[34] This legislation therefore, although it does not impose any criminal or civil sanctions on corporations for complicity in trafficking practices,[35] seeks to eradicate trafficking and promote global welfare by means of market incentives and the reduction of demand for forced labor. The state thus makes use of corporate entities' resources and know-how in order to indirectly influence the human rights conditions of foreign citizens globally employed along the corporate supply chain.

The regulatory model of the CTSCA also enables sovereigns to realize, in a certain manner, some of their *minimal deliberative obligations.* Although, unlike the TVPA, the Act itself does not grant a private right of action, allegations of violations of the Act can be brought to the State of California courts as predicates under other California statutes.[36] These class actions facilitate a judicial dialogue between the state's agents and affected stakeholders pertaining to the scope of companies' obligations of disclosure, and whether they are effectively carrying out the Act's designated goals. Although not all affected stakeholders are aware of or have standing in these proceedings, and thus are not directly heard, the regulatory model of the CTSCA is built on the premise that foreign stakeholders' interests are advocated through the actions of local activists and civil society agents.

In which of the two regulatory models, then, are sovereigns' trusteeship duties better applied? Although both are guided by the sentiment of *other-regardingness,* the TVPA, as a state-centric governance mechanism, imposes on the sovereign the obligation to *take others' interests into account* much more clearly and substantially than does the CTSCA. This coincides with the implicit working premise of the trusteeship framework, insinuating a normative preference of the sovereign as a regulator.

Nonetheless, the CTSCA can be perceived to better conform to the theory's *restricted Pareto criterion*. According to this criterion, the sovereign "must yield to the interests of others

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[34] See Bill Analysis *ibid*.

[35] Compliance with the CTSCA is enforced by the Office of California's Attorney General. The California Franchise Tax Board compiles, each year, a list of corporations meeting the Act's demands, and their websites are reviewed by the Attorney General who eventually determines whether or not the company is in compliance. If it is found to be in violation of the Act, an injunction relief ordering the correction of the corporate behavior could be requested by the Attorney General. CAL. CIV. CODE § 1714.43 (a)(2)(d).

[36] See, for example: *Monica Sud v. Costco Wholesale Corp, et al*., Case no. 15-cv-03783-JSW (N.D Cal. Jan. 15, 2016).

[only] when such a concession is costless to itself."[37] Whereas regulating human trafficking and taking foreign victims' interests into account through the CTSCA seems to be almost costless to the sovereign, thus meeting the restricted Pareto criterion, the TVPA cannot be implemented with the sovereign "sustaining no loss."

The TVPA, as a command-and-control type of regulatory mechanism, imposes numerous costs on the regulatory state. As detailed in the 2008 TIP Report, the coordinated effort of federal agencies to enforce anti-trafficking provisions, identify and protect victims, and promote public awareness of the phenomenon cost the American government approximately $23 million in fiscal year 2007.[38] Moreover, given the applicability of the restricted Pareto criterion to *all sovereign resources*,[39] the TVPA can be perceived as incurring even higher costs to American citizens than the purely financial. The TVPA grants survivors, once identified as trafficking victims, access to services and benefits comparable to those granted to refugees, including immigration reliefs such as continued presence and non-immigrant visas.[40] Given that immigrants often incur a net fiscal cost to the state, pose a displacement risk for the local work force, and change local demographics, these reliefs can be criticized as violating the restricted Pareto criterion.

Conversely, the regulatory modality of the CTSCA allows the use of the corporate entity and its resources as the long arm of the state in order to realize the state's obligations of *other-regardingness*, while incurring minimal costs to both the sovereign and the corporate entity. Although its effectiveness in promoting global welfare in comparison to the TVPA's can be debated (and, as an empirical question, is beyond the scope of this paper), the involvement of corporate entities as regulatory agents in the field of human trafficking seems to enable the state to apply the restricted Pareto criterion while fulfilling its trusteeship obligations.

What, then, are the implications of this analysis for our perception of the theoretical framework of trusteeship? Does it take into account the involvement of TNCs in regulation of public spheres? Is the application of sovereign duties of *other-regardingness* through private entities the way to achieve effective trusteeship? What are the shortcomings of this blurring of the public-private divide, and how does it challenge the minimal legal obligations stemming

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[37] See Benvenisti, *supra* note 5 at 320.
[38] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 51 (2008) [Hereinafter TIP REPORT 2008].
[39] See Benvenisti, *supra* note 5 at 324.
[40] See TVPA, *supra* note 3 § 107; see also TIP REPORT 2008, *supra* note 38.

from the trusteeship sentiment? The following section discusses the concept of trusteeship in light of theories of new governance and transnational private ordering, which depart from the state-centric framework of 'old governance' [41] mechanisms and illustrate a regulatory environment in which sovereigns regularly engage in regulation together with – or through – private regulatory agents. It explores whether and how this regulatory reality necessitates a revisiting of the legal duties stemming from the sentiment of sovereign trusteeship.

PART II: SOVEREIGN TRUSTEESHIP IN LIGHT OF NEW GOVERNANCE AND TRANSNATIONAL PRIVATE ORDERING THEORIES

In contrast to other scholars concerned with the discord between the nearly absolutist construction of state sovereignty and the reality of externalities and interconnectedness, Benvenisti suggests pursuing the golden mean between statist and globalist approaches to this problem by recognizing sovereigns as 'key venues for policymaking'[42] and their 'crucial role in the evolving global architecture of governance.'[43] Given their central and dominant role in regulation of global resources, and thus in the shaping of life opportunities, sovereigns should be entrusted with the responsibility to take foreign stakeholders' interests into account in order to promote global welfare.[44]

How does this account of centralized governance mesh with the growing regulatory involvement of TNCs in social spheres, as portrayed by the CTSCA? The main pillar of new governance theories and transnational private ordering is the notion that regulation is no longer to be carried out single-handedly by the state. While highlighting the considerable contribution of other various actors to the ordering of social fields, these theories challenge the assumption that sovereigns' regulatory powers are based on their superior knowledge of how to obtain public goods,[45] and perceive the increased participation of private actors in the regulatory sphere as enhancing citizens' ability to participate in political life.[46]

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[41] See Abbot & Snidal, *supra* note 9 at 520.
[42] See Benvenisti, *supra* note 5 at 300.
[43] *Ibid* at 301.
[44] *Ibid*.
[45] Orly Lobel, *New Governance as Regulatory Governance, in* DAVIS LEVI-FAUR (ED.), THE OXFORD HANDBOOK OF GOVERNANCE (Oxford University Press, 2012) 65-79; Benvenisti, *ibid*, at 300.
[46] Lobel, *Ibid*., at 67.

Sovereigns are thus no longer regarded by such theories as 'key venues for policymaking,' as in old governance models. Rather, in the new governance models, states pursue public goals by empowering a network of private-sector and civil society actors and institutions. Regulation, accordingly, does not necessarily involve command-and-control rules but is decentralized so as to include the increased involvement of private actors in regulatory standard-setting.[47] These theories, it should be noted, are not quick to 'endorse the demise of sovereignty.'[48] Under new governance models, states retain their regulatory authority, which can be used to intervene with mandatory regulation. However, under these models, regulatory responsibility is shared among private actors together with state agencies. This type of decentralized regulation draws on private actors' immense resources and capacities as compared to states' reduced means. New governance-type regulation is thus an instrument for enlisting private actors as partners in the pursuit of public goals.[49]

Joining new governance theories' assertions regarding the identity of the actors involved in regulation processes in the transnational sphere and their scope of involvement, theories of transnational private ordering also question the prevalent distinction between market self-regulation through private standards and the allegedly formal framework of the state and its authority to make law. According to these theories, these distinctions impede the adequate understanding of the transnational regulatory arena. They suggest, conversely, that contemporary rulemaking in spatial regimes is not confined to nation states' jurisdictional boundaries; rather, "law is shaped by a complex mixture of public, private, state and non state based norms, principles and rules which are generated, disseminated and monitored by a diverse set of actors."[50] Not only are legal norms produced through multilevel processes, but the nature of these norms has changed so as to suggest the blurring of boundaries between public and private ordering.[51]

Should the legal obligations stemming from sovereign trusteeship be revisited given this changed role of the state and its participation in global governance through private entities? The comparative analysis of the TVPA and the CTSCA provides some insights with regard to this

[47] See Abbot & Snidal, *supra* note 9 at 506.
[48] See Benvenisti *supra* note 5 at 300.
[49] See Abbot & Snidal, *supra* note 9 at 524.
[50] Peer Zumbansen, *Neither 'Public 'nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38(1) JOURNAL OF LAW AND SOCIETY 50 (2011) 57-59.
[51] *Ibid.*, at 24.

question. As detailed in the previous section, the realization of trusteeship obligations through the venue of the corporate entity is, by and large, more Pareto efficient than their realization in top-down fashion through statist mechanisms. Since new governance-type regulatory models are highly pluralized, the cost of regulation is dispersed among several regulatory authorities, and therefore not incurred solely by the state. Moreover, from a global perspective, these costs are borne, on the whole, by the wealthier part of humanity, thus establishing an egalitarian model of resource distribution.

Operating through TNCs, such as in the case of the CTSCA, the state leverages the immense financial power of the corporate entity in order to instigate societal pressures that are expected to result in the elimination of trafficking practices and the achievement of global welfare. Given that the sole imposition of the CTSCA on corporate entities is to disclose information on their existing internet websites, not only does the state externalize the cost of regulation (both directly on corporate entities and indirectly on civil society agents), but by relying on market incentives it also reduces the cost of regulation to a bare minimum. As indicated in the Bill Analysis, "both business and consumers would be in a position to exert their economic power and advocate for social change."[52] This regulatory modality enables the state both to fulfill its objective of *other-regardingness* while sustaining almost no financial loss, and circumvents other ramifications resulting from the "3-P's" paradigm and the reliefs granted by the TVPA, as previously discussed.[53]

Besides the fulfillment of the restricted Pareto criterion, this form of meta-governance is also considered by new governance theorists to maintain a more effective role for law.[54] The same can thus be inferred for the realization of *other-regardingness* obligations *through* law. As indicated in the UNODC Global Report on Trafficking in Persons (2014), forty percent of trafficking victims are exploited through forced labor. This share of forced labor detections has been increasing since 2007, pointing to the growing involvement of TNCs in trafficking practices.[55] Victims of trafficking are no longer limited to women and girls in the sex-trafficking industry, but rather labor exploitation has become central to trafficking in persons. Given TNCs'

[52] See Bill Analysis, *supra* note 33.
[53] See in this regard Shamir's criticism of the human rights paradigm advocated through the TVPA and her suggestion of a labor paradigm for human trafficking. Shamir, *supra* note 1.
[54] See Lobel, *supra* note 45, at 69.
[55] UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS (2014).

predominant role in the transnational labor market, new governance rationales would hence advocate for the elimination of trafficking through the corporate venue by engaging corporations in cooperative governance. In other words, engaging TNCs in anti-trafficking regulation while drawing on their know-how, expertise, and resources might prove efficient, according to these theories, in sovereigns' attempt to promote global welfare.

Moreover, the implementation of trusteeship duties through private entities such as TNCs might mitigate the adverse affect potentially created by the attempt to subject these exceedingly powerful actors to command-and-control regulation. Over the past decades, adversarial enforcement has often failed to achieve compliance. Treating private actors as objects of regulation whose agency is limited to questions of obedience has promoted adversarial relations and conflict between the public regulator and the private regulated.[56]

By treating TNCs as norm-generating subjects of human trafficking regulation, the CTSCA employs a legal strategy that seeks to avert this difficulty. Although the state ultimately preserves its authority (as the Attorney General can act to correct corporate nondisclosure by opting for injunctive reliefs), this collaborative model cultivates TNCs' participation in governance.[57] As these injunctions may affect corporate reputation, they create effective incentives for compliance, while abstaining from subjecting TNCs to direct penalties for noncompliance.[58]

Conversely, the TVPA perceives TNCs as inherently posing a challenge to human trafficking regulation and therefore as those in need of regulatory scrutiny. Specifically targeting corporations' financial benefits from labor trafficking, this legislation subjects corporations that benefit from trafficking, either knowingly or in reckless disregard, to civil and criminal liabilities.[59] Such liabilities can be imposed regardless of the locus of the trafficking violation, meaning that even if the violation occurred beyond U.S. borders, or was committed by a separate legal entity in the corporate supply chain, the American corporation involved may still be held

[56] Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise in Governance in Contemporary Legal Thought*, 89 MINNESOTA LAW REVIEW 342 (2004).
[57] Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA Law Review 1 (1997-1998) 32-33.
[58] See Abbot & Snidal, *supra* note 9 at 520-521; John Pickles and Shengjun Zhu, *The California Transparency in Supply Chains Act*, Capturing the Gains Working Paper 15 (2013).
[59] Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Directors' Fiduciary Duty to Monitor and Eliminate Human Trafficking*, 69(2) VANDERBILT LAW REVIEW 499 (2016).

liable.[60] Thus, by treating TNCs as objects of human trafficking regulation, the TVPA might instigate resistance on TNCs' part and prove to be less effective in its attempt to fulfill sovereigns' trusteeship obligations.

Two conclusions can be inferred thus far from the preceding analysis. First, as an empirical matter, in an era of new governance, sovereign states rarely engage in governance alone.[61] Given this reality, a theory discussing sovereigns' obligations exercised through the act of governance should consider that these obligations are frequently implemented and realized in collaboration with, through or supported by private actors. Second, (and this is strictly a theoretical supposition deriving from the previous analysis), collaborative governance proves to be a more Pareto-efficient model for the implementation of the sovereigns' duty of *other-regardingness*.

What shortcomings do these conclusions entail? Or in other words, what are the implications of the blurring of the public-private boundaries in regulatory governance for sovereign trusteeship and the minimal legal obligations stemming from this sentiment? Despite the potential contributions of new governance-type regulatory models to successful governance, the example of the CTSCA can also be taken to put in question the effectiveness of this regulatory regime in *taking other interests into account* and promoting global welfare. The court proceedings which have so far discussed the scope of corporations' disclosure duties under the Act have not proven effective in leveraging the societal pressure so as to hold TNCs liable for partial disclosure or nondisclosure.

For example, in the case of *Monica Sud v. Costco Wholesale Corp, et al.,*[62] the plaintiff alleged that Costco's public disclosure of its code of conduct, prohibiting human trafficking abuses within its supply chain, is misleading given that they sell prawns via a supply chain tainted by human trafficking and slavery violations. The court granted Costco a motion to dismiss for lack of standing, due to fact that the plaintiff hadn't suffered an "injury in fact" traceable to the defendant's conduct.[63] In the case of *Melanie Barber et al. v. Nestle USA Inc.*, the court also ruled in favor of the defendant, accepting its claim that the CTSCA creates a "safe

[60] 18 U.S.C § 1589, 1595-96 (2012). See also, Ezell *Ibid.*, at 518.
[61] See Abbot & Snidal, *supra* note 9.
[62] *Monica Sud v. Costco Wholesale Corp, et al., supra* note 35.
[63] *Ibid.*

harbor," only requiring the company to disclose what it does with regard to human trafficking, but not imposing any obligation to proactively eradicate the phenomenon. The defendant is thus not required, according to the Act, to disclose, at the point of sale, the fact that its products are the product of forced labor.[64]

The judicial interpretation of the CTSCA in these cases and several others[65] is at odds with the basic notion underlying this legislation, pulling the rug from under the California legislator's attempt to *take others into account*. By demanding an "injury in fact" as a prerequisite for holding corporations to their duties of disclosure, and by creating "safe harbors" with regard to pertinent information on trafficking practices within the corporate supply chain, the California courts have thwarted the state's attempt to use corporate entities as platforms for fulfilling their trusteeship obligations. Moreover, the legal interpretation of these rulings, limiting corporations' legal duties to a minimum while maximizing their rights, goes counter to the very notion of collaborative governance. Such legal interpretation perceives the law as an ordering activity rather than a shared problem-solving process, overlooking TNCs' role as norm-generating subjects and as partners in lawmaking.[66]

This mismatch between the legislator's intent of implementing trusteeship duties through the corporate venue and the courts' rulings on these matters problematizes, in a way, the restricted Pareto criterion as a legal obligation of the trusteeship framework, raising several important questions in this regard: Will states' ambition to take others' interests into account *and* be Pareto efficient in tandem lead them to further adopt regulatory models such as the CTSCA in the future? Will this signify a process of privatization of sovereign trusteeship obligations? If so, should the costs incurred by private entities engaging in regulation be part of the Pareto equation? Or does assigning the costs of regulation to the wealthier part of humanity in favor of those in need satisfy the trusteeship framework's aim of promoting global welfare? Conversely, will the fact that new governance models better conform *prima facie* to the trusteeship theory, but in practice – as is evident in the case of the CTSCA – might hinder its realization, lead us to recoil from the theory? Or alternatively, should the theory be explicitly limited to state-centric governance models?

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[64] *Melanie Barber et al. v. Nestle USA Inc*., Case No. SACV 15-01364-CJC(AGRx) (C.D. Cal., Dec. 14, 2015).
[65] See also: *Christina Wirth et al. v. Mars Inc. et al.*, Case No. SA CV 15-1470-DOC(KESx) (C.D Cal. 2016); *Robert Hudsdon v. Mars Inc. et al.* (Case No. 15-cv-04450-RS) (N.D Cal. Sep. 28, 2015).
[66] See Lobel, *The Renew Deal*, *supra* note 56 at 16; see also Zumbansen, *supra* note 50.

In addition to these questions, this analysis raises another concern regarding the adequacy of the "administrative law-based tradition"[67] (upon which the concept of sovereign trusteeship rests) to contemporary regulatory reality. Prof. Jody Freeman, in her article *The Private Role in Public Governance*, conceptualizes the field of administrative law as centering on the need to render state agencies accountable to those affected by their discretion.[68] The trusteeship sentiment, as a moral imperative stemming from "the reality of interconnectedness and shared destinies"[69] in which "sovereigns regulate resources that are linked in many ways and on a daily basis with resources that belong to others,"[70] captures this underlying normative reasoning of administrative law.

However, as suggested by Freeman, the contemporary private role in governance has implications for administrative law. Since traditional administrative law entails a vision of the state "as a bulwark against narrow private pressure,"[71] it naturally perceives private actors such as TNCs as endangering the core administrative pursuit. Nonetheless, given the contemporary interdependence between the public and the private, this vision represents a faulty understanding of the way administrative law works, and masks the accountability problems resulting from collaboration between public and private power.[72] The reality of such collaborations, in turn, demands a search for accountability mechanisms other than the traditional ones, comprised of both formal and informal instruments, in order to mitigate the particular risks posed by collaborative governance.[73]

This understanding can be used to consider whether the four minimal obligations stemming from sovereigns' moral imperative of *other-regardingness* according to the trusteeship framework sufficiently consider the accountability problems arising from contemporary collaborative governance, and whether they should be supplemented in order to effectively realize sovereign trusteeship.

Although corporations, under the CTSCA, are subject to the supervision of the California Attorney General, and indirectly to the authority of the courts, this presence of formal agency

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[67] See Benvenisti, *supra* note 5 at 300.
[68] Jody Freeman, *The Private Role in Public Governance*, 75(3) NEW YORK UNIVERSITY LAW REVIEW 543 (2000).
[69] Benvenisti, *supra* note 5, at 296.
[70] *Ibid*., at 298.
[71] See Freeman, *supra* note 68, at 563.
[72] *Ibid.*, at 575.
[73] *Ibid*., at 549.

oversight does not necessarily guarantee an accountable regime. Judicial proceedings have not been able to produce adequate accountability guarantees in a way that realizes *other-regardingness*. Furthermore, the CTSCA, as a mode of "audited self-regulation,"[74] relies heavily on third-party enforcement by civil society agents.[75] By relying on civil society's role in enforcement, the state distributes the cost of ensuring compliance, but also jeopardizes its control over its enforcement agenda.[76] Citizen's suits, as claimed by Freeman,

> "can disrupt an agency's priorities and undermine cooperative compliance efforts between the agency and regulated entities. Private rights of action create the possibility for private plaintiffs and defendants to negotiate settlements that may deviate from or undermine stated regulatory goals."[77]

Nevertheless, since new governance models are an uncontested reality, and may also be exceptionally productive, rather than advocate *against* such collaborative regimes, Freeman proposes to respond to the unique challenges posed by collaborative public-private governance. Accordingly, Freeman suggests that contextualized analyses of the benefits and dangers of different administrative arrangements be conducted, and that administrative law's rather thin understanding of accountability be supplemented with other, nontraditional accountability mechanisms.[78] Among such mechanisms, Freeman proposes ongoing oversight over corporations' performance by community representatives and employees, or contractual relationships between state agencies and private actors delineating the regulatory responsibilities of each party.[79]

As the foregoing analysis exemplifies, theories of new governance and transnational private ordering challenge the reliance of the trusteeship framework on administrative law's foundations and its implicit focus on state-centric governance mechanisms in which sovereigns act as singlehanded regulators. As new-governance models become more ubiquitous in today's regulatory environment, and TNCs become more involved in human rights regulation,

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[74] *Ibid*., at 649.
[75] As indicated in the Bill Analysis, "... the policy of this state to ensure large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, to improve the lives of victims of slavery and human trafficking." See Bill Analysis, Senate Rules Committee (31/8/2010).
[76] See Freeman, *supra* note 68 at 662.
[77] *Ibid.*, at 664-666.
[78] *Ibid*., at 667.
[79] *Ibid*.

sovereigns' role in enhancing global welfare can no longer be realized in isolation from the influence of such private actors. As exemplified by the CTSCA, TNCs can play an important regulatory role in the transnational arena, as agents of change with regard to human rights sensibilities, and work together with sovereign governments to ameliorate human rights conditions on a global scale.

Nonetheless, the preceding analysis also reveals the limitations of such involvement and the need to revisit the implications of collaborative governance for the ability to create meaningful *other-regarding* accountability. In order to effectively promote global welfare in an era of new governance, collaborative regulatory regimes require the state to be flexible in implementing its role as orchestrator, as well as to maintain a delicate balance between eschewing mandatory actions on one hand and retaining its regulatory authority on the other.[80] While intervening with a heavier hand might not only prove Pareto inefficient but also obstruct corporations' incentives to cooperate, thus challenging sovereigns' ability to realize their trusteeship obligations (as might be attributed to the TVPA), weak monitoring and accountability mechanisms also hinder the fulfillment of *other-regardingness*.

PART III: CONCLUSION

This paper has sought to examine the theoretical framework of sovereign trusteeship in light of the emergence of new governance-type regulatory models, as exemplified in the field of human trafficking regulation, and to explore whether and how the involvement of private actors in *other-regarding* regulation influences its potential to realize sovereign trusteeship and promote global welfare. In the field of human trafficking, as has been demonstrated, the state often depends on non-state, private actors in making judgments in the public interest. In an era of new governance, aspects of policymaking, its implementation and enforcement frequently depend on the combined efforts of public and private actors.

The comparative analysis of the TVPA and the CTSCA has revealed the relative advantage of new-governance regulatory mechanisms in achieving Pareto-efficient policymaking. However, not only do these models challenge the trusteeship theory's implicit normative preference for sovereigns as regulators, they also problematize its reliance on

[80] Abbot & Snidal, *supra* note 9 at 523.

traditional administrative law obligations and its ability to concurrently *take others' interests into account* while being cost-effective: Although Pareto efficiency can be more easily achieved by externalizing the cost of *other-regarding* regulation on TNCs and civil society agents, in order for this externalization to ensure fairness, public access or sound policy for stakeholders, the minimal administrative law-based legal obligations stemming from the trusteeship framework must be adapted to the reality of shared public-private regulation.

TNCs' involvement in regulating the field of human trafficking is an example of their ever-growing role in human rights regulation, and of their influence on the rights of individuals, the shaping of their life opportunities and their ability to achieve self-determination. Through TNCs' participation in regulatory governance regimes such as the CTSCA, they have the potential to considerably contribute to processes of mobilization of human rights in both transnational and domestic settings. This admission of TNCs' growing role as agents of change taking part in the promotion of global welfare is not meant to overlook the serious challenges they pose to the protection of human rights, but rather aims to overcome the binary analysis of TNCs' involvement in non-statist regulatory schemes and to offer an alternative approach to the conditions in which human rights norms are established, diffused, and enforced. By shifting the scholarly attention from the role of the state in the ordering of the field of human rights to other significant actors taking part in this process, this paper has sought to expand on sociological accounts of the way human rights regimes can make a difference.