



Beyond Control?

Studying attempts at taming harmful corporate conduct

Elin Jönsson, PhD Student, Department of Criminology, Stockholm University

Introduction

On a warm summer morning, I opened a newspaper and was met with the news that the largest owners of five Swedish start-up businesses could be traced to offshore locations and tax havens (SvD 2021). As I closed the paper a few minutes later, my mind drifted to *The Hidden Wealth of Nations* by Gabriel Zucman (2015). In this book, Zucman argues that corporations today are practically free, and often within the letter of the law, to shift profits to the location they find most desirable – for example, locations that have low taxes. But legal is not the same as ‘without consequence’. The cost of tax avoidance, in the form of lost fiscal revenues, is borne by governments – and therefore, in the long run, all of us (Zucman 2015). This case sheds light on the relative freedom of corporations in the global economy, as well as the legislative and regulatory challenges in controlling them – but it is far from the only one. In recent years, Swedish media has highlighted enterprises such as H&M – who has shifted production to Ethiopia, where workers make roughly 10 SEK a day (SVT 2018) – and Vattenfall, a state-owned enterprise selling solar panels linked to forced labour in China (SR 2021). Despite the gravity of these issues and the harm involved, however, they seldom make frontpage news – and they are, to a large extent, still at the margins of criminological scholarship. Traditional crimes and means of preventing them remain the focus of criminology, including Nordic criminology, while crimes by the powerful tend to be overlooked (Flyghed 2019). My research project positions itself within a field that seeks to draw our attention to the latter, by focusing on criminal and/or harmful corporate conduct in the global setting – and more specifically, on attempts to regulate and disrupt it.

1. Background: the ‘what’ and the ‘how’

There are two interrelated trends against which this project unfolds. Beginning with the subject of control (the *what*), criminologists have drawn attention to how economic globalisation has created new opportunities for criminal and/or harmful corporate conduct (e.g. Barak 2017; Wonders 2016). In the global economy, multi- and transnational corporations have become more and more flexible – for example, as illustrated above, they may shift their means of pro-



duction, or their profits, to different locations. Thus, they are able to exploit spaces between laws in the global setting by going ‘regime shopping’, in other words choosing the regulatory and political regime that benefits them the most (Michalowski & Kramer 1987; Tombs & Whyte 2020). This could, as Colin Crouch (2011) points out, lead to a ‘race to the bottom’ where countries dependent on attracting foreign investment successively scale back on their legislative and regulatory standards. The issue in the global setting, then, is not simply that corporations may not obey the law, but that they may *choose* what laws to obey – and, as we will discuss later, even develop their own private regimes for ‘responsible conduct’. These developments, perhaps more than anything, illustrate the power of corporations under global capitalism.

Following these lines of reasoning, our concern here is not only breaches of criminal law. Instead, from an understanding of law as a social construct and as such, an expression of existing power relations, this research project seeks to extend the scope of criminology to include actions that may not be criminalised, but still produce significant social harm. In the realm of corporate wrongdoing in particular, some harms may be labelled ‘crimes’, while others are labelled ‘regulatory violations’ – if they are recognised as deviant at all (see e.g. Canning & Tombs 2021; Hillyard & Tombs 2007; Michalowski & Kramer 2006). This issue is even more palpable in the global setting, where national and international frameworks can lack adequate reach, creating gaps where corporations may operate ‘beyond law’ (Prekert & Schackelford 2014). As the introductory examples drew our attention to, corporations may produce social harm while still obeying the letter of the law – and even if there are laws in place to regulate their conduct, they tend to be underenforced (Tombs 2016).

The question of *how* these crimes and/or harms are controlled thus further highlights this dynamic. Over 80 years ago, Edwin Sutherland argued that the principal difference between offenders of the lower class and the ‘white-collar class’ can be found in the implementation of law:

The crimes of the lower class are handled by policemen, prosecutors, and judges, with penal sanctions in the form of fines, imprisonment, and death. The crimes of the upper class either result in no official action at all, or result in suits for damages in civil courts, or are handled by inspectors, and by administrative boards and commissions, with penal sanctions in the form of warnings, orders to cease and desist, occasionally the loss of license, and only in extreme cases fines or prison sentences. (Sutherland 1940, p. 7-8)

We must therefore shift our attention away from more traditional means of punitive and repressive control, to acknowledge a greater plurality of regulatory organisations and mechanisms. Such a shift becomes even more important under contemporary neoliberalism. As governments embrace neoliberal policies promoting de- and re-regulation, not least to be integrated in a unified global economy, they have allowed other mechanisms of control to flourish and expand (Tombs & Whyte 2020) – and as of late, one of



the key regulatory actors has become the corporation itself. The core claim of Corporate Social Responsibility, or CSR in short, is that corporations can voluntarily embrace a sense of social responsibility, and therefore 'do good' without the threat of criminal sanctions (Tombs 2016), resulting in a growth of self-regulatory regimes and non-binding standards that have generally been accepted by governments and much of civil society (Baars 2019). The way that corporations are taking on responsibilities relating to public protection and harm reduction has been interpreted as attempts at 'moralising the market' (Shamir 2008) or creating a 'corporate soul' (Baars 2019), because it foregrounds an image of the corporation as being concerned with values *beyond* mere profit maximisation. Moreover, these developments are part and parcel of what scholars have discussed as the 'new regulatory state'. This is a state that »no longer directly orchestrates the activities of social control nor is the only actor involved in regulating social life« – instead, the responsibility for governing crime is distributed across society, which affects the contemporary delivery of policing and security (Franko 2013, p. 153). The development of the corporation as a self-regulator is therefore yet another example of the increasingly blurred boundaries between public and private sectors. »The 'responsibilised' corporation«, Grietje Baars (2019, p. 377) writes, has thus »dissolved the epistemological distinction between society and the market (more or less, the public and the private, or the economic and the political)«.

What we are left with, then, are increasingly complex 'regulatory spaces' (Hancher & Moran 1989) organised around the issue of corporate responsibility. This concept is utilised as an analytical device to direct our attention to spaces or spheres, in which the regulatory resources are dispersed across multiple actors. This project focuses in particular on a domestic regulatory space, in which we find government departments, regulatory bodies, and non-governmental organisations, alongside multi- and transnational corporations who – despite it being a shared space – are an important locus of power (see *ibid.*). But it is also important to acknowledge sources of law and regulation beyond the nation-state, resulting in an even greater diversity. For example, international organisations such as the OECD have presented frameworks to help corporations conduct themselves responsibly, and have even developed nonjudicial mechanisms to offer access to human rights remedy (see Haines & Macdonald 2020; see also Crouch 2011). It could thus be argued that these organisations also become part of domestic regulatory spaces, not least because these frameworks and mechanisms are often endorsed by national governments.

The concept 'regulatory space' was developed to capture the way that regulation is increasingly transcending the 'public-private' dichotomy – but it does not assume that power and responsibility is dispersed evenly in this space. On the contrary, it is important to pay close attention to the relationships within the space, its boundaries, and the issues subject to regulation (Hancher & Moran 1989). The different actors that occupy the space can be



bound together by common interests – which is nothing new for criminologists interested in state-corporate relations (e.g. Michalowski & Kramer 2006) – but they can also be in their own pursuits for advantages. Regulation is therefore always a stake in itself (Hancher & Moran 1989). Exploring regulation through the concept ‘regulatory space’, then, allows us to consider the relationships between actors present in the struggles over corporate responsibility, as well as the tensions, dynamics, and interests that permeate these struggles.

2. Attempts at taming corporate misconduct: this research project

Against this backdrop, the key issue that this research project explores is how the criminal and/or harmful impact of corporations on people, communities, and the environment can be tamed. More specifically, it directs attention to the relationship between government agencies and actors vis-à-vis corporations, and the attempts of the former to regulate the latter. In doing so, this project seeks to highlight the relationships and tensions between powerful actors in the regulatory space whose interests, when they are aligned, can produce or contribute to social harm (illustrated in the state-corporate crime scholarship, see e.g. Michalowski & Kramer 2006). My aim is to write three peer-reviewed journal articles that engages with these issues, two of which are works at different stages of progress. The first paper explores contemporary shifts in spaces organised around corporate responsibility by focusing on the recent rise in state-based control, which has been conceptualised as steps towards ‘legalised CSR’ (see Baars 2019). Focusing on the Swedish Parliament as a specific arena within a national regulatory space, the paper analyses how these shifts play out in domestic political debates – how ‘regulatory hardening’ has been promoted, and what logic it adheres to. The second paper moves away from the level of political discourse, and focuses instead on National Contact Points (NCPs) – a nonjudicial mechanism created under the OECD Guidelines for Multinational Enterprises, embedded in the nation-state. By analysing the cases brought to the Swedish NCP, and its successive judgments, the paper explores the operations of soft (non-coercive) power that seek to encourage corporate responsibility and offer access to remedy. Taken together, this research project aims to shed light on contemporary attempts to regulate corporate crime and/or harm – attempts that include powerful actors, complex relationships, and, at times, intertwined interests.

3. Looking forward: implications and contributions

It has been a long time since Edwin Sutherland (1940) urged criminologists to pay greater attention to the wealthy and powerful, yet our discipline remains



primarily focused on more traditional crimes and mechanisms of control. This project therefore seeks to contribute to our knowledge on issues that, by and large, are still understudied (see Flyghed 2019; Tombs 2015). In light of the many examples of the corporate power to produce harm – including human rights violations, labour exploitation, and environmental degradation (see e.g. Baars 2019; Barak 2017) – it appears difficult to overstate the importance of studying how this power can be tamed. By analysing attempts at doing so, this project hopes to – at least to some extent – also shed light on the possibilities for change. In terms of policy implications, then, it follows that the project is not only concerned with criminal policy but all areas relating to industry and trade (which is also a consequence of extending the scope of criminology beyond criminalised harm).

Returning to criminological scholarship, this project seeks to add to the expanding literature on the contemporary dispersal of control, and the blurred ‘public-private’ boundaries that have, for example, been illustrated in the realm of policing economic crime (Engdahl & Larsson 2016). Moreover, while the project focuses on a domestic regulatory space, it engages with these blurred boundaries in relation to the global setting, and takes into account the presence of international organisations in this space. In doing so, it seeks to deviate from the traditional criminological emphasis on the nation-state and control over state territory (see Franko 2013).

On a final note, in this research project, I hope to demonstrate the importance of interdisciplinary knowledge. Since the project is not limited to studying conduct officially labelled ‘criminal’, and mechanisms that are in turn labelled ‘crime control’, it is important to engage with not only criminological research, but also socio-legal and regulatory scholarship, political science, economic history, international law, and so forth (cf. Rothe & Friedrichs 2006). This highlights the idea that there is not one ‘Criminology’, put forth in a textbook on criminological theory – instead, criminology »is a ‘site’ of contested meaning where competing theoretical perspectives meet« (McLaughlin & Muncie 2013, p. xi). Following these lines of reasoning, the future of Nordic criminology may not be thought of as ‘one’ but rather as multifaceted, engaging with a variety of theoretical traditions, empirical sources, and academic disciplines. The current issue of *Nordisk Tidsskrift for Kriminalvidenskab*, I am sure, illustrates this point perfectly.

Kontaktoplysninger

elin.jonsson@criminology.su.se

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