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CONSUMERS, TRANSNATIONAL CORPORATIONS AND DEVELOPMENT

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15 CONSUMERS AS VICTIMS OF CORPORATE CRIME

John Braithwaite

Purpose of the chapter

The aim of this chapter is briefly to assess how much of the victimization of consumers by transnational corporations is a result of corporate crime, how useful analytically is the corporate crime concept for understanding the abuses of TNCs, and how useful strategically is the corporate crime concept for controlling these abuses.

What is Corporate Crime?

It is important that we have a clear definition of corporate crime rather than glibly using the label for any harmful corporate behaviour that we do not like. Corporate crime is defined as conduct of a corporation, or of individuals acting on behalf of a corporation, which is proscribed and punishable by law. Both ingredients are necessary for the behaviour to be corporate crime. Governments often do not provide for punishment of behaviours which they define as illegal; often they instead simply provide for compensation for victims. Types of conduct which are subject only to damages awards without any additional punishment (e.g. imprisonment, probation, or fine) are not within the definition of corporate crime adopted here. This is not to say that to be corporate crime, the behaviour must be punished by law; it need only be punishable. The nub of the problem of corporate crime is in fact that because of class bias in the world's criminal justice systems, most corporate crime by TNCs is never punished.

Corporate Crime Against Consumers

Consumers are by no means the only victims of corporate crime by TNCs. With violations of occupational health and safety laws, workers are the victims; with insider trading and other stockmarket manipulations, shareholders are victims; with many types of corporate fraud, creditors are victims; with other types of fraud (e.g. against customs, tax or medical benefits systems), governments are the victims; and with anti-trust and a variety of other offences, other companies are the victims. Nevertheless, consumers suffer at the hands of a wider diversity of offences than any other group: it is consumers who suffer when bribes are paid to government officials to allow unsafe products on the market, when data on the safety of a product is fraudulently manipulated, when prices are rigged by illegal price-fixing conspiracies, and even when taxes are evaded it is the ordinary consumer who must make up the shortfall in government revenue. We will now consider in turn the different major types of corporate crime from which consumers suffer.

office of those who are most adeptly corrupt. To the extent that politics and government administration become more corrupt, then to that extent will men and women of high principle find entry into politics repugnant. Transnational corporate corruption is therefore perhaps the most pernicious form of crime in the world today because it involves robbing the poor to feed the rich, and brings into political power rulers and administrators who in general will put self-interest ahead of the public interest, and transnational corporation interest ahead of national interest.

Safety Testing Fraud

Many types of products are not allowed onto the market until governments are satisfied that they are safe. Drugs, pesticides, electrical appliances, aircraft, motor vehicles and ships are all subject to this kind of pre-marketing safety clearance in a large number of countries. Unfortunately, when companies are required to provide research evidence that they have tested the safety of their product, they have frequently produced fraudulent results. This problem has been well documented with both American and Japanese TNCs. In some cases, safety testing results have simply been manufactured from non-existent experiments. In others, laboratory animals which died after products were tested on them were thrown out and replaced by live animals for the continuation of the experiment. In perhaps the best known case, Industrial Biotech (IBI) failed to report to US government authorities that in tests for a number of important drugs and pesticides, laboratory animals had developed tumours. In addition to a general understatement of the number of animals with tumours, data were reported on many animals which had in fact died before the date of the supposed recording of the data. When the US Food and Drug Administration commenced an investigation which ultimately led to indictment of the company and its senior executives, considerable critical information was shredded, and in some cases, the FDA alleged that false information was substituted for the shredded documents. In 1985, the American TNC SmithKline pleaded guilty to 34 criminal charges of failing to make timely reports to the FDA on the dangerous side-effects of its anti-hypertension drug, Selacryn. The drug had been linked to 35 deaths and hundreds of cases of serious illness.

Anti-trust Offences

Price fixing and other monopolistic practices are dealt with by varying degrees of punitiveness in different countries. An agreement to thwart market pressures on prices by conspiring with competitors to set prices at a uniform and artificially high level can mean massive profit increases for the companies involved. Perhaps the most spectacular case in recent history was the conviction of Japan's twelve largest oil companies and

were in place was at a lower standard than at its plants in the First World; it has admitted that it had no evacuation plan for the residents of the shantytown surrounding the Bhopal plant, though some evacuation liaison with the West Virginia community had been undertaken. TNCs unfortunately do more than allow double standards like this to exist, they actively play on them.

The Law Evasion Strategies of TNCs

Transfer pricing and the tragedy of Bhopal illustrate the way TNCs often deal with the constraints imposed by law evasion rather than outright law violation. International law evasion strategies are those where TNCs evade laws which define certain activities as illegal by shifting those activities to another country which has failed to do so. Thus, asbestos manufacturing plants have been shifted from countries with tougher occupational health and safety laws to countries with none [CASTLEMAN, 1979, 1981]; controversial drugs are tested in other countries when the home countries of TNCs make life difficult, with informed consent regulations or class action laws; then there are pollution havens as well as tax havens. TNCs can find the line of least resistance to achieving their corporate goals by playing off one set of national laws against another. TNCs so often win the international law evasion game precisely because they have an international coherence to their plans, while regulators generally only have national coherence. It is like playing chess where one player can shift pieces to extra squares on the side of the board, while the other cannot. This is why the consumer movement cannot place too much emphasis on its activities with UN agencies like WHO, FAO, the UN Centre on Transnational Corporations, and the like. International, or even regional, harmonization of laws regulating TNCs is the best hope for evening up the chess game. Failing that, the consumer movement must shift its resources into the Third World, where most of the victims of TNC law evasion are to be found, to bring the glare of international publicity to bear on potential future Bhopals. Already this has been happening to an impressive degree. The consumer movement, through IOCU, is a very effectively internationalised social movement.

Is the Community Concerned About Corporate Crime?

A recent New York Times/CBS News Poll of 1,509 Americans found that only 32 per cent of the public thought "most corporate executives are homes", while 55 per cent thought that most were not [NEW YORK TIMES, 9 June 1985:Sec.3p.5]. This finding comes as no surprise to those who have been following the accumulation of an increasing body of public opinion research from many countries showing that ordinary citizens are deeply concerned about corporate crime. The scholar who invented the term white-collar crime, Edwin Sutherland [1983], was inclined to explain

the widespread nature of the problem by an unwillingness of the community to stigmatize the offences of respectable business people. Whether Sutherland was correct at the time of his writing forty years ago, this view simply does not stand up today. [FRANK ET AL, 1984; CULLEN ET AL, 1982, 1983; JONES & LEVI, 1983; SALAS ET AL, 1982:512-4; BRAITHWAITE, 1982:731-42]. What this research literature shows, in summary, is that the community perceives many forms of white-collar crime as more serious and deserving of longer prison sentences than most forms of common crime. There are exceptions to this pattern. Tax offences and false advertising in most studies are not viewed as serious crimes, and most types of individual homicide are perceived as more serious than all types of white-collar crime. Nevertheless, the corporate crimes which cause severe harm to persons are generally rated as more serious than all other types of crime and even some types of individual homicide. For example, in the biggest study, on a national US sample of 8,000, Wolfgang [1980] asked respondents to rate the seriousness of the following offence: "A factory knowingly gets rid of its waste in a way that pollutes the water supply of a city. As a result 20 people die." This was regarded as more serious than some direct intentional forms of homicide, such as "A person stabs a victim to death". Even when the last sentence of the pollution item is changed from "20 people die" to "20 people become ill but none require medical treatment", the offence is still regarded as more serious than attempted murder by shooting a gun and assault with a gun or knife which causes hospitalization. Scott and Al Thakeb [1977] have produced the most wide-ranging international survey of attitudes towards the seriousness of crime; interviews were conducted in the United States, Great Britain, Finland, Sweden, Norway, Denmark, the Netherlands, and Kuwait. The corporate offence in this study which attracted the most punitive suggestions for sentencing the offender was: "The offender is an executive of a drug company who allows his company to manufacture and sell a drug knowing that it may produce harmful side effects for most individuals". In every country, respondents recommended a longer prison sentence for this offender than for car thieves, burglars, perpetrators of aggravated assault and violent robbers. The United States was the only country in which the offence was not also rated as deserving a longer sentence than rape. In Sweden, even murder attracted a lighter sentence than that recommended for the pharmaceutical executive. Meier and Short [1984] have shown that not only do citizens view white-collar crime as serious, they rate being victimized by white-collar offences as more likely than being victimized by other life hazards, including common crime.

Implications for the Consumer Movement

Those in the consumer movement like Ralph Nader who attack business for their corporate crimes tend to be subjected to a counter-attack by business alleging the use of emotive language, a counter-attack which appeals to the community to question

the credibility of critics who "imply that all businessmen are criminals". The evidence summarised in the previous section suggests that such a counter-attack may in fact be counter-productive for business, given the strongly held beliefs in the community that corporate crime is widespread and deserving of much more severe punishment than it is attracting at the moment. When public opinion is firmly on its side, the consumer movement can be most effective, so there is no reason for it to be shy about calling a crime a crime. The stigma of criminality is one of the most powerful symbols in all cultures. To describe behaviour as criminal can therefore be a powerful weapon for reformers in mobilising opposition to exploitative behaviour.

Dangers in Overusing the Corporate Crime Concept

On the other hand, the consumer movement will be discredited for careless rhetoric if it recklessly applies the criminal label to behaviour which is not illegal or not punishable by law. Even when undesirable corporate conduct clearly is criminal, we should avoid falling into the trap of assuming that it follows that the criminal justice system holds out the best hope for solving the problem. Criminal punishment is a blunt instrument for changing many kinds of anti-social behaviour. . We delude ourselves when we believe that by locking up a rapist for a few years we have done anything towards resolving the exploitativeness in human relationships which produce such behaviour. Similarly, if pesticide manufacturers are fraudulently misrepresenting the toxicity of their products, or designing their plants with reckless regard for safety, throwing responsible executives in jail is hardly the most constructive approach. The priority is for regulatory interventions, such as by audit, which force fulsome and honest disclosure of toxicity data and which threaten plant closure where safe design is not achieved. Hence, in many circumstances where the stigma of criminality is useful in mobilising political will for such regulatory interventions, the actual application of criminal sanctions is sometimes not the best control strategy. Often it could be in the interests of consumers to drop criminal charges in return for guarantees of stronger consumer protection in the future. This is not to say that criminal sanctions should not be directed at corporate criminals much more than they are. Strategic criminal deterrence provides a background against which more voluntaristic, consensual mechanisms for social control are entered into more enthusiastically by companies which wish to avoid the stigma of prosecution. Unfortunately, many business regulatory agencies refuse to accept that their routine activities of persuading companies to comply with the law have more credibility when they are known to use the stick as well as the carrot. We need more criminal deterrence of illegal corporate conduct; but let us hope that we do not resort to the overreliance on the criminal sanction which has characterised the social control of crime in the streets.

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