Law and Economy

The Legal Regulation of Corporate Capital

KELVIN JONES

La Trobe University, Victoria, Australia

1982

ACADEMIC PRESS

A Subsidiary of Harcourt Brace Jovanovich, Publishers

London · New York

Paris · San Diego · San Francisco · São Paulo

Sydney · Tokyo · Toronto

ACADEMIC PRESS INC. (LONDON) LTD.
24/28 Oval Road
London NW1

United States Edition published by
ACADEMIC PRESS INC.
111 Fifth Avenue
New York, New York 10003

British Library Cataloguing in Publication Data

Jones, Kelvin
Law and economy. — (Law, state and society series)
1. Conflict of Law — Antitrust law
I. Title II. Series
342.3'72 K7582.M6

ISBN 0-12-390040-9

LCCN 82-72322

Phototypeset by
Dobbie Typesetting Service, Plymouth, Devon

Printed in Great Britain by
St. Edmundsbury Press, Bury St. Edmunds, Suffolk

Preface

The use of law to regulate economic affairs depends upon a definite conception of how law and economy are interrelated. It implies a basic faith in the capacity of law to intervene in economic affairs to effect a specific objective and it assumes, also, that law and economy are sovereign domains. Without this belief legal regulation would be reduced to the status of a King Canute, making fine gestures but bearing little relevance to the conduct of economic activity. Some would argue that this is the inevitable fate of all forms of legal regulation of the economy. This sort of perspective may even be correct, although where held with any degree of seriousness it is invariably for the wrong reason.

The fact of the relationship of law to the economy is quite basic to the pursuit of economic objectives by legal means, although it is seldom acknowledged with any degree of precision or attention to consequence. Of course the law and economy relationship has had much coverage—principally within Marxism and right-wing conservatism—but it is rarely in terms which link the discussion to a specific example of legal regulation or which address the basic presupposition of the law/economy relationship. In this context the book aims to discuss both the relationship between law and economy and to offer an analysis of anti-trust legislation as an example of a prototypical form of legal regulation. The focus is upon the general and the particular and aims to display the manner in which they are in fact interdependent.

The objection may be made that there are perhaps rather too many texts on anti-trust legislation. The topic has generated an enduring fascination for academics ever since senator Sherman successfully articulated proposals for the 1890 Sherman Act. So the question becomes why add yet another to the near infinite catalogue of texts which address the issue? If this book were merely an addition then it could be judged against the backcloth of a cumulative tradition and criticized for its superfluity. This book, however, makes no claim to belong to any such tradition. In one sense it could even be said that it is not about anti-trust legislation *per se*. Its purpose is to unveil the prinicples of legal regulation

together with the mechanisms which are conventionally used toward that end. Anti-trust legislation facilitates this process by providing what is possibly a unique legislative attempt to control monopoly. Therefore, it is of interest only insofar as it provides an example of the more general issue of the feasibility of legal regulation. But the question remains, how does this differ from other accounts?

Anti-trust legislation is normally regarded from two, essentially conflicting, standpoints. First of all, it is examined as a purely technical response to the problem of monopoly. Anti-trust legislation is subjected to a rigorous process of legal scholarship whereby the origins of certain regulatory concepts are traced to common law antecedents (Thorelli, 1954). Also, the precise germination of special interpretations is located within judicial rulings sanctioned by historically determinate supreme court ratifications. This exercise, whilst valid, is basically an exercise internal to legal history. A number of studies widen their scope to include an analysis of corporate structure or economic performance but the level of analysis remains purely technical. For example, there is a current preoccupation with the so-called economic impact of price regulation on performance, output and so on. But the basic issue of whether or not law in general, and the specific articles of anti-trust legislation in particular, can regulate monopoly is seldom asked. Even where the issue is addressed it is from a perspective which seems to argue for greater legal control or enforcement in apparent disregard of what will be argued is the quite limited potential of law in this respect. There are, however, a few exceptions to this general trend which require special attention. These will be dealt with separately.

On the other hand anti-trust legislation is often regarded in terms of its fundamental irrelevance to the basic issues of industrial concentration and corporate ownership. For example, Pearce (1976), Kolko (1963) and Weinstein (1968), each advance substantially similar explanations of anti-trust legislation and its fundamental irrelevance. They are joined in this by a number of pessimists of a liberal or conservative persuasion who believe that the means for effective control of monopoly are incompatible with the freedom they associate with private enterprise. Accordingly, anti-trust legislation is inherently and necessarily inadequate. For whatever reason, then, anti-trust legislation is irrelevant to the problem of monopoly or, worse still, actually enables the process of concentration (Arnold, 1937) or else constitutes an ideological screen or an imaginary social order (Pearce, 1976) behind which concentration and centralization goes on apace.

What these, admittedly diverse, proponents of the weakness of anti-trust legislation fail to consider is the reason for such evident failure or, where reasons are adduced, they concern the co-optation of the regulatory machinery by the very monopolies which are supposedly regulated. In other variations the role of co-opter is undertaken by the ruling class allies or representatives of big business.

Irrespective of which agency predominates it will be argued here that such explanations are necessarily inadequate as forms of social explanation and that they lack the specificity required for an accurate account of the actual failure of anti-trust legislation. It will be argued that anti-trust legislation is unable to affect the process of monopolization even in a fantasy of regulatory potency, and even if it is administered impartially and with critical vigour. It is this factor which requires proper explanation.

The object of the book is to examine the possibility of the legal regulation of monopoly in general, paying particular attention to the example of anti-trust legislation in the United States. It is not intended as a general survey of all the ways and all the geographical contexts in which law is involved in economic affairs. It attempts, instead, to address the way in which the issues of concentration, centralization and monopoly signalled a major transformation in the form of ownership, the ramifications of which were riven deep in American culture. It seeks to deal with the involvement of law in the process of organizational change or adjustment by locating both the general and the specific reasons for the impotence of law in this respect.

Compared with the more conventional accounts or dismissals of anti-trust legislation, this analysis starts off from a rather different perspective. After examining some of the ways in which corporate behaviour is criminalized the argument commences upon what is, after all, the essential element of anti-trust legislation, namely, the very issue of the legal regulation of economic affairs.[1] The mere existence of anti-trust legislation implies that law and economy are interrelated in a manner which enables the relationship of regulation to be valid. By way of an analysis of some of the major proponents of the law/economy relationship it is argued that the regulatory relation invariably rests upon a definite conception of the legal and the economic as separate instances of sociality. Not only is this portrait of social relations basically inadequate but, more especially, it will be argued that this inadequacy contains within it the very seeds of the failure of anti-trust legislation and possibly legal regulation in general. Accordingly, the principle of legal regulation is criticized on the basis of its prior assumption of a particular division of social relations into legal and economic realms and the consequences that this division heralds for the prospect of a truly viable form of regulation.

If the idea of a relationship between law and economy is inappropriate to the question of legal and economic relations then it becomes apparent that an alternative means of regarding the issue is required. This alternative is formulated on the basis of a sociological typology of ownership. For this sort of perspective there is no reason why the law of property must be viewed as something which engages (or is engaged in) a separate form of social action. On the contrary, a general typology of ownership formulated within the auspices of sociological theory should be capable of addressing so-called legal and economic

relations from a standpoint which does not split sociality into legal and economic instances or orders. For example, the elaboration of a general typology of ownership precludes the rather artificial distinction between ownership and control characteristic of most discussions of the corporation and the law. Instead ownership is seen in quite general terms as something which comprises three distinct relationships—title, control and possession. These are defined in some detail for each type of ownership. Thus a given form of ownership is constituted, first of all, by a definite arrangement of these relations and, secondly, by the character of the relations *per se*.

As a statement concerning the proper conduct of sociological enquiry the idea that law and economy cannot be represented consistently as separate instances may be wholly unexceptional. But when anti-trust legislation is seen to be bound up with the development of a type of corporate ownership which was, in its initial stages, anathema to the pioneers of American industry, agriculture and labour then its importance becomes all the more pointed. For anti-trust legislation was seen to be an attempt to use the law to redress the balance which had been dangerously upset by the incursion of the large corporation. The use of the law as a separate agency of review and regulation was to have ramifications upon the effectivity of regulating corporations in this way. Perhaps more importantly monopoly is established by foreclosing alternative forms of independent ownership. This may be achieved directly through the monopolization of trade or covertly through conspiracy in restraint of trade. Either way, the law is used to get to grips with a particular type of corporate ownership insofar as it precludes other forms of ownership and, moreover, it is used in ways which are quite specific. Therefore, the typology is necessary for an appropriate demonstration of the differences involved between *laissez-faire* and corporate ownership. It establishes the parameters of the analysis by defining the central contenders as forms of ownership.

Of course, monopoly and the corporate form of ownership are far from being identical, but there is very persuasive evidence that it was the way in which ownership was transformed from a bourgeois to a corporate type which was at the back of the issue of monopolization and the trusts. Accordingly, it was the impersonal control of the market by distant corporations which elicited the wrath of the various real politico-social groupings which constituted the backbone of the anti-trust movement. The manner in which ownership was held in the form of the trust was correctly identified with the growth of monopoly. Whilst it is quite conceivable that a system of *laissez-faire* capitalism could comprise a number of corporations, the very nature of corporate relations of ownership is such that they generate monopolistic forms and practices by precluding large areas of endeavour from alternative forms of ownership. Accordingly, the essence of the trust question, and monopoly in general, is inevitably bound up with a discussion of the corporate form of

ownership. It is no accident that the form of legislation is styled in the negative as *anti*-trust legislation for this does indeed suggest the very real measure of opposition which characterized the issue in its formative stages.

We have seen how the existence of anti-trust legislation relies upon a particular conception of how law and economy must interrelate in order for legal regulation to be viable and this conception generates a vital weakness in any such regulatory device. Taken together with the way in which law conceives of the corporate form of ownership this reduces still further the possibility of effective regulation. For example, it is argued that within the legal system in question anti-trust legislation depends upon an implicit conception of ownership which highlights the centrality of private property. The fact that the legal concept of private property is riven through with an implicit 'philosophical anthropology', which ultimately relies upon individual or collective subjects as owners, means that the concept of the corporate form of ownership is inadequately drawn. This is not to say that the category of the subject is basic to all law, merely that it occupies a central place in the legal analysis of corporate forms of ownership. There is no reason why the subject must be the atom of juridic theory (as in Pashukanis, 1978) since we are concerned only with the conception of ownership and private property unfolded within a particular sort of legal system. It will be argued that the corporate form of ownership depends upon the radical denial of any form of essential subject, collective subjects or even aggregates of human attributes. Thus for law to address the corporation as if it can be comprehended via a theory of (human) subjectivity is to constrict the potential of the regulatory relationship in a way which renders anti-trust legislation relatively impotent.

The particular centrality of the subject and private property to the legal system in question is far from being a general pervasion of all law irrespective of the content of any given Act. On the contrary, it is the basic structure and content of anti-trust legislation which is responsible for the characterization of the corporation in terms of subjective attributes. For example, the concepts of conspiracy in restraint of trade, monopolization and intent are basic to anti-trust legislation and they each imply certain attributes of (human) subjectivity. Therefore, the manner in which anti-trust legislation addresses the corporation, as well as the fact that regulation is seen as an essentially legal process, place certain constraints on the viability of anti-trust legislation. Of course this does not mean that law has no effect whatsoever or that a system of law which is capable of regulating economic affairs cannot be constructed. Still less does it assume that law has a necessary, unalterable and inadequate structure. All that is argued is that this particular system of law, and especially anti-trust legislation and the law of property, is constrained in a way which prevents it from restructuring the relations of corporate ownership.

The argument against using law to regulate monopoly is twofold. In the first place, the conceptual structure of law in general, and the articles of anti-trust

legislation in particular, impose severe constraints upon the entirely laudable objective of controlling monopoly. Law is ill-equipped to tackle the complexity of corporate interrelationships. Secondly, irrespective of the concepts available to it, the use of law *per se* further restricts the possibility of controlling monopoly. Even if law were supplied with concepts which respected the complexity of corporate interrelationships then the very fact that law is seen as a separate agency of review would limit the potentiality of legal regulation. Whereas the former is argued in the strong sense of the word the latter is perhaps more agnostic concerning the possibility of effective regulation.

Finally, it will be argued that because it is due to specific constraints the failure of anti-trust legislation does not depend upon the existence of a conspiracy between big business and government. On the contrary, the anti-monopoly movement was an authentic political movement subject to definite organizational contingencies which do not collapse into the overall movement of history or the class struggle. Therefore, the anti-monopoly movement will be analysed according to its radical independence which, at least for a time, challenged the very basis of the corporate form of ownership.

At this point it is perhaps as well to issue a number of disclaimers. First of all, it should be reiterated that anyone who expects to find here a detailed examination of anti-trust legislation in action should look elsewhere. This is relatively easy since there are any number of texts which attempt exactly that.[2] The intention here is to concentrate on the way in which the concepts and the various controversies of anti-trust legislation depend upon a distinct vision of what the corporation is like. This vision reproduces the corporation in a fashion which is wholly inadequate to the further regulation of corporate conduct. And this goes a long way toward accounting for the relative failure of anti-trust legislation irrespective of how and whether such legislation is enforced or interpreted. Secondly, there will be further disappointment if the book is viewed as a historical study of the Granger, Populist or Progressive movements. The purpose of the final chapter is to demonstrate that the anti-monopoly movement cannot be written off as an irrelevant adjunct to a real conspiracy between big business and the state and that the movement had an authentic organizational structure of its own. In this sense the argument is no more than a suggestion that there are alternative ways of looking at the issue. In short the chapter is not concerned to describe the 'emergence' of anti-trust legislation in any great detail nor should the thesis be viewed as an historical account of agrarian society or the roots of 'American individualism'. There are volumes which claim this as an objective but this is not one of them.

Finally, the demonstration of a typology of ownership is intended merely to facilitate the description of, and the contrast between, two definite types of ownership. It is not intended as a general survey of several modes of production or types of society. Accordingly, feudal and soviet relations of ownership are

included only inasmuch as they demonstrate the potential versatility of the typology in question.

July, 1982

Kelvin Jones
Australia

Notes

1. The concept of 'criminalization' is relevant because the Sherman Act is a criminal statute with criminal sanctions over and above the realm of civil remedy normally associated with 'regulation'. Chapter One attempts to assess the various ways in which Criminology has handled 'corporate' crime etc.
2. For example, Thorelli, 1954; Neale, 1966; Miller, 1962; Kronstein, Miller, Schwartz, 1958.

Acknowledgements

A book is a social product and so it is tempting to spread the responsibility for its limitations. I shall resist the temptation, however, and would like to express my thanks to the following persons. Their responsibility is limited to whatever there is of merit in the book and does not extend to its shortcomings: Ian Taylor, Paul Hirst and Neil McCormick, together with friends and colleagues in Sheffield and Edinburgh, Zenon Bankowski for editing and Mrs. E. Wood for typing the manuscript.

I would especially like to thank Peter Young for his invaluable support throughout and, finally, Mandy Jones.

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary.

Adam Smith, *The Wealth of Nations* (1884) Vol. I, p.54.

Contents

1 *Organizational Crime and Criminology*

Any discussion of the limits encountered in attempting to regulate large corporations would have to extend beyond the mere technical appraisal or cavalier dismissal of anti-trust legislation described in the introduction. It would have to extend beyond those specific confines to address the problem of the relative immunity afforded to certain social groups or organizations in lieu of formal legal sanction. There is indeed a substantial body of literature which addresses just such a problem. For the most part, it derives from sociological and criminological attempts to deploy the concepts of power, prestige, class and the state as explanations of the a-criminalization of white collar crime, corporate crime and so on. These explanations tend to suggest predominantly external reasons for the effective de-criminalization of certain types of socioeconomic and extra-legal activity. For example, it is often argued that the power of big business and its control or influence on the state prevents the proper and effective implementation of the law in certain areas which directly affect the interests of the ruling class. Over and against this type of explanation it will be argued that whatever defects there are in the legal regulation of corporate relations they are not due primarily to the discriminate implementation of law but inhere in the nature of law *per se* or, more accurately, in the manner in which law construes certain types of socioeconomic relations.

Certain sorts of criminological accounts have fallen prey to the appeal of these concepts in an apparently unending quest for explanatory force. Increasingly they have referenced and come to rely upon the concepts of power, state, capital, class and, lately, totality as the intellectual crutch with which to sustain what, arguably, remains an inherently weak form of social analysis. It is necessary, then to ask whether these concepts are entirely adequate, whether they are used in an appropriate manner and what effect, if any, their incorporation has on the overall structure of criminology as a discipline. These issues are fundamental both to the

proper location of the corporate violation of anti-monopoly law within sociological analysis and to the construction of what can be described as a fully social theory of crime and law (Taylor *et al.*, 1973).

The area of criminology conventionally described by an abiding interest in white collar crime signalled a major contribution by the exemplary manner in which the concept of social structure achieved an unequivocal place on the criminological agenda. Newman makes the following observations: "The most important theoretical implication of white-collar crime is that it presents a problem almost exclusively sociological . . . To comprehend it adequately a fundamental knowledge of class structure, values, roles and statuses, and the many other essentially social process and concepts, is needed" (Newman, 1958, p. 60). He goes on to say that ". . . the concept of white collar crime has forced the theoretician into an analysis of highly complex and very abstract relationships within our social system" (Newman, 1958, p. 63). Finally, and perhaps most pertinent of all, he argues that "whether he likes it or not the criminologist finds himself involved in an analysis of prestige, power, and differential privilege" (Newman, 1958, p. 56). This call for a wider criminological horizon echoes quite generally amongst those concerned with crimes of the powerful. After all, Sutherland (1949) was at great pains to emphasize the general nature of his theory of crime and law and again the superabundance of structural terms attests quite convincingly to the general persuasion as to their relevance.

Attention to white collar crime was supposed to break with the conventional criminological agenda by ushering in theories of crime and law which were truly general in scope. In addition criminology was clearly seen to feed off and to replenish more general sociological debates. Notwithstanding this clear articulation of general sociological relevance, there is an equally transparent failure to measure up to the more stringent requirements set by the overall tenor of the enterprise. A brief examination of the sorts of explanation commonly adduced for the a-criminalization of organizational crime reveals a host of inherent ambiguities which go a long way towards accounting for the relative failure of what remains a laudable attempt.

The most common explanation for the relative immunity of white collar criminals is to be found in the class bias of the court and the prevailing influence of the powerful in moulding the criminal law according to their own interests. For example, Kolko asserts that the involvement of big business in the drafting of railroad legislation was a major factor leading to the attenuation of law in this respect (Kolko, 1963). Likewise Sutherland argues that: "White collar criminals are relatively immune because of the class bias of the courts and the power of their class to influence the implementation and administration of the law" (Sutherland, 1940, p. 44). Such immunity is both an analogue of respect and prestige but also derives from the cultural homogeneity of legislators, judges and administrators and their congruence with businessmen. Conspiracy of this order,

albeit latent, reaches its apotheosis in the assertion that certain presidential regimes, for example, McKinley, Harding, Hoover and Coolidge, were friendly to business and, therefore, their administrations correlated with a low incidence of criminal prosecution of business activity. As a corollary, the climate of trust busting is associated with an identifiable hostility toward big business on behalf of particular administrations. The example of Theodore Roosevelt is often used in this respect, although its use is particularly galling given its largely undeserved character (Hofstadter, 1955). One thing these interpretations share is an equal commitment to the idea that public policy is but an outward manifestation of the self-conscious attitude of a political regime or a homogenous elite. What is more, self-consciously formulated attitudes are seen as an index of real regulation and successful criminalization of corporate activity: an assumption which is arguable to say the least.

There are more sensitive and indeed opposite explanations to be found and Newman is a prime example of an important, but nevertheless incipient, tendency:

> The diffuse nature of the perpetrator (the corporate body), as well as the diffuse nature of the victim (the public), does not fit many white collar cases to the normal criminal format. Then, too, the virtual absence of intent, of *mens rea*, on the part of the violators makes criminal sanction seem inappropriate. (Newman, 1958, p. 54)

Even here the fact that Newman finds it necessary to preface such a revealing remark by the more conventional "The relatively infrequent use of criminal sanctions is undoubtedly a reflection of many factors including the high social status of many violators and the lack of consensus about the criminal nature of their behaviour" (Newman, 1958, p. 54)—would seem to suggest a sense of paralysis in the analysis of 'organizational crime'. A form of paralysis which structures explanations around a series of highly ambiguous and wholly inadequate concepts and which has, as its underlying cause, the entirely inappropriate relationship of sociology to criminology: sociology is seen as a resource made available to criminology in the interstices of explanatory seizure.

Other sorts of explanations may be characterized by the idea that government was impotent in the face of a business plutocracy which would simply take over at the slightest hint of government moves against its interests (Sumner, 1963), or the somewhat simple assertion that 'corporations are powerful social forces', as if that explained anything at all! (Geis and Meier, 1977). Further, the essentially Weberian argument that formal and complex rational law often favours corporate bureaucracies is given new form in the assumption that specialist corporate lawyers invariably run rings around government prosecutors (Braithwaite, 1979), and the idea that foreclosing loopholes is self-defeating given the fact that complexity favours corporate organizations (Pepinsky, 1976). Yet again the idea

that the a-criminalization of organizational crime is to be found in the location of the relevant statutes in civil rather than criminal codes (Geis and Meier, 1977), is perhaps slightly disingenuous given the number of activities which are in principle able to be made criminal, by for example, the Sherman Act provisions. Furthermore, Taft's (1956) argument that the social system compels the business institution to be exploitative and at times even criminal, and Quinney's (1963) assertion that deviant behaviour is a reflection of social structure appear to say a lot without explaining anything at all, evincing a conception of social structure which at once explains everything and nothing: criminal totalities merely replace identifiably human authors of criminal action.

Others have attempted to salvage the essential ambiguity of the concept of white collar crime rather than explain its causal antecedents. Of these undoubtedly the most important is Aubert who argues that the controversial nature of white collar crimes

> . . . is exactly what makes them so interesting from a sociological point of view and what gives us a clue to important norm conflicts, clashing group interests, and maybe incipient social change. One main benefit to be derived from the study of white collar crimes springs from the opportunity which the ambivalence in the citizen, in the businessman and among lawyers, judges and even criminologists offers as a barometer of structural conflicts and change potential in the larger social system of which they and the white collar crimes are parts". (Aubert, 1952)

More recently, Carson (1980) has attempted to recover the ambiguity of white collar crime by arguing that its ambiguity can become institutionalized in the space between the movement of the 'totality' and the historically specific organizational forms of, for example, the factory, which collide at various points with the seemingly inexorable logic of the totality.

One thing these various attempts seem to imply is that sociological theory is at its most incisive at the margins of legitimacy and illegitimacy and that further, the contradictions inherent in the concept of white collar crime offer a unique insight into social structure or the workings of the totality. A peculiar form of sociology indeed where relevance is confined to the margin and importance reigns supreme only when the mask slips: a kind of sociology of error or a sociology limited to the measure of ambiguity rather than regularity. Furthermore, the way in which the concept of a totality insinuates itself into the explanatory framework is perhaps one more example of the way in which the repertoires of criminology, whilst exhausted in the face of complexity, are replenished through a parasitic relationship to sociology, Marxism and political economy.

Still others have sought to question the elasticity of the concept 'crime' and, therefore, the very basis of the field of organizational crime. Thus the classic