COMMENTARY

Heads of cabbage and mouths full of water

On corporate slaughter

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In 1998 Simon Jones, a student at the University of Sussex, signed up with Personnel Selection to earn some extra cash. Sent to work for Euromin at Shoreham dockyard, he was given the job of unloading bags of stones by attaching the bags to chains hanging from the inside of the grab of a crane. Two hours after starting work an 'accident' occurred in which the jaws of the grab closed around his head. His friend Sean Currey, who was working with Jones that day, said that the incident happened so fast that Currey was not aware of it until he heard a grunt and turned round to find himself looking into Jones's eyes, realizing only moments later that the crane grab was where the rest of Jones's head should have been.

In the initial investigation police arrested the general manager James Martell and the crane driver, but both were subsequently released without charge and the Crown Prosecution Service (CPS) decided not to prosecute, despite the fact that Euromin was breaking a string of health and safety regulations: no training or supervision was provided; ten weeks previously the grab being used had had hooks welded to the inside so that it could be used open (a highly irregular practice which the company had introduced to save time and thus money without having carried out any risk assessment); the 'banksman' guiding the crane driver spoke little English; the crane driver could not see inside the ship's hold; and the grab and chains were being brought in too low over the hold. A judicial review of the case in 2000 ordered the CPS to reconsider their decision, which it finally agreed to do some nine months later. The eventual trial in 2001 cleared Martell and Euromin of manslaughter but found the company guilty of two breaches of health and safety regulations. Their punishment was a fine of £50,000.

A one-off? In the first five years of New Labour rule there have been over 2,500 deaths at work, with the official figures for the number of deaths rising by 32 per cent in 2001. The Health and Safety Executive (HSE) has estimated that at least 40 per cent and possibly as many as 70 per cent of these deaths were due to corporate failings. Note that these figures do not include deaths that are widely suspected to be work-related: in the last five years of the 1990s, for example, over 6,000 people – most of whom had been workers in construction and insulation industries – died of mesothelioma, a disease resulting almost exclusively from inhaling asbestos. In addition to deaths at work, in the last fifteen years at least 1,000 members of the public in Britain have died in incidents suggesting corporate failing of some sort (including, for example, 193 at Zeebrugge, 31 in the King's Cross fire, 35 in the Clapham train crash, 51 in the sinking of the *Marchioness*, 96 at Hillsborough stadium, 7 in the Southall rail crash, 31 in the Ladbroke Grove rail crash, and 4 in the Hatfield rail crash). Add these figures

together and tally them with figures from across the world, including the thousands killed in single 'accidents' such as Bhopal in 1984 (in which approximately 6–7,000 people were killed immediately with an estimated 22,000 dying in directly related deaths up to 1999), and it soon becomes clear that history is indeed a slaughter bench, with capital its most active participant.

Few if any of these 'incidents' have resulted in prosecution, and fewer still in successful prosecution. As the law stands it is virtually impossible to prosecute firms and their directors successfully: in the last ten years only 11 companies have been prosecuted for manslaughter in Britain; only 4 of these prosecutions have been successful. When it comes to safety at work, directors have no legal obligations – safety is the responsibility of 'the company'. But because firms can only be prosecuted if a director or senior manager is prosecuted, companies have been more or less immune from prosecution. Because of the complex organizational structures of most firms, it is rare that any single person can be found entirely responsible. Moreover, the police lack any specialist training for investigating workplace deaths or deaths brought about by what appear to be corporate failings; investigations fall to chronically underresourced HSE inspectors.

The obvious response to the above has been the demand for a new crime of corporate manslaughter. The moment for such a law seemed to have arrived in Britain in 1997, when the Labour Party won power having promised to introduce a corporate killing law. Six years later, with the country still waiting, Home Secretary David Blunkett has finally indicated the government's intention to publish a Bill by the end of 2003. The fact that it is to be accompanied by yet another consultation exercise suggests to campaigners that either nothing will happen (this will be the third such exercise since 1994; the previous two collapsed following 'representations' from organizations such as the CBI), or that there is no chance of a new law until after the next election. Nonetheless, a wide range of socialists, anti-corporate protestors and trade unions have recognized that increased awareness following a series of unsuccessful attempts to prosecute corporations in a range of high-profile cases, combined with the government's need to be seen to be doing something, mean that the time is right to push for a new law in this area. It is time to 'put the suits in the dock' as one step on the road to the more general curbing of corporate power.

The key question, however, is whether such a law would work. Campaigners in this area have pointed out that only the managers or directors of small firms have ever been successfully prosecuted. What they fail to realize is that this is likely to *remain* the case even after new legislation. To understand why, and to see the political implications, a little detour into company law is necessary.

The company *persona*

As capital developed in the industrial age it became clear that the classical legal form of property ownership – *persona res* – was inadequate for the capital form. It became clear that capital needed a special legal status, arising from the nature of capital as such. This special legal status is the incorporated company and the institution of limited liability, both of which are a product of massive changes in company law in the nineteenth century.

The Joint Stock Companies Registration and Regulation Act (1844) drew a clear distinction between joint stock companies and private partnerships by providing for the registration of all new companies with more than twenty-five members or with transferable shares. At the same time, it provided for incorporation through the act of registration alone rather than a special Act or Charter. The Joint Stock Companies Act (1856) and then the Companies Act (1862) further allowed incorporation with limited liability to be obtained by just seven persons signing and registering a memorandum of

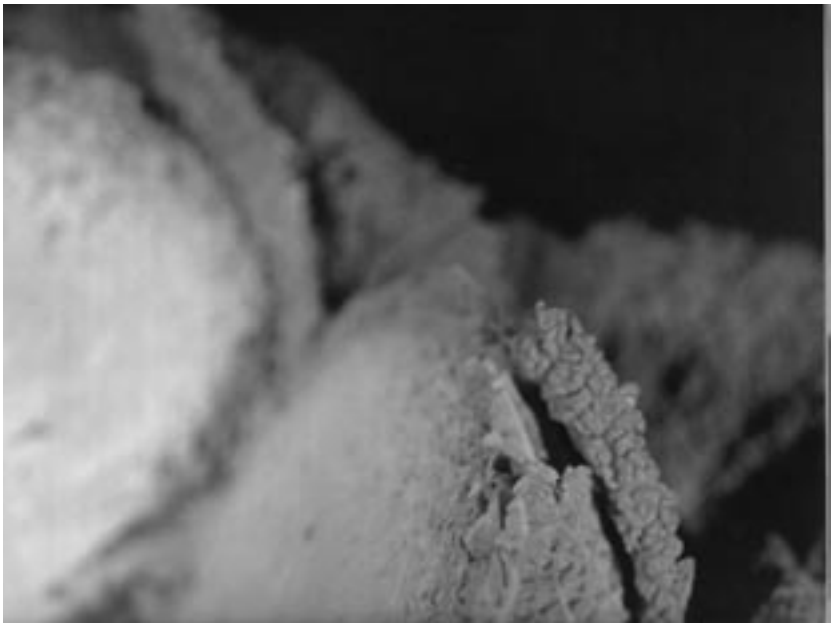
association. Even though this was intended to apply to joint stock companies, it became clear that by reducing to seven the number of persons required to form an association, and not specifying a minimum number of shares, the scope of the company legal form could potentially include small partnerships and one-person enterprises. The decision of the House of Lords in *Salomon* v. *Salomon and Co. Ltd*. (1897) validated the one-person enterprise in Britain, and the Limited Partnerships Act (1907) formally defined and recognized the private company as the legal form of capital.

The historic significance of these changes for the intensification of capital accumulation was enormous. The joint-stock company is often interpreted as either a measure of convenience designed to protect the interests of individual investors (viz. economics), or as a key moment in the developing separation between ownership and control (viz. sociology). But both these interpretations fail to grasp its real significance, which lies in the fact that what was being developed was a special legal *persona* for capital. To grasp the nature of this special legal *persona* we need to distinguish between the company as an economic and as a legal form. By 1855 the company legal form (that is, incorporation with limited liability) was confined to the joint stock company economic form and deliberately withheld from economic partnerships and one-person enterprises. Yet by 1914 the company legal form had become the normal form of enterprise in English manufacturing, due to private partnerships turning themselves into private limited companies. The meaning attached to the term 'company' was thus transformed: from denoting an association of a particular *economic* nature with no connotations as to legal form, it has come to signify an association of a particular *legal* status with no connotations as to economic form. Between 1844 and 1914, then, the company or corporation was constituted as a new form of *persona* for capital.

An important dimension to this *persona* is that companies came to be distinguished from the persons who form them. Where the 1856 Act regarded persons as forming *themselves* into an incorporated company, the 1862 Act saw persons as forming a company *by them* but not *of them*. The earlier Act identified the company with the members; the later Act identified the company as something separate from and external to them. From this point on, companies have been referred to as 'it' rather than 'they'. At the same time it became clear that the shareholder has no property in, or right to, any particular asset of a company other than the share. All the shareholder can claim as a right is to have the assets of the company administered in accordance with the constitution of the company and, crucially, a right to a share in the surplus value produced through the company's consumption of labour power. In effect, the development of company law had produced a new form of legal subject, the private corporation, and a new form of property, the share. A dual separation was effected between companies and their shareholders and between shareholders and their shares. Limited liability thus established the corporation as a *new and independent legal subject* every bit as real in law as the subjects of the classic legal form, *though totally removed from those subjects*. Capital, in other words, had become a fully fledged 'person' in law.

The company mind

Why is such a development important for understanding the problems in prosecuting capital? When in *Salomon* v. *Salomon* the House of Lords held that a corporation is a person distinct from individual persons who compose it, it also held that corporations, unlike human persons, could not commit torts which demand a guilty intention, nor crimes which require *mens rea*. In doing so it raised a question initiated by Pope Innocent IV's decision at the Council of Lyon in 1245 – that, having no soul, the corporation could not be excommunicated – but which brings us straight into the juridical heart of the power of the modern corporation: can we speak of 'the mind' of the corporation? The initial answer provided by the law was 'no'. In *Edwards* v. *Midland*



Railway (1880), for example, an action for malicious prosecution against the railway company, Justice Fry held that 'it is absurd to suppose that a body corporate can do a thing willfully, which implies will; intentionally, which implies intention; and maliciously, which implies malice. They are all acts of the mind, and one is no more capable of being done by a corporation … than the other.' This position held strong well into the twentieth century.

However, in a landmark ruling in 1956 (*H.L. Bolton [Engineering] Co. Ltd* v. *T.J. Graham & Sons*), Lord Denning claimed that companies 'may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre.' As a consequence, one can speak of the mind of the company. But in a crucial caveat the way of determining the mind of the company was to identify its *actual human* controllers. 'Directors and managers … represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.' Denning's caveat made it virtually impossible for corporations over a certain (very small) small size or directors to be successfully prosecuted. In the case against P&O European Ferries for the sinking of the *Herald of Free Enterprise* in 1987, for example, it was widely known that the roll-on/roll-off ferries then in operation needed redesigning. One had capsized in 1982 killing six people, and a paper at the 1985 conference of the Royal Institute of Naval Architects pointed out that a much bigger disaster was likely to happen if a redesign, incorporating new bulkheads which would enable passengers to escape, did not take place. Yet when the prosecution against the five senior employees collapsed, so the case against the company went too.

It is the very nature of company law as it currently stands that led to the failure of the prosecutions in these and virtually all other cases. In these cases the temptation to find the senior figures who made the important decisions is entirely understandable. But if, for whatever reason, they cannot be identified, then any prosecution will fail. The implications of this for any campaign for a new law of corporate killing or manslaughter are enormous, because any new law is unlikely to change this. Campaigns to 'put the suits in the dock' under a new law will stumble at precisely the point at which the law currently stumbles: large organizations being what they are, it is normally impossible to identify which individual or individuals were responsible for any particular decision. Thus no person is punished. Cases will remain almost doomed to fail except for one-person or very small companies in which the 'controlling mind' can be easily identified. Moreover, it seems clear (at time of writing) that the present government's intention is that new legislation should be deliberately framed to avoid directors of large companies ending up in prison.

Campaigners in this area like to argue that all that is needed is the political will: if only the government would take seriously the promise it made in 1997 then massive changes could be achieved (in what would surely be a popular act). And yet there is a

sense in which the failure of politicians even to begin anything in this area is a doffing of the cap to the astonishing social and juridical power capital has been granted with its corporate *persona*. The law which shaped the modern corporation as a new form of legal person has been reluctant to admit that the same persons can commit illegal acts and recognizable harms. The law, in other words, has been structured in a way that it is far more accommodating to corporate subjects than to human ones. In this way the ruling class has more or less defined capital as beyond incrimination: the 'harms' committed by corporations are treated as the result of a failure to follow regulations and procedures and thus are not 'crimes' in the way that laypersons might think. Apropos of right-wing attacks on 'welfare scroungers' and 'the idle poor', one might say that it is the corporation that has acquired plenty of rights but few responsibilities. Capital has used the corporate form to its advantage by avoiding some of the most obvious disadvantages of being a legal subject, namely responsibility for one's acts.

For these reasons any campaign in this area might be better advised to target the corporate subject itself (as well as its human 'controlling minds'). The Left, in other words, needs to get its head around the power entailed by the status of the corporate subject. If we are to take seriously the idea that the corporation is a person in its own right, then corporate actions should not always be identified with the actions of individuals and it does not always make sense to hold a human being responsible for the offences committed by the corporation. It is often pointed out that because a company is a creature of the law with no physical existence, it cannot be tried for murder, as the only punishments available to the court on conviction are life imprisonment or the death penalty – were it available. Thus the only penalty that can realistically be imposed on a company in English law is a fine and/or compensation order. Maybe we need to start thinking through the possibility of more than a fine. Since imprisonment, like excommunication, is impossible for the corporation, the logical step for campaigners would be to argue for a death sentence for corporate subjects: the 'execution' of corporations when their deliberate 'wrongdoings' cause human death, and the seizing of their assets. It might be objected that the 'human' victims of such punishment would, of course, be the shareholders. But then at least shareholders might start exercising some of their powers in making sure that the corporations on which they rely for their dividends show at least a modicum of respect for human life.

I realize, of course, that within the context of bourgeois law such a suggestion is absurd, not least because implicit within it is the death of capital. But it is precisely this absurdity which draws attention to the problems faced in making corporations properly accountable for their actions and, more generally, highlights the tensions within any socialist campaigns to use the law against capital. It needs to be remembered that, like capital, the law was not established for the purposes of justice.

In his *Phenomenology of Spirit* Hegel comments that in the absolute freedom of Terror death appears to have no inner significance or meaning, each dying at the guillotine or in their 'Republican Marriage' – in which couples were tied together and drowned – 'the coldest and meanest of all deaths, with no more significance than cutting off a head of cabbage or swallowing a mouthful of water'. Modern death at the hands of corporations has become something like that: the heads of workers are crushed, party-goers are drowned, and capital just carries on, perpetuating its own special form of Terror.

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