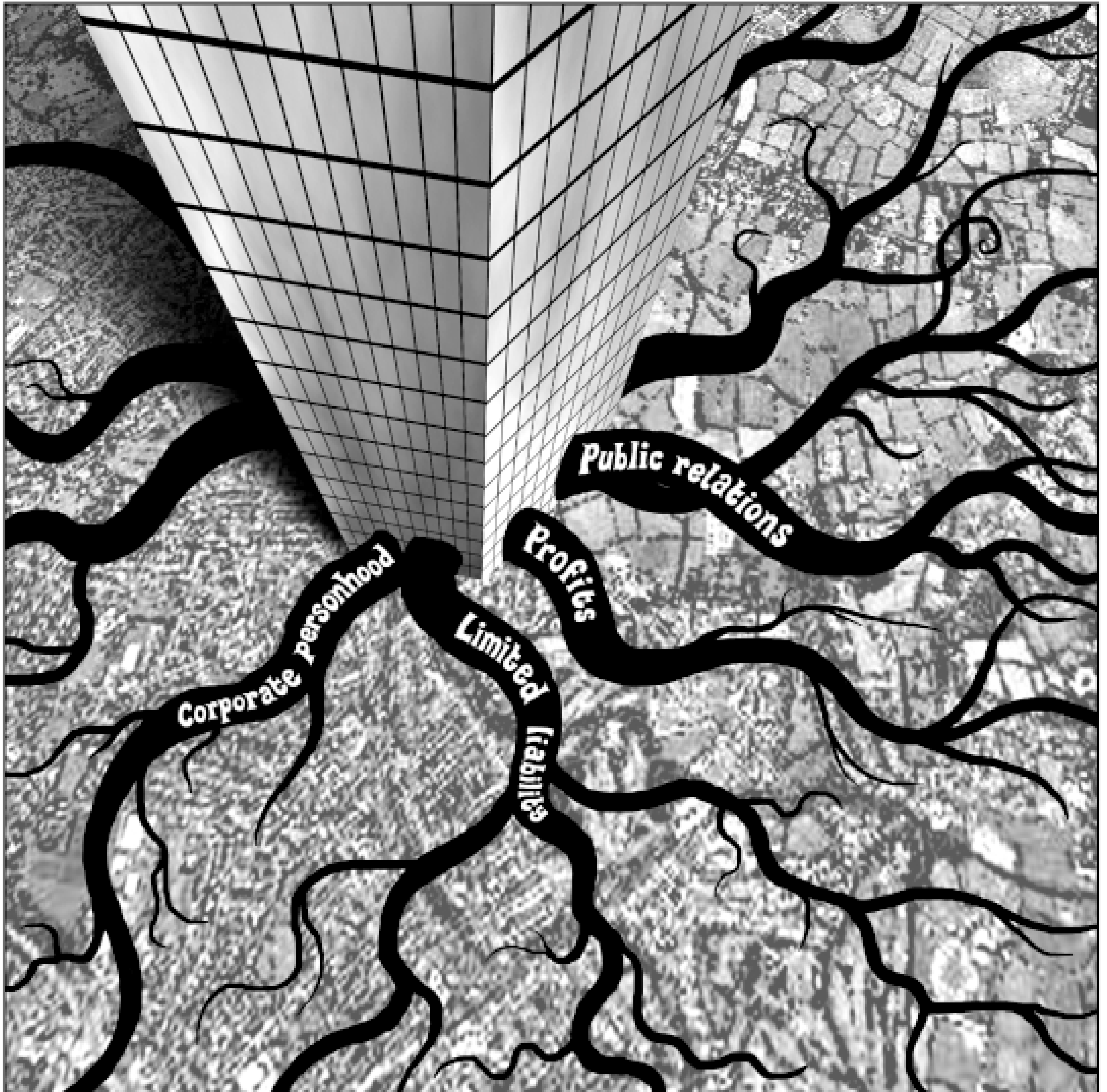
Corporate law and structures

Exposing the roots of the problem



by Rebecca Spencer
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Researched and written by Rebecca Spencer
Cartoons: Carol Simpson, www.zmag.org
Cover illustration: Stig
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Corporate law and structures
- Exposing the roots of the problem

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In the UK as of 19 December 2003, there were 1,951,219 Private Limited Companies and 13,352 Public Limited Companies, including subsidiaries. Approximately 2,500 plcs are traded on the stock exchange.

Introduction: Law for non-lawyers

I am not a company law specialist. Neither are most people who work in NGOs, campaign groups, the media or charities. Most company law specialists seem to work for corporations, and those who do not are largely trapped in academic ivory towers. This is a shame, because the law on corporations has an enormous and mostly unappreciated impact on the working not just of corporations but of our society itself - it is a subject far too important to be left to lawyers.

This briefing, written by a non-specialist for non-specialists, aims to expose a little of what makes corporations tick, legally: the advantages they gain and the parameters within which they operate. How did this situation come about? How does it affect us? What changes could mitigate or reverse the negative effects of current corporate legal structures? What can non-specialists do about it?

The briefing assumes a general understanding of the negative social and environmental impacts of modern corporations. It attempts to explain one set of reasons why these things happen, why they continue to happen and how efforts to stop them might be improved.

Before getting into the specific issues company law poses, it is useful to note what the very existence of companies means. The dominance of corporations over our economy and society is such that they have come to colonise our thinking. It has become normal to think of corporations as inevitable - business is the only way to produce goods and services, corporations are the only way to do business, the corporation was bound to assume the importance it has today and it is a rational, ideologically neutral form of organisation. Without corporations, we would be starving naked in the dark. For the time being, we ask you to put these assumptions aside and look at the corporate form objectively. The corporation is a creation of the law. It does not exist in nature, nor does its existence naturally follow from the conditions of a market economy. The corporation's existence in its current form is the result of accidents, compromises and triumphs of vested interests spread over three centuries. Imagine that things could be different, and the way they are now will seem strange indeed.

What is a corporation?

- In UK law*, a corporation is an artificial legal person – a 'body corporate'[1] - an independent entity with rights before the law similar to those of a human being. The word is technically applied to any organisation with an independent legal identity.
- For the purposes of this briefing, 'corporation' specifically indicates the type of organisation also known as a 'commercial corporation' or 'company'- an organisation intended for profit with capital raised from shares.
- Company shareholders are protected by 'limited liability' (see below, 'Who is responsible? Liability and the 'veil' of incorporation'). Thus the company is known as a 'limited' company.
- In the UK, there are two main types of limited company: private limited companies (which have 'Ltd.' after their name and whose shares can only be sold privately) and public limited companies (plc's), whose shares can be traded on the stock exchange and which are subject to more stringent accounting and reporting requirements.
- For most purposes, the same laws apply to all profit-making companies, plc or ltd, large or small.

* While it is technically accurate to speak of English law and Scottish law separately, with occasional variations for Wales and Northern Ireland, the law is essentially the same throughout the UK on the topics discussed in this briefing, and it seems at present unlikely that changes would take place in one part of the country but not another. Therefore, to avoid confusion, and since this briefing is not aimed at experts, I have referred to 'UK law' and 'the UK courts' throughout.

[1] Companies Act 1985 section 13.3

Brief history of UK corporations

Pre 1600

From the Middle Ages onwards charitable organisations such as hospitals, monasteries and colleges were able to ask for 'corporate' status, making them independent entities before the law. The word 'corporation' derives from the Latin 'corpus', meaning 'body'. Incorporation was only available to non-profit-making organisations via charters from the Crown or by act of parliament. They were not permitted to act outside the terms of their constitution - such acts would be deemed 'ultra vires' ('beyond the power') and could be declared void by the courts. By the sixteenth century charters of incorporation began to be granted to trade associations.

1600-1720

Corporations became commercial by acting outside their constitutions in an unlawful manner. The first commercial corporation was the East India Company. This was initially a trade association, chartered in 1600, holding a monopoly over trade with the 'Indies'. Trade was conducted by individuals and unincorporated partnerships which were members of the Company. In the course of the seventeenth century, these became amalgamated into a single partnership. Later the members of this partnership decided to transfer ownership of their stock from the partnership to the corporation: in exchange for giving up the partnership's stock individual members received shares in the 'joint stock' of the company. The company was then able to trade this stock in its own name, make its own profit and distribute the profit to its members/shareholders. Thus the East India Company became Britain's first commercial corporation - or 'joint stock company'. This was an unlawful act - turning itself into a commercial entity was outside the Company's constitution ('ultra vires'). But no-one challenged it.

There were several advantages to trading as a corporation. The corporation continued to exist even if the original partners died or transferred their shares. The corporation could bring and defend legal actions in its own name rather than the names of the partners. The corporation would not die, so did not pay death duties. If one shareholder became bankrupt, company assets could not be used to pay the person's debts as company assets belonged to the corporation (its own separate legal person) and not the shareholder.

1720-1825

After the East India Company had turned itself into a commercial corporation, other trade associations began to follow suit. The government condoned these unlawful acts and began to grant charters expressly for commercial corporations. Corporations began to seek finance by selling shares to outside investors. The South Sea Company, formed in 1711 with a monopoly on trade with South America (then under Spanish control) was one of the dubious corporations which sprang up in this period. The South Sea Company's share price rose wildly, speculating on the huge profits expected when (and if!) the company was able to gain access to South American ports. But access could not be obtained, and in 1720 the company's founders fled the country and the share price collapsed overnight, ruining many investors and triggering the first stock-market crash. This episode became known as the South Sea Bubble.

In 1720 the government finally acted against commercial corporations by passing the Bubble Act, which wound up or nationalised many commercial corporations, including the colonial companies which had gained great power. The Act banned speculative buying and selling of shares (only people genuinely involved in running the company could buy shares) and restrictions were placed on new companies.

In the following hundred years, the Crown was reluctant to charter new corporations in the light of the South Sea Bubble, but some corporations began to be created by act of parliament to carry out specific schemes (initially canal-building and waterworks) which the state was unable to fund itself.

1825-1989

The Bubble Act was repealed in 1825, permitting free trading of shares. In 1844 the Joint Stock Companies Act abolished the need for companies to gain a specific charter - they could now form by registering themselves and were allowed to carry out any commercial activity stated in their constitution, subject only to approval by the Company Registrar. In 1855 the final step was taken when parliament approved an act giving companies limited liability: this means that shareholders are not responsible for the debts of the company; they can lose the value of the shares they own but not a penny more. When a corporation collapses, limited liability benefits shareholders and imposes costs on creditors, which may include suppliers and workers who are owed wages.

The doctrine of 'ultra vires' originally gave the courts control over corporate activities - a corporation acting outside the objects clauses of its constitution could be challenged, theoretically by anyone, and its acts declared void. For most of the nineteenth century this possibility was used fairly regularly, but successive court cases and manouevring by company lawyers (claiming that 'ultra vires' challenges restricted free trade) gradually eroded the principle. In 1884, the judgement in the case of Bournemouth Corporation v Watts restricted the right to use 'ultra vires' challenges to shareholders, directors and, in some cases, creditors of the company. The final blow came in the Companies Act 1989 which made the objects clause purely a statement with no legal force to restrict the company's activities.

Based on 'What are Corporations?- Where did they come from? How did they become so powerful?' - Program on Corporations Law & Democracy: The creation & development of English commercial corporations and the abolition of democratic control over their behaviour' by Daniel Bennett and Helena Paul (1999).

Timeline

up to C17 – concept of 'corporation' developed to provide independent legal identity for non-commerical institutions.

1600 - East India Company chartered – grew into first commercial corporation.

1720 – South Sea Bubble, followed by the Bubble Act restricting commercial corporations.

1720-1825 – some corporations chartered by parliament for specific purposes such as canal-building.

1825 – Bubble Act repealed, allowing free trading of shares.

1844 – Joint Stock Companies Act created the modern form of commercial corporation.

1855 – A further Act granted corporations limited liability.

1989 – Companies Act abolished possiblity of challenging companies for acting 'ultra vires'.

There is virtually no legal provision for company directors to consider interests other than those of shareholders.

PART 1 - CURRENT UK COMPANY LAW

Who is a corporation? Directors, shareholders and everyone else

Legally, a corporation is owned by its shareholders and controlled by directors. In running the company, directors are bound by common law 'fiduciary duties [duties of faith]', the most important of which is to 'act in good faith (bona fide) in the best interests of the company as a whole'. This duty has generally been interpreted by the courts to mean acting in the interests of the shareholders; in turn, these interests are assumed to be maximising profits in order to pay dividends[2]. In the shorter term a company may aim at, for example, increasing market share or developing new products in the anticipation that this will eventually lead to greater profits.

There is virtually no legal provision for company directors to consider any other interests. The Companies Act 1985 does include a token call for directors to consider employees: '[directors] should have regard to the interests of the company's employees in general as well as to the interests of the members.'[3] Just to show how ineffective this directive really is, the Act also states that this duty is owed 'to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty'. Since 'the company' here refers to the shareholders, and fiduciary duties are generally enforceable by challenge from shareholders, this means the foxes are responsible for the welfare of the chickens. The only effect this clause has had is that before 1985 shareholders could have prevented directors from taking employees' interests into account by claiming that this was beyond their duty of acting in the interests of the company – i.e. shareholders' interests[4].

The author has found no case law relating to directors attempting actively to consider other interests such as employees' welfare, social benefit or environmental protection, to the detriment of profits. Case law and most provisions of statute law in this area deal largely with directors breaching their fiduciary duty in their own self-interest. It is possible for a director's act which is challenged as breaching fiduciary duty to be subsequently approved by shareholders[5], but again, we find no examples of this happening in relation to favouring wider interests over that of profits. The interest of shareholders is considered to include 'future investors', which theoretically could provide scope for longer-term thinking, although it seems that even this is little known among company directors [6].

It might be argued that it is thus the responsibility of individual shareholders to hold companies to account and that shareholders could force responsible action if that was what they wanted. This is probably the case for smaller private companies. However, this argument assumes that shareholders are individuals. At present, around 70% of shares in UK public companies traded on the stock exchange are owned by institutional investors[7]: pension funds, investment houses, insurance companies etc. who, as a result of their own profit-making obligations, are not going to call for companies to be more responsible and make less profits. It is quite common for one of these large investors to own a considerable percentage of a company's shares - not a majority, but enough that if they decided to sell out the company's share price and image could be damaged. They are thus ideally placed to apply behind-the-scenes pressure to directors to increase profitability in ways that might otherwise have been avoided. In fact, both campaigners and company directors have cited this effective control by large institutional investors as a reason why many companies are becoming more and more ruthless and short-termist - the lay-offs, outsourcing, movement of plants to developing countries etc. observed throughout the 1980s and 90s can be partly traced to this ownership trend. Ironically, this may mean that workers trying to secure their own future by paying into pension funds actually jeopardise other workers' futures when the pension funds act as ruthless investors seeking instant profit and causing job losses.

[2] Stephen Griffin, *Company Law – Fundamental Principles* p. 246
[3] Companies Act 1985 s. 309
[4] Griffin p. 248
[5] Nicholas Grier, *UK Company Law* p. 393
[6] Janice Dean, *Directing Public Companies – Company Law and the Stakeholder Society* p. 15
[7] Dean p. 32

There is no distinction between a corporation and a real person in most aspects of company law.

Corporations are people too! The corporation and human rights

A corporation is an artificial person permitted to do most things a human individual is permitted to do in terms of business - and some things humans can't[8]. This holding of human-equivalent standing before the law is called 'corporate personhood' or as some writers rather charmingly have it, 'corporate personality'. Corporations cannot do everything a human can do - they cannot marry or vote, for example, but in business terms they are at least equal. For example, in the UK, corporations have an unlimited lifespan - one obvious advantage over real people.

There is no distinction between a corporation and a real person in most aspects of company law: a company can hold shares in another company, be a director of that company, even solely own another company. When applying legal precedents to a case, courts regularly use precedents relating to real people in cases relating to ownership by corporations.

The corporate person is held to be fundamentally separate from its members, whether they are humans or other companies. The precedent establishing this principle dates from 1897 - the case of Salomon v A. Salomon and Co. Ltd. The case involved a leatherworker, Mr Salomon, who had turned his sole trader business into a company (A. Salomon and Co. Ltd.) with himself, his wife and their five children as the seven shareholders the law at that time required (these days, a company can be set up with only one shareholder). Mr Salomon 'sold' his business to the company, taking much of the payment in the form of debentures (a type of unsecured loan). Some time later, Mr Salomon sold his debentures. When A. Salomon Ltd. subsequently collapsed, the debentures were paid off but there was not enough money to pay trade creditors, who attempted to sue Mr Salomon personally to settle their debts[*]. The court found that since no fraud was involved, Mr Salomon was not personally liable for the companies's debts[9].

The Salomon case clearly established the separate identity of a company from its members (though the verdict was controversial at the time), but in more recent times this precedent has had wide implications. The principle of separate identities, known to lawyers as the 'veil' of incorporation, has led to large companies (and some smaller ones) developing complex structures in which a 'parent' company owns a number of 'subsidiaries' which it may wholly control but is legally separate from (except for some tax and accounting regulations). The precedent of Salomon has then been used to allow the parent company to escape from the liabilities of 'separate' subsidiaries (see below under 'Who is responsible? Liability and the 'veil' of incorporation' for more detail).

But just how human is a corporation? In criminal law, this is a problem, not least because a company cannot be punished by imprisonment, community service orders etc - in effect the only possible punishment is to fine it. Criminal case law has found that a company cannot be found guilty of crimes requiring intent (such as murder) since a company does not have a state of mind ('mens rea'): 'A company as an artificial being has no mind or independent will, and as such cannot attain knowledge or form an intention[10].' However, in the civil court things look slightly different - a company has been found capable of being 'aggrieved' and therefore is permitted to sue for defamation[11].The law seems somewhat irrational here: surely 'aggrieved' is a 'feeling' - a reaction which an 'artificial person' should not be capable of? How can it form a reaction if it is incapable of attaining knowledge?

A pattern begins to emerge of corporations sharing the benefits of personhood without the drawbacks (death, punishment for misdeeds etc.). This pattern is continued in the 1998 Human Rights Act (HRA), which incorporates the European Convention on Human Rights into UK law. While Labour was in opposition, in 1993, John Prescott made a speech claiming Labour's planned human rights act would be for humans and not corporations[12]. The reality - that companies can claim rights under the 1998 Act,

[8] Companies Act 1985 section 13.3
[9] Griffin p. 7-8
[10] Griffin p. 71
[11] Alan J Dignam and David Allen, *Company Law and the Human Rights Act 1998*, p. 151
[12] Dignam and Allen, p. 149

[*] The company was by this time in the hands of the creditors, hence the rather odd situation that in the case reports Mr Salomon appears to be suing his own company.

It is theoretically possible that a corporation could attempt to claim the right to lie under the ECHR.

is largely the result of the stance of the European Court of Human Rights in Strasbourg, the highest court where cases under the Act can be heard, in which corporate 'human' rights have been accepted without challenge[13]. Interestingly, however, precedent suggests the Strasbourg court may be less attached than UK courts to the concept of separate corporate identities, and may be more willing to 'lift the veil'[14].

Some of the rights resulting from the Act are not relevant to corporations: for example, they could not effectively claim rights to freedom from torture and slavery, or the right to life. Crucially, however, corporations can claim the right to a fair trial, which not only effectively enshrines their current equality with real people before the law, but means that, for example, corporations cannot be made to incriminate themselves, which may allow them to conceal relevant documents in criminal cases[15].

Precedent as well as common sense suggests that corporations cannot claim rights to 'freedom of thought, conscience and religion'. However they can claim the right to freedom of expression[16] (though why an entity which is apparently held to be without thought or conscience should be allowed to express itself is another issue). 'Expression' has two levels of protection: it is highly protected as media presentation, e.g. newspaper articles or TV documentaries; and less protected in the form of 'business interests expression' such as advertising and marketing, where regulation has generally been left to national courts[17]. Where benefits can be cited countries may be permitted to restrict advertising even if the content is true, for example to ban tobacco advertising or restrict advertising to children[18]. It is also theoretically possible that, where no prior restriction exists, a corporation could attempt to claim the right to lie, under freedom of expression[19], as Nike recently recently attempted to do in the US, though there is currently no case law on this (see box).

Protocol 1, Article 1 of the European Convention on Human Rights refers to property rights, which are specifically extended to 'legal persons'[20] - i.e. corporations.

[13]Dignam and Allen, p. 173
[14]Dignam and Allen, p. 220
[15]Dignam and Allen, p. 202
[16]Dignam and Allen, p. 244
[17]Dignam and Allen, p. 244
[18]Dignam and Allen, p. 247
[19]Dignam and Allen, p. 253
[20]European Convention on Human Rights (ECHR) http://www.hri.org/docs/ECHR50.html Protocol 1, Article 1, 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.'

Nike and the right to lie

In 1998, Californian anti-Nike activist Marc Kasky filed a suit accusing the company of making false and misleading statements in its responses to criticism by activists of Nike's treatment of workers in a Vietnam factory. Ironically, some of the activists' facts Nike attempted to counter were based on a leaked report actually commissioned by Nike but never published. Kasky argued that Nike's statements amounted to false advertising and should be punished as such. Rather than defend the truth of its statements, Nike chose to argue that its comments, made in paid-for articles in the press, media releases, letters to newspapers and elsewhere, were protected by US free speech legislation (the 'First Amendment') as they were part of a political debate. They won (as legal precedent would have expected). Kasky appealed. He lost.

Kasky then took the case to the California Supreme Court. In May 2002, he won. The court found Nike's statements to be 'commercial speech' - and therefore covered by legislation relating to false advertising - on the grounds that the 'speaker' is commerical, the 'audience' is commercial (e.g. statements contained in letters to heads of university sports departments, which are major customers of Nike clothing) and the material was commercial as it intended to promote the company's image and sales. Nike postponed publication of its annual Corporate Social Responsibility Report and is turning down many invitations to speak at events. Other companies are reported to be following suit.

Nike then appealed to the US Supreme Court, which has final jurisdiction on constitutional issues. Despite an outcry over the case by PR practitioners and corporate-friendly media across the US, the Supreme Court ruling delivered on 26 June consisted of a simple refusal to hear the appeal. It did not constitute a judgement on the issues, but argued that the Supreme Court cannot hear the case until the California court has issued a final judgement on whether Nike's statements were in fact true.

However, the California Supreme Court never will issue a ruling, because on 12 September Marc Kasky agreed to settle the case out of court – a move which has mystified anti-corporate activists across the US. So the California ruling stands, though the issue of the right to lie is not fully resolved at a federal level.
http://www.reclaimdemocracy.org/nike/index.html

Normally a holding company is not liable for the debts of its subsidiary.

Property rights are generally judged fairly low in the 'hierarchy of rights', but it may be possible for companies to use this article to challenge control and regulation of property, e.g. through the planning system, if they can show that government behaviour is 'disproportionate' or compensation inadequate[21].

When it comes to violations of real people's human rights by corporations, the Strasbourg court is unhelpful. The Convention essentially assumes only two groups in society: 'persons' and 'states', and sets out to protect persons' rights from interference by states[22]. Corporations are taken to be 'people'. In the majority of cases the only sanction against corporations is through the so-called 'horizontal effect' of the Act - courts are responsible for upholding A's rights when violated by B, though A is as likely to be a corporation as a human being[23]. It may, however, be possible to bring HRA cases against government regulatory or funding agencies arguing that in their dealings with companies they have failed to consider the human rights of the people affected by the company's actions. There have as yet been insufficient cases to judge whether this could be a useful avenue.

Worryingly, it remains possible under the Act for an individual to waive their rights[24]; employment contracts have been cited as a specific example of where this may be applicable, meaning that employees may find they have less rights when at work than the company has, if they are incautious about signing contracts.

Privatisation and the HRA

The Human Rights Act provides for cases against companies where they are acting as a 'public body', intended to provide redress against privatised utility companies, for example. However, the limited scope of this provision is shown by a test case in 2002 brought by residents of a privatised care home in Hampshire. The residents objected against the planned closure of the home on the basis that it would interfere with their 'right to a home life'. However, the court found that the home's owners were not carrying out a public function and were thus not responsible for the residents' human rights. This appears to mean that as well as letting companies off the hook, governments and local authorities will also be able to increasingly avoid human rights responsibilities by privatising their functions.
Information from 'Selling off the twilight years: The transfer of Birmingham's homes for older people' Melanie McFadyean and David Rowland, Menard Press 2002.

Who is responsible? Liability and the 'veil' of incorporation

One of the key advantages corporations have over individuals is that their shareholders have 'limited liability'[25]. This means that shareholders are not liable to pay the company's debts, nor are they responsible for civil or criminal offences committed by the company, unless the shareholders were personally involved. When a company cannot pay its debts, shareholders lose the value of their shares - and not a penny more. Not only may trade debtors may go unpaid, but wages owed to workers and civil damages can be escaped.

This is bad enough in cases where the choice is between the workers or victims of the company paying and the individual shareholders paying - the shareholders benefit if the risks the company takes pay off, or if it gets away with damaging behaviour, but they do not have to pay the cost if things go wrong. However, the situation gets worse because limited liability also applies if the shareholder is another company: 'normally a holding company is not liable for the debts of its subsidiary'[26]. Since the parent and subsidiary companies are separate 'persons' in law under the legal doctrine of the 'veil' of incorporation (see above) the one cannot normally be held responsible for the actions of the other.

A company cannot set up a new subsidiary to take on existing known liabilities[27] - here at least the law sees sense and 'pierces the veil' to hold the parent company liable - but it can set up a subsidiary to take on possible future liabilities. The most recent case in which this concept was reviewed is that of Adams v Cape Industries plc (1990)[28]. Cape Industries, a UK-based company, operated a US subsidiary, NAAC, trading in asbestos. A group of workers who became ill after working with asbestos

[21] Dignam and Allen, p. 267
[22] ECHR Article 25
[23] Dignam and Allen, p. 154
[24] Dignam and Allen, p. 171
[25] Companies Act 1985 Section 1.2a
[26] Grier 1998 p. 29
[27] Griffin 2000 p. 11
[28] Details from Griffin p. 12

Since the company is held incapable of forming an intention it cannot be convicted of murder.

had successfully brought an action against NAAC and been awarded damages of US$5.2 million. NAAC then went into liquidation, without paying the damages, and its operations were taken over by a new company CPC, which was funded by Cape though not actually a subsidiary. CPC was run from the same premises as NAAC with the same managing director, but controlled by a Liechtenstein registered company, AMC, which acted as an agent for Cape.

Following the liquidation of NAAC, the workers tried to bring an action against Cape in the UK on the basis that it was responsible for the actions of its subsidiary and had liquidated NAAC to avoid paying the damages. The court found that Cape was not liable: 'If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign company is the business of its subsidiary and not its own, it is, in our judgement, entitled to do so.' The judgement went on to say, in effect, that the legal precedents were more important than justice: 'Neither in this class of case nor in any other class of case is it open to the court to disregard the principle of Salomon v A. Salomon and Co. Ltd. merely because it considers it just to do so.'[29]

The Adams v Cape precedent is far-reaching and still stands, but may not be strong. For one thing, some lawyers have suggested that the decision may have been influenced by the question of whether the initial US damages award (which the workers wished to pursue Cape for) was unreasonably high by British standards[30]. Also, since 1990 a number of cases related to Adams v Cape have arisen, raising questions of whether foreign subsidiaries of a UK-based transnational can be tried under UK law, the law seems to be moving in the direction that they can. Although these judgements suggest a development in the law, on each occasion the company has settled out of court, so the cases have not in fact been heard and the Adams v Cape precedent technically stands.[31]

Although in civil and criminal law the parent company is merely a shareholder and hence not usually liable, some legislation is able to pierce the corporate veil. In tax and accounting law, groups of corporations including various subsidiaries can be treated as a single body, and some pollution legislation can get at the parent company behind a polluting subsidiary[32].

As discussed above, making companies liable for criminal offences can be extremely difficult. Since the company is held incapable of forming an intention (see above) it cannot be convicted of murder: it is also impossible to convict a company of rape or, according to a recent precedent, of driving offences[33] (on the grounds that the company cannot drive a vehicle). This last is an odd precedent since it also implies that a company cannot be found guilty of any crime requiring operation of machinery or performance of any other physical activity - this will probably be clarified by further cases. In most cases, an individual must be found who can be proven to have acted as an 'alter ego' or 'controlling mind' of the company[34]. It is generally very difficult to apply the crimes of a subordinate to the company - the manager of a supermarket that was part of a national chain has been judged not senior enough to be acting as a 'controlling mind' for the company, for example[35] - while directors themselves have sometimes been held to be too far away from the day-to-day activity of the company to be responsible for specific acts, as in the prosecution following the *Herald of Free Enterprise* disaster in 1987[36]. In fact, although it is technically possible to convict a company of manslaughter by gross negligence, this has only happened in one case, following the 1993 Lyme Bay canoeing tragedy in which four teenagers died[37]. In this case, a company director had been informed of a specific risk and chosen to do nothing about it - it was relatively easy to identify the director's guilt and to characterise him as a 'controlling mind'. For an overtly similar case with a very different ending, see the box on Simon Jones, below. Criminal prosecutions of companies or directors for crimes other than financial or fraud offences are relatively rare in the UK, and the complicated state of the law combined with the often complicated nature of the cases seems to make the police and CPS unwilling to investigate as convictions are difficult to achieve.

[29]Lord Justice Slade, quoted in Griffin p. 21
[30]Peter Muchlinski, 'The Company Law Review and multinational corporate groups', in John de Lacy (ed) *Reform of United Kingdom Company Law* p. 259
[31]Muchlinski p. 251
[32]Griffin pp. 28-29
[33]Griffin p.78
[34]Grier p. 35
[35]Simon Goulding, *Company Law* p. 57-58
[36]Goulding p. 60-61
[37]Griffin p. 78

Simon Jones – getting away with corporate manslaughter

On 24th April 1998, 24-year-old Simon Jones turned up to his first day at work for Euromin at Shoreham Docks. Two hours later he was dead, his head crushed by a mechanical grab.

Simon had never worked on docks before, yet was sent by employment agency Personnel Selection to work in the hold of a ship, unloading bags of stone. Neither Personnel nor Euromin gave Simon the safety training required by law. The unloading process involved hooking chains from the bags onto hooks welded to a mechanical grab. The grab had been modified - in a way which health and safety experts later judged extremely dangerous - to save the time needed to change the grab for a hook. Simon had to put his head inside the grab to attach the chains. While doing this the grab closed, almost decapitating him.

The Health and Safety Executive did investigate. James Martell, the manager of Euromin (a Dutch-owned company, but with Martell clearly in charge of the Shoreham operation), was arrested on suspicion of manslaughter but released without charge. That would normally have been the end of the matter, but Simon's family and friends (including members of Brighton-based campaign group Justice?, who publish radical newsletter *Schnews*) were not willing to accept it. His friends set up the Simon Jones Memorial Campaign, and a three-year campaign of lobbying and direct action followed, in which they managed first to overturn the decision not to prosecute Martell and Euromin, then to have a criminal prosecution brought. The trial took place in November 2001, with Martell and Euromin charged with manslaughter and Euromin charged with breaches of health and safety regulations. Despite the overwhelming evidence of general disregard for health and safety by Martell and the operation of risky systems on the dock, both Martell and Euromin were acquitted of manslaughter after a summing-up (afterwards described a 'severely unbalanced' by Simon's brother) in which the judge emphasised every element of the law which could protect the defendants, particularly the 'controlling mind' issue (see above), and questions about the responsibility of other workers on the dock at the time. The company was fined £50,000 for breaches of health and safety regulations which led to Simon's death.
Simon Jones Memorial Campaign: http://www.simonjones.org.uk/

PART 2 – THE EFFECTS OF CURRENT STRUCTURES

Corporate power: The elephant in the courtroom

The political and financial power of corporations is like the proverbial elephant - it is still there even when everyone pretends it isn't. Even when corporate law academics discuss the possibilities for corporate law reform - which they do, and say some very useful things about it - they tend to assume that corporations can simply be regulated and reformed and that will be the end of it - the giants will roll over and have their tummies tickled. Some NGOs have a tendency to think the same way - to lobby for changes to the law as if it's just a question of getting politicians to understand, and as though the corporations themselves have no influence on government. Most of the non-specialist world already knows the problem with this: corporations have enormous lobbying power over governments, control much of the media, exploit the law to their own advantage (they can and do afford all the best lawyers) and use that power to maintain and extend their dominance.

One could argue that companies are legally obliged to lobby governments since directors are obliged to act in the best interests of the company. This implies using whatever resources are available to ensure the continuation of a corporate-friendly political and legal environment, and opposing any regulatory efforts which might force the company to make less profit. This could mean anything from obvious issues such as resisting efforts to increase the minimum wage or strengthen pollution controls to more 'positive' action on policy issues such as lobbying for privatisation of public services so that companies can make money from them. In the US, one morally extremely dubious example of this is that corporations involved in running privatised prisons have been known to lobby for tougher sentences for offenders - which would mean more prisoners and more money for the companies running the prisons: the logic of corporate influence over government leads to people being literally locked up for profit.

We have reached a situation where corporate power over government is such that corporations are the first and last to be consulted about any legislation that may affect them. And this has come to seem natural, even in cases where corporations are the suspected criminals the new legislation attempts to bring to justice. Drug dealers are not consulted over changes to the drugs laws, benefit claimants are luckly if they get a token consultation about changes to social security, yet it is routine to re-write or delay legislation to take account of corporate interests, even when the law is targeted at corporate crime - this seems to be the main reason for the non-appearance of Tony Blair's promised Corporate Manslaughter Bill (see below).

Corporations' power stems partly from their willingness to work together. While companies may be in competition within an industry (though in practice large

"You know if money did grow on trees, I might be more sympathetic to the environmental movement."

Social and environmental reporting is still largely carried out as a PR exercise and no coherent standards exist.

corporations are as likely to reach mutually beneficial agreements as try to cut each other's throats), in dealings with government the interests of the whole industry, and often the whole corporate sector, are the same. Corporations tend to speak with one voice, be it on minimum wage rises, privatisation or environmental protection, and when they do they are deafening. This is even more true at a global level, where the largest corporations are able to dominate lobbying not just at the World Trade Organisation but in forums which ostensibly have nothing to do with them, such as the 2002 Johannesburg World Summit on Sustainable Development.

Even where governments do show some desire to control corporations, corporate power makes it a real battle. For example, UK tax law is formulated to largely avoid the 'liability shuffle' discussed above, so corporate groups are largely taxed as a whole rather than as separate holding company and subsidiaries, but even here the arcane complexity of corporate group structures, including offshore subsidiaries, and the layers of tax loopholes, breaks and special deals negotiated by generations of corporate lobbyists, lead to a situation where a corporation that is really determined to avoid tax can get away with paying as little as 1p in the pound: this is what Rupert Murdoch's UK companies are estimated to have paid in the 1990s.

Perhaps the oddest thing about the invisible elephant of corporate power is that it often seems invisible to corporations themselves. To hear the pronouncements of groups like the Confederation of British Industry (CBI) one would imagine that companies are the most persecuted organisations in the country, harassed on all sides by unjust taxes, nannying health and safety laws, cripplingly high minimum wages, bureaucratic auditing requirements, lunatic pollution restrictions and all the other controls the CBI lumps under the heading 'red tape'. They seem terrified. But again, this is reasonable: even if companies can see the elephant, the logic of corporate profit will always say, 'well, maybe there is an elephant - but it's not big enough!'

CSR - Corporate Sidelining of Reality

Corporate Social Responsibility (CSR) is the buzzword of the decade. Everyone claims to be into it - not just large corporations, but also governments and NGOs promote CSR as the solution to all, or at least many, of the social and environmental problems caused by corporate pursuit of profits. But what is CSR?

Corporate Social Responsibility essentially means the idea that corporations should consider the interests of society and the environment when making decisions. An image which was popular a few years ago is that of the 'triple bottom line' - social, environmental and financial performance - by which the company should be judged. According to CSR advocates, corporations are already moving voluntarily towards 'responsible' behaviour.

At least, that's the myth. There is plenty of analysis available elsewhere about corporate public relations, 'greenwash' and the substance or otherwise of individual companies' CSR programs. The concern in this briefing is to show how the corporate ideology of CSR deals with the facts of company law.

Legally, corporations are responsible only to their shareholders, who are often themselves large financial institutions; the stockmarket judges companies almost entirely on their financial performance (with the exception of ethical investment organisations); and whereas financial accounting procedures have been refined over hundreds of years, social and environmental reporting is still largely carried out as a PR exercise and no coherent standards exist*.

Where does this leave CSR? It needs propping up against the overwhelming weight of evidence, and to do this CSR relies on two main strands of mythology. The first holds that, 'corporations are good really, because when you really look at it, in the long term, being good for society (and the environment) is good for business profits too'.

* It is interesting to note that one of the recent triumphs of corporate PR is the hijacking of the phrase 'corporate accountability'. Once a rallying cry for opponents of corporate power calling for a share in decision-making, 'corporate accountability' has been downgraded in business discourse to mean something like 'publishing social and environmental reports', so that corporations can now claim to be 'accountable' simply by telling a few people a sanitised version of what they're doing.

There are some corporate executives who genuinely believe this, and genuinely believe that environment and social justice campaigners should actually just be pushing corporations to do the right thing for their own good. We're all on the same side, they want people to think - as soon as the penny really drops with the big corporations we can all work together to save the planet, lift everyone out of poverty and still keep making money.

It's a lovely rosy-tinted vision. But it all falls apart when you ask, what if they're wrong? What if environmental and social demands mean you have to stop making money (they inevitably will, for many companies - see 'Rotten companies in rotten industries', below)? Here the corporate myth starts to look like a fudge. For example, consider the European Round Table of Industrialists' 'Position on Corporate Social Responsibility and response to Commission Green Paper'[38]:

> *It is important to stress that, in meeting their corporate social responsibilities, [commercial companies] must follow courses of action which reconcile all three pillars of sustainable development - financial as well as social and environmental. Profit is a sine qua non [trans: 'essential condition'] for sustained performance as a responsible member of society.*

When you get to the bottom line, the bottom line is still the bottom line.
To put it another way, in the corporate mind the myth of CSR comes with the unspoken assumption that business values are inherently more important than the environment and society: CSR requires a reversal of moral priorities. Yes, the ideology incorporates social and environmental values, but only as secondary considerations. For most people, economic values are secondary, and social and to a lesser extent environmental values come first: making money is good but only if it doesn't conflict with believing it's wrong to murder, steal or cut down virgin rainforest. For the corporate 'environmentalist', profit is absolute, social and environmental values are relative: their first aim is to make as much money as possible, but given two ways to make that money they choose the one that requires the least murder, blatant theft or environmental destruction. Then they pat themselves on the back for being so responsible.

The other supporting myth of CSR is not even an argument, it's more of an image. This tactic involves presenting the company itself as a human being, a 'corporate citizen', as if the legal fiction of corporate personhood were a reality. We have become accustomed to seeing corporations, or business more generally, as having needs comparable to human needs - we talk about the 'business community'. At the United Nations, business interest groups such as chambers of commerce and trade associations are able to gain recognition as NGOs - approximately 15% of UN-recognised NGOs purely represent business interests - and at an international level, business interests means corporate interests. Similarly, business is a 'stakeholder' in UN multi-stakeholder dialogues, along with women, indigenous peoples, youth, civil

[38]European Round Table of Industrialists, 'ERT position on Corporate Social Responsibility and response to Commission Green Paper "Promoting a European Framework for Corporate Social Responsibility"' http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/043-COMPNETEU_ERT_EU_011122_en.pdf viewed 12/1/04

The robots take over

...People create what looks to be a nifty machine, a robot, called the corporation. Over time the robts get together and overpower the people. They redesign themselves and reconstruct law and culture so that people don't remember they created the robots in the first place, that the robots are machines, are not alive.

For a century the robots propagandise and indoctrinate each generation so it grows up believing that robots are people too, gifts from God and Mother Nature; that they are inevitable, and the source of all that is good. How gullible we've been. How docile. How obedient.

From 'Corporations, Accountability and Responsibility' by Richard L. Grossman, published in *Defying Corporations, Defining Democracy* ed. Dean Ritz. Apex Press 2001

"Miss Whitney, cancel that memo requiring that personal appearance should reflect our corporate culture."

society groups and so on. What this effectively means is that corporations' sole aim of making money for shareholders is seen as equivalent to human needs and concerns - as if an oil company's pursuit of profits by doing business in Saudi Arabia and thereby propping up an oppressive regime is comparable to Saudi women's pursuit of an end to oppression and greater equality before the law.

Corporations' success in portraying themselves as human - citizens and neighbours - not only gains them yet more influence but lends credence to CSR's claim that corporations can be 'responsible'. By seeing corporations as people, we are persuaded that they have ethical values and consciences similar to our own, whereas of course a single-minded legal fiction which is scarcely even legally liable for its own activities has no ethics at all.

The corporate mind

If we agree that the corporation is not a human being, the question arises: what is it? Viewed from within in political terms, the answer is simple. The corporation is a dictatorship, or at best an oligarchy, run as a centrally planned economy with an extensive bureaucracy. Workers within the system have few rights, they are increasingly under tight surveillance, and the penalty for disobedience is loss of livelihood (less extreme than the imprisonment or torture used by political dictators, but nonetheless terrifying). Rebellion is made less likely by bread and circuses (wages plus benefits of every kind from subsidised canteens and works outings to private health insurance and expense-account lunches), coupled with sheer fatigue, and by the shortage of different models to aspire to. It's true that workers, unlike subjects of a political dictatorship, are generally free to emigrate, but most of the possible destinations are run the same way.

The analogy goes further: like most dictatorships, corporations foster a self-serving ideology (CSR - see above); seek ever more power and control; are intensely fearful of attacks from outside; and cannot tolerate dissent (witness the disproportionate reactions to protests against world trade summits).

The analogy breaks down, however, because whereas the political dictatorship is run to the wishes of an individual or ruling party elite, in the corporate system the CEO and board of directors are themselves merely tools of the system.

But where is the core of the system? Here lies the true power and true vulnerability of the corporation, because at its centre is a power vacuum: the shareholders own, and

'I live in the Managerial Age, in a world of 'Admin'. The greatest evil is not now done in those sordid 'dens of crime' that Dickens loved to paint. It is not even done in concentration camps and labour camps. in those we see its final result. But it is conceived and ordered (moved, seconded, carried and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voices.' C.S. Lewis

supposedly have control, but they do not actually control: the board and CEO actually control, but theoretically owe their power to the shareholders. As a result, the buck doesn't stop - no-one has the ultimate duty to think about what the corporation should do and be: the only imperative is the directors' duty to act in the best interests of the company, which means the best interests of the shareholders, which means profit. If this leads the directors or managers to have to act against their conscience, well, that's their duty to shareholders. When shareholders see the company acting in ways their conscience would otherwise reject, well, the directors run the company, it's their responsibility.

This situation has itself grown out of a centuries-long development in company law and practice. Selfish individuals have no doubt contributed to this, but others who truly believe themselves to be decent and well-intentioned are also caught up in the corporate web. The vacuum at the heart of the corporation harnesses its managers' and employees' intelligence to aims which their consciences would otherwise abhor. Far from calling itself a human being, the corporation for all its power is a mindless predator, a super-brute, with a single, self-centred, self-expanding aim - to act in its own best interests.

Corporate psychology – killing from behind a desk

Who are the people who manufacture torture equipment, advertise cigarettes to children, bribe dictators, discharge toxic waste into the environment, order goods from sweatshops? Even the most rabid of anti-corporate activists doesn't believe that everyone working for Union Carbide in 1984 was an evil psychopath who laughed when chronic neglect of safety procedures led to the company's Bhopal factory blowing up, spewing poison gas and killing 10,000 people. But if decision-makers and employees of criminal corporations are much like the rest of us - they love their families, enjoy watching football or walking the dog, worry about old age and the state of the world - how can they collaborate in the things their company does?

Dan Gretton, an activist and writer working at Platform in London, has researched this. While psychological research hasn't gone far in examining the backstage perpetrators of corporate crime, it has looked at the psychology of torture and genocide in human history, most particularly at the Holocaust. Gretton's project, entitled 'Killing us Softly', takes this research and shows how it applies to the everyday workings of corporate crime: if ordinary, otherwise sane people could find themselves collaborating in the greatest evil the world has ever seen and psychologically adapt to it (and the research shows that they could and did) less extreme versions of the same psychological traits or mechanisms could allow them to do the same in less extreme situations, where killing is a consequence rather than the aim of an operation.

There is no attempt here to compare the *crimes* of corporate employees to those of the Holocaust: while one should not underestimate the number of victims of corporate crime (the figures on babies dying through inappropriate feeding with infant milk formula run into the millions, yet the companies involved continue their irresponsible marketing), the level of individual guilt involved is orders of magnitude lower. This section attempts simply to show how the very extremity of the crimes of the Holocaust revealed the psychological mechanisms of the adminstrative criminal which continue to contribute to lesser crimes. Corporate crime itself had a role in the Holocaust: commercial companies manufactured extermination equipment and poison gas and used concentration camp slave labour.

Gretton has identified six crucial mechanisms by which otherwise 'moral' people come

Corporate crime itself had a role in the Holocaust: commercial companies manufactured extermination equipment and poison gas and used concentration camp slave labour.

to collaborate:

• **incrementalism**
The hundreds of steps, often accompanied by increasing responsibility and reward, by which people gradually become accustomed to participation.

• **normalisation**
The existence of a culture in which the crimes are considered not only normal but necessary, and where continued exposure makes people accustomed to them. Gretton discusses how young doctors became 'normalised' to selecting victims for the gas chambers at Auschwitz, 'In the beginning it was almost impossible. Afterward it became almost routine.' Doctors became 'insiders', doing the work but drowning their basic objections in group drinking and ritualised outbursts of disgust.

• **linguistic dehumanisation**
Changing the way people are referred to from sentient beings to objects or abstract concepts: this can be found almost anywhere one looks, from the SS descriptions of trainloads of doomed Jews as 'cargo', to the infamous US military description of civilian war dead as 'collateral damage' to the slave owner calling his slaves 'hands' to the corporate euphemism of 'downsizing'.

• **avoidance of physical violence**
Perhaps more a side-effect of than a precondition for collaboration, this trait was observed in Nazis including Adolf Eichmann and Franz Stangl when they came to trial. The men displayed disproportionate reactions to allegations that they had themselves beaten or shot at prisoners, suggesting that they fetishised the evil of physical violence to reduce their own guilt over their much larger crimes of administrative killing.

• **distancing**
Not just physical distancing but mental distancing, this phenomenon is often linked with the linguistic dehumanisation described above - the people affected by the act are never seen as individuals but as a mass - 'the Jews', 'the natives', 'the enemy'. In the corporate context, one can find a version of this mechanism in the concentration on speculative long-term or large-scale outcomes - 'Nigeria will benefit from oil development [so it doesn't matter if a few people die]', 'agriculture must become more efficient [even if this means forcing half the farmers off their land and into poverty]' - by looking far into a bright distance the decision maker avoids seeing what is crushed under their feet.

• **compartmentalisation of the mind**
Perhaps the most crucial mechanism: this is a well-documented phenomenon in which people put parts of their lives in different categories. Powerful people often display a capacity to exercise affectionate and moral qualities at home, but somewhere on the journey to work human and ethical values are put away into a safe box to allow them to act according to the requirements of the job. The oil company executive who has just authorised the forced 'development' of a chunk of Nigeria, who then goes home and plays with his grandchildren believes his conscience is clear because he has closed off the connection between the different parts of his world. Thus Gretton has found a doctor working at Auschwitz in 1942 who wrote journal entries recording the weather and the excellence of the food in between brief notes on mass executions and the extraction of human tissue from living bodies for experiments. A slightly different aspect of compartmentalisation can be seen in the phenomenon of the person who is 'only doing my job': even when that job is assembling detonators for cluster bombs, they manage not to see themselves as contributing to killing.

For corporate decision-makers, there is also a simple practical mechanism at work - they are extremely unlikely to be held personally responsible for the consequences of their company's acts. There is less motivation to consider the consequences of one's acts if you know no-one will ever punish you for them.

Gretton's project explores a concept developed during the 1961 trial of Adolf

Eichmann, architect of the Holocaust – the concept of the *Schreibtischtäter*, which Gretton translates as 'desk-murderer' – a person who does not kill themselves, but who, from behind the scenes, in a quiet office, organises or orders actions which result in killing. There is some sign of a formal adoption of this view of the perpetrator in the statutes of the International Criminal Court which specifically include ordering or facilitating crimes. The fact that this concept of holding distant decision-makers responsible for the consequences of their actions has not significantly spread into national law perhaps reveals another basic problem of human psychology, or ethics – we find it very difficult to assign responsibility for serious crimes spread across a large group of people or a variety of bodies. For example, hundreds of people will be involved in the decisions which lead to the building of an oil pipeline. When the poorly-trained armed police hired to guard the pipeline route start shooting the evicted locals when they protest, hundreds of people, some of them thousands of miles away, share the responsibility. The way the law has traditionally operated offers little means to bring them to justice – who of the hundreds can be held responsible? Are they all guilty of murder or manslaughter and liable to face the full penalties? Or should a share of responsibility only merit a share of punishment? We haven't answered these questions yet – they're scarcely being asked. This is partly the flip-side of our legal system's and our culture's fetishisation of physical violence, as discussed above: the psychological mechanisms permitting and condoning corporate crime operate not only in corporate decision-makers but in all of us.

I am the clerk, the technician, the mechanic, the driver.
They said, Do this, do that, don't look left or right,
don't read the text. Don't look at the whole machine. You
are only responsible for this one bolt. For this one rubber-stamp.
This is your only concern. Don't bother with what is above you.
Don't try to think for us. Go on, drive. Keep going. On, on.

Answer them, said he to himself, said the little man,
the man with a head of his own. Who is in charge? Who knows
where this train is going?
Where is their head? I too have a head.
Why do I see the whole engine,
Why do I see the precipice—
is there a driver on this train?
The clerk driver technician mechanic looked up.
He stepped back and saw — what a monster.
Can't believe it. Rubbed his eyes and — yes,
it's there all right. I'm all right. I do see
the monster. I'm part of the system.
I signed this form. Only now I am reading the rest of it.

from 'I am your spy' by Mordechai Vanunu, the technician who blew the whistle on Israel's secret nuclear weapons programme in 1986. Vanunu has spent the seventeen years since then in prison, mostly in solitary confinement.
http://www.vanunu.freeserve.co.uk

The misdeeds of small companies are generally the misdeeds of the people who run them, not a rottenness within the structure itself.

PART 3 - POSSIBLE CHANGES

Small and large companies

As suggested in the introduction, part of the problems we currently experience with corporations seem to stem from the fact that large corporations are essentially governed by the same rules as small ones. This suggests that one of the issues to address is *which* corporations need to be subject to changes. Some issues need to be changed for all corporations: criminal liability and eligibility for human rights obviously fall into this category. Others are much more of a problem in relation to large corporations than small - for example, limited liability is exploited by large corporations, particularly via group structures, but for small companies it is often a means of saving individuals from bankruptcy when companies fold due to cash-flow problems.

Similarly, corporate power over government and internationally is the result of large companies capable of funding lobbying operations; it is large companies that fund the PR efforts which came up with the ideology of Corporate Social Responsibility. Smaller companies benefit to a certain extent off the back of these efforts, but also suffer from them as large corporations take over markets and redefine them to suit themselves, as has happened with the death of small shops as supermarkets take over. Small companies (alone) are relatively easy for governments to pass regulation on - they could probably muster no more lobbying power than, say, the consumer rights movement at present.

This is not to say that small companies are an unalloyed good thing - they are more likely to try to pay less than the minimum wage, for example - but the misdeeds of small companies are generally the misdeeds of the people who run them, not a rottenness within the structure itself.

The common working definition of a small business as having less than 20 employees seems reasonable. But just how big is a 'large' company? Multinationals (companies with operations in more than one country) would almost always fall into this category, but so would some other corporations operating in a single country - some of the privatised rail and utility companies in the UK, for example. And what is 'medium-sized'? This briefing doesn't aim to answer these questions, merely to suggest that they need to be considered in future changes to company law.

National and international action

Since corporations are transnational, action to restructure them must also ultimately be transnational too. This briefing discusses mainly the changes necessary to UK law, but many of these would be impossible without similar changes at European and international level. Issues of the problems of national versus international changes are being actively discussed by other organisations, although not on the areas outlined here (see 'Contacts').

One point to note is that while corporate law differs in some respects in different countries - in France, corporate charters only last 99 years; in the US corporations' claim to human rights has never been enshrined in statute but operates based on a dubious nineteenth-century precedent; in Germany large corporations have to have Workers' Councils which have some influence on decision-making - the essence of the profit-maximising corporate form is much the same across the developed world and is likely to require similar remedies.

Might it be possible for corporations to become a positive part of human society – a democratically controlled economic instrument - rather than a mere brutish parasite relentlessly protecting its own independence?

Reforming corporate decision-making

At present, a corporation is basically a legal machine for making money for shareholders. As such, it is clear that of the changes that might be made to corporate structures, the one which will really affect how a company works on a day-to-day, business-as-usual level, is an end to the sole duty to maximise profits. It is becoming apparent even to some corporate law academics that the current situation is ultimately damaging and that corporations must begin actively and formally to take account of the interests not only of their workers, but also their customers, suppliers and people living near their operations (in the UK and overseas) as well as the environment. Ideologically, the gist of this argument is that power over corporations' actions should be shared between everyone who is affected by those actions. Precisely how these interests would be balanced would depend on the industry concerned. This does not just mean representation at board level - all levels of the hierarchy need to be involved in decision-making, and there will need to be resources dedicated to ensuring that, for example, environmental impact is assessed independently and people living near the company's operations are not just consulted but able to access information and follow decision-making procedures.

Companies' main objections to this scenario focus on the argument that balancing so many often conflicting interests will lead to 'inefficiency'. To which one can only reply (a) what's efficient? and (b) individuals and other actors in society such as local government have to consider everyone else's interests all the time, so why should companies be different? At present, those private-sector non-subsidised organisations which do attempt to consider wider interests, such as workers' co-ops and the fairtrade movement, are at a disadvantage because their products must compete against those of the profit-maximisers.

A variation on the 'inefficiency' argument is the 'specific competence' argument - business should stick to business and not get involved in social issues. This exemplifies the corporate ideological position that the economy - and thus corporations - are somehow separate from society, even though everything they do impacts on society one way or another. The production and distribution of goods and services is a social issue. How companies undertake the production and distribution of goods and services is a social issue, and where companies have a share in creating social problems they should be expected to take a share in dealing with them.

The other main argument against changes to the law obliging corporations to act in the best interests of shareholders is little more than a sophistry, but worth noting to observe the bankruptcy of corporate thinking. It's the shareholders who put the money into the company, the argument runs, so they have a right to have it run in their interests. To which one might reply, it's the workers who put the labour into the company, so they have a right to run it in ***their*** interests...

In any case, this could only be true if shareholders have put money into the company. Shareholders only put money into a company by buying newly-issued shares. Most established public limited companies very rarely offer new shares, and share buyers are generally buying shares which were issued many years ago, have long since paid out many times their value in dividends, and have changed hands dozens or hundreds of times since the investor who actually put money into the company. Such shareholders are not investors in any real sense but merely speculators in the company's shares, who contribute nothing to the company and in return expect indefinite payouts and the total orientation of company operations to their benefit. US writer Marjorie Kelly, in ***The Divine Right of Capital,*** has shown that on Wall Street in 1999, new stocks represented about 7% of the increase in value - if one deducts company share buyback from this, it emerges that far from being a source of investment, the value of new share issues less buyback was negative - Wall Street actually cost companies money[39]. Shareholders are parasites. Yet company law as currently operated, in the US as in the UK, allows these parasites, as Kelly puts it,

[39]Marjorie Kelly, *The Divine Right of Capital* pp. 33-34

'essentially to install a pipeline and dictate that the corporation's sole purpose is to funnel wealth into it'[40].

Changing the interests in which the company operates obviously entails changing governing structures - how should the various stakeholder interests be represented? How should directors and managers be appointed? Who should they be and who should they be responsible to? This briefing is not about to answer these questions – it merely suggests that they should be asked.

What seems crucial is that the very act of incorporating other interests than that of shareholders profits could cause the vacuum at the centre of corporate power to implode and throw into question the very purpose of the corporation's existence. Stripped of the single-minded imperative of shareholder primacy, how long would the company remain a machine for making money? With wider interests in control, and abandoning the god of economic growth, might it be possible to collectively re-imagine the corporation and see it as having wider purposes: the provision of meaningful livelihoods (as distinct from mere jobs); the protection and regeneration of natural and social environments; where international trade takes place, could companies become an agent for communication between cultures? In such circumstances, how long would profit and dividends themselves survive? Might it be possible, in short, for corporations to become a positive part of human society – a democratically controlled economic instrument - rather than a mere brutish parasite relentlessly protecting its own independence?

Reforming Corporate Personhood

Unlike profit maximisation and shareholder primacy, corporate personhood is accepted almost without question by corporate law experts and government. Apart from some token questioning of whether corporations are entitled to the rights enshrined in the Human Rights Act, the principle that companies have the same legal standing as humans has not been in doubt since the nineteenth century. However, this principle is one of the major obstacles to bringing corporations under democratic control. As long as corporations can claim the same rights as people, plus all the privileges that the corporate form brings, and can afford to pay lawyers to exploit them to the full, it will be extremely difficult to reform the law itself.

The language that must be used in relation to corporate personhood - removal of

"I think we're lost. Try going in circles."

[40] Kelly p. 2

rights, restriction of access to legal remedy, downgrading of status - has unfortunate overtones and would be authoritarian and unacceptable if used in relation to any group of human beings. But corporations are not human. Their claim to human standing before the law is an historical accident. Corporations are not beings with rights, they are economic tools – legal robots created to do our bidding - with no more claim to intrinsic rights than computers or lawnmowers. While the human beings connected with corporations must see their rights maintained and indeed enhanced, the 'artificial persons' themselves have no claim to any legal status other than what their usefulness requires: indeed, it might be more appropriate to see all corporations (which are, after all, licenced by the state) as organs of the state and therefore responsible for upholding human rights rather than capable of claiming them.

The first step to change might be to remove Human Rights Act protection from corporations. The more fundamental issue, however, is creating a legal category for corporations which abolishes the fiction of 'artificial persons' and prevents artificial entities taking advantage of precedents where the original parties were human beings.

Reforming Liability

The law on corporate liability and particularly corporate manslaughter is already admitted to be in need of revision. The current government has promised a 'Corporate Killing' bill since it was first elected (but so far has failed to produce one) and, partly due to the actions of human rights and other campaign groups, the issue of liability for offences committed abroad is getting more attention. By contrast, the principle of limited liability itself has scarcely been questioned since the nineteenth century.

A number of organisations including trade unions and NGOs are already conducting research, lobbying and campaigning around the issue of corporate manslaughter or corporate killing in the UK (see 'Contacts' for details). An issue not currently under discussion is that of extending the punishments that can be used against corporations. Larger fines and sending directors or managers to prison would be useful mechanisms, but particularly where a company is a repeat criminal offender it might be worth considering whether the company should exist at all – persistent

*"Besides engaging a solicitor ...
I'd advise a generous donation to prison reform."*

Persistent criminality would suggest severe failure of the company's systems perhaps only to be cured by liquidation.

criminality would suggest severe failure of the company's systems perhaps only to be cured by liquidation.

Liability must also be effectively extended to hold parent companies responsible for the actions of their subsidiaries. This is likely to be included if and when the law on corporate killing changes, but this will not affect other offences, nor civil law, nor, probably, offences committed abroad. Evasion of risk by the parent company inherently means transference of risk to someone else: creditors, workers, neighbours or society generally. Also, the current situation leads to a cost/risk/benefit approach to breaking the law: if breaking the law is easy, the responsibility can be transferred elsewhere, and if it makes money, the company has an incentive to do it, regardless of the consequences for everyone else. The simplest way to stop such risk transference would be to treat corporate groups as single entities (as happens in tax law). Where a subsidiary is jointly owned with another company, both parents would be liable. This would also require more intensive auditing to tackle the issue of offshore subsidiaries in countries which do not require registration of parent companies. An even more radical solution would be to prevent companies owning or directing other companies, or owning shares in other companies at all.

Since the aim of reforming liability law is partly to make those who benefit from crime and exploitation pay for it, it makes sense to also look at extending financial liability to individual shareholders. This would obviously discourage investment in risky or hazardous activities and would ensure that those who benefit financially from company success also pay for failure. Obviously shareholders would need to be pursued for company debt proportionally to the number of shares they hold. Changes to debt and bankruptcy laws may be necessary to avoid driving individuals to destitution for company debts, but the net effect of discouraging speculation would have a stabilising effect on the economy generally. Of course, in conjunction with the changes suggested in 'Reforming corporate decision-making', above, shareholders themselves could eventually become irrelevant.

Rotten companies in rotten industries

One of the fundamental problems which CSR gurus refuse to confront is the question of what to do about companies in industries whose products are inherently destructive: companies which can never be 'socially responsible' because to be socially responsible would mean ceasing to exist. The obvious examples are the arms and tobacco industries, while a similar point can be made about fossil fuel industries and others whose products are useful but which have massively detrimental social and environmental side-effects. In the case of the arms industry, the obvious mechanism already proposed by a few mainstream organisations such as the Oxford Research Group is to divert the current enormous overt and hidden subsidies given to arms manufacture into converting the arms industry's facilities and undoubted technological expertise towards peaceful purposes: a program similar in substance to that which converted the UK economy from 'wartime' to 'peacetime' production after the Second World War.

Whatever solution people and governments can come up with, we must first realise that these industries will never and can never act in the public good of their own accord: they must be dismantled from without. The same applies to the 'useful but ultimately destructive' industries, including oil and gas, the nuclear industry, and much of the mining and agrochemicals industries: policies of replacement of products, conversion and/or dismantlement of the corporations themselves would

seem the only way to change their fundamentals. It should also be noted that all these industries are dominated by very large companies with major engagement in lobbying and significant power over governments - they will not be easy nuts to crack.

Conclusion – a political debate

The suggestions for change offered in this briefing emerge from a political position - they are at present vague and subject to revision. The underlying position is that in order for a society to be democratic, democratic values must be embodied in its institutions, including its economic organisations. Readers are free to agree or disagree.

A step towards democracy can be taken by readers recognising that they are also free to agree or disagree with the the corporate ideology. This ideology draws its strength from pretending to be objective, pragmatic truth, which cannot be disagreed with. Corporations present themselves and the economic neo-liberal system within which they operate as the ultimate stage in human evolution and above human laws and concerns. But the briefest look at their legal and internal structures shows that they are in fact merely a legal and ideological construct, organised to advance vested interests. As such, they are as vulnerable to change as any other human-made institution. The more people recognise this, the sooner we can move on.

Glossary

bona fide – Latin term meaning 'in good faith'.

case law - law made by judges in the form of legal **precedents**, usually interpreting the detail of **statute law** or modifying earlier precedents.

corporate group – a **parent** or **holding company** and its **subsidiaries**. The group may consist of only two or three companies or a great many, including subsidiaries of subsidiaries, overseas subsidiaries, 'shell companies' and many more complex relationships. Most transnationals are in fact corporate groups.

Corporate social responsibility (CSR) - the ideology that corporations should consider impacts on society and the environment when making decisions.

dividend – money paid to shareholders (as a proportion of the value of their shares) from company profits.

holding company – another term for **parent company**, most commonly used of a company which owns a number of other companies and does little or no business on its own account.

Human Rights Act (HRA) – The 1998 UK legislation which incorporates the European Convention on Human Rights into UK law, making it possible to challenge existing UK law on human rights grounds.

incorporation – the act of becoming or creating a corporation as a separate legal entity.

joint stock company – an older term for **company.**

liability – the state of being legally responsible for an act or its consequences.

limited liability – a corporation is said to have limited liability because shareholders and directors may not be pursued for the company's debts beyond the value of their shares.

members (of a company) - shareholders.

Memorandum and Articles of Association - the documents necessary to incorporate a company in the UK, stating what the company is set up to do, who the initial directors are etc.

mens rea - Latin term meaning 'guilty mind' - to convict of murder and some other crimes, the prosecution must prove the accused had a 'mens rea'. In UK law, corporations are held not to have a mind, therefore cannot be convicted of any crime requiring mens rea.

multinational - see **transnational**.

NGO – Non-governmental orgainsation.

parent – the company which owns a **subsidiary.**

personhood – the legal fiction that a corporation is an 'artificial person' with a separate identity from the individuals involved in the corporation and with rights before the law.

precedent - in **case law**, previous cases or judgements which serve as examples or justifications in subsequent cases.

private limited company (ltd) - a company not permitted to trade its shares on the Stock Exchange.

public limited company (plc) - a company which is permitted to trade its shares on the Stock Exchange. Usually larger companies, plcs are also subject to more stringent regulations than ltds on some issues, notably financial reporting.

shareholder – a person or institution which owns shares in a company and thereby gains the rights to receive **dividends** if the company makes a profit, to appoint directors and to vote at company annual general meetings (AGMs). In practice in large companies shareholders generally leave decision-making to the board of directors and AGM voting is a ritual.

stakeholder (of a company) - anyone who might be considered to be affected by a

company's behaviour. Generally includes workers, customers, suppliers, shareholders, people living near the company's operations and sometimes other actors such as government or pressure groups.

statute law - law made by government, as set out in Acts of Parliament and other legislation. Interpreted by judges in **case law**.

subsidiary - a company which is partly or wholly owned and controlled by another company (**parent company**).

transnational - technically, any company with assets and operations in more than one country; mostly used of the largest companies which seek to dominate markets globally and have effectively transcended their country of origin.

ultra vires - Latin term meaning 'beyond the power' previously used to refer to acts of corporations which were outside the terms of their charter or **Memorandum and Articles of Association**.

veil of incorporation - the concept that a corporation is a separate entity from its owners, interpreted to mean that a **parent company** cannot be held responsible for the debts or crimes of a **subsidiary** because they are separated by the 'veil'.

Contacts

Groups working on corporate power and corporate structures:

Program on Corporations, Law and Democracy (POCLAD) - US research and activist group who have been working on corporate law and structures issues for years. Also published *Defying Corporations, Defining Democracy*(see other reading).

POCLAD, P.O. Box 246, South Yarmouth, Massachusetts 02644
email: people@poclad.org web: www.poclad.org

CORE coalition - coalition including Friends of the Earth, New Economics Foundation Amnesty International, Traidcraft and Christian Aid campaigning for legislation on corporate reporting, liability and directors'duties.
CORE Coalition, 26-28 Underwood Street, London N1 7JQ
tel: 0207 566 1665 email: brians@foe.co.uk web: www.corporate-responsibility.org

The Corner House - provides support, research and analysis for social justice and environmental campaigning. Have published briefings on coporate corruption of government, among other issues. Also publish *Campaigners' Guide to Financial Markets: Effective Lobbying of Companies and Financial Institutions*(2001).
The Corner House, Station Road, Sturminster Newton, Dorset DT10 1YJ
tel: 0845 330 7928 *(UK)* 0044 01258 473795 *(International)*
email: enquiries@thecornerhouse.org.uk web: www.thecornerhouse.org.uk

Platform - "PLATFORM has been described as many things - an arts group, a forum for political dialogue, an environmental campaign - but, in essence, it is an idea, a vision of using creativity to transform the society we live in; a belief in every individual's innate power to contribute to this process. " (from their website)
Platform, Horselydown Lane, Bermondsey, London SE1 2LN
tel: 0207 403 3738 email: webinfo@platformlondon.org web: www.platformlondon.org/

CorpWatch US - Research and campaign group (unrelated to Corporate Watch UK) working on corporate crime and corporate power.
CorpWatch 1611 Telegraph Avenue., #702 Oakland, CA 94612 USA
tel: 510-271-8080 web: www.corpwatch.org

Groups working on corporate criminal liability and corporate killing

Centre for Corporate Accountability (CCA) - Information and advice on safety, law enforcement and corporate criminal accountability issues
Fourth Floor, 197/199 City Road, London EC1V 1JN
tel: 0207 490 4494 email: info@corporateaccountability.org web: www.corporateaccountability.org

Hazards Campaign - Network of resource centres and campaigners on health and safety at work, including corporate killing, health and safety, asbestos, pesticides and other campaigns.
The Hazards Campaign, c/o Greater Manchester Hazards Centre, 23 New Mount Street, Manchester M4 4DE web: www.hazardscampaign.org.uk

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Other Reading

Unmasking the Crimes of the Powerful- Scrutinizing states and corporations eds. Steve Tombs and Dave Whyte 2003 ISBN 0-8204-5691-8

Holding Corporations Accountable – Corporate conduct, international codes and citizen action Judith Richter 2002 ISBN -85649-984-7

Defying Corporations, Defining Democracy – a book of history and strategy ed. Dean Ritz (Program on Corporations, Law and Democracy) 2001 ISBN 1-891843-10-9

*When Corporations Rule the World*David C Korten 1995 ISBN 1-887208-01-1

The Post-Corporate World – Life after capitalism David C. Korten 1998 ISBN 1-57675-051-5

The Enemy of Nature – The end of capitalism or the end of the world? Joel Kovel 2002 ISBN 1-84277-081-0

One Market Under God – Extreme capitalism, market populism and the end of economic democracy Thomas Frank 2000 ISBN 0-099-42224-7

Corporate Killing – Bhopals will happen Tara Jones 1988 ISBN 1-85343-009-9

Company law is killing the planet. The law determines that companies are machines for making money for shareholders, regardless of the consequences for everyone else. The law provides companies with protection originally intended for human beings, yet frees them from the liabilities individuals face. Single-minded and legally sheltered, corporations are able to prey on society and the planet while fostering an ideology that paints them as ethically-concerned citizens. Corporate Watch cuts through the public relations and invites readers to take on the challenge of re-inventing corporate structures.

Corporate Watch is a not-for-profit research organisation working to expose the environmental and social impacts of transnational corporations, and the structural and systemic causes behind them. Current projects include: UK food and agriculture; the public relations industry; biotechnology; corporate structures; and a newsletter and email news updates on corporate issues. Most research is available free on our website.

Corporate Watch, 16b Cherwell Street, Oxford, OX4 1BG
Tel: 01865 791391
Email: mail@corporatewatch.org
Website: www.corporatewatch.org.uk

Price where sold: £1.50