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How Should the State Interact Constitutionally with Corporations which have significant power and influence over its population? Lessons from the Impeachment of Warren Hastings, 1788-1795

By Nathan Beck-Samuels

|Preamble|

| How to maintain constitutional accountability over large corporations is an increasing theme in contemporary politics. The impeachment trial of Warren Hastings in 1788-1795 addressed this directly with the behaviour of the East India Trading Company. What lessons for today are illustrated by this historical trial? |

The question how to maintain constitutional accountability over large corporations has been an increasing theme in contemporary politics. Governments and Courts across the globe have been addressing several constitutional issues in the last decade as a result of corporate behaviour. In North America, for example, Congressional hearings and investigations into tech companies have raised questions both around the integrity of freedom of speech online, and the exploitation of digital media platforms by foreign adversaries to influence democratic elections. In Europe, legislation such as the General Data Protection Regulation (GDPR) aims to protect digital privacy rights and address exploitation of user data on digital platforms. Furthermore, in Australia, proposed legislative attempts to address bargaining imbalances between media companies and digital platforms has highlighted the dangers of market monopoly. The notion as to whether these large and powerful corporations are ‘too big to fail’ or are dangerous to the stability of democracy raises serious questions for society. However, there is an important question which underpins these actions – one which is jurisprudential in nature: how should the State interact constitutionally with corporations which have significant power and influence over its population? History can provide a guideline to this question. The question as to how States can and should interact constitutionally with powerful corporations, and how States can constitutionally hold corporations accountable, was explored and discussed in the 18th century during the Impeachment trial of Warren Hastings – Governor-

General of Bengal – between 1788-1795. The nature of the trial stretched far beyond that of debating the actions of one colonial administrator, however, but that of the role and behaviour of the East India Trading Company (EITC) – one of the most successful, and powerful, corporations of the British Empire. Albeit in a colonial context, the EITC was accused of abusing power, disregarding human rights and dominating trade markets in India. What lessons can therefore be drawn from the 1788-1795 impeachment trial as to how governments, and courts, can and should interact constitutionally with large corporations in contemporary politics? What similar themes are addressed in both the historical and contemporary scenarios, and what aspects have changed over time? By analysing the impeachment trial as an historical case study, and comparing this with recent constitutional challenges, further insight can be achieved, and discussion encouraged, into the constitutional relationship between the State and corporations.

The first day of the Impeachment trial in Westminster Hall, London, on 13th February, 1788, demonstrated the extraordinary nature of the trial. The grounds around Parliament were bustling with spectators queuing to collect tickets to witness the trial. Amongst the 170 members of the House of Lords were 200 members of the House of Commons and several barristers, lawyers, and legal clerks. Even Queen Charlotte of Mecklenburg-Strelitz was in attendance.¹ The importance of the trial was not focused on the acts and misdeeds of Warren Hastings himself, however, but that of the company he represented – the East India Trading Company. Founded in 1600, the EITC was one of the first share-holder companies to arise from the Elizabethan era.² Conducting trade between Britain and India, the company had grown in size, scale and power across India by the end of the eighteenth century to become a dominant military, economic and governing power on the continent.³ As a result, the behaviour of one of the Empire's largest companies was now under intense legal scrutiny. Members of the prosecution at the trial included that of Charles James Fox (a radical arch-rival to William Pitt the Younger); the playwright Richard Brinsley Sheridan; and Edmund Burke – a prominent

¹ Dalrymple, *The Anarchy*, pp. 307-308

² Keay, *The Honourable Company*, p. 9

³ Stern, *The Company State*, pp. 3-6

Whig and political theorist known for his opposition towards taxation in the American colonies (and later the French Revolution).⁴39 The prosecution was influenced and encouraged by Sir Philip Francis – an Irish-born politician who previously served on the Supreme Council of Bengal at the time of Hastings’ position as Governor-General. Francis took an instant dislike towards Hastings – accusing the Governor-General of extortion and corruption for his own financial gain. Francis’ grudge grew further following an unsuccessful duel, in which he was wounded, against Hastings in 1780.⁵ Cooperating with Burke, both he and Francis coordinated a five-year campaign in Parliament to investigate the behaviour of Hastings and the EITC in India and bring charges. With Burke’s dramatic four-day opening oratory he laid out the accusations against Hastings before the anticipating crowd in Westminster Hall: “We have brought before you the head, the chief, the captain-general of iniquity...”, said Burke in his opening speech, “...one in whom all the frauds, all the peculations, all the violence, all the tyranny in India are embodied, disciplined and arrayed.”⁶ Burke went on to accuse Hastings on twenty-two charges of indictment for high crimes and misdemeanours. These included acts of speculation, bribery, coercion in the province of Oude, and extortion against local princes such as the Nawab of Lucknow, Asaf ud-Daula and the Begums of Avadh to fund military campaigns against the Tipu.⁷89

The impeachment trial against Hastings was not only as a result of his personal actions, however, but a last attempt by Parliament to address decades of EITC behaviour in India. The first attempt was in 1773 with the ratification of the East India Trading Company Act.¹⁰ In response to reports of embezzlement and bribery, in addition to the company’s financial ruin caused by widespread famine across the Indian continent, the Act sought to limit financial freedom through government oversight, prevent bribery and corruption with local leaders, establish British law in India, and restructure the management of the company (inaugurating Hastings as the Governor-General).¹¹ This proved to be a short-term solution, however. Abuses of power, corruption with local

⁴ Burke, *On American Taxation*, p.5

⁵ Dalrymple, *The Anarchy*, pp. 249-250

⁶ Burke, *The Writings and Speeches of Edmund Burke*, Vol. 6, pp. 275-276

⁷ Marshall, *The Impeachment of Warren Hastings*, pp. xiv-xv

⁸ Dalrymple, *The Anarchy*, p. 312

⁹ Burke, *The Works of the Right Honourable Edmund Burke*, p. 424

¹⁰ 13 Geo. III c. 63

¹¹ Bowen, *British India*, pp. 539-541

princes and the unsuccessful (and expensive) Second Mysore War between 1780-1784, forced Parliament to introduce a second Act in 1784.¹² The Act of 1784 (known also as Pitt's India Act) introduced direct administrative changes to the management of the company – establishing a 6-man privy council, a joint-governed board of State and corporate members and a President of Board which acted as Secretary of State (ultimately removing Hastings from his position as Governor-General).¹³¹⁴ However, from the viewpoint of the prosecution, Hastings, because of his position, was ultimately culpable for the prolonged mercantile misdeeds of the company. The impeachment trial was therefore a platform for debate and scrutiny of the company's behaviour in India. "I impeach [therefore] Warren Hastings, Esquire, of High Crimes and Misdemeanours...", concluded Burke on a dramatic fourth day of his opening speech at the trial, "...I impeach him in the name of the Commons of Great Britain in Parliament assembled, whose Parliamentary trust he has betrayed...[and] whose national character he has dishonoured." The list of impeachable offenses stretched far beyond Britain, however: "I impeach him in the name of the people of India, whose laws, rights and liberties he has subverted, whose properties he has destroyed, and whose Country he has laid waste and desolate." Hasting's activities were, according to Burke, much more severe: "I impeach him in the name and by virtue of those eternal laws of justice...he has violated. I impeach him in the name of human nature itself, which he has cruelly outraged, injured and oppressed, in both sexes, in every age, rank, situation and condition of life."¹⁵ In other words, Hastings and the company had robbed India. Not just for its resources and wealth to acquire financial gain and territorial expansion, but of the dignity and human rights of Indians and their communities.

Despite the pomp and circumstance of the trial, and vicious accusations led by the prosecution, Hastings was acquitted of all charges on 23rd April, 1795. Nevertheless, the trial provided a jurisprudential debate about how the State can, and should, interact constitutionally with corporations. More specifically, the prosecution facilitated a discussion as to how Parliament can hold

¹² 24 Geo. III Sess. 2 c. 25

¹³ Ray, *Indian Society and the Establishment of British Supremacy*, pp. 520-521

¹⁴ Bowen, *British India*, pp. 544-545

¹⁵ Burke, *The Writings and Speeches of Edmund Burke*, Vol. 6, p. 459

corporations, which practice unchecked and conducting malignant behaviour, accountable. Perhaps one of the most important jurisprudential aspects of the trial was the accusation that the EITC had violated and ignored the human rights of Indians which were, as argued by the Prosecution, universal in nature. As stated by Burke during his opening speech, “the laws of morality are the same everywhere, and there is no action which would pass for an act of extortion, of peculation, of bribery, of oppression in England which would not be an act...in Europe, Asia, Africa and the world over.”¹⁶ Burke was accusing the EITC of violating the natural rights of Indians through its activities of commerce and trade – something which he argued should not be tolerated under any jurisdiction. Such natural right violations that Burke was referring to included that of the use of torture (taking away one’s right to life), coercion (that of limiting one’s liberty) and tax collectors ransacking villages and communities (impeding one’s right to property). Indeed, Burke went further to say that the company was “more like an army going to pillage the people under the pretence of commerce than anything else.”¹⁷ Although the prosecution used the violation of natural rights by the EITC as an argument for impeaching Hastings, they were referring to an important constitutional aspect of the role of the State and its use of the rule of law – that of a duty to protect natural rights. The theory that the State has a responsibility to protect natural rights refers to the ideas of the Social Contract Theory – a philosophy developed during the Age of Enlightenment – that envisaged the State must protect the natural rights of people in return for the surrender of a part of their liberty to the State.¹⁸ The concept had gained traction following the 1770s; the US Declaration of Independence in 1776, and later the US Constitution in 1789, both stress the importance of this doctrine.¹⁹ Furthermore, the Declaration of the Rights of Man and of the Citizen in France, in 1789, had further promoted State protection of natural rights albeit at a constitutional level.²⁰ By bringing the EITC accountable through legal scrutiny before Parliament, the British State was performing its duty of protecting the natural rights of the people of India (and therefore acting in line with the social contract theory) against the

¹⁶ Burke, *The Writings and Speeches of Edmund Burke*, Vol. 5, pp. 401-402

¹⁷ As quoted in Dalrymple, *The Anarchy*, p. 310

¹⁸ Alcock, *A Short History of Europe*, pp. 164-165

¹⁹ Gosewinkel, *The Constitutional State*, pp. 950-951

²⁰ Hunt, *The Declaration of the Rights of Man and of the Citizen*, pp. 77-84

behaviour of the EITC. It must be noted, however, that although the people of India were not subjects of the British Empire at this time (as India was not under formal British rule until 1858), the EITC was ultimately answerable to the British parliament – therefore the argument of the prosecution still stands. The prosecution therefore highlights an important lesson from the impeachment trial of Warren Hastings; that the State will interact constitutionally with powerful corporations to protect the natural rights of citizens through legal scrutiny and upholding the rule of law.

Another jurisprudential aspect of the impeachment trial of Warren Hastings which demonstrated how the State interacted constitutionally with the EITC was that of the notion around the nature of Sovereignty and legitimate governance. The prosecution argued that the EITC was not a legitimate body to govern India as it did not have the necessary checks and balances which make a national government a legitimate governing body. Burke's dramatic opening speech again portrays this: "The Company in India does not exist as a nation...the consequence of which is that there are no people to control, to watch, to balance against the power of office." Furthermore, "[Hastings] has used oppression and tyranny in place of legal government."²¹ Burke was suggesting therefore that, as the people of India had no influence nor power to change the management of the company, they could not apply a checks and balance system to remove the company if it conducted tyrannical behaviour. The company, therefore, had not the legitimacy from the people of India to govern Bengal. As a result, the company had no sovereignty over the region. Whilst this argument may refer to the works of Rousseau and his ideas that sovereignty can only be held in the people, this becomes particularly apparent when considering both the East India Trading Company Acts passed by Parliament in 1773 and 1784, respectively. Both Acts established greater parliamentary scrutiny and control over the financial freedom and administrative management of the company through joint governance (the equivalent of a modern-day public-private partnership). In doing so, Parliament (i.e. the State) had installed a checks and balance system against the company through the legitimacy of the British people (and therefore

²¹ As quoted in Dalrymple, *The Anarchy*, p. 309

reaffirming the authority and legitimacy of British sovereignty over the company). Whilst this may represent colonial ambitions of the West at the time (by that of gradually legitimising British rule over India), it does provide an example of how the State interacts constitutionally with corporations which have conducted malevolent behaviour and has significant influence over a population – that of partly or completely nationalising companies so to provide a checks and balance system, and greater scrutiny, against the behaviour of the company.

When comparing the historical case of the impeachment trial of Warren Hastings with the modern-day, there are a number of stark differences which need to be mentioned. The first is that companies in the twenty-first century do not feature their own standing armies. The second is that, thanks to the development of Sovereignty and the rule of law through international organisations, formal colonialism no longer takes place in the twenty-first century. A third difference is that, as a result of deindustrialisation, the nature of how the majority of companies operate and conduct their services in developed countries has transferred from tangible to intangible economies. However, the European idea of the corporation has endured and outlived imperialism; the twenty-first century has an abundance of multinational corporations – some of which have a market capitalization larger than that of nation-States – that conduct their operations in multiple countries across the globe. What are the similarities, therefore, as to how States interact constitutionally with powerful corporations today, and has it changed since the impeachment trial of Warren Hastings?

The first jurisprudential lesson of the impeachment trial of Warren Hastings – that of the State interacting through the rule of law to protect natural rights – can be found in politics and international law today. The nature of these rights, and where these rights are situated, has shifted, however, from the tangible sphere in the case of the EITC to an intangible sphere on digital platforms (for example, the rights of life, liberty and property have been transferred into privacy, behavioural modification and consumer data in the intangible sphere). Nevertheless, the way in which the State has interacted constitutionally with corporations to uphold these rights has not changed since

the 18th century. A prominent example of where this has become apparent is the General Data Protection Regulation (GDPR) implemented by the European Union (EU) in 2018. The regulation attempts to address the harvesting and exploitation of consumer data by increasing the powers of the consumer to approve, prohibit and access their data on digital platforms – such as consumer consent to approve personal data use, protections against algorithms and a right to the erasure of data.²² Article 1 of the policy bluntly represents the regulation’s aim: “This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.”²³ Although the EU is a supranational governing body made up of multiple sovereign States, it nevertheless demonstrates that the State (or in this case States) will interact constitutionally with corporations by protecting the natural rights of citizens – regardless of the nature of the sphere in which those rights are situated. Other examples where this is the case include that of the 2000 Personal Information Protection and Electronic Documents Act (PIPEDA) in Canada, the 2018 Data Protection Act (DPA) in the UK (which enshrined GDPR into British law) and the 2018 California Consumer Privacy Act (CCPA) in California, United States, amongst others across the globe. How the State interacts constitutionally with corporations in this aspect has therefore not changed since the impeachment of Warren Hastings.

The lesson that the State will interact constitutionally to assert State sovereignty to provide a series of checks and balances against corporations which embody governing behaviour – as demonstrated by the impeachment trial – is an area which has changed, or become more complex, since the 18th century. As a result of privatisation policies in the 1980s and 1990s, the decreased responsibility of the State has changed its approach to addressing corporate behaviour which has significant influence (and therefore governance) over its population. Whereas partial or complete nationalisation was an approach used by the British State in the 18th century to regulate the EITC, nationalisation is now predominantly used as a means of providing

²² Zuboff, *The Age of Surveillance Capitalism*, p. 481

²³ OJ L-119, p. 32

economic sustainability to corporations which provide essential services.²⁴ This has shifted to applying checks and balances through the authority of legislation only. Such an example is the GDPR introduced by the European Union as previously mentioned. However, the intensification of globalisation has made the approach of checks and balances through legislation more complex and difficult for States to address corporate governance. The jurisdictional legitimacy to change the behaviour of misbehaving corporations which originate from another State has made the debate political, and diplomatically complicated. An example where this is apparent is the current debate surrounding the proposed Treasury Laws Amendment Act in Australia. Intended to address bargaining imbalances between Australian media companies and digital platforms (such as Facebook and Google), the proposed bill (if ratified) will allow Australian media companies to bargain with digital platforms to pay for its media content by law.²⁵ From a jurisprudential point of view, the proposal is a demonstration of the State attempting to provide a checks and balance system, through legislation, to control the behaviour of an organisation which is outside State control. However, in this case, the State cannot directly influence, change or regulate the management of the company and therefore prevent its behaviour from repeating or occurring in other States. Jurisdiction ultimately lies with the State that the company originates from. The complexity of globalisation and jurisdictional legitimacy of the State to bring corporate behaviour to account suggests that two changes have occurred since the 18th century. The first change is that the responsibility of the State to apply checks and balances on corporations which behave in a malignant manner has, to some degree, increased since the 18th century. The second is that large corporations, which have significant governing influence over population, market, or workings of a State, will be subject to greater scrutiny from the jurisdictional Parliament to which the company is ultimately accountable.

The impeachment trial of Warren Hastings between 1788-1795 facilitated a jurisprudential debate as to how the State can, and should, interact

²⁴ An example of this is the partial nationalisation of the Royal Bank of Scotland by UK Government Investments in 2008.

²⁵ Parliament of Australia, *Treasury Laws Amendment Bill 2020*, pp. 1-29

constitutionally with corporations which harvest significant influence over a population. By scrutinising the behaviour of the East India Trading Company and its actions in India, the prosecution of the impeachment trial found two lessons as to how the State should interact constitutionally – that of upholding the rule of law to protect the natural rights of citizens, and the need to apply checks and balances by asserting State sovereignty through co-management of corporations. Such lessons are evident in the twenty-first century: States across the globe are introducing legislation aimed at protecting the natural rights of citizens against digital corporations. The intensification of globalisation, however, has changed the complexity of providing checks on corporate behaviour and raises questions around the jurisdictional legitimacy of States to hold global corporations accountable.

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