

# Everything old is new again – a resurgence of the company-state?<sup>1</sup>

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## A tale of treachery and tarpaulins

Obviously at least, it was a truly astonishing military victory – an estimated 3,000 soldiers equipped with ten field guns and a handful of howitzers defeating an estimated 50,000 strong army comprising of, among other things, 16,000 cavalries. Yet, the Battle of Plassey was not what it seemed. A significant majority of the 50,000 strong Bengali army of Siraj-ud-Daulah, the last independent Nawab<sup>2</sup> of Bengal, had secretly defected to the enemy before hostilities had commenced. In a deft display of political chicanery, Robert Clive, a controversial rogue from the West Midlands, masterminded an elaborate conspiracy securing the loyalty of Mir Jafar, the commander-in-chief of Siraj-ud-Daulah's army – promising to make him Nawab of Bengal. With a vast majority of Siraj-ud-Daulah's now suborned, the outcome of the Battle of Plassey was all but assured. The final blow to Siraj-ud-Daulah's chances of victory came during the battle itself, with heavy rain drenching his artillery and rendering it inoperable. Clive's modest arsenal of weaponry, however, was sheltered by tarpaulins.

Perhaps even more astonishing was that the 3,000-strong army which defeated Siraj-ud-Daulah was largely comprised of soldiers not belonging to a nation-state, but instead employees of a private joint-stock company. Approximately two-thirds of Clive's army that fought at the Battle of Plassey were mercenary 'sepoys,' an expression of Persian origin given to professional Indian infantrymen. Indeed, for Clive, the conspiracy was good company policy. As Clive testified before the House of Commons in 1773, defending his actions in personally deceiving a key intermediary (Omichund) in the conspiracy:

*The event took place, and success attended it; and the House, I am fully persuaded, will agree with me, that, when the very*



*existence of the Company was at stake, and the lives of these people so precariously situated, and so certain of being destroyed, it was a matter of true policy and of justice to deceive so great a villain.*

The Battle of Plassey is regarded by many historians as having laid the foundation for the consolidation of British rule in India, which continued for another two centuries. More correctly, the Battle consolidated the East India Company's already significant stronghold over parts of the sub-continent, controlling Calcutta, Madras and Bombay.

## Not so humble origins

The East India Company came into existence on New Year's Eve 1600 following the signing of a royal charter by Queen Elizabeth I. The 'Charter to form the Governor and Company of Merchants of London, Trading into the East-Indies'<sup>3</sup> was an instrument of incorporation granted by the Crown, conferring independent legal personality and setting out its objectives, constitution and powers to govern its own affairs. Significantly, the Charter permitted the East India Company to conduct itself as a joint-stock entity with limited liability, a concept which, at the time, was alien to both English statute and common law. This innovation in structure distinguished the East India Company from its Portuguese and Dutch counterparts, both of which were

largely government-owned and controlled. Although the British government initially neither held shares nor directed the Company's activities, it nonetheless exerted substantial indirect influence over its fortunes. In addition to using military and foreign policies to create a conducive global trading environment, the British government indirectly influenced the Company through its regularly exercised prerogative to evaluate and renew the Charter.

The Company was controlled by a governor and a board of twenty-four directors sitting in East India House in Leadenhall Street, London. Operational activity was conducted by professional managers who managed employees organised into a hierarchical structure. It was an incredibly efficient operation. During its first 20 years, the Company operated from the home of its governor, Sir Thomas Smythe, with a permanent staff of only six. In 1700, it operated with 35 permanent employees from its London office and, in 1785, while controlling a vast empire of millions of people, its permanent staff in London increased to just under 160. Initially, the Company raised separate joint-stock for each voyage – beginning with the first voyage in around 1603, with stockholders subscribing to stocks on a voyage-by-voyage basis. Profits made from each voyage were shared by the stockholders after the completion of each voyage according to the value of their stocks. After 1773, the shares of the Company began to be traded on the London Stock Exchange.

## Outsourced imperialism

The East India Company was a product of its time – a 'mercantilist' era in which the prevailing zeitgeist considered trade monopolies as the most effective means for building the wealth and power of the state. As mentioned above, however, unlike its Continental European counterparts, the Company was, at least initially, a private stock company not directly controlled by the state – although, there existed a

symbiotic relationship between the two throughout the Company's existence. This mutuality was a spectacular success. By 1820, England's market share of Asian trade was about two-thirds of the total market compared to a quarter in 1650, thanks in large part to the activity of the Company. Further, by 1800, it is estimated that Company *ruled* (yes, ruled) one-fifth of the world using a larger military force than that of England.<sup>4</sup> It established forts and trading posts, organised and commanded land and naval forces, minted currency, collected taxes, and administered justice – all through a trade in spices, textiles, and, eventually, opium.<sup>5</sup> Indeed, so pervasive and extensive were the Company's activities that scholars have described the East India Company as a 'company-state' which was 'possessed of political institutions and underscored by coherent principles about the nature of obligations of subjects and rulers, good government, political economy, jurisdiction, authority, and sovereignty.'<sup>6</sup> Such assessments are consistent with contemporaneous accounts. As an example, philosopher and parliamentarian Edmund Burke described the Company in 1788 as 'a state in the disguise of a merchant.'<sup>7</sup>

#### A law unto itself

Following the victory at Plassey, Clive was appointed Governor of Bengal. In 1764, he was successful yet again in the Battle of Buxar and subsequently entered a treaty, on behalf of the Company, with the Mughal Emperor Shah Alam II. The 'Treaty of Allahabad' as it came to be known granted to the East India Company, among other things, 'Diwani rights' – that is, the right to collect taxes directly from the people of the eastern province of Bengal-Bihar-Orissa, leading to a doubling in the Company's share price overnight. The Company's reach even extended to the establishment of its own Courts and own law. The Company's status as sovereign was fortified in 1791, when the Nawab of the Carnatic sued the Company in the Court of Chancery seeking an accounting of rents and profits, which possessed part of his territory in south-eastern India as security for a loan. The Court ultimately dismissed the Nawab's claim on the basis that, as the Company argued, the matter involved a treaty between two powers – the Nawab and the Company – acting as independent sovereigns. Accordingly, the English Courts lacked jurisdiction, as '[t]he power, which the Company exercises upon these occasions, is in fact that of a state.'<sup>8</sup>

#### Alternate sovereigns and algorithmic governance

The Company's status as sovereign was not only legal but political. Its dominance of space and time in its areas of influence finds parallels in today's virtual worlds. Technology titans such as Google, Meta and Twitter create their own virtual spaces and impose their own private governance mechanisms. Evans observes that 'multi-sided platforms,' such as exchanges, search engines, social networks and software platforms, develop governance systems to modify behaviour and minimise negative externalities.<sup>9</sup> These platforms enforce rules by exercising their property rights to exclude users from the platform. In some cases, the rules and penalties imposed by the platform are similar to, and, in some cases, close substitutes for rules and penalties adopted by a public regulator.<sup>10</sup> Such private regulatory regimes often serve to create a certain community and to establish norms of acceptable conduct. Meta, for example, has a code of conduct that specifies what behaviour is prohibited on its sites. Such governance systems provide for penalties and punishment for misbehaviour, including banishment from the site,<sup>11</sup> with obvious similarities to the physical realm.

Srivastava, an assistant professor of political science at Purdue University, posits that technology titans amass global power through classification algorithms.<sup>12</sup> Such algorithms often use unsupervised or semi-supervised machine learning that process massive information databases to model predictions for commercial and political purposes. This governance by algorithms or 'algorithmic governance' has implications for power relations in at least two ways. Firstly, it creates new private authorities, as private corporations control critical bottlenecks of knowledge, connection, and desire; and second, it mediates the scope of state–corporate relations as states become dependent on Big Tech. On one view, the East India Company's activities as sovereign pale into insignificance when compared to the sheer extent of information now being scrutinised and used by Big Tech. As Srivastava observes:

*Algorithms use increasingly granular behavioral data that contain not "only what you post online, but whether you use exclamation points or the color saturation of your photos; not just where you walk but the stoop of your shoulders; not just the identity of your*

*face but the emotional states conveyed by your 'microexpressions'; not just what you like but the pattern of likes across engagements" ... Classifying individual users as possible spammers or extremists may rely on "high rate of declined friend requests, gender unbalanced networks, or using certain phrases."<sup>13</sup>*

The extensive reliance upon predictive analytics, which utilise such algorithmic analysis, reflects both the use of algorithms *by* authorities and algorithms *as* authorities.

#### 'Democratic degradation'

As already alluded to, the East India Company effectively imposed upon subjects under its control its own system of courts and law. While not as explicit, many modern corporations essentially achieve the same outcome today. Margaret Radin, an emerita professor of law at the University of Michigan Law School, observes that many corporations today use standard term 'boilerplate' or 'adhesion' contracts to 'change the legal infrastructure' applicable to individuals and use such contracts to 'create [the corporation's] own legal universe.'<sup>14</sup> So widespread are these adhesion contracts that they give rise to what Radin describes as 'democratic degradation.' Use of such forms or contracts, promulgated to govern the rights of users of products and services, in effect removes rights granted through democratic processes and instead these are being substituted by a 'constricted' system of rights that the corporation wishes to impose.<sup>15</sup> In the United States Supreme Court case of *American Express Co. v Italian Colors Restaurant*,<sup>16</sup> for example, a clause contained in a standard form contract between American Express and merchants, who accepted the former's cards, required any disputes between the parties to be resolved by arbitration, and further provided that there 'shall be no right or authority for any Claims to be arbitrated on a class action basis.' Despite the clause, a group of merchants commenced a class action against American Express claiming that it violated s 1 of the Sherman Act (anti-trust legislation). American Express responded by seeking to compel arbitration of individual claims. The Supreme Court found for American Express effectively insulating American Express from a class action. As Kagan J, with whom Ginsburg and Breyer JJ joined, observed in dissent:

*[the arbitration clause] imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability — even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.*

Other examples of this democratic denuding abound – choice-of-forum clauses, exculpatory clauses, disclaimers of warranty, limitations of remedies, divestments of information user rights and a variety of other onerous clauses.<sup>17</sup> Of particular significance is the supplanting of court systems by third party mechanisms, which can take a variety of forms – such as, the insistence on arbitration, as already described, the use of internal dispute resolution processes, and even the use of ‘machine rule’ (discussed in more detail below). Schachter argues that the use of arbitration, for example, ‘is a factor in transforming private contract practices into authoritative law for the business community.’<sup>18</sup> Radin calls this realm of degraded democracy, the world of Boilerplate, or World B, a world which is starkly at odds with the traditional notion of contract law predicated upon voluntary exchange and negotiated agreement. While Radin's arguments are open to critique,<sup>19</sup> they nonetheless highlight some parallels between modern corporate power and the power exerted by the Company during its existence.

### Control by any other name

A key characteristic of monopolistic behaviour is the evasion of regulation, which the East India Company skilfully achieved for decades. There are many modern-day parallels. In June 2014, for example, it was revealed that during one week in 2012, Facebook subjected 690,000 of its unsuspecting users to an ‘emotional contagion’ experiment. The experiment entailed Facebook using an algorithm to filter posts with positive or negative keywords, with a view to determining whether Facebook could alter the emotional state of its users. In the United States, experimentation involving human subjects conducted with public funding is subject to regulation under the National Research Act.<sup>20</sup> In undertaking its mood experiment, Facebook collaborated with two communications and information scientists at Cornell University.<sup>21</sup> Cornell decided that because the work of its researchers involved only data analysis and no actual interaction with human subjects, review under the National Research Act was not necessary.<sup>22</sup>

Similarly, many technology companies engage in extensive surveillance and, to that end, reserve their rights to scan and analyse user content, which they frequently do – often with devastating consequences. In a widely reported case from the United States, a father of a young boy, concerned with swelling in his child's groin area, took a series of photos with his Android phone and sent them to his physician. A few days later, Google

disabled the father's phone and flagged him as a potential sex offender.<sup>23</sup> The police also became involved launching an official investigation into possible sex offences. A related and increasingly common trend is that of corporations weighing in on public policy through corporate action.<sup>24</sup> For example, in 2018, Microsoft began to require its suppliers and contractors with more than fifty employees, to offer workers at least twelve weeks of paid parental leave – a policy which closely resembled a Washington state law. Bank of America has also relatively recently announced that it would cease lending to gun manufacturers that make military-style weapons marketed for civilian use.

One scholar has commented that recent corporate action in public policy issues heralds a fundamentally different mode of corporate activism, with corporations now imposing their preferred policies on suppliers, contractors and customers.<sup>25</sup> Through this kind of coercive action, corporations are assuming the role of regulators and are drastically changing the scope of permissible and impermissible business conduct in the marketplace. Such conduct is redolent of a modern version of the coercive and monopolistic tactics employed by the East India Company, such as the Company's attempts to coerce local farmers to grow indigo on grossly unfavourable terms which gave rise to the Indigo rebellion of 1859–60.<sup>26</sup> One hopes that the unfair monopolistic practices of today can be stopped by less dramatic means.

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### ENDNOTES

- I acknowledge and thank my colleague Nicholas Bender SC for bringing the case of *Nabob of the Carnatic v East India Company* (1791) 30 Eng Rep 391 to my attention, which inspired this article. I also thank Ingmar Taylor SC for his commentary and suggestions.
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