

Rachel's Environment & Health News

#609 - Can Corporations Be Accountable? Part 1

July 29, 1998

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In 1628, King Charles I granted a charter to the Massachusetts Bay Company. In 1664, the King sent his commissioners to see whether this company had been complying with the terms of the charter. The governors of the company objected, declaring that this investigation infringed upon their rights. On behalf of the King, his commissioners responded:

"The King did not grant away his sovereignty over you when he made you a corporation. When His Majesty gave you power to make wholesome laws, and to administer justice by them, he parted not with his right of judging whether justice was administered accordingly or not. When His Majesty gave you authority over such subjects as live within your jurisdiction, he made them not YOUR subjects, nor YOU their supreme authority." [1]

From childhood, this King had been led to act as a sovereign should. What about us?

By means of the American Revolution, colonists took sovereignty from the English monarchy and invested it in themselves. Emerging triumphant from their struggle with King George and Parliament, they decided they would figure out how to govern themselves. Alas, a minority of colonists were united and wealthy enough to define MOST of the human beings in the 13 colonies as property or as non-persons before the law and within the society, with no rights that a legal person was bound to respect.

Ours was a flawed sovereignty from the beginning. Because of its moral failings and structural inequities, whole classes of people had to organize and struggle over centuries to gain recognition as part of the sovereign people--that is, they had to get strong enough as a class to define themselves and not let either people or institutions define them: African Americans, native peoples, women, debtors, indentured servants, immigrants...

To this day, many still must struggle to exercise the rights of persons, to be recognized as persons by law and by society.

Throughout this nation's history, there has always been plenty of genuflecting to democracy and self-governance. But the further each generation gets from the Revolution, the less the majority act like sovereign people. And when it comes to establishing the proper relationship between sovereign people and the corporations we create, recent generations seem to be at a total loss.

Yet, earlier generations were quite clear that a corporation was an artificial, subordinate entity with no inherent rights of its own, and that incorporation was a privilege bestowed by the sovereign. In 1834, for example, the Pennsylvania Legislature declared:

"A corporation in law is just what the incorporation act makes it. It is the creature of the law and may be moulded to any shape or for any purpose the Legislature may deem most conducive for the common good." [2]

During the 19th century, both law and culture reflected this relationship between sovereign people and their institutions. People understood that they had a civic responsibility not to create artificial entities which could harm the body politic, interfere with the mechanisms of self-governance, assault their sovereignty.

They also understood that they did not elect their agents to positions in government to sell off the sovereignty of the people. In other words, they were human beings who tried to act as sovereign people. One thing they did was to define the NATURE of the corporate bodies they created. If we look at mechanisms of chartering--and at the language in corporate charters, state general incorporation laws and even state constitutions prior to the 20th century--we find precise, defining language that was often mandatory and prohibitory and self-executory in nature. These mechanisms

DEFINED corporations by denying corporations political and civil rights, by limiting their size, capitalization and duration, by specifying their tasks, and by declaring the people's right to remove from the body politic any corporations which dared to rebel.

Here is an example of language which sovereign people--responding to the rise of corporations after the Civil War--placed in the California Constitution of 1879, and which appears in other state constitutions at about that time:

"Article I, section 2: All power is inherent in the people...

"Article I, section 10: The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives...

"Article XII, section 8: The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals, and the exercise of the police power of the State shall never be so abridged or construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general well-being of the State." [3]

The principal mechanism which sovereign people used during the 19th century to assess whether their corporate creations were of a suitably subordinate nature was called QUO WARRANTO. The QUO WARRANTO form of action, as attorney Thomas Linzey has noted, [4] is one of the most ancient of the prerogative writs. In the words of the Delaware Court of Chancery, "the remedy of QUO WARRANTO extends back to time whereof the memory of man runneth not to the contrary." [3]

QUO WARRANTO simply means "by what authority?". All monarchs understood how to use this tool in self-defense. They realized that when a subordinate entity they had created acted "beyond its authority," it was guilty of rebellion and must be terminated.

Sovereignty is in our hands now, but the logic is the same: when the people running a corporation assume rights and powers which the sovereign had not bestowed, or when they assault the sovereign people, this entity becomes an affront to the body politic. And like a cancer ravaging a human body, such a rebellious corporation must be cut out of our body politic.

During the first hundred years of these United States, people mobilized so that legislatures, attorneys general and judges would summon corporations to appear and answer to QUO WARRANTO. In 1890, the highest court in New York State revoked the charter of the North River Sugar Refining Corporation in a unanimous decision:

"The judgment sought against the defendant is one of corporate death. The state which created, asks us to destroy, and the penalty invoked represents the extreme rigor of the law. The life of a corporation is, indeed, less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason... Corporations may, and often do, exceed their authority only where private rights are affected. When these are adjusted, all mischief ends and all harm is averted. But where the transgression has a wider scope, and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise and the violation of its corporate duty... The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech... The state permits in many ways an aggression of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a

prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants... the state, by the creation of the artificial persons constituting the elements of the combination and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause, of an aggregation of capital... the defendant corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution... Unanimous."[5]

Such a judgment should not be regarded as punishment of the corporation, but rather a vindication of the sovereign people. When our sovereignty has been harmed, we are the ones who must be made whole. The concept is similar to what Hannah Arendt described in her book EICHMANN IN JERUSALEM (1963), writing about Nazi crimes against humanity,

"The wrongdoer is brought to justice because his act has disturbed and gravely endangered the community as a whole, and not because, as in civil suits, damage has been done to individuals who are entitled to reparation. The reparation effected [here] is of an altogether different nature; it is the body politic itself that stands in need of being 'repaired,' and it is the general public order that has been thrown out of gear and must be restored, as it were. It is, in other words, the law, not the plaintiff, that must prevail."[6]

There is no shortage of court decisions affirming the sovereignty of the American people over corporate fictions, recognizing the need to restore the general public order. In RICHARDSON V. BUHL, the Nebraska Supreme Court in the late 19th century declared:

"Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are... accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals."[7]

[Continued next week.]

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[1] Neil Berman, "A Short History of Corporations in Massachusetts," written for POCLAD, October 1995, p. 2.

[2] Carter Goodrich, ed., THE GOVERNMENT AND THE ECONOMY, 1783-1861, Indianapolis: Bobbs-Merrill, 1967, p. 44 (Report of the Packer Committee of the Pennsylvania Legislature).

[3] Excerpts from the "California Constitution of 1879," selected by the author, March 1996 (POCLAD memo).

[4] Thomas Linzey, et al., Brief in Support of Motion for Peremptory Judgment, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND V. THOMAS CORBETT, ATTORNEY GENERAL OF PA ET AL., CIV. NO. 1074 M. D. 1996, p.[4], citing WILMINGTON CITY RAILWAY CO. V. PEOPLE'S RAILWAY CO., 47A, 245, 248 (Del. Ch. 1900).

[5] PEOPLE V. NORTH RIVER SUGAR REFINING CORP., 24 N. E. 834 (1890).

[6] Hannah Arendt, EICHMANN IN JERUSALEM, New York:

Viking Penguin, 1977.

[7] RICHARDSON V. BUHL, 43 N. W. Rep. 1102.

Descriptor terms: richard grossman; corporations; american history; sovereignty;