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ENCOUNTERS WITH BOOKS FROM OTHER DISCIPLINES

Empire, Incorporated: The Corporations That Built British Colonialism

By Philip J. Stern, The Belknap Press of Harvard University Press, 2023. 408 pp. ISBN: 9780674988125

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Just like the joint-stock corporation, the subject of Philip Stern's richly detailed and superbly imagined *Empire, Incorporated: The Corporations That Built British Colonialism*, the book itself is chameleon-like in its flexibility. It is a history of the fusion of two legal ideas – that of the joint-stock, which enabled individuals to pool resources and risk by dividing up enterprise into 'shares' that could be purchased by any individual, and of the corporation, an entity that could act on behalf of its members but also independently by itself – to form the joint-stock corporation. Stern describes how this amalgamation 'would transform the modern world' by forming the basis of what he terms 'venture colonialism', a form 'of overseas expansion that was bound across four centuries by the conviction that the public business of empire was and had always been best done by private enterprise' (p. 1).

The book is also a narrative history of the British empire through the lens of the joint-stock corporation. Stern offers a broadly chronological view of the various roles that the joint-stock corporation played in British imperial history, with brief forays into French and Belgian imperial history. In doing so, he examines the role of behemoths like the English East India Company, a territorial sovereign in South Asia that has been analysed in more detail by Stern himself in his earlier work (Stern, 2011); the Hudson's Bay Company, which formed the effective government of large parts of modern Canada; and the Royal African Company, which played a significant role in the transatlantic slave trade. Stern, however, is also interested in failed imperial enterprises such as The Governor and Assistants of the Cittie of Raleigh in Virginia, whose colonists famously disappeared (pp. 39–40), as well as companies that focused on commercial roles such as the Eastern Telegraph Company that practically controlled much of the British communication network, thereby playing a critical role in the colonial project (pp. 259–261). The sheer number of companies, corporations, and societies that played a role in the expansion of European empires can be discerned through a separate six-page index (pp. 389–394) that meticulously lists every entity discussed in the book. Law governed every aspect of the establishment, expansion, and dissolution of these joint-stock corporations, with legal instruments such as charters, treaties, grants, concessions, covenants, indentures, contracts, patents, bills of exchange, and share certificates all playing starring roles in this book as it charts the spread of the imperial project across the world.

The global scope of the book also punctures the distinction drawn in British imperial histories between an early period of chartered and Crown colonies and a later period of colonies, protectorates, and protected states. Stern demonstrates how the joint-stock corporation was key to imperial enterprise from the late fifteenth through to the twentieth century. This view is buttressed by one of Stern's key arguments: that despite repeated critiques, colonial corporations were 'central to the expansion of modern empire and, eventually, its dissolution' and endured, even if 'reformulated and transformed' (p. 10). Law was critical to this regeneration process, with the book examining a virtual goldmine of clever legal arguments (some of which are described in more detail below) made by both supporters and detractors of corporate colonialism in their efforts to create, challenge, and reform joint-stock corporations. The nature of colonial corporations was constantly shifting, allowing them to be both 'sovereign representatives and suppliant subjects', with negotiations over corporate power

requiring ‘the constant deployment of political, legal, ideological, financial, and not to be forgotten, physical power’ (p. 48).

Stern demonstrates how individuals who aimed to raise finances for overseas exploration relied on the instrument of the royal charter to incorporate corporations that had exclusive trading rights as well as other rights such as perpetual succession, making and implementing law, and exercising control over overseas settlers. The scope and extent of these charters was never set in stone and was the subject of continual deliberation. In the seventeenth century, for instance, such chartered corporations came under criticism from opponents who argued that they constituted illegal monopolies, while supporters contended that instead of restricting trade, joint-stock corporations were, in fact, creating trade where none existed in the first place by providing ‘order and government’ through their establishment of diplomatic links, factories, and other infrastructure in far-off ‘uncivilized’ lands (pp. 66–70). There were also numerous legal disputes over the powers of joint-stock corporations overseas and the extent of Crown control that could be exercised over them, with incessant questions raised over whether colonial corporations were independent and self-governing bodies that were sovereign themselves or merely entities that were created by royal charter and thereby subject to the Crown’s ultimate sovereignty (pp. 109–119; 150–163). The emergence of Parliament as a key player in shaping overseas empire in the eighteenth century posed additional complications for debates over the scope of corporate and colonial power, as demonstrated by the repeated efforts to regulate the East India Company (pp. 168–184; 195–203). Even after the abolition of corporate colonies in South Asia and Canada and the rise of the new registered (as opposed to chartered) corporations deriving their powers from statute, the joint-stock corporation remained key to empire, often acquiring special government privileges and concessions that enabled not just commercial enterprise but control over peoples and territory (pp. 243–300).

Time and again, therefore, and despite numerous and often vituperative critiques, the joint-stock corporation survived, and even thrived. As Stern contends throughout his book, this persistence was possible precisely because of its legal flexibility. For instance, joint-stock corporations skirted the ban that most North American English colonies placed on ‘private persons’ making treaties with indigenous persons by claiming to have ‘public status’ that was backed by royal charter (pp. 101–102). On the other hand, in South Asia, the East India Company expanded its territorial control by obtaining ‘the offices, assignments, and jurisdictional authority’ that were attached to posts such as those of a *jagirdar* (holder of a right to collect revenue in return for service), a *zamindar* (holder of a right to collect a share of produce of the land), or a *diwan* (revenue official). The East India Company relied on its status as a private individual to assert its rights to each of these positions, which were ‘normally assumed by individuals often with familial and lineal claims to them’ (p. 173). In Stern’s view, the joint-stock corporation’s position as ‘a powerful paradox: person and group; public and private; commercial and political’ enabled it to weather innumerable storms and reinvent itself to maintain its existence and, in fact, move from strength to strength (p. 2). The book is packed with details of repeated attempts to regulate joint-stock corporations, many of which echo modern debates over the limits of corporate power.

While the book’s focus on legal arguments made to both limit and defend corporate power are interesting and even eye-opening, Stern himself recognizes that ‘much of this book takes places in quite distant times, places, and contexts, whose character and circumstances often shed light on those of the present through only the faintest of family resemblances’ (p. 2). Contemporary debates over monopolies are shaped more by the effects of policies on privatization and deregulation adopted in the late twentieth century than by the distant past. However, what Stern’s book offers for legal scholars is a vibrant historical overview of the nebulous character of the public/private divide – a distinction that has been central to enduring debates over the nature of the law and legal thought.

Scholars such as JWF Allison have contended that a distinction between the public and the private is alien to the common law and is a judicial import by English judges (Allison, 1996). In fact, as Morton Horwitz has argued, ‘it was only gradually that English and American law came to recognize a public realm distinct from medieval conceptions of property’, with ‘[t]he emergence of the market as a central legitimating institution [bringing] the public/private distinction into the core of legal discourse during the nineteenth century’ (Horwitz, 1981–1982, p. 1424). Given the recent character of the rise of the public/private divide, American legal scholarship has long demonstrated the hollowness of the distinction, beginning with legal realist critiques articulated in the early twentieth century. Robert Hale analysed bargaining between individuals over goods, noting that ‘[t]he owner of the shoes or the food or any other product can insist on other people keeping their hands off his products’ and ‘[t]he owner of the money can likewise insist on other people keeping their hands off his money’; in both cases, ‘the government will back him up with force’. Consequently, when ‘[a] bargain is finally struck, each party consent[s] to its terms in order to avert the consequences with which the other threatens him’ (Hale, 1943, p. 604). Similarly, Morris Cohen suggested that ‘the essence of private property is always the right to exclude others’ with ‘the law of property help[ing] me directly only to exclude others from using the things which it assigns to me’; by enabling such exclusion, the law, therefore, engendered ‘[t]he character of property as sovereign power compelling service and obedience’ (Cohen, 1927–1928, p. 12). By focusing on the role of coercive state enforcement in upholding the allegedly private rights of contract and property, the legal realists ‘concluded that any purported dichotomy between mutually exclusive public and private spheres is illusory’ (Williams, 1985, p. 227). More recently critical legal studies scholars have argued that the public/private divide constitutes an ideological (to be specific, a liberal) view of the world and formed the core of what has been termed ‘classical legal thought’ that gained dominance at the turn of the twentieth century and has largely been in decline since (Kennedy, 1979; Kennedy, 1981–1982; Kennedy, 2006). There are also extensive feminist critiques of the public/private distinction, with scholars arguing that the divide disguises the political nature of the private (Olsen, 1983; Charlesworth, Chinkin, and Wright, 1991; Knop, 1993).

Stern’s book supplements this extensive legal scholarship and furnishes a comprehensive and much-needed historical counterpoint to claims of the alleged ‘naturalness’ of the public-private divide by using the lens of the joint-stock corporation to examine imperial history. In Stern’s own words, given contemporary debates over the extent of corporate power, ‘understanding that the thin line between public and private governance has a deep and complex past has never been more consequential’ (p. 2). Many of the activities and actions of joint-stock corporations in this book appear to ‘blur the lines between colony and commerce, finance and governance, and public office and private profit’; as Stern notes, this was ‘because they arose from a world in which such fast boundaries had never existed in the first place’ (p. 19). The joint-stock corporation’s superpower was (and remains) its curious hybridity; while claiming ever-broader powers and a sovereign status in the colonies, its defenders also claimed that any form of legal regulation would be a violation of their charters and akin to an expropriation of private property (see, for instance, pp. 181–182; 195). Stern’s careful analysis lays bare the manner in which colonial corporations, despite their claims of private property rights to defend their authority, were dependent on royal charters and other means of governmental support and privileges to both engage in commercial enterprise as well as exercise control over peoples and territories, acting effectively as delegated sovereigns. For instance, supporters of companies like the East Indian Railway and the Great Indian Peninsular Railway adopted a racialized logic to argue that private enterprises were the best mechanism for doing business in places like India that were corrupt and demanded governance in a disinterested manner; on the other hand, they also insisted on being underwritten by the state

through the grant of subsidies, land, and powers over property and peoples in order to obtain security for their investments (pp. 199–200). Despite the often-antagonistic relationship among the Crown, Parliament, and joint-stock corporations, this book demonstrates, as Stern has argued elsewhere, that the state and the corporation are effectively ‘mutually constituted’ (Stern, 2016, pp. 441–442). The line between the public and the private, therefore, was and continues to remain arbitrary and hollow.

After a century of legal scholarship, the public/private distinction remains key to organizing law school curriculums; there is also evidence of a recent move by some legal scholars towards the contention that such a divide is somehow fundamental to English law (Priel, 2013). Hopefully, the addition of this empirically rich and historically adept work to the canon of legal critiques of the public/private divide would go some way towards disturbing its resilience.

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