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Marija Bartl and Eva Vermeulen *

Decentering the “Private” in the World Power System

I. Introduction

Robé’s *Property, Power, and Politics* is an important book that masterfully grounds some of the core problems of contemporary capitalism: the decentralization of power through the legal institution of private property, the concentration of property and power in the hands of legal persons (most notably corporations), and, finally, the incapacity of the nation-state to rein in many of the externalities of the exercise of this private power. If inequality today is reaching the staggering levels of the end of the nineteenth century, this condition has much to do with what Robé calls the “World Power System,” which leaves vast power repositories in contemporary capitalism not only weakly checked, but also employed in the service of extractive “shareholder value” principles.

The analysis behind the “World Power System” is in itself very powerful; it highlights a major failure of constitutional law to deal with private power, remaining stuck with the engagement of public power as the only relevant power. What is more, the book clearly overcomes an unhelpful, or ideological, distinction between public and private law—which, by covering up the concentration of power in our globalized economy in private hands, has only served to condone the abuse of this power.

II. Robé’s Conception of Property as Decentralized Despotism

Critique of this excellent book is hard to come by. But there is, in our view, one aspect of Robé’s work that remains somewhat unsatisfying: his understanding of the institution of property.

To come to his profound analysis of the corporation, Robé has had to do quite some groundwork on property. He embarks on this endeavor by giving a brief, but accurate, review of the Anglo-American property theory landscape, which, for various reasons, predominantly tends to see property as a bundle of rights (Smith 2011). Disagreeing with that image and following in the footsteps of Karl Renner (2009), Robé juxtaposes property with the right of personal liberty. For just like the right to personal liberty, property is a power-conferring *default* rule. As such, both are, in principle, all-encompassing, or scopeless. Hence, rights like property or personal liberty are not accurately presented by a collection of more specific rights or liberties. They only make sense as one comprehensive whole (Robé, 80–82).

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Property is thus a general right “as a matter of principle” (86) and is only limited as a matter of exception by other legal rules.¹ Instead of giving content to property by means of a list of actions that flow from it, as the typical Anglo-American bundle-of-rights conceptualization of property persistently does, property should be defined negatively as the power that is left when legal limitations are set. This negative definition—the “as a matter of principle-ness”—is what gives property its paramount constitutional position in liberal democracies.

Furthermore, drawing on Oliver Hart’s (economic) theory of ownership (Hart 1993, 141) and following the example of several property scholars, Robé argues that the best way to understand property is by its comparison with the sovereignty of a state. States can make rules over the use of their territory, and therefore over the land and material in that territory. In parallel, the institution of private property has delegated some of this rule-making power to the owners, forming an important link in the apportioning of sovereignty that is characteristic of the modern constitutional state (120–21). Property owners thus become sovereigns—or rather despots, for no democracy is required in the governance of private property—over their property, having the full right to set the agenda for their objects of property unless limitations are introduced by legal rules.

As we will see later in Part IV, both the conceptualization of property as sovereignty, and its framing as an all-encompassing default rule constrained by legal rules, turn out to be crucial to Robé’s argumentation about the corporation. This is because even if these legal limitations to property may be ubiquitous within the borders of most Western nation-states, they are scarce-to-absent when incorporated private property enters the global stage.

III. (Private) Property: Unitary or Plural?

Important consequences follow from Robé’s conception of private property as decentralized sovereignty, or private despotism. Namely, in order to defend his understanding of property as decentralized decision and rule-making power, he takes pains to explain that while the identity of an owner and the way they execute their property right can be modified, the right to property itself essentially remains the same. On page 75, for instance, he writes:

The prerogatives granted to the owner via property are inherent to property as such and are not affected by the modification in the identity of the owner.

He continues:

This is the key consideration to keep in mind. Property is a decentralization of the authority to make the rules in connection with the use of the object of property. The identity of the owner can be modified; property remains the same. Or as Lippmann puts it, communism, when it abolishes private property in productive capital, establishes a new kind of property in the policy offices which manage the collective capital. The commissars replace the capitalists, but they exercise the same power or greater ones. And the struggle for wealth is just transmuted with a struggle for power. (75)

By putting so much emphasis on this supposedly inherent core of property, the book over-stretches, or essentializes, *private* property—underestimating real-world differences in how property is owned, by whom, and for what purposes. Without much concretization, property is

¹ Property may be a general and principal right, but still very much a malleable and *legal* construct. Robé stresses that property is not an economic phenomenon—as opposed to its factual counterpart, possession. Property is constituted and shaped by the law and power of states, rendering it inherently legal—not natural (142).

explained solely by means of what piece or part of the total of power it offers to its holder(s), thereby ignoring the different effects that various *ways* of governing that source of power can and will have in any “Power System.” This uninterest in who owns property, and in what way, does justice to neither reality nor the potential of this key institution to deal with some of the problems that Robé rightly identifies.

Historically, the institution of property has come in various modes of holding and governance (Di Robilant 2014). Not only has public property played an important role (Piketty 2020), but also *private* property has come in a whole range of more or less “privatized,” or “power-centering,” variants, including shared ownership, commons, mutual funds, cooperative ownership and enterprises, and so on. Thomas Piketty shows that the decrease in the diversity of legal property ownership—that is, the growing dominance of privately held property in “developed countries”² over the past 50 years—has been an important driver of inequality in these states (Piketty 2020). What is more, the “degrowth” of public and shared ownership has been significant also in a *cultural* sense. It has “normalized” individualism and self-interest, as opposed to sharing, as the main cultural norms, as central to the institutions of neoliberal society (Bartl 2022). Therefore, the other forms of ownership are not just despotic property in different clothes—they are qualitatively different from it.

It is then somewhat surprising that Robé chooses to hold onto his rather narrow definition of property. Admittedly, he does not deny that there are other important forms of ownership, beyond the institution of private property. He even sees public ownership as a necessary condition for the emergence of private property; the two are inextricably linked in his account (133). But what he does not seem to acknowledge well enough is how these forms of property are actually different from each other—and therefore he leaves the less “privatized” forms of private property largely unexamined. We might agree with him that defining property like this helps to unpack the problems that the institution creates in the “World Power System” of globalized capitalism today. But it is crucial to understand that this is only one possible institutionalization of private property, which in turn opens up possibilities to radically reimagine this institution.³

IV. The “Private” and the Corporation

Robé’s conceptualization of property as decentralized sovereignty is crucial for his critique of globalized capitalism. With the emergence and rise to dominance of the corporate form, we have unleashed the powers inherent in the institution of private property. Economic actors (firms) can now constitute themselves freely by means of complex corporate structures, avoiding (always limited) constraints placed on them by nation-states. If anything, in the context of globalized capitalism, nation-states have been brought into competition with one another to place as little constraint on private power as possible (82, 118, 172–74).

The book shows the transformation of the corporation over the past decades, in particular the rise of the “shareholder value” paradigm. In the context of financialized capitalism, contemporary corporations have become ever cruder vehicles for the generation of large profits by means of the

² Another illustrative example can be found in the developments in former “communist” (or “really-existing-socialist”) countries, such as Russia, Poland, Czechoslovakia, Croatia, and so on. Here the privatization of property has contributed to an explosion of inequality—even though the economy may have grown. These effects cannot only be ascribed to the (undeniably) mismanaged privatization process. In fact, if we go with Piketty, allowing the concentration of property in private hands, rather than public ones, will unavoidably go hand in hand with increased inequality.

³ This reimagining is already taking place in the property literature, albeit in varying degrees of radicality. Some leading examples include work by Gregory Alexander (2018), Larissa Katz (2020), Amon Lehavi (2008), and Ezra Rosser (2015).

extraction of labor, social and environmental value, and resources. This extraction nowadays importantly takes place via corporate design and legal arbitrage (Pistor 2019, 47–76), which help avoid stricter labor laws, environmental standards, or tax payments (Robé 241–293).

In contrast to the somewhat essentializing analysis of property in the first part of the book, the second part reveals how the operation of the corporate “private” in society has fundamentally changed over time. The book itself leaves no doubt that corporations have had different “hybrid” forms over the years. In the early nineteenth century, corporations had to be authorized and installed by governments to meet public ends (243–44). In the mid-twentieth century—the period that the French emphatically call “*les trente glorieuses*”—corporations were run differently from the current neoliberal corporation. All this must mean that not only has the way the corporations were regulated and governed changed over time, but also that the private property entrusted to them has been put to different uses, ranging from more to less socially oriented ones.

By implication, if the corporation were governed differently from how it is today, its “private” power could be directed to different purposes and have different social and environmental outcomes. It is therefore again quite surprising that Robé plainly rejects the idea that corporations could pursue public or common purposes—something that several of his colleagues in corporate governance scholarship strongly argue for (Winter 2020; Mayer 2021). This is made very clear on page 239, where he states:

Although some argue that corporations/firms should be run in the public interest, I do disagree because that would make of them public institutions, Organs of the State, which they are clearly not. But they are not purely private either.

One has to ask, why? Why would a corporation that is run in a public or common interest immediately become an “Organ of a State”? And what does that really mean? How shall we think of economic practices—such as social enterprises—that embrace social purpose? Shall we consider them all “Organs of the State?” They certainly would not consider themselves to be such, or accept direction in their business activities from state officials other than those who are legally mandated. Or is the implication of this statement that we should discourage such enterprises because of their hybrid status? That would clearly go against other commitments of Robé, insofar that these enterprises are far less extractive (they use profits to finance common purposes) and contribute to Europe’s resilience and equality (Pijl 2022, 28–29). Most importantly, why assume that operating in the common interest cannot be a perfectly “private” preoccupation? One must adopt quite an impoverished understanding of the human to suggest that pursuit in life can only be private if what is sought for is profit.

V. Conclusion: The Way Forward

Perhaps the most surprising turn comes at the end of the book, when Robé—counter to some of the claims made before—argues that we need to use multinationals, and their administrative capacity, to solve the problems of global capitalism. Robé also (rightly) suggests that the use of accounting standards may help to reorient multinationals toward more suitable purposes than value extraction for the sake of shareholders (324–26).

This prompts us to ask a somewhat provocative question. How is it that multinationals, who own property as private despotism and therefore cannot operate for public purpose, are now suddenly able to solve the, rather public, problems of global capitalism? Isn’t this to suggest that neither private property as a legal institution, nor the corporation or the conception of “private,” have any essential meaning? Furthermore, *can* they thus be repurposed for a very different kind of political

economy—for instance, by means of accounting standards? And isn’t this a crucial insight—in a world where democratic majorities tend not to favor radical change (Bagchi 2022, 376)?

In this contribution we stressed the importance of placing different institutionalizations of property and corporation at the forefront of the analysis of contemporary capitalism—an element that could have been more clearly embraced by Robé’s *Property, Power and Politics*. But even if this book, as with every excellent academic achievement, may have some blind spots, it remains one of the most important contributions on the linkage between property and the corporation in globalized financial capitalism, and it is a must-read for every student of (law and) political economy.

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