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Rutger Claassen and Tully Rector*

Introduction: On Jean-Philippe Robé's *Property, Power and Politics*

I. Introduction

Our present crises are growing more urgent, pervading many domains of public life—economic, political, environmental, and social. This motivates scholars to find more adequate, combinatory perspectives from which to explain them. One such effort, under the broad heading of Law and Political Economy (LPE), challenges an established view of legality that insulates the market and its dominant actors from critique and accountability. The established view is based on two misconceptions. First, it sees the real function of a capitalist legal device, whether in contracts, antitrust, property, or corporate law, in terms of efficient wealth creation; this function is its underlying rationale and normative aim. Second, it tends to remove equality, coercion, and legitimacy—the core problems of power—from the scope of economic appraisal. When laws and policies are fashioned out of these ideas, democratic institutions will be unable to counter the dominance of capital. New analytical approaches are therefore necessary (Purdy et al. 2020). Along with researchers in associated fields, LPE scholars are attempting to better understand the legal constructions in which financial and political power are anchored, and to develop new ways of integrating the economy into democratic life.

Robé is a leading voice in these debates. His new book, *Property, Power, and Politics*, encloses in one volume his ideas on the role of incorporated firms—and of markets, property, and finance—in the larger dynamics of global politics. In this symposium, interlocutors with backgrounds in law, political science, and philosophy engage with this rich analysis. This introduction provides an overview of the book's arguments (sections 2 and 3) and then introduces the contributions (section 4).

II. Robé's Analysis of Property

The concept of a “World Power System” is crucial for Robé. It goes beyond the “State System” to emphasize how societies today are made up of various powerful actors, both private and public. The organs of nation-states and the powers in the private sphere have co-evolved, and are mutually dependent. The book is divided into two parts. The first focuses on the manner in which private actors have gained power; property is central here. The second part focuses on the business corporation as the most important contemporary property structure.

In Robé's analysis, property is the legally enforceable right to exclude others from objects. This right in turn implies rights to determine the use of the object, including the right to govern others to whom access is granted over the object (69). As Robé states: “owners are akin to lawmakers in connection with their property” (53). The most important application of the owner's power is in

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the context of labor. Owners give access to the means of production, gaining authority over employees, which is not founded on the labor contract—it is founded on property (76; 98–100). Inequality in wealth therefore translates into inequality in legally sanctioned power over others (70; 77).

This power is constitutionally protected by the state and belongs to the fundamental rights of individuals. The autonomy of owners with respect to their assets is the open-ended default rule. The owner is the “decision-maker as a matter of principle” (84). Regulation by the state to limit the uses of property is the exception, given by a finite list or regulations (82). While different jurisdictions over time vary widely in the limits they (do not) impose on owners’ discretion, the basic allocation of residual decision-making power to owners remains the same everywhere (86).

Robé traces this understanding of property in the history of the modern, largely Western, constitutional state. The differentiation of public and private prerogatives provides the key. Modern states gained legal personality, and under the rule of law the organs of the state are to treat all citizens impartially. State officials have “public prerogatives,” which must be used in the public interest (92–4). Simultaneously, the constitutional system gives “private prerogatives” to citizens, creating a sphere of discretionary autonomy to be used according to their particular wills. Property is a key example of such a private prerogative (94–6). This bifurcation is important, because it means that in a constitutional state “the protection of property rights by—and against—the State prevents the integration of owners as “Organs of the State” (101). Owners create what Robé calls “micro-systems of governance” (102). Since others cannot influence the rules that owners make, these amount to “despotisms” (103). Whereas the state is bound to democratic norms of inclusion, these norms are completely optional for ownership structures, such as firms, in which people cooperate for productive purposes.

Within Robé’s understanding, property becomes a political and constitutional category despite it being quintessentially private. Or more accurately, property is—as much as the political power concentrated in the state which protects and limits it—itsself a form of power. As Robé puts it: “Via liberal Constitutions, internal sovereignty *within States* was decentralized as a matter of principle to owners” (107). In working out this thesis, Robé engages extensively with the work of North, Wallis, and Weingast (North et al. 2009), who have traced the emergence of “open-access orders” (roughly, constitutional democracies) to the ability of states to monopolize the use of organized violence (10–113). Robé agrees with much of their analysis, but he is critical of their neglect of the role of law in this process. Creating a legitimate, impersonal order of rules is for him first and foremost a legal project. Robé’s genealogy of this order puts a heavy weight on taxation (148–162). Taxation—that is, the more or less regularized, legitimate appropriation of a portion of private production—is the necessary means for states to be able to secure their monopoly. Herein lies its political importance (157).

Because of this history, we are now saddled with a constitutional system which is a legally pluralistic order—a mix of democracy and despotism (163). Behind the right to property, understood as right over things, stands the hidden order of power organized by owners. However, this legally pluralistic character goes unrecognized, since the modern order perceives itself as monistic, having broken with the officially pluralist order of the *ancient regime* (169–170). Here Robé introduces the importance of the corporation. As a concentration of property, a corporate organization is an order of organized power (170). This detracts enormously from the democratic nature of societies, a fact strangely accepted by the majority of the population, Robé speculates, because competition in the economic sphere (market) and the political sphere (election) is seemingly open to all.

Modern states did try to rectify some of these imbalances of power through regulatory action throughout the twentieth century. Robé's calls this countermovement the "second constitutional revolutions" (174). This movement, however, is now on the defensive, since it relies on nation-state power, while the World Power System has moved on, towards a global economic order, in which multinational firms are the main actors.

III. Robé's Analysis of Corporations

The argument driving the second part of the book is that governments have been unable to institute a global regulatory apparatus to counter, constrain, or even properly monitor the influence and capacities wielded by multinational firms. This power asymmetry has made states vulnerable in myriad ways, pitting them strategically against each other. Legal orders are systematically commercialized, shaped to offer firms the most attractive, profitable investment opportunities. This is a direct consequence of the legal technology adopted by firms to secure and direct their property powers. Incorporation, in Robé's analysis, is crucial. Firms are *not* corporations. The disjunction between the actual economic unity of firms and their fractured legal representation as a complex of corporations badly impairs global markets. Efficiencies are lost, value is destroyed, and an increasing percentage of commercial processes are enclosed in the privately administered allocation systems of major global firms, allowing them to externalize costs upon society. A profusion of morbid social and political symptoms can be traced to these processes.

The second part of the book sets out to analyze these dimensions of the global system. Robé is at pains to emphasize the distinction between firms and corporations, and to explain the features of the latter that make them so decisive an instrument of the former's power; the distinction has proved somewhat controversial (Deakin et al. 2021; Robé 2021). While a firm is "an *organization* performing an economic activity" (199), a corporation is a legal instrument for that activity, specifically a type of "*legal person* used to own key property rights used in [the firm's] operations" (200). Corporations are key points of intersection in a global lattice of contractual relations. This forms the infrastructure of economic globalization. Although the "World Wide Web of Contracts . . . allows the existence of firms" (207), neither firms nor corporations are, according to Robé, nexuses of contracts—which is how they have been mistakenly contemplated in the law. Corporations are the legal persons to which ownership rights over productive assets, and contracting powers, are assigned, but no one owns the corporation itself. It is only because of this fact that corporate assets and liabilities can be separated from those of its shareholders, and secured against their claims. These features—legal personality, asset and liability partitioning, and capital lock-in—explain the utility of the corporate form. Firms that use it can amass and deploy unrivalled magnitudes of capital on the basis of rights imputed to individual persons. But since firms "have no legal existence as such" (238), their directors and managers are not constrained in their exercise of the powers granted by those rights.

Incorporation allows firms to generate financial share capital in addition to, and separate from, the productive capital assets they operate. Financialization involves the increasing independence of these two forms of capital from one another to the detriment of productive capital's real value. Because of the extreme flexibility with which firms can organize the legal representation of their financial assets, tax and regulatory arbitrage become more attractive avenues of enrichment. According to Robé, "a considerable portion of the control over the world economy has migrated out of States' jurisdictions," such that profit maximization—the promotion of "shareholder value"—is achieved via the externalization of "risks, costs, and tax payments onto others" (267). Firms can clone corporate vehicles and parcel them out in the most favorable jurisdictions, setting their inter-contractual terms in ways that undermine and negate the efficiencies of market competition. States lack visibility into these mechanisms. Other market actors are deprived of key

information. Profits can be relocated without actual productive capital having to be shifted accordingly. This generates perverse incentives for states, driving them into “opportunistic positioning on the world market for legal norms” (279). As a result, firms enjoy an ever-widening array of legal possibilities for modifying the relations between the corporations they control. They are modified to the advantage of private wealth holders, and to the detriment of states’ capacity to regulate market activity and defend the interests of their citizens.

There is, accordingly, a need for more effective mechanisms to confront and deal with the power of firms. Degradation of state sovereignty has closely tracked the expanding ability of multinationals to create corporate subsidiaries, which are then entitled to protection under treaties that heavily favor firm interests. Robé argues that—on account of the sheer number of these treaty structures and the collective action problems faced by states in trying to amend them—“some method must be found . . . so that global firms develop *internal* governmental rules making them internalize the interests affected” by their actions (302). What would be needed is yet another constitutional revolution, this time at the level of global governance (301–5). However, efforts at effective global control of firms have been hampered by a pernicious embrace of agency theory, which ascribes to managers a fiduciary duty to promote the interests of their principal, the corporation—as a legal person—and its shareholders. This is equated with a duty to maximize the short-term value of corporate financial capital. In Robé’s view, shareholder value has thereby been detached from the substantive, long-term value of the firm’s assets and processes. Only a more accurate, inclusive, and complete accounting structure could provide undistorted information about the sustainability of a firm’s operations. This should be the main aim of governance reform. Forcing firms to enhance their accounting will allow “market participants . . . to identify and promote the firms which are better at producing real value” (349).

IV. The Contributions in the Symposium

Let’s now turn to an overview of the contributions in this symposium.

Marija Bartl and Eva Vermeulen focus on Robé’s conception of property, writing from a legal perspective. Their main claim is that his work “overstretches, or essentializes, *private* property—underestimating ‘real-world’ differences in how property is owned, by whom and for what purposes.” They stress that various, more socially oriented forms of ownership have always existed—for example, in mutual funds and cooperatives, and forms of shared and public ownership. Hence the institution of ownership seems to be more malleable, and amenable to reform, than Robé’s picture of “small-scale despotisms” suggests. This point also has repercussions for Robé’s view of corporations. Bartl and Vermeulen argue that corporations have historically been hybrid (public/private) entities, and could be more strongly oriented towards public purposes again. Indeed, in their conclusion, they argue that if global multinationals are to be steered towards more sustainable accounting standards, as Robé advocates, this amounts to a public re-purposing of the corporation.

Larissa Katz and Rutger Claassen continue the discussion of Robé’s conception of property. Their main focus is his rejection of the notion of ownership as an “office.” Katz and Claassen argue that such a rejection is surprising, given Robé’s emphasis on the fact that property rights are the result of a constitutionally created mandate for owners to exercise authority over others. In the analysis offered by Katz and Claassen, this delegation of sovereign power to owners warrants conceiving of ownership as an office. Moreover, this opens up space to add several layers of duties or responsibilities for owners as a matter of political choice. The discretionary authority ascribed to owners would be embedded in a legal system in which owners do not just have decision-making

rights, but also various duties to use these rights in certain ways—duties to refrain from harming third parties, or even to employ their resources in ways that benefit third parties.

Bertjan Verbeek's contribution assesses the value of Robé's work for the discipline of political science. Against the current trends of specialization, Verbeek welcomes Robé's study of the political domain in its connection with legal, moral, and economic spheres. He then draws a close comparison between Susan Strange's foundational contributions to the study of structural power, and Robé's own conceptualization of power. The latter adds to Strange's framework an emphasis on property as a dimension of power, sustainability as a key value, and globalization as a process rendering accountability more difficult. In a more critical vein, Verbeek argues that Robé's analysis would have benefited from a more actor-oriented perspective. In particular, he calls for more attention to the legal actors shaping property law, and to the role of NGOs and social movements as political actors shaping the world power system. Verbeek closes with the question whether the economic globalization at the center of Robé's account is likely to continue, given that Russia and China are taking more confrontational stances on the world stage.

Tully Rector agrees with many of Robé's core claims about the global political power of multinational firms, and the role they play in compromising the integrity of sovereign legal orders. His critical points focus on what he sees as the limits of the book's diagnosis. With a robust conception of the form of property that firms command (namely *capital*), deep problems of unaccountable power—of the same kind that motivate Robé's intervention—remain unaddressed by his regulatory solution. Moreover, the view of legal order presented in the book is a predominantly instrumental one. If we have autonomy-based reasons to favor a broader, more constitutive conception of legality, then the use of property and other legal modules to institute domination presents a graver problem than Robé recognizes—with his emphasis on strict market functionality. A normative argument about autonomy is thus necessary to develop a complete picture of the relevant power relations.

Barbara Bziuk and Philipp Stehr also celebrate much of the book's ambition, but take issue with what they regard its undisclosed, or underdeveloped, normative commitments. They argue that more work is required to specify and defend the principles Robé believes should constrain what economic actors are permitted to do. They attempt to reconstruct his views on the foundations of autonomy and accountability. Given such views, they argue, the suggested reforms—a more integrated accounting framework, a wider set of government-imposed regulations, and so on—are insufficient to make firms into accountable promoters of human freedom. They present an expanded set of changes, and call on Robé to reconsider his overview of the World Power System in light of what these changes would require.

The volume closes with a vigorously argued reply to these texts. Robé defends ideas that were challenged, answers queries that were put to him, and at several points suggests lines of interpretation that would bring his positions closer to those of his interlocutors. All in all, we hope that the interventions in this symposium move the debate forward on matters of vital interest with respect to the relations between power, property and politics in today's global economy.

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