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REVIEW SYMPOSIUM

On the chances of structural pluralism in the liberal theory of property

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Hanoch Dagan is an admirable thinker and a particularly persuasive writer: in fact, only a person with a heart of stone would fail to love his liberalism. Yet, that should also give rise to doubt – how is it possible that many critics of both property and autonomy can so easily line up behind Dagan’s story? Is it really the case that if only we properly incorporate the criticisms of private property, we can end up with an institution of liberal property that works for all? Where commons co-exist with private property, and markets co-exist with other forms of economic provisioning, all on an equal footing, in a state of perfect equilibrium?

In this contribution, I do not intend to critique Dagan on the basis that his normative theory is impervious to the harsh realities of contemporary capitalism. That point has been made.¹ Rather, I would like to argue that Dagan’s account does not work even on its own terms. That is, his structural pluralism – a condition for the legitimacy of private property – cannot really exist within his individualist framework.

The criticism that I will raise here is a version of the criticism that Dagan himself mounts against the feasibility of Nozick’s utopia:

‘The state’s obligation to foster diversity and multiplicity cannot be properly met through a hands-off or passive approach on the part of the law. Why? Because such an attitude “would undermine the chances of survival of many cherished aspects of our culture.” A commitment to personal autonomy, as shown below, requires that a liberal state, through its laws, work actively to “enable individuals to pursue valid conceptions of the good” by providing them a multiplicity of options.’ (Dagan, 2021, p. 118)

Dagan points out, correctly in my view, that Nozick’s idea of a minimal state cannot bring about structural pluralism, since it does not duly acknowledge how people, with all their conditionings and limitations, actually function. Having only one rule that says, for instance, that ‘property shall be protected’ would not give people sufficient support to experiment with different ways of relating to things and to each other.

The question remains, however, of whether Dagan provides a recipe that, in contrast, *can* facilitate the experimentation with different ways of relating to things and to each other. Can his combination of individual choice, and enabling legal rules, usher in structural pluralism? In other words, if Dagan expands Nozick’s thin framework with a palette of enabling private law rules, can we plausibly assume on those grounds that we will end up with ‘really existing’ structural pluralism, which he deems is a fundamental precondition for the legitimacy of a private property regime?

My response is that we will not for at least two separate but related reasons. First, starting from individual choice as a cornerstone of his framework, even if mediated through a system of enabling legal rules, is not sufficient to foster genuinely collective forms of organisation and property.

¹See e.g. *The Law and Political Economy Project*, Symposium on Dagan’s Book ‘A Liberal Theory of Property’, available at: <https://lpeproject.org/symposia/liberal-theory-of-property/> (accessed 3 April 2021).

Second, Dagan is too optimistic about markets, and too suspicious of the state, in ways that are inadequate to giving collective forms of ownership a chance.

To take the first point – brilliant as Dagan is, he recognises and accepts many criticisms that have been raised against private property. In order to grapple with the challenges that these criticisms pose, Dagan tries to integrate some of the concerns that afflict this largely individualist institution by arguing, among other things, for structural pluralism:

‘So long as the boundaries between the multiple property types are open and non-abusive navigation of these options is a matter of individual choice, ... the availability of several different but equally valuable and attainable interpersonal frameworks makes autonomy more meaningful by facilitating people’s ability to choose and revise their forms of interaction with other individuals regarding various types of resources.’ (Dagan, 2021, p. 128)

Dagan believes that by providing a palette of property ‘regimes’ that cater to both self-interest and collective interest, we may preserve some of the ‘cherished [collective] aspects of our culture’ (Dagan, 2021, p. 118, citing Raz) within the ambit of an individualist framework.

Yet, what Dagan fails to acknowledge is that the difference between the collective and the individual is not just a matter of degree: the collective is not just ‘a set of mechanisms for collective decision-making aimed at aligning individual and group goals by aggregating individual preferences or objectives’ (Dagan, 2021, p. 104). To create conditions that would foster actually existing structural pluralism – that is a meaningful mix of private, public, collective and commons property regimes in the overall texture of property – much more has to be done than what Dagan envisages.

The ‘problem’ with the collective is that it cannot be so easily *willed* into existence. Individuals have far less immediate control over collectives, with regard to both their emergence and their success. We are fundamentally dependent on others to bring collectives into life. How then?

Collective forms of organisation and property, to be attractive for people to pursue, do indeed require supportive institutional structures, as Dagan suggests. Thus, empowering legal institutions, including effective means of conflict resolution, will be important.² But beyond this, collective forms of organisation and property also require supportive ‘cultural infrastructure’ that makes a choice for collective modes of life meaningful and valid – something that Dagan, as a liberal, fails to explore.

This argument, I believe, goes far beyond communitarian celebration of traditional communities. It goes to the heart of Dagan’s commitment to self-determination as experimentation, problematising his individualism as the starting point for reflection. If people are to establish workers’ co-operatives, share property or hold certain types of property in commons, they need to be ready to relinquish a degree of authority that private property currently affords them, while accepting increasing dependence on others. In order to do so, they need to see *why this is a meaningful thing to do*. If the broader cultural framework, however, is premised on the equation of morality with individual autonomy, exit and choice, and rationality with self-interest, how can Dagan really expect a sizable number of people to want to engage in collective enterprise in the first place? If the starting point for imagining the world is ‘me’, how can a ‘me’ even start contemplating a collective that puts the same ‘me’ at peril?

If we seriously want to engage with the question of how to foster structural pluralism – that is, what institutional and cultural infrastructure such structural pluralism needs – we should start by asking if and when we have seen a degree of actually existing structural pluralism. In which period, and under what conditions, could the property pool plausibly be said to have included a genuine mixture of private, public and collective forms of both ownership and action?

Perhaps the closest we have gotten to actually existing structural pluralism, at least in the countries of the West, was in the postwar decades: the *trente glorieuses*.³ The postwar consensus was sustained by

²One may ask a question of whether we would really develop properly such legal institutions in the first place if there is no more general sense of their need.

³That is, the period between World War II and the 1970s.

a cultural framework, over time entrenched in many institutions, that foregrounded values of solidarity, co-operativism, mutualism, collective action, class struggle and public ownership, action and responsibility, etc.⁴ In fact, many enabling and supportive rules, including many rules of private law that Dagan mentions, emerged in this context.

These values, as well as the institutions that enabled them, were to a large degree hollowed out over the past forty years. The consequence is that we have increasingly moved from structural pluralism to structural monism, with private ownership and competition taking pride of place, ‘crowding out’ more collective forms of ownership and action.

Given the importance of state and public authority in creating conditions for structural pluralism, perhaps the most striking element of the theory of liberal property is its deep-seated distrust of public institutions. In the book, we find a chapter on ‘just markets’, but no chapter on a ‘just state’ or ‘just public institutions’. Public authorities are mainly considered in the last chapter on the regulatory takings and dealt with from a perspective of considerable suspicion:

‘In our non-ideal world, corruption of public-spiritedness can take various forms, and some of its more troubling manifestations are not necessarily crude infirmities of the administrative process but more systemic and subtle problems, such as strong interest groups capturing public authority.’ (Dagan, 2021, p. 277)

In Dagan’s account, for the most part, property is there to guard us against the ‘progressive pact’ (Dagan, 2021, pp. 276ff.), thus ensuring that the state does not overreach. The justification for this safeguard against the state is the protection of the weak – rather than the rich or the powerful – leaving, as it is done in normative theory, empirical questions (how does this really work?) off the radar. Importantly then, the institutions of private property, or market, are not *more immune* to the perversions of our ‘non-ideal’ world than those of public authority. Dagan’s somewhat asymmetrical worries about the real-life perversions of the state, and much less so of property or markets, go, I would suggest, to the detriment of the ability of his theory to convince many critics of liberal property.

To conclude, a liberal theory of property that engages only narrowly with the institutional preconditions of structural pluralism (facilitative rules), while relying on an individualist cultural framework (autonomy, choice and exit), will fail on exactly the same grounds as does Nozick’s. In different words, Dagan’s ideal property framework does far too little to foster experimentation with collective forms of ownership and action, failing to create preconditions for both more robust modes of self-determination and structural pluralism. The ‘really existing’ structural pluralism requires ‘really existing’ pluralism of foundational values – individual autonomy alone will not do the trick.

Reference

Dagan H (2021) *A Liberal Theory of Property*. Cambridge: Cambridge University Press.

⁴This is certainly not to say, however, that all included a happy story.