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Capital's global rule

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1 | INTRODUCTION

Capital is not a thing, as students of capitalism have long insisted (Harvey, 2010). Instead, capital is often depicted as a social relation that has been forged in the production process between capitalists. Missing in this social relation is the critical role of the state and of law. Capital is coded in law, as I argue in my recent book, *The Code of Capital* (Pistor, 2019). It piggybacks on and at times hijacks the state's institutional powers of coercion to create wealth for holders of capital assets. Four critical attributes that are fashioned in law distinguish capital assets from any other asset: the holders of capital have *priority* rights over competing claimants; they can extend their rights in time, making them *durable*; further, the holders may be given the right to *convert* these assets into safe assets that can retain their (nominal) value. Last but not least, *universality* ensures that the above attributes, priority, durability, and convertibility can be enforced against the world. They bind not only the parties to a transaction but anyone, because they are backed by state power.

Several legal modules have been used time and again to graft these attributes onto different asset—a piece of land, a pile of debt, a business organization, an idea. Contract law, property rights, trust, corporate and bankruptcy law are the most widely used of these modules. With the exception of bankruptcy law, which remains mandatory, these modules have become readily available off the shelf. Only minimal requirements have to be met to ensure that a contract, a trust, or a corporation will be recognized as legal and the claims they create enforceable. There is no need for obtaining approval or for considering the possible negative effects a particular coding strategy might have for others, even the public at large, unless there are specific regulations in place that call for regulatory oversight. Even if states regulate certain activities or specific entities, such as banking, the private modules of the code can be used to arbitrage around them. The system we call shadow banking is a good example: Off balance sheet "special purpose vehicles," that is, trusts or corporate entities, have ben used to fashion new assets that can be used as collateral to back claims to future cash flows. They substitute for central bank reserves or deposit insurance as they were designed to offer banking services without being regulated as banks.

The spread of shadow banking domestically and globally would not have been possible without their implicit backing by the state's coercive powers. A promise to future cash flows is an empty promise unless it or the assets that back it, can be enforced. Anonymous markets in which trillions of dollars are traded by the stroke of a key don't rely on personal trust; they depend on the possibility of coercion. This implies that is not accurate to suggest that state power has not been scaled back in the age of globalization; rather, it has been repurposed to serve the interests of capital. States have offered their laws, the modules of the code of capital to asset holders; and they have empowered private parties to pick and choose from among different legal systems the modules that best suit their needs, while resting assured that their choices will be enforced. In addition, they have consented to the privatization of dispute settlement and encouraged arbitration in domains that used to be off limits, thereby eliminating courts as the only space for public contestation that the private coding of capital affords to contest capital's preferred coding strategies.

The ability of private parties to pick and choose from among the different legal systems the law that best suits their transactional needs or gives them the most accommodating tax or regulatory regime stands in tension with the use of law as a means of democratic self-governance. The ease with which some can opt out of one legal system and into another weakens the effectiveness of law as a collective self-governance device.

2 | THE LEGAL FOUNDATIONS OF GLOBAL MARKETS

The literature on global governance has expanded exponentially since the early 1990s, as academics have sought to conceptualize the rapid reorganization of economic, political, and social relations at a global scale. Much emphasis has been placed on the integration of markets, particularly financial markets, and about the nation-state losing its preeminence. The fact that financial assets worth trillions of dollars can be zipped from one place to another within seconds has often been understood to signify a new spatial order. Yet, as I will attempt to show in this article, the global order, and in particular the financial order, is much more deeply rooted in national legal orders than is usually acknowledged. Not every legal system and not every currency has the same weight as the source code for global capital; but this should not distract from the fact that in the end, it is still all about law that is backed by nation-states. Perhaps law will someday be replaced by a digital rather than a legal code, but we are not there yet.

In what follows, I will not attempt to summarize the vast literature on global governance. Instead, I have selected three contrasting perspectives on the role of law in global governance. By offering my own critique of each I hope to situate my own perspective, which views states as deeply implicated the project of globalizing capital.

2.1 | Mechanics of accountability in global context

I start with Ruth Grant's and Robert Keohane's attempt to map global "power wielders" into accountability mechanisms that can be used to limit effectively their ability to abuse the power that has been conferred on them (Grant & Keohane, 2005). Every power wielder, they suggest, is prone to abusing their power, which explains the need for effective accountability mechanisms. The authors first introduce the two models of accountability they associate with nation-states: participation and delegation. Participation allows people who are affected by a power wielder's actions to evaluate them, and if necessary to alter their course in order to align them better with their own interests. It can take the form direct democracy, self-governance, or populist leadership. The alternative to direct participation is delegation by way of elections or assignment. Delegated power is subject to agency constraints or fiduciary duties.[1]

This model of power and accountability from the perspective of capital that is coded in law, is deeply incomplete. Grant and Keohane assume that a state is organized as a closed polity with legislation extended to all members of the polity with no exceptions. Yet individual actors have many chances to opt out of the formal legal system and substitute it with informal norms, or to opt into another subnational or foreign legal system.

Further, while the authors recognize that the power wielder in both the participatory and delegation models may not act as a unitary actor, they seem to embrace the notion of an overarching public interest that is indivisible. This is revealed in their definition of the abuse of power. "Power is abused," they write, "whenever it is used for private or partial interests contrary to the interests of the public" (Grant & Keohane, 2005, p. 34). Read literally, this definition condemns much, if not all, of private law, as it allows private actors to use the law to further their private interests with the backing of the state's coercive powers. One might claim, against this argument, that the sum of all private interests *is* the public interest, and that, therefore, empowering private parties to invoke state power for their own ends is not only justifiable, but the right thing to do. Quite apart from the fact that this ignores conflicting interests, private parties availing themselves of state power in their relation with each other departs from the original model of participation or delegation. Private actors who utilize state power for their own interests become the true power wielders, and they are accountable to no one.

Grant and Keohane draw a stark line between domestic and the global power wielders based on their limited understanding of the former. Not realizing that domestic polities face similar challenges, they argue that because a single polity does not exist at the global level, accountability in the global context must take different forms. They produce a list of seven mechanisms of accountability: hierarchical, supervisory, fiscal, legal (international law), market, peer, and reputational. For each they identify the "accountability holder," the "power wielder," and the costs the former can impose on the latter, and offer a couple of examples as illustration.

Yet law is a much more versatile tool of governance than they suggest. They view law primarily as a top-down device of formal governance and use administrative and criminal law examples to illustrate this. They ignore the entire body of private law and its role in empowering markets and property rights, business organizations, and financial assets. Firms are mentioned only in passing and are said to be subject to "*domestic* supervisory and legal accountability" in addition to participatory accountability by their stockholders. Globally, the only mechanism with real bite other than shareholder governance are reputational sanctions in the form of consumer boycotts and the like.

This, however, is only a partial reading of the legal coding of the modern business corporation. Since the 19th century most industrializing countries have allowed firms to use the corporate form off the shelf, that is, without the need for prior approval and with great latitude to adapt the corporate form to their needs. Whoever complies with the ever-more lenient entry requirements for creating a corporation, with all the legal privileges this entails, gets to enjoy them. These privileges include legal personhood, meaning that in private law at least, a corporation is treated like a person with the power to own assets, contract in its own name, and sue and be sued in its own name. It follows that shareholders cannot access these assets and neither can their own personal creditors. Shareholders do, however, enjoy limited liability, that is, they themselves are shielded from the liabilities the firm entails and have no obligation to stand in for them. In return, shareholders are able to elect management. Corporations that are publicly traded are subject to additional oversight by securities or capital market authorities in jurisdictions where their shares are traded. Other than that, they can simply continue to exist as corporate entities; and unlike humans, they don't have a natural life expectancy; they have to be actively liquidated to vanish.

Corporations owe these legal privileges to the domestic law of the jurisdiction where they incorporate. In principle, there is no reason to assume that just because one state has granted a certain legal privilege, another will respect it. In the past many countries have insisted that a business organization that wishes to do business on their shores and be recognized as a separate legal entity needs to form a corporate entity, not just under any legal system, but under their own domestic law (Nougayrède, 2019). If this were fully realized in practice, multinationals might still exist but every subsidiary in a different country would be organized under different laws. Yet life for them has become much easier ever since the incorporation theory has prevailed. Most countries recognize a corporate entity as such, wherever it has chosen to incorporate, as long as it followed the legal rules of the jurisdiction of its choice. The implications of this rule are clear: they encourage corporations to go on a shopping spree that meets the interests of their constituencies which control the incorporation decision: management, shareholders, and their lawyers. Further, the jurisdictions that offer the most attractive law to these constituencies get to set the rules for these corporations. The most favorite jurisdictions are the US state of Delaware, the UK and the Netherlands; these jurisdictions are the rule-markers, all other jurisdictions are confined to the role of rule-takers.

In short, the transnational world is not devoid of law, and contrary to Grant and Keohane, a consumer boycott is not all there is in terms of public governance when corporations operate on a global scale. Rather, the transnational world is built on the *domestic* law that determines when foreign law will be deemed enforceable in a domestic court. As part of the domestic legal system (in individual states in the USA), conflict-of-law-rules are in principle subject to the political accountability mechanisms these systems afford. Yet these rules are hiding in plain sight, too arcane to ruffle many feathers, and with effects that are difficult to fully anticipate at the outset for the electorate or their representatives.

2.2 | The new (global) anarchy

At the opposite end of the spectrum lies a literature that embraces the notion of radical pluralism and anarchy in the global context. In a provocative recent article, Philip Cerny and Alex Prichard suggest that we are in the midst of "transformations in the power of state and capital" and call for a reconstitution of world politics (Cerny & Prichard, 2017). Rather than reconstitute state sovereignty as we know it, they advocate the "radical pluralization" of the political order (Cerny & Prichard, 2017, p. 385). Cooperatives, subsidiarization or multinational firms, in their words, are "economic counterpowers developed from the ground up" (p. 389).

Proposals such as these are based on a view of the state that has lost its ability to act and instead only *reacts*. I agree with the observation about the reactive nature of state action, which has been only too evident in the management of the global financial crisis. Yet, once again, it would not only be naive but simply wrong to suggest that global capital operates without the support of state law or state power. After all, capital is coded in law and cannot thrive without the ability to invoke the coercive powers of a state if and when needed. For no assets is this more relevant than for th assets that owe their very existence to law itself; namely, for intangibles, such as financial assets.

Financial assets are claims to future cash flows, which are not worth much unless they are backed by a credible threat of enforcement. They are crafted in contract law but are often fortified with collateral law to prioritize some claims over others, or are shielded behind the legal veils of trusts or corporate entities to ensure their durability. It takes a lot of careful legal coding to fashion complex financial assets, such as asset-backed securities and their derivatives. To scale markets to global size the industry had to standardize. Instead of radical pluralization we therefore observe remarkable parochialism. Beneath the surface of pluralism, we do not find global anarchy but sophisticated legal coding that is embedded and backed by a few select domestic legal orders. Jurisdictions with a track record of accommodating the needs and desires of finance in terms of flexibility and limited state oversight get to set the global standard. Once a global standard has been set others often have little choice but to follow suit if they wish to participate.

To think that bottom up, decentralized counter moves will be effective in dislodging this system is mistaken. There may be good reasons to foster cooperatives and other forms of grassroot self-governance for their own sake and that of their members, or to consider how to broaden their appeal. Without more active state policies that make these organizational forms more attractive they will not be able to dislodge the legal structures that dominate today. After all, there is a reason why capital has embraced trusts and the corporation, not the cooperative: it thrives on the asset-shielding powers of these legal devices that limit its risks and extend its durability while keeping other stakeholders at bay.

In sum, contrary to Cerny and Prichard, globalization is not a new space that opens beyond the borders of nation-states; rather, it is an extension of the powers of some nation-states that offer their law and their coercive powers to the coders of capital and their clients. The complexity of its multifaceted nature may, to the casual observer, look like anarchy. Digging deeper, however, reveals a highly structured order: a web of law that can be traced to only a few legal systems.

2.3 | Transnational private regulation

Grant and Keohane understand law primarily as a regulatory or administrative tool of a powerful state that must be held accountable to the people. Other scholars have studied more closely the extension of domestic legislation beyond the territorial boundaries of the nation-state. This body of scholarship addresses "transnational private regulation," which can take again many different forms (Cafaggi, 2011). It may consist of non-binding rules of conduct or model codes that exert strong persuasive power, or, more likely, that are adopted for fear that those who do not follow them will be excluded from a market. However, contract law can also be used to transmit the regulatory objectives of a state beyond its territory. Finally, conflict of law rules can extend the reach of assets and intermediaries that are coded in the private law of one jurisdiction to other jurisdictions around the globe.

The first mode of transnational private regulation is exemplified by the book by Buethe and Mattli (2011) *The New Global Rulers*, showing how non-state actors are able to make transnational rules (Büthe & Mattli, 2011). These rules may be non-binding but they are often incorporated into domestic law and thereby achieve binding powers. The most visible manifestation of transnational private regulations are standards-setting organizations, such as the International Accounting Standards Board (IASB) (Büthe & Mattli, 2005).

In their analysis, Buethe and Mattli employ the principal-actor model, one of the Grants' and Keohane's accountability models, but they extend it in important ways. Whereas for Grant and Keohane the principal agent or fiduciary model is a binary relationship, Buethe and Mattli show that the introduction of private regulators creates multiple principals: private rule-setters, public rule-adopters, and the public. Within a democratic framework of delegated power, the public is nominally the principal but often ends up as the rule-taker at the end of a process that is controlled by private agents at the rule-setting stage. With more than one principal in play, one can no longer assume that when creating a new rule a responsible principal will strive to find a middle ground between two or more constituencies with conflicting interests. In fact, the private rule-setter typically represents a single constituency, the interests of which are amplified by coordinating their interests globally, and feeding the product, the final rule, back into the domestic legal system. The private rule-makers are not agents or fiduciaries of the public but are accountable only to its own constituencies.

Domestically, private regulators typically operate in the shadow of public regulators. For example, the US Financial Accounting Standards Board, a private regulatory body, is monitored and overseen by the Securities and Exchange Commission. Lack of resources at in this commission make its oversight rather weak, but at least formal accountability mechanisms are in place. At the transnational level there is no comparable oversight mechanism. The IASB was given an elaborate governance structure to ensure that it is geographically diverse and cannot be easily captured by a national interest group or domestic regulator, but this should not detract from the fact that the general public, whose interests should be protected by the rules of the IASB is seriously underrepresented. Holding the IASB accountable therefore is limited to peer and market pressure: the willingness of the regulated companies and of the domestic public and private regulators to follow its standards (Büthe & Mattli, 2005).

In other cases, private entities extend domestic regulations beyond the territorial boundaries of the rule-originating state by incorporating them into contracts along a global supply chain (Cafaggi, 2011). Only suppliers that meet the food safety or other product quality standards set by the legislatures and regulators of the importing countries are able to sell their products to multinational corporations. The regulatory mechanism of choice is the contract, which can be used to stipulate in great detail the conditions that the purchased goods must meet. Contracts are typically assumed to be the results of a negotiation, but there is no room for bargaining when it comes to regulatory constraints that even the importer cannot alter. There may be more than one way to implement the standards, but even then, for the parties to the contract the choices are rather limited. The effect of regulation by contract is to impose the rules of some countries (mostly the importing ones) on the rest of the world. With regard to the EU, this has been dubbed the "Brussels effect."

Lastly, the private law of one country can serve as the foundation for global markets if all market participants agree to opt into that country's legal system. All it takes is a coordinator to resolve the collective action problem that multiple private actors face when making their own choices. The International Swaps and Derivatives Association (ISDA) was founded in 1984 as such a coordinator (Biggins & Scott, 2012; Morgan, 2008). Private actors had discovered that credit derivatives—complex contractual instruments that allocate different types and levels of risk with regard to an underlying credit asset (such as a pool of mortgage-backed securities) to different holders—are potentially lucrative assets. The first movers made a great deal of profit but soon realized that in order create a global market in these assets the underlying contracts had to be standardized.

ISDA's founding members were major banks and financial intermediaries that had already moved into these new assets. They signed up as members and their lawyers became associate members of the association. Jointly they developed ISDA's master agreement, a piece of "private legislation," as insiders like to call it. There are no multiple principals here and no principal-agency relation other than that between the financial intermediaries and their lawyers. The finance industry is in the driver's seat to advance its interests with their lawyers at their side. They are employing age-old tools of transactional law: contract law, collateral, and property and bankruptcy law. Further, the master agreement advises users to opt into the laws of the UK or the state of New York, and to opt into the court system of these two jurisdictions as well. Thus, calling the ISDA a regulator, even a private one, may not fully capture its mission. The ISDA does not transmit regulatory standards; instead, it employs private law as a mode of self-governance at the global level by offering a master agreement, by coordinating the choice of law and choice of forum of its users, and by lobbying domestic legislatures for legal changes if they stand in the way of the smooth operation of the master agreement.

In sum, the term "transnational private regulation" captures a variety of different types of governance. Nevertheless, for my purpose it serves as a reminder that the rules that may end up becoming state law are often forged by private interest groups, and increasingly by groups that have the capacity to coordinate globally. Further, they all piggyback on state law and state power in one way or another. It therefore serves as a good example of the transformation (not the demise) of state power and state law in the age of globalization.

3 | STATE AND CAPITAL: A SYMBIOTIC RELATION

The legal code that rules finance and commerce domestically and increasingly globally predates the rise of constitutional democracies. Its core features can be traced to feudal times, when property rights in land were forged. In fact, the legal elements that are used to code capital today have not changed much over the centuries; they were adapted to fit new classes of assets but their basic features and function has remained remarkably stable. They prioritize some claims over others; they extent legal privileges in time and in space and they allow some asset holders to convert risky assets into safe ones in order to lock in past gains. The versatility of these legal modules has allowed them to survive even major political changes over the long road from feudalism to modern constitutional democracies. As a result, modern democracies live with an inherent tension between the normative foundations of a new constitutional order and the remnants of a hierarchical legal order that serves the few privileged asset holders.

3.1 | Constitutions versus private law

Few constitutional courts (or their equivalents) have sided as explicitly with the primacy of constitutional law as has the German Constitutional Court. As the guardian of a new constitutional order that followed the horrors of fascism, the court has ruled that the new Constitution prevails over lower law, including the civil code that preceded its enactment by half a century and codified legal practices that were even older. Constitutional principles, such as human dignity, or the principles of a social state based on the rule of law, radiate outwards and guide the interpretation of subconstitutional law, including private law (Alexander, 2003; Levi-Faur, 2009).

In contrast, Supreme Court justices in the USA, especially the originalists among them, have been more inclined to protect the integrity of the common law and to shield it from interference. As an added complication, in the USA private law is largely a matter of state, not federal law. This sets the country apart from other federalist systems like Germany or India, for example, where most private law falls within the jurisdiction of the federation. The extension of constitutional principles into matters of private law in areas that concern racial or sexual equality, for example, is criticized not only on jurisdictional (or federalist) grounds, but because this threatens to upends the norms of a private legal order that preceded the Constitution. The attack on the administrative state that is on the rise in scholarly writing and, more recently, in decisions of the US Supreme Court (Gundy v. United States, 588 U.S.___), can be read as an attempt to roll back political governance over economic relations, which the common law vested firmly in the hands of private actors (Hamburger, 2015).

In the common law, which was transposed from England to the USA, private attorneys have much leeway to mold the law and graft legal protections onto new assets, subject only to the occasional vindication by a court of law (Hodgson, 2009). Moreover, unlike in civil law systems, where judges are career bureaucrats, in common law systems judges are recruited from the practicing bar. Not surprisingly, they have always been inclined to validate the legal innovations that their former colleagues have brought before them (Twiss, 1942).

In addition, asset holders in the UK and its offshoots have benefited from the tradition of chancery courts, offshoots from the King's Council that rule on broad principles of equity and are freed from the more stringent rules of the common law. If a party lost in a common law court (or thought it might), it could take its case to the courts of chancery in the hope of obtaining a more forgiving ruling. Chancery courts presided over many of the land disputes that ended up enclosing much of England's arable land in the 16th century (McDonagh, 2013). One of the more intriguing effects of the duality of common law and chancery courts is the extent to which the chancery court was willing to protect landowners in the 18th century from their creditors. They allowed families to entail their assets for future generations, giving the current "owner" only a life tenancy. As a result, creditors, even secured creditors, could seize only half of the land and never the family mansion (Chesterman, 1984).

A legal overhaul of real estate law did away with some vestiges of feudal privileges, but others have remained to this day. The US Supreme Court ruled only recently that a state (North Caroline) may not tax the income of a trust that was formed under the laws of the state of New York, even though the trust beneficiary resided in North Caroline (NC v. Kimberley, 588 U.S.__ 2019). A beneficiary who does not have the right "to control, possess, enjoy, or receive trust assets" (p. 7) does not create a close enough connection for her home state to tax the trust's income. "The Due Process Clause limits States to imposing only taxes that bear fiscal relation to protection, opportunities and benefits *given by that state*" (p. 5; emphasis added).

The trust's income may still be taxable under New York law, albeit at a lower rate. The Court treats the trust—a brainless legal creature that is designed to protect assets from the reach of creditors, including the taxing authority-as completely separate from the interests of the beneficiary. In fact, the beneficiary of the trust, which had been set up by her father to ensure that his wealth would pass on to his children undiminished by tax burdens, had decided not to take advantage of the termination of the trust when she turned 40. Instead, she advised the trustee to roll over the assets into yet another New York trust. Sanctioned by the Supreme Court, the assets in this (and similar) trusts can continue to breed wealth while keeping North Carolina and other creditors at bay.

The power to tax is widely regarded as a quintessential power of the state; and the power to control the state's budget is an accountability mechanism, which has inspired the idea of self-governance. "No taxation without representation" was the battle cry of the original Tea Party participants. This nexus, however, has long been fiction; not only because the public may not have had much control over the public purse but because some of the most influential players get away with paying no taxes at all. Instead of taxation with representation, we thus get representation without taxation. This works only because states continue to recognize formal legal creatures, such as trusts or corporate shells, even when their purpose is to shield assets from creditors, including the state itself.

3.2 | Old, new, and new-old property rights

The power of private over public law is amplified at the global level. The multiplicity of legal systems paired with legal rules that allow private actors to shop among them means that they can push states into a bidding war to attract capital (Michaels & Jansen, 2006). Many governments fall for this, either because they fear that companies might either leave or ignore them, a fear that is not always borne out by the data (Carruthers & Lamoreaux, 2009); or because they believe that whatever they do to enhance the inflow of capital will expand national wealth. In truth, capital does not flow; it is coded in the law of the recipient or of some other state that recognizes and enforces capital's legal attributes. The legal and tax privileges that governments make available to capital therefore become part of capital's genetic makeup that determines who will benefit from the returns on capital at the end of the day.

Capital and states are thus entangled in a symbiotic, some might say parasitic, relation; they are mutually dependent on one other. States not only create the legal code for capital; they also enabled capital to become footloose by allowing capital holders to pick and choose among their laws. State power has not receded in the age of globalization; rather, states have relinquished control over the ends to which their coercive powers are used.

The story of capital resembles the account by Polanyi of the subordination of society to the market principle (Polanyi, 1944). As he has shown, states actively participated in the dismantling of the protective barriers that society had erected to protect itself from the market: guilds, local markets separate from long-distance commerce; the obligation to take care of the poor, and so forth. In more recent times states have expanded private autonomy over the choice of law and law enforcement and have offered additional bonuses for individuals and corporations to do so, such as tax benefits. They often compete with each other in the hope that, in return, capital will reward them with more growth and greater wealth. Capital, however, is (and has always been) about the accumulation of private, not national wealth. This is well captured in the empirical regularity that Thomas Piketty has discovered (Piketty, 2014): The returns on capital have outpaced the growth of national economies by 5 percent on average over long stretches of time, a trend that has been disrupted only by major calamities, such as a depression or war.

Because they have always been handmaidens in the coding of capital, one might assume that states could simply take back what they have given and change course. As it turns out, this is not so easy. Not only might they face an economic backlash; they would also find themselves on the other side of *legal* disputes in which holders of capital employed constitutional and international treaty law against them. As is well known, private property rights are protected in constitutional law against expropriation without due process and fair compensation. This is a classic accountability mechanism against a powerful state that might abuse its powers to deprive individuals of their property rights. Most constitutions do not define but presume property rights. This open-endedness has paved the way for the transformation of the meaning and scope of property rights over time. John Commons noted the transformation of property rights from "use value" to "exchange value" in the late 19th century, and we have since moved from exchange value to expected returns (Commons, 1924).

Of course, not all claims to future cash flows are equally protected. Future cash flows that the state promises in the form of social security or explicit subsidies are typically not deemed to be property rights but entitlements that states can give or take at their discretion, except in the rare cases when they have created reliance expectations. This disparity in the treatment of expectations has long been criticized. Decades ago, Charles Reich called for the protection of "government largess," that is, cash flows that emanated directly from the state, as the "new property" (Reich, 1964). Others have called for expanding new properties to claims to housing, access to labor, and so forth, but to little avail (Super, 2013).

Instead, the protection of "old" property, expectations based on private bets not public commitments, has been further expanded. Of course, private bets don't always work out, and in most instances, the betters will have to absorb the losses. However, if the losses reach a magnitude that might affect the price of private assets across the board, governments often step in ex post and socialize the losses (Bernanke, 2015). In these cases the only difference between old and new property is that explicit government pledges to future cash flows will have been approved in a democratic process, whereas ex-post rescue operations are often crisis-driven and conducted by independent agencies, such as a central bank, or backed by ad hoc legislation that leave little room for deliberation. The central bank rescue deals in the midst of the 2008 crisis followed by bailout legislation in the USA, the UK, Germany and elsewhere, are prominent examples (Bordo, 2008; Fender & Gyntelberg, 2009). They are often justified by noting that the governments recovered most of their losses when they sold these assets back to the market. But this misses the negative effect of the crisis on firms and households on the periphery of the system that did not receive similar support and were driven into default.

Nowhere is the expansion of old property rights more apparent than in bilateral investment treaties (BITs) (Elkins, Guzman, & Simmons, 2006). Since the early 1990s most treaties incorporate so-called investor state dispute settlement (ISDS) mechanisms. The sovereign states that are the parties to a BIT thereby empower private parties, specifically investors from their own country, to take the host state of their investments to arbitration for alleged infringements of their "investment." Several aspects of this arrangement are worth noting. First, the investor needs only a formal attachment to a state to invoke the rights created in the BITs that the state has entered into with other states. Incorporating a subsidiary for the purpose of taking advantage of particularly generous investment treaty is sufficient. Technically, a foreign subsidiary of a parent company that is located in the "host state" is sufficient; in some cases, arbitral tribunals have given standing to subsidiaries that were formed in order to take advantage of a country's BIT with the host state *after* the dispute had arisen (Arato, 2015).

Second, investment is an even more open-ended term than property rights (Yannaca-Small, 2008). Whereas the meaning of property rights has been contested in most legal systems for centuries, the same cannot be said for investments, the term found in most BITs (Lehavi & Licht, 2011). Most BITs claim that they protect "every kind of investment," followed by a list of examples that includes movable and immovable property; and direct investments as well as portfolio investments (i.e., shares), including minority shares or indirect shareholders according to some arbitral tribunals; intellectual property rights and "claims to money and claims having a financial value." This latter wording indicates that not just property rights but even contracts can trigger remedies on par with compensation for expropriating property rights. Any government actions, by the executive, the legislature, or even the courts, might trigger claims, the defense against which alone can run into the millions of dollars.

This suggests that investments in BITs straddle the line between old and new property. They follow the pattern of old property rights in that private actors initiate investments and create expectations; but they can be used to hold the state to ransom for any changes in the investment environment, thus effectively insuring the investor against future change by the state. In short, BITs don't just extend old property rights to the global realm; they create new-old property rights.

When the ISDS mechanism was first introduced in the 1994 North American Free Trade Agreement, hardly anybody expected that it to be used with sufficient frequency to create a body of case law that is unprecedented in international relations. Governments in the Global North had pushed for ISDS in BITs as a means of disciplining countries with weak legal institutions where domestic firms did business (Franck, 2007). Soon, these governments have found themselves on the defense in ISDS cases that challenged their prerogative to govern their internal affairs and imposed liabilities on federal governments (the US or Mexico, for example) for actions taken by states or municipalities within their own jurisdiction, even for decisions rendered by independent courts. In response, many countries have therefore redrafted their model BITs.[2] Getting out of existing BITs is, however, easier said than done. They run typically for 10 years and often guarantee the rights investors received under them beyond this time limit.

In addition, lawyers who defend investor rights have advanced an argument that is meant to deprive sovereign states of their ability to amend BITs prior to the expiration of their term. BITs, they argue, may have their origin in a bilateral treaty between two sovereign states. However, by including special protections for investors, such as ISDS, these sovereigns have created a vested interest that they cannot alter again without the investors' consent. This argument has an equivalent in private law, where a third-party beneficiary of a contract between two others may be able to claim a vested interest against them (Roberts, 2015). When it comes public entitlements, however, states have much greater discretion in giving and taking, as we have seen. Extending these protections to foreign investors dissolves the distinction between new and old property rights (Roberts, 2015). It is not clear yet whether this argument will carry the day; the fact that it has been made and has numerous followers, however, shows the depth of the legal entanglement of states and private actors in the production of private wealth, an entanglement from which there is no easy escape.

4 | THE POWERS OF LAW

Law is a powerful, multifaceted tool of governance. For constitutional democracies, law is the primary means for collective self-governance. It derives its legitimacy from the Constitution and the law-making processes set forth therein, together with its binding power from the institutionalized means of coercion that the executive commands. All shall be equal before and none shall be above the law. In addition, individuals can use law to govern their private affairs and invoke the coercive powers of the state to enforce their rights vis-à-vis one another. This is the realm of private law.

Law's powers as a tool of collective governance, accountability, and private governance sets the stage for expanding individual autonomy within a collectively determined legal order. Keeping the right balance among the powers of the law has proven difficult. The fear that states may abuse their power and the need for effective accountability mechanisms to check this abuse has been foremost on the agenda of advocates of individual autonomy and democracy alike. Yet, as this article has shown, the expansion of private legal rights can undermine the law's power as a collective self-governing device.

States have expanded the scope for individual autonomy internally by offering more and more legal privileges that exist only qua law. Private parties can avail themselves of collateral, trust, or corporate law, with few strings attached, and invoke the powers thus created not only against one another but also against the state that created or endorsed these powers in the first place. The protection of private autonomy through law is, in principle, desirable. It empowers individuals to order their own relations while shifting the costs of maintaining this order to the collective. In this way, law enhances capability: it enables individuals to live the lives they have reason to value, as Sen put it (2005). Not all individuals, however, are equally equipped to take advantage of the empowerment of the law. Some require proactive support by the collective, that is, by the state as its representative, to realize the normative goal of the capabilities approach, namely that *all* members of society should be enabled to live the lives they have reason to value (Nussbaum, 2011). This is where the tension between autonomy-enhancing private law and collective self-governance law kicks in. Private autonomy, understood as an individual right without obligations to the collective and shared norms, empowers private actors to erode collective self-governance by turning their private rights against collective norms.

The tension between individual autonomy and collective governance is, of course, latent in any rule-bound system with a strong commitment to individual rights. In combination with a culture that rewards striving for individual wealth, it has laid the foundation for modern capitalism, an economic system that fosters the competitive search for new sources of wealth. Land and the resources it harbors became the first natural breeding ground for power and wealth. Only the legal enclosure of land, however, turned these resources into wealth-producing or capital assets. Over time, the legal devices that were used to enclose the land, give landowners priority rights, and make their claims durable and universally enforceable, were grafted onto other assets: financial assets, firms, know-how, and data (Pistor, 2019).

Along the way, savvy entrepreneurs and their lawyers discovered that law itself could be turned into a source of wealth. Claims to future cash flows are not natural rights. They are hopes, and sometimes only bets made on an uncertain future. With the help of private law they can be turned into capital assets that generate wealth. For this they need to be fortified in private law with property and collateral law to create priority claims; or protected behind legal shields that allow the value of assets grow over time, undisturbed by tax authorities or other creditors. Private law invokes state power in the interest of private asset holders who can use the law to fend off challenges against them.

The fragile balance between collective governance and private autonomy, both of which are guaranteed by law, is difficult to sustain even within a single polity like a nation-state. The self-destructive tendency of this system has manifested itself in a series of major crises, including the Great Depression in the 1930s, and, of course, the crisis of 2008. Globalization has made this balance even more fragile. In the hope of promoting economic development, states have made legal devices portable. They have allowed private actors not only to opt out of their own legal system but to opt into other legal systems of their choice, without compromising their access to the coercive law enforcement institutions that states command. They have empowered private actors to defend their interests against themselves, not only in their own courts but even in offshore arbitration tribunals. In short, states have become entangled by a web of legal claims that they helped to create, which have weakened their ability to use law as a means for collective self-governance. States have empowered capital to rule by law and in the course of this they have allowed themselves to be ruled by capital.

NOTES

[1] Grant and Keohane contrast the two, yet in law most agents owe fiduciary duties.

[2] For a summary of the evolution of the US model treaty, see https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/april/model-bilateral-investment-treaty.

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