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Reappropriating the rule of law: between constituting and limiting private power

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ABSTRACT
Starting from a teleological understanding of the rule of law, this article argues that private power is a rule of law concern as much as public power. One way of applying the rule of law to private power would be to limit instances of 'lawlessness' and arbitrariness through formal requirements and procedural guarantees. However, we argue that private power is, to a significant extent, constituted by law in the first place – and that its lawful exercise is no less pernicious than its unlawful exercise. Drawing on this constitutive function of law, we propose a normative core of the rule of law grounded on the moral equality of individuals. Attention to individuals' needs, capabilities, and public autonomy points to requirements of distributive justice and democratic participation as part of the power-conferring function of law. Through a discussion of contestations of fossil fuel policy, the article shows the critical and empowering potential of a reconfigured rule of law.

KEYWORDS
Rule of law; private power; constitutive role of law; moral equality; fossil fuel policy

Introduction

Discussions of the rule of law often start with a definition of the concept. It has proven difficult to find a robust definition that can be agreed upon; like many other political and legal concepts, it is essentially contested.[1] The general slogan of 'government by law, not by men' can be given a range of more particular meanings. The most common approach to attempt a definition has been termed 'anatomical': taking apart the concept to list its elements.[2] It is recognisable in the debate about the formal or substantive nature of the rule of law.[3] The anatomical approach has been criticised for generating 'laundry lists' of requirements and not paying sufficient attention to the overarching meaning of the rule

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[1]Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21(2) Law and Philosophy 137; For an attempt to go beyond contestedness by identifying the common aims that undergird the most frequently cited conceptions of the rule of law, see Paul Burgess, 'The Rule of Law: Beyond Contestedness' (2017) 8(3) Jurisprudence 480.

[2]Martin Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?' in James E Fleming (ed), *Getting to the rule of law* (New York University Press 2011)

[3]Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004)

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of law concept.[4] Famous formulations of lists are by Lon Fuller and Joseph Raz, although both authors do not offer these as stand-alone accounts: they embed their lists in an account of the function of law.[5] In contrast, Martin Krygier formulates a 'teleological' approach that forefronts the purpose of the rule of law and resists breaking it down into specific requirements. The idea here is to focus on the *purpose* and to consider the rule of law in its social context, which is why it can also be referred to as a 'sociological' approach.[6]

One element that is common to most theories of the rule of law, be they anatomical or teleological, is a concern for the restraint of power, in particular arbitrary power. However, when these theories are given more body, this concern takes a particular shape: the restraint of public power. From Dicey to Fuller, the limitation of government power in the interest of its citizens is seen as the thing to worry about. It seems, as Burgess argues, as if the main form of power that is seen as potentially problematic is the power of the state.[7] However, it is by no means a given that arbitrariness in the exercise of power is mainly found in the operations of states and governments. The abusive use of labour contracts by employers, or of service contracts in sub-contracting; the extent of entitlements and immunities encapsulated by various forms of property rights, including investment protection; environmentally unsustainable corporate conduct that goes largely unaddressed; the exploitation and monetisation of data by big tech companies that may harm privacy rights; all these problems are problems of arbitrary power too. Likewise, the rise of private power, especially in the context of the globalised economy, means that in a variety of contexts private power assumes the characteristics of functional sovereignty:[8] private actors exercising power in ways that are comparable to and often indistinguishable from state power. This is done through, for example, the expansive use of private legal ordering that assumes characteristics of bindingness for stakeholders and communities,[9] the assumed power to resolve disputes extra-judicially,[10] or the provision of social services that extend beyond wages, like housing or healthcare in the context of corporate social responsibility programs[11] – all of which contribute to a high degree of dependence of workers' and communities' livelihoods on corporations. Although not exclusively the case, this is particularly visible at 'corporate frontiers'.[12] Historically, this is unsurprising considering how colonising

[4]Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E Fleming (ed), *Getting to the rule of law* (New York University Press 2011); Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 210–29

[5]Lon L Fuller, *The Morality of Law* (Yale University Press 1969)

[6]Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the rule of law* (Hart Publishers 2009)

[7]Paul Burgess, 'Googling the Equivalence of Private Arbitrary Power and State Arbitrary Power: Why the Rule of Law does not Relate to Private Relationships' (2021) 17(1) International Journal of Law in Context 154

[8]Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (University of Minnesota Press 2013)

[9]Ioannis Kampourakis, 'The Postmodern Legal Ordering of the Economy' (2021) 28(1) Indiana Journal of Global Legal Studies 101

[10]Rory van Loo, 'The Corporation as Courthouse' (2016) 33 Yale Journal on Regulation 547

[11]Maha R etal, 'White Capital: Corporate Social Responsibility and the Limits of Transformation in South Africa' (2017) 4 The Extractive Industries and Society 735

[12]Laura Knöpfel, 'An Anthropological Reimagining of Contract in Global Value Chains: The Governance of Corporate-community Relations in the Colombian Mining Sector' (2020) 16(1) European Review of Contract Law 118

Powers exercised their domination through corporate entities, such as the Dutch and British East Indian companies.[13]

In this article, we argue that private power should be seen as a rule of law problem as much as public power. Yet, there is an ambiguity in the function of the rule of law with regards to private power. On the one hand, it promises the regulation of private power and the protection of those who are subjected to it from its arbitrary exercise. On the other hand, private power is, to a significant extent, constituted by law in the first place. A seemingly straightforward perspective is that the rule of law requires the exercise of private power to be governed by norms and be accountable – this is what it means to temper 'arbitrariness'. Yet, such a formalist position that passes no judgement on the content of the norms meant to govern private power equates the ambit of the rule of law with the application of 'legality'. However, it is precisely legality – and not illegality or 'lawlessness' – that fundamentally enables the forms of exploitation and structural inequality that shape our political economy.[14] One needs only to think about the ways in which transnational corporations become gatekeepers of global value chains[15] or powerful platforms cement their power over users' data:[16] It is by means of legal rules of permission and prohibition, and not by breaking the law. Indeed, private power is itself, to a significant extent, a product of legal entitlements – of property rights and contractual freedom backed by public enforcement. Therefore, we argue that the complicity of law in supporting and perpetuating private power should be a rule of law concern as well. To that end, we take up the ideal of the rule of law as curbing arbitrary exercise of power and investigate how the notion of arbitrariness is linked to the allocation of power.[17] In our view, this requires taking seriously the value of moral equality as underpinning the rule of law. Moral equality of individuals, understood not as abstractions but rather as embedded in their social context, requires attention to their needs, capabilities, and public autonomy – this, in itself, points to a direction of distributive justice as part of the power-conferring function of law, as well as to a requirement of democratic participation in the shaping of the laws that govern one's life.

The rule of law constitutes a normative framework that has been repeatedly mobilised to legitimize legal regimes and policies. For example, the rule of law is a foundational value of the EU, while it has also been employed in the contexts of investment protection and in financing for development. Owning to the positive connotations associated with it, the rule of law has a performative force in legitimising exercise of power. As such, it has often found itself at the receiving end of critique for the kind of instances of power it legitimises. Our 'reappropriating' account, rather than ceding the concept to its currently

[13]Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1; Kate Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) 21(1) Colorado Journal of International Environmental Law and Policy 1

[14]Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019)

[15]The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4(1) London Review of International Law 57

[16]Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019)

[17]We focus on the shift from arbitrariness as unpredictability (the standard sense of the term in liberal rule of law theory) to a substantive idea of arbitrariness as the failure to recognize the moral equality of individuals. We leave aside the unpacking of dimensions of arbitrariness – including unreasoned, unaccountable and possibly unfair exercise of power (in addition to, not replacing, unpredictability). For such unpacking, see Krygier 'The Rule of Law: Pasts, Presents and Two Possible Futures', 204; see, also Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying its Core and Contextualizing its Application' (2016) 8 Hague Journal on the Rule of Law 25.

hegemonic instantiations, seeks to harness the performative power of the rule of law as an ideal to point to alternative forms of power and legality. Pre-empting critiques of overly politicising the notion of arbitrariness and the normative framework of the rule of law, we argue that all understandings of the rule of law, including formalist ones, are irreducibly political. A thin conceptualisation of the rule of law, referring exclusively to formal equality, predictability, and mechanisms of accountability is not apolitical, but rather serves as the legal articulation of the institutions of the capitalist economy . Instead, our 'reappropriating' account suggests that tempering the arbitrariness of private power is not only about procedural guarantees but fundamentally about tempering the dynamics of social relations of production and exchange that are incompatible with minimum standards of moral equality and democratic participation.

In Section 2, we discuss the tension between the rule of law as an ideal that could address private power and the notion that private power is constituted by law in the first place. This leads to the conclusion that applying the rule of law to private power to temper its arbitrariness cannot be exhausted in 'restraining' private power (e.g., by preventing situations of 'lawlessness') but it must rather refer to *reshaping* private power (i.e., by proposing a different 'legality'). In Section 3, we inquire as to an alternative normative core of the rule of law: If public power can rearrange legal entitlements to reshape private power, what should be the normative direction of this reshaping? It is at this point that we introduce moral equality as part of the function of tempering power. In Section 4, we expand the discussion of moral equality as a key aspect of the rule of law, linking it to democratic participation. We look into how the rule of law has been employed as justification for derogations from the democratic principle, as is for example the case with the a-contextual understanding of the rule of law in international investment protection. This highlights how formal requirements, like formal equality and predictability, may exacerbate power asymmetries. We also explore how, on the contrary, in cases of climate change litigation, the law has been mobilised to re-empower marginalised voices. This points to the performative potential of a re-envisioned and reappropriated concept of the rule of law. We conclude with a brief recapitulation of the argument and a reflection on the importance of struggle over open concepts, such as the rule of law.

The rule of law as a source of private power

The rule of law as a normative framework that requires power to be non-arbitrary and to rest on general norms that ensure formal equality and legitimate expectations has traditionally been applied with reference to public power.[18] However, if, following Martin Krygier's perspective,[19] one starts not from the different attributes and characteristics that must in theory comprise the rule of law but rather from its immanent goal and its *telos* as a normative project, then the question of private power cannot be brushed off.[20] This is because, if the telos of the rule of law is the limitation of power and the reduction of arbitrariness for the benefit of those who are subjected to power, there is

[18]Craig (n 3)
[19]Krygier, 'The Rule of Law: Legality, Teleology, Sociology' (n 6)
[20]Kinnari Bhatt, Jennifer Lander and Sanne Taekema, 'Introduction: The Rule of Law in Transnational Development Projects – Private Actors and Public Chokeholds' (2021) 17(1) International Journal of Law in Context 91

no conceptual reason to exempt the exercise of private power from the ambit of the rule of law.

Assuming, therefore, that the rule of law as a normative framework could apply to private power, the initial temptation would be to simply transpose the framework intact, calling for the limitation of private power, possibly following similar requirements as those established by Lon Fuller as aspects of the 'internal morality of law'.[21] On the one hand, such a perspective would highlight the value of positive law to set rigid boundaries to the exercise of private power. On the other hand, this position avoids the question of the origins of private power, possibly presuming these lie within the economy, on which law is only secondarily superimposed and can therefore *only limit*. As such, the call to employ the rule of law on private power can be accommodated by theoretical accounts that otherwise endorse the prioritisation of market rationalities and largely exclude questions of distributive justice from their visions of the social order. For instance, early twentieth century ordoliberalism was attentive to how markets need to be encased in an institutional framework that protects them from political contestation, while also recognising the need to secure a level-playing field and prevent accumulation of private power by means of competition law.[22] Therefore, we suggest that in order to meaningfully discuss the ideal of the *rule of law* with regards to private power, it is essential to first uncover the role *law* plays with regards to the generation of private power.

Drawing from the legal realist and institutionalist schools of thought that also reflect in contemporary law and political economy scholarship,[23] law can be understood as *a key source* of private power. This is because private power accumulated through market transactions, economic activity, and wealth cannot be divorced from the initial allocation of legal entitlements and the coercive power these confer. Legal entitlements, both in the form of property rights and in form of background rules of permission and prohibition, confer to their holders a certain amount of coercive power – the power, that is, to restrict socially available choices of other parties.[24] The legal realist emphasis on legally-induced coercion dispels the mystification of 'voluntary' market exchanges, that otherwise represent the core imagery and the normative case for markets.[25] For example, contract terms should not be simplified as expressions of free will but rather as determined by each party's ability to coerce each other's compliance by withholding goods or services from exchange and by the relative ability to hold out for more acceptable terms.[26] This private coercion is in turn underpinned by the public power that recognises and

[21]Fuller (n 5)

[22]David J Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42(1) American Journal of Comparative Law; Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (First printing, Harvard University Press 2018)

[23]Jedediah Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 The Yale Law Journal 1784; Angela Harris and James J Varelas, 'Law and Political Economy in a Time of Accelerating Crises' (2020) 1(1) Journal of Law and Political Economy 1; Ioannis Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe' (2021) 1(2) Journal of Law and Political Economy 301

[24]Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) Political Science Quarterly 470; Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 4 Legal Studies Forum 327

[25]Andrew Lang, 'Market Anti-Naturalisms' in Justin Desautels-Stein and Christopher L Tomlins (eds), *Searching for contemporary legal thought* (Cambridge University Press 2017)

[26]Barbara H Fried, *Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Harvard University Press 2009) 17

is willing to enforce the relevant property rights.[27] Importantly, property rights, as with legal categories in general, do not express a deeper 'essence' that the law only secondarily recognises. Rather, they should be understood as the contingent products of political decision making.[28] An illustration of how the economy as a site of private power is constituted by law is the recognition of private property in natural resources, which institutionalises scarcity and is fundamental for individual market activity.[29] Theorising the relationship between law and private power is a precondition for the elaboration of a normative rule of law concept that accounts for private exercises of power. Thin versions of the rule of law ideal implicitly start from the premise that private power is exogenous to law. As a result, they limit their normative edge to calls for extension of legality – formal equality, procedural guarantees, accountability mechanisms. On the contrary, understanding legal arrangements as constitutive of private power implies that the rule of law, as a normative ideal, needs to refer to the *content* of legality. Importantly, reaching this conclusion does not require a strong thesis that fully conflates law and private power. In other words, for the purposes of this paper, the argument is not that legal rules, categories, and entitlements are the sole but rather a *sufficiently constitutive* source of private power.[30]

The rule of law as a normative idea about government often appears as overlapping with the fundamental legal institutions of market society, owing to the shared liberal origins of both.[31] Indeed, legal concepts that are core pillars of the rule of law, such as formal equality and legal certainty, have been historically and conceptually necessary for the development of capitalism and the market economy. Historically a product and a trigger of tectonic developments that disintegrated Europe's feudal system, legal equality in market transactions dispensed with the status inequalities of the former regime and materially fuelled the rise of the merchant class by providing cheap labour for the production of commodities, following the freeing of the serfs once they chose to reside in cities.[32] Yet, formal legal equality was not extended to the 'periphery', where violent dispossession enabled the primitive accumulation that allowed capitalism to flourish in the West.[33] Conceptually, legal equality means the compatibility of capitalism with a version of the ideals of freedom and equality, as free and equal property owners enter voluntarily into market exchanges by means of contract.[34] This enables social relations of domination between formally equal but substantively unequal individuals to appear in the mystified form of mutual subordination to an impersonal

[27]Simon Deakin and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45(1) Journal of Comparative Economics 188

[28]Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 36(6) Columbia Law Review 809. Along these lines, see the dissenting opinion of Justice Holmes in *International News Service v. Associated Press*, 248 U.S. 215 (1918), according to whom 'property, a creation of law, does not arise from value, although exchangeable—a matter of fact'.

[29]Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge University Press 2021) 312–13

[30]On how private power may be found beyond law in the context of colonial societies, see Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018).

[31]Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) Georgia Law Review 1

[32]Tamanaha, *On the rule of law* (n 3) 30; Henri Pirenne, *Medieval Cities: Their Origins and the Revival of Trade - Updated Edition* (Princeton University Press 2014) 141

[33]Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2012); David Harvey, 'The "New" Imperialism: Accumulation by Dispossession' (2003) 40 Socialist Register 63; B. S Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 Oregon Review of International Law 17

[34]Bob Fine, *Democracy and the Rule of Law: Marx's Critique of the Legal Form* (Blackburn Press 2002)

authority.[35] Legal certainty and the lack of arbitrariness were also necessary to protect private rights and eventually enable investment-led growth. As Douglass North and Barry Weingast have shown in the context of seventeenth century England, for economic growth to occur, the sovereign not only had to establish a set of rights but also make a credible commitment not to violate them, by obeying to a set of rules set beforehand.[36] Although this account underplays the importance of labour exploitation for the generation of economic growth, it does capture how the establishment of inviolable legal entitlements was a condicio sine qua non for the emergence of investment-led, capitalist growth.

The operating framework of the market society takes different forms depending on the social and historical context, coinciding in varying degrees with the different philosophical versions of the ideal of the rule of law. Nevertheless, according to Grewal, there are two constants in the 'legal constitution of capitalism',[37] which can be associated with key elements of the cluster of ideas identified with the liberal theories of the rule of law. The first is the permanence of the public – private divide, according to which 'politics' and 'state power' must be accountable, while the economy remains a sphere of individual freedom, where property rights provide a shield from direct political control. Liberal theories of the rule of law legitimize and perpetuate this divide by highlighting the need for accountability of public power, as well as the demand for legal certainty, predictability, and formal equality – without extending these standards to private power. The second constant is the need to set boundaries to the power of the legislator by means of a constitution that defines the limits of political possibility (e.g., the inviolability of fundamental rights, including property rights) and can constrain contingent majorities that might seek to defy them. This constant has also been defended in rule of law theory, for example in Hayek's idea of the rule of law requiring the existence of a constitution or a bill of rights to limit the exercise of political power by the legislator.[38] As will be discussed in Section 4, a similar logic of limiting the spectrum of political possibilities animates investor protection in investment treaties, a feature that has been hailed as a modern form of the rule of law.[39]

Seeing the law, and thus eventually political power, as an origin of private power marks a difference from the theoretical traditions that see the source of private power in the economy.[40] As already hinted, in certain strands of liberalism, individual rights, including the right to property, are intrinsically linked to the moral imperative for autonomy and self-authorship, or even to human nature.[41] The need to safeguard such moral (and in some cases pre-political) imperatives constitutes the justification of the existence

[35]Evgeny B Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2002)

[36]Douglass C North and Barry R Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice inSeventeenth-Century England' (1989) 49(4) The Journal of Economic History 803, 803–04

[37]David S Grewal, 'The Legal Constitution of Capitalism' in Heather Boushey, J. B DeLong and Marshall Steinbaum (eds), *After Piketty: The Agenda for Economics and Inequality* (Harvard University Press 2017).

[38]F.A Hayek, *The Road to Serfdom* (Routledge 2001) 88

[39]Stephan Schill, 'International Investment Law and the Rule of Law' in J Lowell, J. C Thomas & J. van Zyl Smit (ed), *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Academy Publishing 2015)

[40]Poul F Kjaer, 'The Law of Political Economy: An Introduction' in Poul F Kjaer (ed), *The law of political economy: Transformations in the function of law* (Cambridge University Press 2020) 10–11

[41]This common thread traverses a wide range of liberal theories, from the libertarianism of Robert Nozick, *Anarchy, State and Utopia* (Basic 1974) to the liberal perfectionism of Ḥanokh Dagan, *A liberal theory of property* (Cambridge University Press 2021), although there are significant differentiations with regards to the origin and extent of such imperatives.

of public power. At the same time, individuals are portrayed as free agents, who willingly enter exchange relations. As such, private power results from benefits accumulated by entering beneficial market exchanges, based on legitimate property rights.[42] From this perspective, the rule of law as the protection of individuals from public power is the cornerstone of liberal society and market economy.

In certain strands of Marxism, especially those associated with economism, it is similarly the economy that is the driving force of society. It is social relations of production, in which capitalists can expropriate part of the value generated by workers in the form of surplus value, that ground private power and domination. Juridical categories are only an epiphenomenon, a mere reflection of these social relations of production. Therefore, the liberal legal form, even if susceptible to the possibility of reforms, can never radically transform structures of exploitation.[43] As such, the ideal of the rule of law can only be an instrument of ideological hegemony, cementing the substantive hierarchies that go along with the establishment of formal equality.[44]

The realist perspective assumed here, according to which law is to a significant extent constitutive of private power, means that political power is not an external intervention in a quasi-natural and apolitical social sphere ('the market') that needs to be mitigated. Political power shapes the social sphere through the power-conferring function of legal entitlements, making the framing of any private, market relations ultimately traceable to political decision making. This collapses the 'private' dimension of the public-private distinction. Therefore, instead of being conceptualised as an ideal that superimposes itself on a set society of endogenous private power asymmetries to only limit these asymmetries, the rule of law's normativity must refer to *how power asymmetries are created in the first place*. Extending the rule of law to private actors should not be exhausted to calls for regulation or for procedural guarantees and access to remedy designed to redress *illegality*. Instead, it should include an inquiry into the shaping and constitution of legality in the first place, acknowledging that it is legality that enables the forms of exploitation and structural inequality that shape our political economy.[45] This means that the reappropriated ideal of the rule of law would have something to say about the nature and extent of property rights, the limits of contractual freedom, and the coercive power created by further rules of permission and prohibition. Yet, as legal institutions are bound to be partial and have distributional and power-conferring consequences, the utopia of a world beyond power remains unfathomable. Instead, the questions become what kind of power is conferred, with what justification, and for whose benefit. For such questions, we propose that the rule of law as an ideal and a normative framework should not be abandoned but nor should it remain a simple transposition of classic liberal ideas of limiting power, only this time not against public but rather against private power. Rather, it must build on the critical analysis of the function of law as a fundament of

[42]According to Lockean theories of ownership, (legitimate) property rights stem from mixing one's labour with nature, see John Locke, *Two Treatises of Government* (1689), Chapter V 'Of Property'.

[43]Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill Nijhoff 2019); Ellen M Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Verso 2016)

[44]Morton J Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 Yale Law Journal 561, 566

[45]For example, on how modern slavery is attributed to criminal and immoral suppliers and portrayed as an exception, when, in fact, labor abuse is a predictable and systematic outcome of regular exploitation practices in global regimes of production, see Geneviene LeBaron, *Combatting Modern Slavery: Why Labour Governance is Failing and What We Can Do About It* (Polity 2020).

capitalist market society. From this point of view, the rule of law as an ideal could be rescued from its hegemonic instantiations and suggest an avenue for empowering the powerless.[46]

Rescuing the ideal of rule of law: an alternative normative core

There are at least two interrelated reasons why the rule of law, as an ideal, fits neatly in a vision of law as protecting economic power structures. The first, sociological, reason is that the rule of law has become a normative standard that is effectively appealed to by powerful private actors and their lawyers in various legal practices.[47] With the allocation and protection of property and contractual rights as an entrenched part of current legal structures, the basic normative ideal of the rule of law as preventing arbitrary exercise of state power and ensuring predictability of state action and legal certainty is automatically seen as protective of these legal rights. The second, philosophical, reason that underlies this is that the rule of law in the dominant legal theory discourse is either seen as a stand-alone virtue of legal systems[48] or as supporting highly abstract values such as equality, freedom and individual autonomy.[49] Either as an independent thin notion of equality before the law, divorced from context, or as connected to a vague set of values, the rule of law has been seen as normatively compatible with the protection of powerful private actors through their property and contract rights. Although the normative claim is contestable – and we contest it – the argument is understandable under a specific interpretation of the meaning of a thin notion of the rule of law.[50] After all, the generally recognised point of the rule of law is to ban arbitrariness, so the predictable enforcement of existing rights seems a direct rule of law requirement. The association of the ideal with private entitlements also paves the way for arguments that legal systems which do not adequately protect these rights need to be adjusted so as to offer more predictability, especially through the enforceability of property and contract.[51]

However, these arguments are easy to question once the purpose of the rule of law ideal is given more body. The first step is to recognise, as some liberal theorists do, that the rule of law is meant to benefit all individuals equally. Especially in rule of law theories that highlight the moral underpinnings of the rule of law, such as those of Allan and Dworkin, the connection between the rule of law and each person's equal claim to dignity, autonomy and well-being is expressed.[52] It should be emphasised that such moral equality extends beyond equality before the law and a formal equality

[46]Along these lines, on how the rule of law could be rendered compatible with the welfare state, see also Raymond Plant, 'Freedom, Coercion, Necessary Goods and the Rule of Law' (2011) 2(1) Jurisprudence 1. For a sceptical position, according to which 'a pedigree of (neo)liberal economic development remains a powerful and dominant element in rule of law's social and political DNA', see Johanna del Pilar Cortés-Nieto and Giedre Jokubauskaite, 'A counter-hegemonic rule of law?' (2021) 17(1) International Journal of Law in Context 128.

[47]Ugo Mattei and Laura Nader, *Plunder: When the rule of law is illegal* (Blackwell 2008) 60; A. C Cutler, 'The Judicialization of Private Transnational Power and Authority' (2018) 25(1) Indiana Journal of Global Legal Studies 61, 62

[48]Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 211

[49]Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press 2016); Fuller (n 5) 162; Hayek (n 38)

[50]Tamanaha, *On the rule of law* (n 3)

[51]Jennifer Lander, *Transnational Law and State Transformation: The Case of Extractive Development in Mongolia* (Routledge 2020)

[52]T. R S Allan, 'The Rule of Law' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical foundations of constitutional law* (Oxford University Press 2016) 213; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 180

in the application of given legal rules. It is a *substantive form of equality* that demands respect for each individual, which could also be said to have profound distributive implications. Even in theories that are not explicitly concerned with the connection between rule of law and equality equalising tendencies can be brought out.[53] Deepening the rule of law's support of individual autonomy to include respect for every person's agency and dignity[54] means that the allocation of legal entitlements must be such that it provides a framework for exercising that agency and recognising that dignity. Arguably, connecting the rule of law to both equality and individual autonomy in a meaningful way expands its normative meaning beyond limiting power to include reorganising power. Discussing the purpose of the rule of law in this way does not have to be external to liberal rule of law theory. Connecting the discussion of private power and its allocation to this dominant discourse may help to show that there is a variety of starting points for opening up the rule of law to these problems, from liberal to critical theory.[55] What is necessary in all accounts is to acknowledge the impact of law on the lives and livelihoods of the people subject to it and to take seriously that the rule of law ideal demands that law's arbitrariness is curbed in relation to each person as much as possible. Not addressing the distribution of power, both public and private, is a failure to address that demand.

Linking non-arbitrariness to power distribution is by no means self-evident. The association of the rule of law with arbitrariness rests on notions of limiting power that has been distributed by political means – or at least in a way that precedes rule of law control. The argument that the normative core of the rule of law as curbing arbitrary exercise of power also has relevance for power allocation can be made in two ways. The more radical proposition makes a direct link between non-arbitrariness and justice. Starting from the socio-legal work of Nonet and Selznick, analyzing modern law as responsive and engaging with political purpose, it can be argued that this includes filling the ideal of the rule of law with a purposive orientation towards justice. As they phrase it: 'To press for a maximum feasible reduction of arbitrariness is to demand a system of law that is capable of reaching beyond formal regularity and procedural fairness to substantive justice'.[56] To be sure, this does not clarify the meaning of substantive justice, which in their work is still primarily a legal value and does not necessarily have radical implications.[57] However, associating non-arbitrariness and substantive justice brings in political considerations, and it is not a conceptual stretch to say that once substantive justice is brought in, the legal distribution of power becomes relevant. Of course, this directly implies controversial political choices about how to realise a just distribution of power.

[53]Fuller (n 5) 183; Tamanaha, *On the rule of law* (n 3) 94

[54]Waldron, 'The Rule of Law and the Importance of Procedure' (n 4)

[55]In particular, our argument resonates with the work of rule of law theorist Julian Sempill, who shows how the limited government approach to the rule of law historically included an anti-oligarchical strand that problematized corporate power, see Julian Sempill, 'What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power, (2018) 10 The Hague Journal on the Rule of Law, 219–53. We move beyond Sempill's argument in proposing a particular way to reinterpret the normative core of the rule of law, but our argument can be seen as continuing from his starting points.

[56]Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers 2001) 108

[57]While acknowledging the close link between law and politics, Nonet and Selznick still distinguish political and legal action, ibid 112.

A slightly more conventional way of including distributional considerations could be to flesh out the moral base of the rule of law. Rather than say that the normative idea of non-arbitrariness can incorporate justice dimensions, we could say that the underlying idea of substantive moral equality requires inclusion of distributional justice in a broader rule of law ideal. Rather than formulating a unitary normative core of the rule of law, one could argue that it should be construed as encompassing multiple values. The underlying point of tempering arbitrariness in this vision is *relational*, it is about mitigating the exercise of power towards individual people to ensure they are respected in a meaningful way. The relational aspect of the rule of law extends beyond non-arbitrariness to fostering the equal position of each person. People need to be respected as agents through attention to their needs and capabilities.[58] If, as we propose, moral equality becomes the main rationale for a rule of law ideal, different values are needed to achieve this, including distributive justice. The manner of distribution of power and resources impacts the extent to which people are able to participate as equal members of society and people's sense of self-esteem. This also means that entangling the rule of law with moral equality associates the rule of law with non-domination, where 'domination' is understood as 'the possession of *subordinating* powers over others'.[59] Moreover, moral equality and the relational idea of the rule of law imply that the rule of law includes a value of legal recognition of subjects.[60] In this light, the nineteenth century law denying legal standing to the enslaved was a rule of law issue, however predictable it was.[61] Such very basic legal distributions, however political they are, concern the rule of law ideal.

Such an expansion of the rule of law is certain to be challenged: once the distribution of legal rights and powers is seen as a rule of law concern, it becomes difficult to uphold the claim that predictability and legal certainty are at the core of the rule of law ideal. Are these allocation concerns really part of the rule of law, or are we moving into the realm of social justice rather than law? Clearly, moving beyond limitation of power shifts the focus of the reconceptualised rule of law from predictability to other values, such as equality and fairness. Yet, understanding non-arbitrariness as restricted to formal equality and predictability is also politically loaded, as it eventually legitimises the basic tenets of capitalist formations. Using Krygier's phrase of rule of law as 'tempering power'[62] it is arguable that the shape of power, who gets to wield it and how, is a rule of law concern as much as the exercise of existing power. Although this expands the scope of the

[58]Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (First Harvard University Press paperback edition, 2011); Amartya Sen, 'Equality of What?' in Sterling M McMurrin (ed), *The Tanner lectures on human values* (Cambridge University Press 2011)

[59]Nicholas Vrousalis, 'Exploitation, Vulnerability, and Social Domination' (2013) 41(2) Philos Public Aff 131. Krygier uses Pettit's theory of non-domination for his rule of law concept, see Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 Annual Review of Law and Social Science 199, 203. In this context, Vrousalis criticizes republican conceptualizations of domination and the narrow view of arbitrariness employed therein. At the same time, he articulates an even more trenchant critique of the possibility to use arbitrariness as a benchmark to critically understand power in modernity. While conceding the point, we find that in our context there is value to give more body to the concept of arbitrariness by pinning down what is to count as reason. For an in-depth discussion of social domination see Vrousalis, 'Exploitation, Vulnerability and Social Domination', *Philosophy and Public Affairs* 41 (2013), 131–57.

[60]The link between legal recognition and substantive equality is also supported by Axel Honneth and Nancy Fraser, *Redistribution Or Recognition?: A Political-Philosophical Exchange* (Verso 2003), see also Sandra Fredman, 'Substantive equality revisited', *I•CON* 14 (2016), 712–738.

[61]Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press 1975)

[62]Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (n 59) 205

concept of the rule of law beyond constraints on the application of formal law, it still includes predictability of application as a standard. It is important to note, however, that this needs to be balanced against other rule of law values.

Conceptually, expanding the scope of the rule of law ideal to include allocation of power issues goes against the grain of most theoretical rule of law accounts.[63] The expansion requires politicising the rule of law ideal in a way that challenges the distinction between law and politics, especially as claimed in positivist theories of law.[64] Yet, following Waldron's argument that theories of the rule of law and the concept of law are intertwined,[65] rejecting the separation of law and politics as we do comes with a reconsideration of the rule of law as well. Acknowledging that the rule of law is an essentially contested concept means that more arguments are needed for a rule of law conception than a simple claim that the elements of a conception are generally accepted. Although the contested character of the rule of law is conceded by most theorists,[66] we argue that the concepts proposed in legal theory are generally insufficiently open to addressing the source of power.

The more radical reconceptualization we propose requires incorporating a normative vision of who should have power and how this should be structured legally. In the context of public and private power, this could be done by demanding that traditional political institutions take back the lead: private power needs to be reallocated and constrained by democratically legitimate state lawmakers.[67] However, there are two kinds of societal problems that may frustrate such a course. A first problem is the consolidation, and perhaps even growth, of autocratic regimes that hollow out the democratic base of national governments.[68] If we take the rule of law ideal seriously, it also means that the political realm is subject to normative assessment, and equality and individual agency need to be respected here as well. If political freedoms are curbed and electoral systems are rigged, that requirement is not fulfilled. A simple call for distribution of power to be decided by a parliamentary system cannot suffice in such a context, because it would only shift the illegitimate exercise of power. A second problem, discussed in more detail in Section 4, is the existence of transnational private powers. Transnational private actors are often in a position to escape regulation by state authorities and may even wield their power against states and other legitimate political communities quite effectively, as in the investor-state arbitration regime.[69] This entails that the formal jurisdiction of state institutions, such as a democratic parliament, may be undercut by the bargaining power of large transnational actors and their threats to withdraw business activities. If the rule of law ideal is to have meaning in the current

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[63] Waldron, 'The Concept and the Rule of Law' (n 31); Raz (n 48); T. R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001); Brian Z Tamanaha, 'The Tension Between Legal Instrumentalism and the Rule of Law' (2005) 33 Syracuse Journal of International Law and Commerce 131

[64] Raz (n 48)

[65] Waldron, 'The Concept and the Rule of Law' (n 31)

[66] Tamanaha, *On the Rule of Law* (n 3)

[67] Robin West, 'The Limits of Process' in James E Fleming (ed), *Getting to the rule of law* (New York University Press 2011)

[68] Kim L Scheppele, 'Autocratic Legalism' (2018) 85(2) University of Chicago Law Review 545; Freedom House, 'Freedom in the World 2021: Democracy under Siege' (2021) <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege>

[69] A. C Cutler, 'The Rule of Law, New Constitutionalism, and Transnational Legality' in Christopher May and Adam Winchester (eds), *Handbook on the rule of law* (Edward Elgar Publishing 2018); Alessandra Arcuri, 'The Great Asymmetry and the Rule of Law in Investment Arbitration' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2018* (Oxford University Press 2019)

transnationalized context, the particularities of current public and private power need to be taken into account.

This also means that the rule of law cannot be conceptualised in a vacuum: the ideal needs to be applied to a variety of social contexts in which different particular demands may be relevant.[70] Democratising the transnational investment regime may demand different forms of participation and accountability than national parliamentary politics. Thinking critically about the distribution of property is an important first step towards more equality in private power, but also a difficult feat given the diverging views of property and land around the world. For instance, simply establishing legal title for individuals in communities that traditionally do not recognise individual ownership of land imposes a liberal solution where communal use rights may have more legitimacy. Even if such titling projects are done for good reasons, they may still fail to empower people on their own terms and disrupt communities.[71]

The argument of contextualisation, however, does not imply that there is no meaningful argument to be developed about the rule of law ideal itself. On the contrary, only by conceptualising the ideal can we confront it with particular contexts and ask how it should be developed further. Thus, the normative core of the rule of law can still be summarised as the reduction of arbitrary power, or the tempering of power, to use Krygier's phrase. However, the purpose behind it should be to ensure the rule of law's equal protection of all. Highlighting equal protection, however, may be misinterpreted as demanding only that legal institutions ought to be active in keeping their subjects from harm. We would argue it includes having space for an active role for law's subjects and respecting the ways in which individuals and groups from across society appeal to the law and aim to transform it.[72]

The rule of law and democracy: from de-empowering to re-empowering

A key aspect of moral equality is indeed an element of public autonomy – of participation, that is, in the shaping of the laws that govern one's life. As was already hinted at, the rule of law has been employed as justification for derogations from the democratic principle. In the international legal domain, the rule of law has been widely deployed to condone the very excesses of private power and the marginalisation of the most vulnerable: From the ways in which the World Bank has 'subordinated political to economic processes' under the guise of the rule of law,[73] to how the rule of law rhetoric has become a justification for the system of international investment law.[74] Our account seeks to pave the way for the rule of law to acquire a re-empowering dimension. If we are to reimagine the normative core of the rule of law as 'tempering of power', we ought to engage with the question of who has too much power and, symmetrically,

[70]Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?' (n 2) 87

[71]Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism in Development' (2011) 3(01) Hague Journal on the Rule of Law 1, 11

[72]This argument extends the argument by Waldron that the rule of law is about respecting the voice and arguments of individuals in procedures Waldron, 'The Rule of Law and the Importance of Procedure' (n 4).

[73]David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008) 213

[74]Stephan Schill and Djanic Vladislav, 'Wherefore art thou? Toward a public interest-based justification of international investment law' (2018) 33(1) ICSID Rev Foreign Invest Law J 29

who is disempowered – as well as with the question of the (legal) origins of such asymmetries. Diverse forms of contestation of climate change policy are emblematic of the dynamics through which power can be either (unduly) accumulated or redistributed. On the one hand, major fossil fuel producers have mobilised international investment law to counter the adoption of regulatory measures to combat climate change. The case of international investment law is exemplary of how an a-contextual understanding of the rule of law could enable power accumulation by corporate actors and, contextually, de-empower the general public. On the other hand, in climate change litigation the law has been mobilised to re-empower marginalised voices. This second practice alludes to ways in which the rule of law can be 'reappropriated' to fulfil its vocation of tempering power.

The rule of law as de-empowering

In 2021, the German energy company RWE demanded €1.4 billion compensation from the Dutch government for adopting a law phasing out coal power plants by 2030.[75] The case is based on the Energy Charter Treaty (ECT), which entrusts foreign energy investors with the right to sue states before an international arbitration tribunal. The ECT transfers power from civil society to corporations. This is because the ECT, like most of the other 3000+ investment treaties with investment-arbitration clauses, establishes exceptionally strong substantive and procedural rights for foreign investors (e.g., broadly formulated provisions on fair and equitable treatment and the right to sue governments before three international arbitrators, without exhausting domestic legal remedies). By conferring such protections to foreign investors, the investment law system contextually shrinks the rights of citizens.[76] In extending the breadth of the property rights of the main beneficiaries of the fossil-fuel economy, the ECT *de facto* perpetuates the fossil-fuel economy.[77] In this respect, it is worth noting that RWE is not an isolated case. 20% of all investor-state arbitration cases relate to the fossil fuel sectors; 72% of those cases have been won by investors, with an average compensation of USD 608.6 million.[78]

Oftentimes, the massive transfer of power that the investor-arbitration regime confers on foreign investors is condoned because it stems from treaties to which states have consented. Such treaties typically include a sunset clause, granting investors the right to initiate a dispute 15–20 years after a state's withdrawal from the treaty. This is not only a way to lock-in the protection of investors' property rights temporally, it is also a subversion of healthy democratic processes. For a foreign investor it is sufficient to strike a deal with one 'friendly' government, that democratic decision-making will be limited for many years to come. It is as if for every political win of (a typically

[75] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/4)

[76] Arcuri (n 69); Arcuri, Alessandra and Montanaro, Francesco, 'Justice for All? Protecting the Public Interest in Investment Treaties' (2018) 59 *Boston College Law Review* 2791.

[77] Kyle Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action? Investor-state Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development 2020)

[78] L. Di Salvatore, *Investor–State Disputes in the Fossil Fuel Industry* (IISD 2021), https://www.iisd.org/system/files/2022-01/investor–state-disputes-fossilfuel-industry.pdf; see also, Kyle Tienhaara et al, 'Investor-state disputes threaten the global green energy transition' (2022) 376 (6594) Science 701.

already) powerful corporation, citizens are expropriated of some rights.[79] Such sunset clauses and lock-in rules constitute a sombre reflection of one of the constants of the legal constitution of capitalism, discussed above: The need to set boundaries to the power of the legislator and to limit the scope of political possibility.

That investor-state dispute settlement confers 'too much' power on corporate actors is particularly evident in the specific case of the fossil fuel economy. A rich body of scholarship demonstrates how the fossil fuel industry has deliberately exercised its power to shed doubt on climate science and delay democratic regulatory efforts to do something about climate change.[80] As put by one author 'the *political power* of the fossil-fuel industry has always been the single biggest obstacle to making real change'.[81] The delay of regulatory action enabled the fossil fuel industry to continue growing and accumulate power. Investor-state arbitration augments a power that, even if exercised within the boundaries of legality, has been achieved mischievously, eroding values widely shared by many legal constitutions across the world (e.g., protection of the environment and human rights). In initiating an investor-state arbitration against the Dutch government, *RWE* acts as if entitled to fossil fuel profits, irrespective of the fact that the effects of coal power on climate change was (or should have been) well known. Given the colonial pedigree of the contemporary regime of international investment law,[82] it may be no coincidence that the rule of law is deployed to legitimize it.

Today such a regime serves the chief purpose of protecting transnational capital and, as capitalism is enmeshed with imperialism,[83] domination is almost unavoidably encoded in investment law and any version of the rule of law sustaining the system. Making moral equality and the tempering of power essential to the rule of law alludes to its incompatibility with hyper-capitalist legal regimes and it is then a way to resist the ossification of relations of domination by law.[84]

The rule of law as re-Empowering

The re-empowering dimension of the rule of law as 'tempering of power' becomes evident through its interlocking with democracy. Interestingly, the decision of the Dutch government to phase out coal power was spurred by the (by now) notorious *Urgenda* case. Dutch courts concluded that the climate change policy of the Dutch

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[79]This is for instance what has happened in *Chevron v Ecuador*, where an arbitration tribunal has de facto nullified the judgments of domestic courts, who had condemned Chevron to pay compensation to local communities for the environmental disaster related to oil extracting activities in the Amazon, see Lorenzo Pellegrini and others, 'International Investment Agreements, Human Rights, and Environmental Justice: The Texaco/Chevron Case From the Ecuadorian Amazon' (2020) 23(2) Journal of International Economic Law 455.

[80]Alice Bell, 'Sixty years of climate change warnings: the signs that were missed (and ignored)' (2021) <https://www.theguardian.com/science/2021/jul/05/sixty-years-of-climate-change-warnings-the-signs-that-were-missed-and-ignored>; Naomi Oreskes and Erik M Conway, *Merchants of doubt: How a handful of scientists obscured the truth on issues from tobacco smoke to global warming*

[81]Bill McKibben, 'Are We Past the Peak of Big Oil's Power?' *The New Yorker* (28 May 2020) <ttps://www.newyorker.com/news/annals-of-a-warming-planet/are-we-past-the-peak-of-big-oils-power>

[82]Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press 2013)

[83]Chimni (n 33)

[84]From this vantage point, our work resonates with the work of others who have articulated a principle of non-domination to govern international relations, see John Linarelli, Margot E Salomon and M. Sornarajah, *The misery of international law: Confrontations with injustice in the global economy* (Oxford University Press 2018).

government was violating human rights.[85] From this vantage point, *Urgenda* could be seen as realising a rule of law ideal, as courts control a problematic exercise of power by the government (i.e., human rights violation). It is plausible to argue that the Dutch government (and likely other governments) failed to act on climate change because of the powerful lobby of oil corporations, who have purposively enacted a strategy of doubt,[86] and contributed to lay the epistemic and conceptual conditions enabling climate change denialism.[87] Even if we do not accept this interpretation, the plausibility of such a scenario poses a general problem. If governments can be captured by powerful corporations to the extent that common people are deprived of their fundamental rights through legal means, what role is left for the rule of law? Can we just be content with a formalistic conception focused on legal certainty?[88] The problem with this formalistic conception is that it can subvert the very core of the rule of law, i.e., tempering power. The point being that when power is extremely skewed, discerning arbitrariness becomes a moot (either too open or irrelevant) exercise in practice. An absolute monarch can easily dodge the questions of arbitrariness by first enacting the laws to legally accomplish her wishes. Mutatis mutandis, private actors whose economic power is convertible in political power can concoct laws preserving, and in fact enhancing, their power.[89] This power convertibility, all too common in contemporary hyper-capitalist systems, leads to an accumulation of power that is at odds with the rule of law. The rule of law becomes inconsequential without the democratic (as power to/by the people) nexus. Are we then not collapsing rule of law with democracy? To the contrary, by clarifying that some of the non-negotiable elements of rule of law are democracy, the tempering of power and the respect for moral equality of human beings, we can avoid morphing of the rule of law into pure (neoliberal) ideology.[90] With this analytical move, we can refute empty utterances of absolute monarchs[91] abiding to the rule of law and declare them a paradox. Likewise, we can refute the neoliberal rhetoric that has pompously used the rule of law discourse to keep democracy at bay.

Against this background, it is worth paying attention to another case on the now vibrant Dutch legal landscape: the *Shell* case.[92] As widely reported, the case launched

[85]André Nollkaemper and Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/]>

[86]Oreskes and Conway (n 80)

[87]Leah Aronowsky, 'Gas Guzzling Gaia, or: A Prehistory of Climate Change Denialism' (2021) 47(2) Critical Inquiry 306. One of the most glaring examples is the establishment of the Global Climate Coalition, originally founded by Exxon, and later coming to represent many oil corporations. The GCC has operated from 1989 to 2001 to orchestrate a massive PR campaign to shed doubts on climate science and lobby governments and UN bodies to slow down climate action. For a background, see 'Global Climate Coalition (GCC)' <https://www.desmog.com/global-climate-coalition/#s22>. See, also the literature cited in the previous sub-section, Bell (n 80); Oreskes and Conway (n 80); Cristophe Bonneuil, Pierre-Louis Choquet and Benjamin Franta, 'Early warnings and emerging accountability: Total's responses to global warming, 1971–2021' (2021) 71 Global Environmental Change.

[88]For a conception of legal certainty that attempts to go beyond formalism, see Isabel Lifante-Vidal, 'Is legal certainty a formal value?' (2020) 11(3) Jurisprudence 456.

[89]Pierre France and Antoine Vauchez, *The neoliberal republic: Corporate lawyers, statecraft, and the making of public-private France* (Cornell University Press 2020)

[90]Mattei and Nader (n 47)

[91]In tracing the history of the rule of law, Brian Tamanaha refers to Louis XIV: 'Even Louis XIV, the exemplar of absolutist monarchy, stated in an ordinance in 1667, 'Let it be not said that the sovereign is not subjected to the laws of his State; the contrary proposition is a truth of natural law … ; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law' Tamanaha, *On the Rule of Law* (n 3) 22.

[92]*Milieudefensie et al v Royal Dutch Shell* ECLI:NL:RBDHA:2021:5337, [2021]

by more than 17.000 citizens and a group of NGOs, has yielded a remarkable development in the struggle for climate action. The Court ruled that Shell is responsible for its emissions, which should be cut back by 45% (vis-à-vis 2019 levels) by 2030. Without entering into the details of the case, one dimension of this case is highly pertinent to our analysis. The reasoning of the Court is anchored to the 'size' of Shell emissions; in this context, the Court notes that the emissions by the Shell group exceed those of many states, including the Netherlands.[93] The Court also refers to RDS market position, 'a major player on the worldwide market of fossil fuels'.[94] We could read in these passages an important act of contextualisation, where RDS is not treated as just any abstract actor, but for what it is, a corporation with enhanced powers in the fossil fuel market.

Among the many readings that have been given of the Shell case, it is possible to advance one where the case is understood as a counter-move, enabling civil society to resist the legally enabled power grab by private actors.[95] From this vantage point, the case could also be read as a manifestation of counter-democracy.[96] Instances of counter-democracy, enabling the civil society to hold public and private powers accountable, are clues found in the lived experience of disempowered actors. They are junctures where the disempowered have mobilised the law to challenge (transnational) private power structures and, indirectly, to reclaim the rule of law.

The Shell case enabled a public control on the powers feeding the fossil fuel economy. Yet, the case is not just about a power check – it is about taking back power. The dynamic of the Shell case alludes to the possibility of a rule of law that recognises the agency of the people. It alludes to the possibility of a rule of law that directly tackles the accumulation of private power. Taking the tempering of power seriously may then mean that the rule of law, as a normative agenda, cannot shy out from tempering capitalism itself. The *Urgenda* and the *Shell* cases testify that there is a realm where people can legally reclaim power. This realm is made of human rights as well as other rights (existing and to be enacted yet) oriented towards the realisation of human wellbeing and thicker democracies. The rule of law, as we envision in this article, is then to shield this realm from the excesses of both public and private power. The critique to be expected in relation to our attempt is that reappropriating the rule of law as we do, sets us on a troubling slippery slope. Indeed, it may; but a rule of law concerned with power cannot but stay with the trouble.[97]

Conclusion

In this article we argued that the rule of law as a normative framework could extend to private power. Going beyond formalist accounts, which would only require private

[93]ibid para 4.4.5.
[94]ibid
[95]For an analysis sketching a parallel between ISDS and climate change litigation, see Christina Eckes, 'The Courts Strike Back: The Shell Case in Light of Separation of Powers' (2021) <https://verfassungsblog.de/the-courts-strike-back/>; see also, Kampourakis, Ioannis: *The Power of Open Norms: Milieudefensie et. al. v Royal Dutch Shell, VerfBlog,* 2021/6/15, https://verfassungsblog.de/the-power-of-open-norms/, DOI: 10.17176/20210615-193526-0.
[96]Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (John Robert Seeley lectures vol 7, Cambridge University Press 2008)
[97]The expression 'stay with the trouble' is freely borrowed from Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press 2016)

power to be subject to predictable norms and accountability mechanisms, we suggest that the potential of the rule of law, as an ideal, lies in *what kind* of legality it outlines. Building on constitutive theories of law, we suggest that private power is to a significant extent a product of legal entitlements. Therefore, addressing accumulated private power and its pernicious effects passes through the question of the allocation of the legal entitlements that enables it. An alternative normative core for the rule of law must then be sought in the moral equality of individuals – which also encompasses a requirement of democratic participation in the shaping of the normative orders that govern one's life. This is an account that places particular importance on the political and the ways in which current forms of political economy can largely be traced back to it. Contrary to narratives of a growing impotence of the State to regulate market relations, especially those of transnational nature, public power remains a central – although not the exclusive – addressee of calls for social transformation. Even in cases of transnational private power, where certain states lack the ordering capacities to rearrange such power, international cooperation and centripetal legal instruments remain an avenue for such rearrangements – as opposed to relying on private self-regulation.

Two possible critiques of our account, starting from very different starting points, may converge at the following question: Why attempt this reappropriation of the rule of law? This might be a shared query among both those who think the rule of law cannot be rescued from its current hegemonic instantiations, or that it is bound to remain a legal expression of the capitalist economy; and those who think that our account over-politicizes the rule of law, attaching to it normative dimensions that it cannot possibly sustain. Going back to the first lines of the introduction, our answer starts from the fact that the rule of law is an open and contested concept. As a contested concept that has functional relevance for legal thought and institutions, its content should not be conceded without argument. The rule of law, as a normative framework, is bound to be political by virtue of the understandings on which it relies (e.g., what is 'legal equality'), of what it includes, and of what it prioritises. Formalist accounts are not neutral: Linking the rule of law to equality before the law (of substantively unequal individuals), to predictability and procedural guarantees (meant to secure the smooth operation of markets), and to the limitation of contingent political majorities is generative of the current forms of (neo-)liberal capitalism. As such, our account is not more or less political than other accounts – it is simply a different political account, which, if it were to map on to practice, would arguably lead to different constellations of political economy than the currently predominant. This is why our account is one of 'reappropriation' and not simply 'reconceptualization'. The rule of law, as a normative framework with legitimising function, is increasingly appropriated by interpretations favourable to the expansion of market rationalities. As such, our intention is not to simply imbue the concept of the rule of law with new substantive content and meaning. Rather, our aspiration is for this meaning to have functional relevance and to be mobilised to legitimize claims and movements that seek to upend market dominance and established commercial interests. Ultimately, our understanding is that the 'tempering' of private power inevitably entails a 'tempering' of capitalism as well. It is in this normative context that the rule of law as an ideal against private power becomes meaningful.

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