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'Inequality of Goods and Lands' in Mortgaged Democracies: Paradigms and Effects of Global Comparative Law

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Abstract

The article reappraises the law's 'egalitarian commitment' in an era of global inequality. It upholds that such an egalitarian predicament scarcely squares with the reality. Firstly, international groups aim to control how wealth is distributed in society; secondly, the divide between the Global South and the Global North rises at a steady rate. Thirdly, the rule of law, which should spread good governance and development, conceals a policy of domination. Finally, global financial actors code their own interests through the law by seeking a connection with the public sphere in the field of public finance. The article argues that private interests have infiltrated the public sphere and contributed, globally and domestically, to the rise of 'mortgaged democracies'. In so doing, it draws examples from English constitutional history and considers how the common-law mentality has facilitated their advent. It then explains how this has triggered a change in how societies perceive the political bond, which is now rooted in several acts of conveyance. Finally, the article provides us with a further paradigm for the organisation of communities. English law has been able to cope to the iniquitous effects of the mortgage by developing the conception of the equity of redemption. The redemption paradigm is probably able to challenge the role of economic interests within societies and therefore radically transform the idea that political obligations might be conveyed *upon condition*.

Keywords Equality · Global comparative law · Distribution of wealth · Mortgaged democracies · Political obligation · Equity of redemption

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'Equality of Estates Causeth Equality of Power:' The Iniquitous Effects of Law's Egalitarian Commitment

We have been constantly taught that the law plays a major role in promoting substantive equality. As a 'powerful social ordering technology,' it has been instrumental in protecting individuals and their interests from private groups whose aim to amass affluence and control 'the levers for the distribution of wealth in society'.[1]

Not only has this role been backed by legal scholars, but novelists have also examined the law's 'egalitarian commitment'. Once enforced in the courts, as Harper Lee notes with a bit of irony, the law becomes a driver that 'makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president'. The 'courts,' she continues, 'are the great levelers' whereby 'all men are created equal'.[2]

Lee's predicament has a historical lineage that stretches back to the seventeenth century: 'the laws ought to be equal … and not evidently destructive to the safety and well-being of the people,' the Levellers had argued in 1647.[3] As a 'light to the king,' it equally provides 'for the good of king and people';[4] and 'a commonwealth, especially if it be popular and equal,' should support a balanced distribution of resources. For 'equality of estates causeth equality of power, and equality of power is the liberty … of every man'.[5] By virtue of such allocation of resources, 'the poorest man hath as true a title and just right to the land as the richest man,' and 'the earth ought to be a common treasury of livelihood for all, without respecting persons'.[6]

Comparative legal scholars are disconcerted by how writers and polemicists praise legal egalitarianism. This attitude scarcely squares with the reality: when it comes to examining how substantive equality is actually enforced, comparative law discloses how uncomfortable the reality is. It is not just a matter of applying the potential of comparative law; the uncomfortable reality poses methodological problems, which are both procedural—related to the comparative legal approach—and substantive.

This is not another essay on the struggle for equality before the law, nor do I intend to make large claims on how it has evolved over time in different contexts. My purpose is limited in scope: the paper mainly deals with the law's egalitarian commitment when it comes to allocating world's scarce resources. The eradication of social imbalances through the law entails reconsidering the themes around which societies are organised. I understand that economic interests are the new organising themes within communities. These have infiltrated the public sphere and contributed, globally and domestically, to the rise of a constellation of 'mortgaged

[1] Pistor (2019: 17, 19).
[2] Harper Lee (1989: 226–227).
[3] Agreement of the People (1906: 333–334).
[4] Sidney (1698: 242).
[5] Harrington (1992: 35, 20).
[6] Winstanley (1649: 2).

democracies'. By 'mortgaged society' I understand a body politic where the new financial organising theme has turned the political bond in several acts of conveyance. As Pistor puts it, 'states are not neutral when it comes to whose interests in an asset shall be given priority'. Indeed, the prospect of benefiting from capital gains is 'more likely to find [its] blessings than claims that assert self-governance or seek to ensure environmental sustainability'.[7] By controlling the levers for the distribution of wealth, thus, financial actors pursue a policy of domination. The new political bond, however, does not consist in symmetric acts of conveyance. By contrast, the new organising theme conceals an asymmetrical relation, which mimics the balance of economic (and political) power between the mortgagor and the mortgagee.

This assumption populates the debates about inequality, democracy and global law. Notwithstanding the current level of global wealth, economic inequalities still exist. Half of the wealth is in the hands of an insignificant percentage of the world's population: 'In the twenty-first century, a small handful of global corporations perpetuate the conditions that flourished in the late 1700s'.[8] Instead of putting bridles to financial actors, the rule of law evaluates the efficiency of the legal systems and their attractiveness towards international investments: the more efficient the system, the more likely the investment, and the higher the economic return. Although global comparative law 'clearly offers opportunity' to the actors of globalisation, its 'benefits and costs are unevenly distributed'.[9]

'In the Service of Capital': How Private Actors Organise Communities

How wealth is distributed in societies raises fundamental questions, which are both political and normative. Indeed, 'the control and accumulation of resources … was and remains' the organising theme within political communities, as well as a 'key element of political tension'.[10] Democratic societies entrust the law with a crucial role in the redistribution of wealth. The law implements its egalitarian commitment by setting constraints on private actors, the aim of which is to benefit from an uneven distribution of wealth. Indeed, private interests tend to gain control over the distribution of wealth by placing 'the law … firmly in the service of [their] capital'.[11]

In order to code their own interests through the law, these forces seek a connection with the public sphere. These force usually draw this connection by providing the political community with a renovated 'morally eligible foundation on which' the latter might 'organise [its] practical affairs'.[12] The 'powerful holders of global

[7] Pistor (2019: 23).
[8] Athreya (2011: 5) See the World Inequality Report (2018).
[9] Husa (2018: 74).
[10] Capra and Mattei (2015: 53).
[11] Pistor (2019: xi).
[12] Mullender (1997: 25).

capital' have 'found ways to utilize the law' by turning their interests into *the* organising theme of the community, which now count as the interests of the whole.[13]

We have already experienced how this organising theme affects political societies: these have been turned into acquisitive communities, within which individuals act as consumer-borrowers. As we shall see, this change has also been favoured by a change in perception of charges applicable to real property, in general, and of mortgage conditions, in particular. This change has then penetrated the common-law mentality. Instead of responding to the needs of the consumer-borrower, the law seems to encourage them to take out mortgages to an extent that, as Lord Diplock stated it in *Pettit v. Pettit*, our democracies are now 'real-property-mortgaged-to-a-building-society-owning,' democracies.[14]

I argue that private interests have infiltrated the public sphere and contributed to the rise of the 'mortgaged democracies'. These have become part of what Stanley Fish terms 'interpretive communities,' whose members share a 'sense of relevance as to what is at stake in the fields that concern them'.[15] The concern that is shared by the public sphere and private interests is the maximisation of profits for shareholders, capital investors and assets owners by applying an efficiency rule. Within the public sector, the rule usually points to the profitability of elevate rates of return on capital. In so doing, private investors' concern 'meets that of public finance and the income and solvency of state'.[16] This occurred after 1689, with the establishment of the Bank of England: the 'dramatically increased rate of growth in public finance' was tackled by resorting to the national debt and other 'means of state funding through new kinds of long-term and short-term loans'.[17]

The constitutional history of England provides us with further examples on how this efficiency rule has been working throughout the centuries. Firstly, in order to maximise the return on its estates, the Crown set a 'deliberate system of management' for them: as a source of income, they went under the control of the Exchequer. Estates could thus be sold, revenues levied, and land leased.[18]

Secondly, public-finance concerns were the organising themes during the Civil War and the Interregnum. As 'other sources of income, mainly assessment and excise taxes, proved insufficient to pay parliament's soldiers,' Parliament 'disgruntled army by increasing the flow of property confiscation revenues' among royalist and neutralists'. Two committees were therefore established: the 'Sequestration Committee' and the 'Committee for Compounding with Delinquents,' which secured parliamentary domination over the Royalists. These, indeed, could voluntary relinquish 'what was usually a modest portion of their estates' (composition); but they could also choose sequestration, 'meted out by [these two] committees,'

[13] Pistor (2019: 154).
[14] *Pettit v Pettit* (1970) AC 777, HL, *per* Lord Diplock, at 824.
[15] Mullender (2019: 549–550). For more on the interpretive communities see Fish (1980).
[16] Hoyle (1992: 1).
[17] Rudolph (2013: 131).
[18] Hoyle (1992: 33).

which levied 'punitive fines and confiscations against the uncooperative'.[19] The latter was vividly portraited in Thackeray's *The History of Henry Esmond, Esq.* During the Civil War, Lord Castlewood, the main character's ancestor, 'pawned his plate for King Charles the First, mortgaged his property for the same cause, and lost the greater part of it by fines and sequestration'. After standing 'a siege of his castle by Ireton, where his brother … capitulated,' he 'made terms with the Commonwealth,' probably compounding, 'for which the elder brother never forgave him'.[20]

Thirdly, public and private concerns interweaved as far as the commons, waste lands and forests were concerned. In order to increase the production of commodities and maximise profits, several tracts of lands, which had always been the major source of sustenance for commoners, were enclosed. Enclosure became a further organising theme of the English community: as it turned lands into capital, it allowed the owners 'to extract monetary values'.[21]

It was argued that, by enclosing waste and common fields, the state would bring advantages to 'the poorest that dwell upon wastes'. These would 'have a portion secured them to enclose about their cottages to raise herbs and roots, a cow and some corn for their better relief'.[22] The assumption proved to be simplistic in that not only did the enclosure of the commons displace the entire class of small proprietors, but it also swept away the public policy introduced by the Statute of Merton, according to which 'the lord of a manor may enclose so much of the waste as he please … provided he leaves common sufficient for such as are entitled thereto'.[23]

Fourthly, private interests were able to infiltrate the public sphere because enclosure, as a public policy, was pursued by pieces of parliamentary legislation. By authorising enclosure, Parliament did not establish 'equality of goods and lands;' by contrast, freeholders legally appropriated commons, wastes, and forests, thus making 'themselves thieves by act of Parliament'.[24] 'In these utilitarian days', Anthony Trollope would put it in the nineteenth century, public financial concerns turned the *Crown estates* in capital gains. In *Framley Parsonage*, he vividly portraits how 'People still come from afar to see the oaks of Chaldicotes, and to hear their feet rustle among the thick autumn leaves;' but they would 'soon come no longer. The giants of past ages are to give way to wheat and turnips; a ruthless Chancellor of the Exchequer, disregarding old associations and rural beauty, requires money returns from the lands'.[25]

Through legislation, finally, private interests pursued the creation of a 'safe normative space' where interests 'seek to secure unanimous endorsement by making declarations that will elicit a positive response from their audience'.[26] Private actors present a new normative space, where they might gain the complete 'mobilisation'

[19] Shedd (2000: 195 fn 5).
[20] Thackeray (1852: 2).
[21] Pistor (n. 1) 29. See ME Turner, *Enclosures in Britain 1750–1830* (Macmillan 1984) 36.
[22] St. John (1792: 306).
[23] Bl. Comm. II, 34. See 20 Hen. III. c. 4. 29 Geo. II. c. 36, and 31 Geo. II. c. 41.
[24] Walwyn (1649). See Hill (2001: 139); Clark and Clark (2002).
[25] Trollope (2016: 26).
[26] Mullender (2018: 697), who quotes Bourdieu (2014).

of 'immovable' land. 'Land mobilisation' refers to the 'simplification of the conveyancing process and the facilitation of the alienability of land' in order to allow the 'possessive market society' to flourish.[27]

In the nineteenth century, economic actors and political reformers advocated 'free trade in land;' regularly criticising the land laws, they targeted family settlements, the purpose of which were 'to preserve landed estates intact'.[28] By limiting the 'landowner … to a life tenancy in his estate' and entailing the estate 'upon the landowner's eldest son,' settlements prevented 'land being sold, mortgaged, or dispersed by will'.[29] Such mobilisation took place in the nineteenth century and culminated in the enactment of the Conveyancing Acts 1881–1882 and of the Settled Land Act 1882: 'by 1921 over one-quarter of English land had changed lands;' in 1996, family settlements eventually left undisturbed the English legal order.[30]

Some Interests Are More Equal Than Others? The Advent of 'Mortgaged Democracies'

English law also resorted to enclosure in the colonies, where it turned land into property,[31] meaning that its attentiveness to private interests was well-equipped for setting the rules for land mobilisation. To this extent, common lawyers have always been used to 'treat things as things' and, at the same time, 'as wealth'.[32] This has allowed different interests—namely, those of debtors and those of creditors—to cohabit in the same tract of land. The Law of Property Act 1925, for example, crowds the land with them: 'legal estates', 'equitable interests,' and 'equitable interests "capable of subsisting as a legal estate"' coexist in it.[33] In case of conflicting interests—co-ownerships entitlements, estates upon condition, charges by way of legal mortgage—, the law assumes that the mortgagee's 'legal coding'[34] is 'more equal' than the mortgagor's. Such a hierarchical order was also stated in *Bruce v Marquis of Ailesbury*. In case manifold interests coexisted in the same land, and 'notwithstanding any opposition by those who might be next in remainder,' creditors' interests in land would be preferred to family 'sentimental considerations'.[35]

The practice of conveyancing estates in fee simple into mortgagee's estates in the lands is long-standing. Not only had the mortgagor's and the mortgagee's interests

[27] Respectively: Gravells (2010: 43); Macpherson (2010: 48).

[28] See *The Economist*, May 29, 1847. Spring (1977: 43).

[29] Spring (1977: 41).

[30] Spring (1977: 40). See Trusts of Land and Appointment of Trustees Act 1996, s 2(1). For more on land conveyancing in the late nineteenth century see Anderson, (2010: 202–231). See also Rudden (1994: 84).

[31] Jones (2019: 191–194).

[32] Rudden (1994: 82).

[33] Law of Property Act 1925, s 205(1) (x).

[34] Pistor (2019: 5). See Law of Property Act, ss 34 and 87. See Rudden (1994: 95): 'the lender's interest is merely in the thing as wealth,' whereas 'the family member's interest is in the thing' as such.

[35] *Bruce v Marquess of Ailesbury* [1892] A.C., 356, H.L.(E.) *per* Lord Halsbury at 360–362.

in the same land always diverged, but the interests of the latter had always been ranked as superior. Common law and equity have always consented to such a multiple coexistence of distinct-and-often-conflicting interests in the same land. Suffice it to remember the concept of estates held *in vadio mortuo* (i.e., in dead pledge), which were used to secure the performance of an obligation.

This legal device, however, gave rise to several concerns among common lawyers. The pristine common law set a hierarchical order of interests, which gave preference to the mortgagee's. This accrued 'the fruits and rents' during the continuance of the mortgage, but fruits and rents 'did not count towards repayment of the loan'. In the Middle Ages, this order of interests was not considered morally eligible. Although it was 'not forbidden by the court of the lord king, the mortgages were deemed to be a kind of usury,' as well as 'unjust and dishonourable'. And if the mortgagee died 'seised of such a gage and after his death this [was] proved, his property [was to] be disposed of as the property of a usurer'.[36]

With the advent of modern liberal democracies, private interests were able to frame the organising theme of communities around the things-as-wealth principle. The laws of the market started percolating through the political system; the new foundation of the political obligation allowed communities to reconcile the variety of conflicting economic interests giving primacy to private actors' 'legal coding'.

Within our liberal 'mortgaged democracies,' the social contract is grounded on several acts of conveyance, whereby the consumers borrow of lenders sums of money, which in turn are granted a security by transfer of proprietary rights.

The Iniquitous Effects of the Common-Law Paradigm: The Rise of The Global 'Mortgaged Society'

The legal coding whereby the common law incorporates creditors' interests in land proves to be useful when assessing the rise of global 'mortgaged societies'. English common law has historically constituted the backbone of global law; the same U.S. common law, which is supposed to be the hegemonic legal system, owes its features to English law.[37] Even if we assume that globalisation prospers without 'a global state or a global law,' we must concede that transnational legal modules are the derivatives of a process of legal enculturation promoted by the world-wide dominant common-law legal profession.[38] Consequently, common-law paradigms are now applied globally for processing things as wealth and turning them into capital. English legal language also performed a 'communifying function' within the global society.[39] Odd at is may seem, English legal language (i.e. the global legal language)

[36] Glanvill (ed. GDG Hall 1965), Book x, ch 6 and 8: See also Co. Litt. 206, 253; Bl. Comm. III, 158. Plucknett (1956: 604); Pollock and Maitland (1968: 119–123); Chaplin (1890: 2, 6); Rabinowitz (1943: 179); Barton (1967: 229–239); Baker (2019; 330).

[37] On the English origins of (global) U.S. law see Nelson (1975).

[38] Pistor (2019: 176, 158).

[39] Berman (2012: 38, 69). On the law as a long-collective factor in '*commoning* societies,' see Capra and Mattei (2015: 14).

had been created when 'the bulk of capital was land'. As the processes of capital coding turned out to be transnational and loosely tied to territories and communities, English legal paradigm adapted to 'stocks, shares, bonds and the like … crossing oceans at the touch of a key-pad in the search for a fiscal utopia'.[40] Like in English land law, 'the feudal calculus lives and breeds, but its habitat is wealth not land'.[41]

The organising theme of transnational private interests is now the promotion of efficient institutional legal paradigms. At the global scale, the Western legal tradition is dominant, and within it, the English common law prevails over the civil law, because it is said to ensure elevated economic performances.

To this extent, globalisation hides a treacherous policy. Whereas traditional comparative law presupposes variety, global comparative law requires homogeneous politico-legal features throughout the world. Quite paradoxically, the inequal allocation of resources is pursued by promoting homogeneity, which, in a global and economic-oriented environment, manages legal complexity by simplifying it. Homogeneity now pervades governmental structures and policies.

In a globalised economic world, the legal systems of the world act as mere recipients of the proposed policies of domination. We have got used to equating trade, equality and civilisation within the context of globalised markets, to praise *global commercial law* and its allegedly equalising effects.

To be honest, there is nothing like *sanctity* in globalisation. The narrative of progress hides a *narrative of superiority*: when gaining control of the levers for the distribution of wealth in society, transnational actors establish unequal relationships between themselves and those who are economically weak.

Nation states, then, are in a state of flux; instability is accrued by freedom of the movement of capital and goods, which generates even sharper cross-cutting economic cleavages. This is the by-product of international investment law, which 'shifts power and authority from states to investors, tribunals and other decision-makers'—decision-makers who are not democratically accountable—; '[t]hese shifts produce outcomes that only partially support global policies'. The holders of global capital have thus found new ways 'to utilize the law for their interests:' 'legislatures, regulators, even courts' have been turned 'into agents that serve their interest rather than those of the citizens to whom they are formally accountable'.[42]

The change in the democratic paradigm is threefold. Firstly, the shift towards centralisation is triggered by a homogeneous common regulation of international financial relations and markets. Secondly, there is an even more remarkable shift towards the efficiency rule. Thirdly, when capital is allocated at the national level of government, this is financially responsible *vis-à-vis* financial markets and international investors. As global financial dominance causes a shift from the political to the economic sphere, nation states seem to rely on a new form of confidence between the political power and the sovereign financial market, where the 'distressed sovereign

[40] Rudden (1994: 82).
[41] Clarke and Kohler (2005: 55).
[42] Cheng (2005: 20), See also Houghton (2019: 466).

debt can be sold on private equity markets and the debtor [is] subjected to the harsh economics of private law'.[43]

Global comparative law has generated a constellation of mortgaged societies. However, transnational actors aim to dominate, not to be governed; the law is equal and homogeneous, not egalitarian. Interests conveyed by legislation do not have to be accommodated but articulated as if they were arranged upon a hierarchical scale. Transnational actors are the 'natural proprietors' of the levers of wealth, 'owing nothing to societies for them'.[44]

Adopting this organising theme, mortgaged democracies have infringed their egalitarian achievement. This reminds me of how, in Shakespeare's *Richard II*, John of Gaunt harshly accuses Richard II of mortgaging away his realm:

> This land of such dear souls, this dear dear land,
> Dear for her reputation through the world,
> Is now leased out, I die pronouncing it,
> Like to a tenement or pelting farm:
> England, bound in with the triumphant sea
> Whose rocky shore beats back the envious siege
> Of watery Neptune, is now bound in with shame,
> With inky blots and rotten parchment bonds …

Both Richard II and the modern liberal state have 'exhausted the royal revenue;' this has made it necessary 'to mortgage the supplies of the future for a supply of ready money'. By 'misusing [their] sovereignty to mortgage the land,' both have violated 'the symbolic order;' and they lose their sovereignty:'[45]

> … That England, that was wont to conquer others,
> Hath made a shameful conquest of itself.[46]

John of Gaunt's emotional predicament immediately calls into question the legitimacy of our political obligation. Within the global scenario, transnational actors seek to settle uncertainty, and states develop their own policies in order to face the state of flux; and this undermines the safe normative space.

This suggests we enquire how public leaders have been able to transform the cause of the problem (inequality) we must confront into the presupposition of their non-egalitarian policies. States have indeed adopted the same organising theme of financially oriented global actors: the theme deliberately sacrifices the interests of the community in favour of the gains of a limited elite. Not only does this raise concerns about the legitimacy of state policies, but it also questions the authority of the global actors when it comes to confronting the latest challenges to political

[43] Muir Watt (2012) 286.
[44] Macpherson (1954: 564).
[45] See respectively: Forker (1998: 308); Belsey (1991: 35).
[46] Shakespeare (2011: II.3.57–66).

obligations. Global massive mobilisation, labour migration—not to mention the insurgent ecological crisis—require further reflection on how arrange a new political obligation around a new, fair and 'sustainable' organising political theme.

Forced to Sell the Assets? 'By Trick or By Main Force'

The adoption of private actors' interests as the organising theme of political communities may be understood within the context of 'parliamentary contractarianism,' or a 'political society [as] a form of contract produced by the consent of the people'.[47] Contractarianism infiltrated the English common-law constitution during the seventeenth century, when it experienced a process of transfiguration and reengineering that affected its core principles. This caused a shift from the 'unwritten constraints of the ancient constitution, the immemorial *suprema lex* or common law,'[48] to the adoption of 'mixed regime arguments'.[49] In the aftermath of the seventeenth-century constitutional vicissitudes, which had been raised by the competing claims of royal prerogative and parliamentary power, the paramountcy of the fundamental law of the land was restored on the basis of the constitutional principle of mixed government and upon a contractual basis. From that time onwards, English political power has its root in the consent of the people.

The adoption of an economic-oriented organising theme also triggered a change in the foundation of the political obligation. As I have already said, this is now grounded on several acts of conveyance. The change was also prompted by the radical transformations which had been characterising eighteenth-century England: the industrial revolution, the Empire, trade and colonial expansions had a deep impact on the English constitution. From the late eighteenth century onwards, these changes resulted in an era of legal reforms. The common law had 'to consider all the complicated relationships which were being created through the machinery of credit and joint enterprise;'[50] acting as a forerunner of globalisation, it also propagated the conveyancing pattern through the British Empire. In the colonies, commercial law was 'transformed and replaced by Anglo-American commercial law, because of pressure to conform to the norms of the dominant economy'.[51]

The process whereby conveyancing is accepted by the political community is a deliberative process. It is a decision-making process in which deliberation, through argumentation and persuasion, gives way to the broadest consent possible in public decisions on the new organising them.[52] Arguments have to be persuasive and, at least at first glance, 'incipiently egalitarian in orientation'.[53]

[47] Lee Ward (2004: 48).
[48] Raffield (2010: 85).
[49] Lee Ward (2004: 59).
[50] Plucknett (1956: 68).
[51] Palmer (2012: 79, 82).
[52] Goodin (2000).
[53] Mullender (2018: 697).

The proposed persuasive argument cannot, however, be *religious*. It is evident that the conveyancing pattern has become 'one of the world's new universal religion[s]'.[54] This trend is even more apparent if only we consider how financial international actors 'spread the word' by promoting democracy as an 'emerging right to democratic governance': "Go ye into all the world, and preach the Gospel to every creature".[55] This, however, does not square with the 'Word of God,' as Gerrard Winstanley put it, which indeed is 'pure law of righteousness,' and therefore does not allow anybody 'to be lord or landlord over another'. As the 'whole mankind was made equal and knit into one body' are united into equality of love to preserve the whole body'.[56] In terms of distribution of wealth, this implies that 'the earth … made by Almighty God' is 'a common treasury of livelihood for whole mankind in all his branches, without respect of persons. Therefore, 'no tenure, estate, charter, degree, birth, or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected'.[57] This argument has a strong egalitarian commitment: not only is this antagonistic to the economic order, but it also advocates "'commoning' as the organising principle of a community in caring for the public good'.[58]

Nor can the argument be *ethical*. Global law has proved to be 'untroubled about the moral values of the system,' and essentially 'driven by the very nature of things'.[59] If the aim of transnational actors is to amass affluence by controlling the distribution of wealth, it follows that their equal, albeit iniquitous, law is grounded on covetousness. According to the social contract theory, this passion causes 'the desire for power' and aggressive policy of accumulation,[60] as the practice of the debt instrument 'NC2 Mortgage Loan' demonstrated. Sold by Citigroup Mortgage Realty Corporation (CMCR), this instrument prompted aggressive strategies of originating mortgages 'by pushing homeowners into financial arrangements they could hardly afford'. At the global scale, this disseminated a 'logic of private-label securitization,' which was 'mass production'. Therefore, new mortgages 'had to be fed into this machine constantly to sustain it'.[61] If considered persuasive, the ethical argument would turn the government in a 'serpent to which each individual has consented, 'by this covetous power,' in order 'to lift up himself above another'.[62]

Under any circumstances is the argument *rational*. Nobody would indeed consent to an order within which, having adventured 'the loss of their estates,' each individual should live 'to redeem the land from bondage'.[63] Nor is it *political*. As clearly stated in *Fyloll* v *Assheleygh*, it may be justifiable that those who acquire resources are allowed to keep them for themselves to the exclusion of the others:

[54] Corcoran (1983: 14).
[55] Franck (1992: 86). See *Ma.* 16:5 (KJV).
[56] Winstanley (1649: 2).
[57] Respectively: Winstanley (1649: 2) and Agreement of the People (1906: 133).
[58] Capra and Mattei (2015: 162).
[59] Macpherson (1954: 564).
[60] Hobbes (1991: 53).
[61] Pistor (2019: 81, 82).
[62] Winstanley (1649: 3).
[63] Winstanley (1652: 39).

> At the beginning of the world, all beasts were obedient to our forefather Adam … but after he had broken the commandment of our lord God all the beasts started to rebel and to become wild … Now they are in common, and belong to the first occupant (*occupanti conceduntur*) …. When I have taken a fowl, and by my industry have tamed it by restraining its freedom, I have a special property in it …; and then it is not lawful for anyone to take it.[64]

This, however, does not account for how private property owners could acquire rights without the consent of the political society. Instead of setting constraints on private actors in order to reduce socio-economic imbalances, the community would indeed consent to a more uneven distribution of benefits and costs.

The argument is persuasive because it is *consociational*. Coined by Arend Lijpart, the expression points to those federalist processes whereby highly conflictive societies, usually divided along ethnolinguistic cleavages, are accommodated and the maintenance of territorial integrity is secured.[65] The consociational argument arranges the different sectionalities around a power-sharing organising principle. It assumes that there is an unequal distribution of wealth; and yet, this does not prevent each member of the community from gaining access to it. 'Since community of goods is impracticable,' as Thomas Wood put, 'in as much as some men are naturally more ambitious than others, and all men would not be equally industrious to the raising of the common stock, we must suppose distinct property'.[66]

Although it does not reflect an egalitarian commitment, the consociational argument is egalitarian in its commitment. The LPA 1925 holds this assumption: a legal mortgage of land may be created 'by a charge by deed expressed to be by way of legal mortgage', i.e., without transferring the legal title to the land to the mortgagee. s 87(1) of the LPA 1925 gives us the illusion of taking part in the global distribution of wealth.

Glanvill's, Bracton's, Littleton's, Coke's and Blackstone's mortgagee's estate in the land disappeared long time ago; and yet, its legal framework—a conveyance of land *upon condition*—still infiltrates the common-law mentality. This idea of law and 'the extent to which we accept it as valid … rests … in' our perceiving it as a relevant part of our collective 'political imagination'.[67]

Consequently, and if the deed so establishes, the mortgagor has also right of redemption, including an option to repurchase.[68] In mortgaged societies, however, the 'terms and conditions' of the political obligation requires unceasingly acts of conveyancing—and this makes the political liens irredeemable. 'The current packages on offer', furthermore, 'could have the effect of removing or rendering illusory'

[64] *Fyloll* v *Assheleygh* (1520) Y.B. Trinity Term 12 Hen. VIII, *Selden Society* 2, 15 *per* Broke J (119 SS 15).

[65] On consociational federalism see Lijphart (1979: 505).

[66] Wood (1702: 63).

[67] Ian Ward (1999: 1). For more on the evolution on mortgage law throughout the English legal history see Burkhart (1999: 64 250–254).

[68] LPA 1925, ss 5.1 and 205.1.xvi.

this very basic right.[69] For when the 'mortgagee in possession' has entered into and is in possession of the mortgaged property,' as Thomas More had already realised, 'landlords as well as tenants are turned out of possession by tricks or main force;' or wearied by ill usage they sell at last'.[70]

'Spaces for Rebellion;' Or, The Redemption of Communities' Equitable Interests

The consociational argument is a useful instrument for the promotion and propagation of global comparative law. Egalitarian in its commitment, it facilitates the harmonisation and the convergence of laws in order to stimulate business and economic development. It also proposes a transnational, borderless legal framework into which heterogeneous legal systems coalesce. How this occurs is due to pressure from economic models, which aim to make laws converge towards economic semantics. The alleged egalitarianism of transnational law is a thus a projection of global financial dominance, which evaluates the efficiency of the legal systems and their attractiveness provide they positively discriminate towards international investors.

The consociational paradigm holds a particular fascination for those to whom globalisation promises an 'impeding radiant future' to humanity.[71] The pursuit of happiness and the illusion of taking part in the global distribution of wealth mobilises mass migration. This triggers a spill over effect, because it makes the consociational argument the organising theme of the transnational community. At the same time, this multiplies the iniquitous effects of the conveyance of the political domination. Not only do migrants enter into irredeemable conveyances, but they are also treated as inferiors and therefore must bear the costs of financial domination: 'the explosion of inequalities, the systematic pillaging of natural resources, environmental catastrophes, … the standardization of culture, and endless wars'.[72]

This has also triggered a change of mood in how the societies now perceive the political bond: within it, interests are now arranged after a hierarchical scale, and this causes 'an imbalance between their interests and the interests of the lender'.[73] Like in Glanvill's dead gage, this order of interests is now understood as morally untenable for binding the political community. Like Glanvill, we understand that this mortgaged society, to which we consented, is 'unjust', albeit 'not forbidden by the court of the lord king'. This echoes St Paul's predicament in 2 *Cor* 10:23–4 (KJV): 'All things are lawful for me, but all things are not expedient' for the community; 'all things are lawful for me, but all things edify not' the political obligation'. By contrast, this should be rebuilt on the egalitarian commitment: in St Paul's words, 'Let no man seek his own, but every man another's [wealth]'.

[69] Houghton and Livesey (2001: 167).
[70] More, *Utopia* (1908: 24–25).
[71] Xifaras (2016: 216).
[72] *Ibid* at 219.
[73] Houghton and Livesey (2001: 163).

Not only are mortgage transactions still 'construed strictly and unsympathetically,' but the covenant for re-conveyance is indeed unlikely to be enforced. This is, I argue, John of Gaunt's main argument. When conveyancing the English kingdom *upon condition*, Richard II had not considered that its organising theme also comprised debtors' equitable interests in land. Therefore, the King should also have ensured that redemption could not be 'hindered by provisions in the mortgage or by the activity of the mortgage'. Common-law principles warn us against such a possibility: 'any clog upon the mortgagor's right to redeem is simply void'.[74]

Within parliamentarian contractarianism, this unavoidably raises concerns as to the legitimacy of the current political obligation. In order to stimulate business and economic development though the convergence of laws, sovereign states seem to have ignored the socio-cultural contexts within which the homogeneous global law is applied. By accepting external constraints on national government, states acknowledge the iniquitous effects of global law.

When global actors control the levers of wealth distribution, the availability of resources is even more reduced—and the political obligation becomes unsustainable. In times of political and environmental crisis, the property charged by way of legal mortgage is indeed 'worth infinitely more than the debt'.[75] To this extent, the conveyancing of the political obligation should seek an equitable balance of bargain powers and conflicting interests. According to the rule in *Knightsbridge Estates Trust Lts d v Byrne*, indeed, the right of redemption is vane and illusory, when 'the totality [of the conveyance] is sufficient to enable the Court to say that the contract is so oppressive and unconscionable that it ought not to be enforced in a Court of equity.[76]

As for climate change and migration issues, it might be argued that states have failed to reconcile the tensions between the 'production of useful scientific knowledge' in environmental issues and the 'democratic participation' in decision-making process related thereto. Public-finance concerns about the trade of their distressed sovereign debt have also led to their 'marginalisation' in almost all political discussions of climate change.[77] This also hinders another failure: 'that of state authorities to create the law that was wanted' by the political community, i.e. a law which should be firmly rooted in an environmentally, sustainable egalitarian commitment. The 'readiness on the part of the state authorities to allow' the private international investors to 'make a considerable part of the law' discloses state successful opportunism towards these contentious topics.[78]

This probably explains why the same 'bonds of the social contract' have recently been declared 'to be null and void:'

[74] Simpson (1961: 228).
[75] *Ibid* at 227.
[76] [1939] 1 Ch 441, 463.
[77] Howkins (2017: 8).
[78] Watson (1988: 87, 96).

> When Government and the law fail to provide any assurance of adequate protection, as well as security for its people's well-being and the nation's future, it becomes the right of its citizens to seek redress in order to restore dutiful democracy and to secure the solutions needed to avert catastrophe and protect the future.[79]

I am not advocating the 'creation of spaces of collective rebellion'.[80] I understand that, in order to stir the rules of global law, it is necessary to mobilise the most active forces within society. Besides organising society, the law should also act as a bridge linking 'reality to an imagined alternative'.[81] Odd as it may seem, this is the 'paradigmatic example of [British] historical particularism … because it gives expression to the view that, as conceptions of justice change over time, so too should common law rules'.[82]

Indeed, common law offers us an alternative when it comes to responding to the needs of consumer borrowers and societies. English law has been able to cope to the iniquitous effects of the mortgage by developing the conception of the equity of redemption, i.e. an estate in the land which overlaps and coexists with other interests in lands.[83] Like, the mortgagee's interests in land, the equitable interest required a seisin, 'for without a such a seisin, a devise could not be good'.[84] I submit, then, that the common law legal tradition also provides us with a further paradigm for the organisation of communities. The paradigm stems from equity and does not endorse the creation of a common, homogenous legal order. Nevertheless, the paradigm is probably able to turn societal engineering into effective legal change, since, like equity, it should radically transform the idea of conveyancing political obligations upon condition. Equity has indeed developed 'the doctrine that a mortgagee in possession is strictly accountable for the profits of the land'—which, in mortgaged society, means moving toward 'truly inclusive solutions to the world's environmental, social and political problems'.[85]

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[79] Extinction Rebellion (2019).

[80] On collective rebellion when confronting the state of flux see Silver (2018: 161–168).

[81] Watson (1988: 36).

[82] Mullender (1997: 27). See Baker (2016: 16): 'common lawyers always followed the developing currents of professional understanding and recognised that these could change'.

[83] The expression was first used in *Dutchess of Hamilton v Countess of Dirlton and Lord Cransborne* 1 Ch R 165. See also Ian Ward (1991: 28).

[84] *Casborne v Scarfe* [1738] 2 J and W 194. However, *Casborne v Scarfe* [1738] 1 Atk 605, at 379, clearly states that 'the person … entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.' I owe a debt of gratitude towards Catherine Dale, Newcastle University Law Library, for having detected this variation between the sources of the same judgment.

[85] Respectively see Howkins (73) 210 and Simpson (n. 70) 228.

Compliance with Ethical Standards

Conflict of interest On behalf of all authors, the corresponding author states that there is no conflict of interest.

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