CHAPTER 19

Human Rights and Wealth

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Don Wallace is, within the community of international law professors, something of a rare bird. He cares passionately about the international rule of law as a check on state power. This distinguishes him from the skeptics who question the very value and reach of the international legal system. Yet he also believes that one of law's normative tasks is to provide a basis for wealth creation. He thinks that wealth creation is not the province of plutocrats, but rather a democratic process that facilitates human flourishing and the realization of humane values. This commitment distinguishes him from the great majority of his international-law peers, who associate wealth with the self-protective instincts of the plutocracy and see reining in the rich as a legitimate and desirable function of the state. Don is not so naive as to believe that great riches cannot corrupt the institutions of a liberal democratic republic, but he is unwilling to indulge a presumption that where wealth goes, abuse necessarily follows. Don would be my friend, and I would be his admirer, even if we did not agree on these matters. But because we do, I wish to honor Don by unpacking and, I hope, illuminating these entangled convictions.

The notion that wealth protection serves the purposes of liberty has noble antecedents, especially in Locke's conception of a social contract. It pervaded the thinking of the founders of the United States. In our part of the world, respect for wealth fell into disrepute largely because of the cataclysm of the Great Depression, and today continues to draw fire because of the Great Recession. But, this essay argues, international law specialists in the academy especially embraced skepticism about the value of wealth because of the post-World War II transformation of the world political order, principally the rise of the self-described socialist states and the dismantling of the European colonial empires. As

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cosmopolitans seeking to find common ground across the schisms of the postwar world, proponents of international law found it easy to empathize with the emerging critiques of the international economic order emanating from the new state actors, even if they for the most part did not go so far as to embrace exclusive state ownership of the means of production.[1] Unlike the economists who forged the ephemeral Washington consensus after the collapse of the Soviet Union and China's restructuring, these lawyers remain largely skeptical of property-based liberalism. In the global banking crisis of October 2008 they found vindication.

The result for mainstream international law has been a great schism between the international human rights community, especially that portion that works in international adjudication, and those who believe that the safeguarding of wealth from arbitrary exercises of state power ought to be a core function of international law. This essay focuses especially on the work of the European Court of Human Rights (the Strasbourg Court), the oldest and most widely and highly respected of the international human rights tribunals. In two recent decisions, the Strasbourg Court openly embraced the proposition that holders of wealth have less of an entitlement to protection against arbitrary governmental action than do ordinary persons. Recent arbitral decisions applying bilateral investment treaties, by contrast, have rejected that position, in one instance in a matter involving the same facts as a Strasbourg Court case.

A conventional means of explaining these different outcomes is to invoke the concept of fragmentation. International law has decomposed into separate fiefs with different domains and values. Investment treaty law does what it does unconcerned with the values and principles of human rights law, which pursues a separate agenda based on different legal settlements and intellectual commitments. Some academics deplore

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[1] Typical of this cosmopolitan outlook was the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A/XXI (1966), which emphasized state power and provided no comfort to private property, as well as the so-called New International Economic Order more generally. While the Western powers did not subscribe to this project, prominent Western academic international lawyers did. *See*, *e.g.*, Burns H. Weston, *New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections upon the Contemporary International Law Debate*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 89 (Richard B. Lillich, ed., 1983). The Western-sponsored International Covenant on Civil and Political Rights, G.A. Res. 2200A/XXI (1966), while focusing more on individual liberty, contains no protection for property other than nondiscrimination provisions.

this phenomenon and seek to recompose a coherent international legal regime, but no consensus exists about how this recomposition would work.[2]

There is nothing inherently implausible or objectionable about different legal regimes operating within different domains.[3] In national legal systems, for example, we accept that public and private law operate in different spheres, that different categories of public and private law operate more or less autonomously, and that various kinds of domain rules allow these different regimes to coexist. Municipal Law, the product of social, economic, political and ideological conflict, cannot aspire to complete coherence. Why should international law be any different?

But it some ways the fragmentation explanation, as applied to the schism between international human rights and property protection, seems a bit too pat. Rather than relegating international human rights and the international law of investment protection to separate hermetic enclaves, why can't the two fields inform and complement each other? This essay seeks to make progress toward a reconciliation.

I. Protection of Property as a Fundamental Liberty

The Constitution of the United States, one must recall, arose primarily to solve an international law problem. The Treaty of Paris had obligated the United States—then organized as a Confederation—to respect the property and contract rights of British subjects. The several states largely flouted this duty by discharging the debts that their subjects owed British creditors and only haphazardly respecting the property of persons who enjoyed British protection. These violations of international law were not only intrinsically wrong. British commercial interests reacted by starving the United States of credit and capital, leading to

[2] FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW – REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION, A/CN.4/L.682 (2006); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 RECUEIL DES COURS 101 (1998); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. (1999). For a proposal, admittedly visionary, to develop a law of conflicts of international law, *see* Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049 (2012).

[3] For the concept of legal domains, see Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1583-84 (2011).

economic misery. Motivated as much by a desire to right the economy and forestall renewed military hostilities as by a wish to uphold international law, the Framers bestowed the authority to enforce these obligations on a newly constituted Congress and federal judiciary.[4]

One might, of course, dismissing these long distant events as an instance of realpolitik lacking any principled basis. But for the Framers, deep philosophical commitments, confirmed by a century of historical experience, associated wealth protection and liberty. When James II sought to emulate his patron, Louis XIV, by consolidating the management of the national economy under the Crown and rationing through royal prerogative the privileges that flowed from wealth, British leaders looked to the alternative settlement achieved in the Netherlands. John Locke, during his exile there, fully appreciated the ability of holders of wealth to check and supervise the government, fostering a social compact that bolstered individual liberty. When he returned to Great Britain with William of Orange to construct and theorize the Glorious Revolution, he articulated a vision of dispersed governance that had as its lynchpin the privileging of vested rights over governmental discretion.[5] The Framers for the most part regarded Locke as their lodestar and designed a governmental structure that would protect property from the state.

This concern over property rested on two assumptions. First, the Framers believed that sovereign authority, with its monopoly over the legitimate use of force, represented the greatest threat to the liberty of the subject. Second, they expected the sovereign to concentrate its force, and to threaten most, exactly those points of private power that most effectively checked sovereign discretion. They thus anticipated that the state will single out the wealthiest subjects for the greatest abuses exactly because these subjects posed the most effective check on sovereign will. Accordingly, the Constitution protected the wealthy not because of the inherent virtue of riches, but to safeguard the rights of all.

Today these convictions seem quaint to many. With the rise of monopolies in the nineteenth century, we witnessed wealth creation based not on innovation and risk taking, but rather on the suppression of competition, and thus of commerce. In the late twentieth century it was

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[4] *See*, *e.g.*, *J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94-96 (2002) (reciting history); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (confronting state disregard of treaty obligations and invoking the subsequent Constitution to reverse this course of conduct).

[5] JOHN LOCKE, TWO TREATISES ON GOVERNMENT §§ 45-51 (1698) (1994).

financial engineering, bolstered by governmental guarantees and bailouts, that seemed to equate wealth formation with redistribution, rather than creation.[6] In both instances the rich did not check the sovereign so much as coopt its power and exploit it for their own perverse purposes—perverse in the sense that the alliance of wealth and political power shrank overall welfare even as it benefited the few.

For defenders of economic liberalism, these are sobering facts. They demonstrate, if nothing else, that no balance between state and private power is perfect, that an uncompromising embrace of either unlimited state power or full laisser-faire economic policy likely leads to bad outcomes. But they do not make the case for abolishing or harassing wealth, rather than regulating the means by which it is gained. Locke and the Framers both understood that lawful state power should be exercised to rein in the baser instincts of entrepreneurs. Adam Smith famously observed that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[7] Smith followed this point, however, by arguing that this danger did not justify government suppression of private commerce, but rather supported the use of lawful power to thwart those conspiracies that harmed the public interest. His principal concern was that government would join in with the conspirators, much on the model of the French economy of his day.[8]

The mainstream in academic international law, however, does not seem to have much patience with these arguments. They have learned the lesson of market failure, while downplaying the risk of government failure. They look not to wealth as a check on state power, but rather to international human rights law and the various structures—international tribunals, domestic courts, and activist NGOs—that implement these rules as the best, and perhaps only, way of reining in the state.

II. International Investment Law as International Law's Orphan

If, as I assert, the academic international law community has grave suspicions about the value of property as a fundamental liberty, what is one to make of international investment law? For more than three

[6] For a trenchant exposition of this argument, *see* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 36-37, 89-92 (2012).
[7] ADAM SMITH, WEALTH OF NATIONS 152 (1776).
[8] *Id.*

decades, much of the emerging world—the world that inspired and led the retreat from wealth protection in the post-war era—has joined treaties that not only provide certain core rights to foreign investors, but also gives them access to a special enforcement mechanism—investor-state arbitration—from which nationals of these states are barred. The monetary compensation that this system provides seems, if anything, a stronger form of legal protection than most states (Europe aside) employ to buttress human rights. How can this system have emerged, if it rests on principles to which so many in the academic community are opposed?

One response from within the academic community is to represent the investment treaty regime as a triumph of power over ideas. An influential article by Professor Guzman is representative. He asserts that developing countries in a position to host valuable investments faced a collective action problem that they failed to solve. Rather than presenting a united front to investors and admitting investments only on advantageous terms, they responded to the risk that investment would move to the most protective states by entering into a race to the bottom. What resulted was a world in which many developing states surrendered sovereignty, and perhaps sovereign wealth, to the first-world firms (represented in the treaty negotiations by catspaw states) who chose where to site their operations.[9]

More broadly, many academics view investment law as an instance of *lex specialis*, unfortunate inasmuch as it contributes to the fragmentation of international law and therefore deflecting the field from its broader humanizing mission.[10] In the view of these scholars, investment treaties are aberrant, not foundational. Rather than vindicating international law by providing manifest and effective remedies to enforce international obligations, the regime constitutes a perversion of a system meant to promote democratic and universal human flourishing, an enterprise from which wealth protection detracts.

There are many manifestations of the hostility of human rights lawyers to the investment protection regime. Perhaps the most vivid, however, involves the Strasbourg Court. In recent decisions it has gone so far as to suggest that normal human rights protection does not apply to the rich. The juxtaposition of these decisions with those of investment treaty arbitration tribunals is remarkable.

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[9] Andrew T. Guzman, *Why States Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

[10] *See* FRAGMENTATION OF INTERNATIONAL LAW, note 2 *supra*.

III. Strasbourg's Take on Wealth Protection

The framers of the European Convention on Human Rights, working only a few years after the end of World War II, appreciated that one of the ways that an over-mighty state might persecute minorities is to rob them of their property. Indeed, the German treatment of the Jews provided a recent and compelling example of how this can work. Accordingly, at the outset they forbade discriminatory interference with property rights.[11] Not much later they added Protocol 1, which protects "the peaceable enjoyment" of possessions, subject, however, to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[12]

Strasbourg's Protocol 1 jurisprudence bears only the most passing resemblance to the takings principles enshrined in the U.S. Constitution. In 1983 the Court decided, in what was considered a groundbreaking case, that it had jurisdiction to consider whether the British government had to pay fair compensation for a nationalized company.[13] In a subsequent decision on the merits, however, the Court stated that, due to the "state interest" proviso in Article 1, it was unnecessary to provide full compensation or to make any special effort to particularize the assessment of the expropriated property's value.[14] The Court made clear that it attached no great priority to property protection, and that *de minimus* state efforts to compensate victims of expropriation would satisfy all that human rights law required.

Two recent cases illustrate dramatically the benign neglect with which Strasbourg regards property protection. The first involved a claim by Yukos, a Russian holding company, that the tax authorities had invented a new theory of liability specifically to allow the state to seize the company's valuable assets and then drive it into bankruptcy.[15] The

[11] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 213 U.N.T.S. 222, Sept. 3, 1953 (entered into force), art. 14.

[12] Protocol 1 to European Covenant of Human Rights, Mar. 20, 1952, 213 U.N.T.S. 262, May 18, 1954 (entered into force), art. 1.

[13] *Lithgow v. United* Kingdom (9006/80), [1983] E.H.R.R. 5 CD 491.

[14] *Lithgow v. United Kingdom* (A/106), [1986] 8 E.H.R.R. 329.

[15] I did not participate in the Strasbourg matter, but between 2005 and 2011, I provided advice on Russian tax law to both Yukos and Yukos investors in connection with various disputes, including proceedings under a bilateral investment treaty. For fuller description of the disputes and my role in them, *see* Paul B. Stephan, *Taxation and Expropriation – The Destruction of the Yukos Oil Empire*, 35 HOUSTON J. INT'L L. 1 (2013).

Court made no serious effort to understand Yukos's arguments, instead dismissed them with a cavalier reference to the "margin of appreciation" due sovereigns. More to the point, the court referred to "the fact that the applicant company was a large business holding which at the relevant time could have been expected to have recourse to professional auditors and consultants" as a reason for its refusal to look behind the Russian government's tax claims to see if they had any basis under existing law.[16]

A few weeks later the Strasbourg Court disposed of a case brought by the financier George Soros against France. The French had convicted Soros of insider trading in 2002. Before Strasbourg, the French government conceded that the legislation that Soros had violated provided an opaque standard and that even the government could not be confident of its meaning. But again, Soros's wealth and sophistication disabled him, in the eyes of the Court, from arguing that he had been ensnared by the state.[17]

For Yukos, Strasbourg was only one venue for pressing its claim against Russia. Its investors benefit from several investment treaties into which the Soviet Union or Russia entered. One arbitration tribunal, applying the U.K. treaty, ruled that Russia had no legal basis for its tax assessment.[18] A second, applying the Spanish treaty and writing after the Strasbourg decision, not only rejected Russia's efforts to justify the assessment, but observed that the Strasbourg judgment seemed to have "entirely missed the point being made."[19]

Here we can see starkly the divide between the human rights establishment, at least in its European instantiation, and the investment law mainstream. In the Yukos matter, largely identical facts and evidence were presented to different tribunals, resulting in sharply different outcomes. The Strasbourg judges took the Russian representations at face value and put the burden of coping with unstable rules on the supposedly sophisticated company. The investment tribunals had a different sense of

[16] *OAO Neftyanaya Kompaniya Yukos v. Russia* (14902/04), [2012] 54 E.H.R.R. 19, ¶ 599. The Court did determine that Russia's refusal to accept payment from the company and instead auctioning off assets of its choice to itself constituted an independent violation of the company's procedural rights.

[17] *Soros v. France* (50425/06), ¶ 59.

[18] *Rosinvest Co. UK Ltd. v. Russian Fed'n*, Final Award, SCC Case No. 075/2009, IIC 471 (2010).

[19] *Quasar de Valores S.I.C.A. v. Russian Fed'n*, Award, SCC Case No. 24/2007, IIC 557, ¶ 82 (2012). I testified in this case on behalf of the Spanish investors as an expert on Russian tax law, and in particular rebutted Russia's justification of the assessment.

the range of interpretive discretion needed in tax enforcement and found that Russia had gone beyond any acceptable bounds.

I do not isolate this conflict to praise one court or condemn the other, but rather to illuminate the profound differences in judicial methodology and the principles that underlie them. The Strasbourg judges saw a sketchy taxpayer and a sprawling state justification with multiple references to municipal legal sources. The judges lacked an intuition about general state practice in dealing with the enforcement issues that this tax problem presented, and did not have the inclination to dig into the Russian law sources to see if they actually backed up Russia's claims. The investment tribunals came to the matter with a more fully developed sense of how tax authorities deal with problems of transfer pricing and VAT fraud, the conduct with which Yukos had been charged. Recognizing that the Russian approach was idiosyncratic, indeed inexplicable, the tribunals examined the Russian legal materials more skeptically.

There may be good realpolitik reasons for the Strasbourg Court to have done what it did in *Yukos*. Inviting defiance by Russia would not have helped the Court's prestige. In both *Yukos* and *Soros*, it may have sensed that the looming financial restructuring that threatens to consume Europe might trigger many expropriation and fair-treatment claims, which it wished to head off at the pass. But, by justifying its decision by reference to the special wealth and expertise of Yukos and Soros, the court added another layer: To paraphrase Leona Helmsley, human rights are only for the little people.

IV. Wealth Protection and Human Rights

The *Yukos* case, perhaps more than *Soros*, illustrates why human rights advocates should care about wealth protection. Yes, Yukos was a large company with great resources, including the best legal, accounting and tax-planning experts. Yes, the provenance of its assets in the loan-for-shares scheme of the 1990s raised many an eyebrow. Yes, it took an aggressive stance toward minimizing its tax liability. But these factors did not distinguish the company from any other private firm in the Russian oil and gas industry, none of which suffered as it did. What made Yukos stand out was the willingness of the oligarch who controlled the company, Vladimir Khodorkovsky, to use his wealth to mount a political challenge to the Russian state. Yukos lost its property, and then its legal existence, not because of a state policy of renationalization of critical assets, but because those controlling the state wanted to squelch a threat to their suzerainty.

The point is not that Khodorkosvky necessarily presented a more attractive and liberal alternative to the thugocracy that the Putin regime was becoming, and now, post Crimea, has become manifest. Rather, as Locke and the U.S. Framers understood, it is opposition itself that creates space for constraints on arbitrary state cruelty. The ability of wealth to translate economic power into political influence is a feature, not a bug. Companies like Yukos, and personalities like Khodorkovsky as well as Soros, require human rights protection exactly because their power makes them dangerous.

The point, to be clear, is not that the risk of abuse of economic power is not great, and that the state should not protect society from these risks. The problem is harder than that. The state must enforce the tax laws, in the case of Yukos, and protect the border between legitimate and embezzled information, in the case of financiers. Rich and sophisticated actors are certainly more likely to test the limits of these laws than are average, "little" people. But those invested with the power to enforce these necessary public norms are themselves not angels, as the Framers completely understood. They can use seemingly legitimate authority to squash dissent and suppress political dynamism.

The challenge, then, for human rights lawyers is to develop the capacity to distinguish legal from arbitrary uses of regulatory power, and to take the distinction seriously rather than hiding behind the "margin of appreciation" veil. This means mastering the manifold forms of business law and economic regulation, taxation included. The alternative is to become irrelevant, an intellectual ghetto cut off from purpose and meaning.