Dagan and Dorfman's *Jus Gentium Privatum*

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Introduction

When Immanuel Kant cast his gaze across the legal landscape occupied by humanity, he noticed a gap. National private law regulated interactions between private parties. National public law governed relations between individuals and the state, as well as between the state's own institutions. The law of nations mediated interstate relations. But none of these kinds of law, Kant observed, governed relations between states and foreign nationals. To this task, Kant assigned *ius cosmopolitcium*, or what we now commonly refer to as cosmopolitan law.[1] It is hard to overstate the significance of this accomplishment alone: Kant cleared a conceptual fog by carving the legal universe at its joints and bringing into view a distinctive kind of law.

Massively ambitious and highly original, *Interpersonal Human Rights* by Hanoch Dagan and Avihay Dorfman points us toward another alleged gap. Dagan and Dorfman argue that when private parties from different national jurisdictions interact, their interaction is properly subject to a distinctive regime of private law they call *jus gentium privatum*.[2] As with Kant and cosmopolitan law, the authors aim to illuminate a kind of law that is conceptually distinct because it responds to a particular kind of interaction; i.e., transnational interactions between private parties. Their *jus gentium privatum* holds the promise of a paradigm-shifting contribution because it purports to supply an organizing framework to private transnational interactions on grounds analogous to those on which cosmopolitan law supplies a legal structure to its domain: both regimes govern the legality of interactions that, for different reasons, ordinary municipal and international law are ill-equipped to govern (or at least, are ill-equipped to govern capaciously and systematically).

In this comment, I wish to draw attention to two dimensions of the Dagan/Dorfman project. The first is internal, and involves an examination of Dagan and Dorfman's basic argument from privity in favor of the *jus gentium privatum*. They argue that private law is especially well suited to explaining why *this* transnational actor owes human rights duties to *this* plaintiff, since private law alone systematically connects the plaintiff and defendant through privity. I will suggest there is tension between their use of a formal concept of privity, on the one hand, and their theory of private law, on the other. The

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1. *See* IMMANUEL KANT, PERPETUAL PEACE 20 (Cosimo Classics 2005) (1795).

2. *See* Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J. 361, 384–85 (2018).

51 CORNELL INT'L L.J. ONLINE 112 (2018)

second dimension I explore pertains to characterization, and interrogates Dagan and Dorfman's description of the *jus gentium privatum* as a regime of *interpersonal* human rights. I ask after what Dagan and Dorfman mean here by "interpersonal," since the human rights duty-bearer of international law—the state—is a person, too.

I. Privity and Substantive Equality

The urgent practical motivation for Dagan and Dorfman's innovation is the pervasiveness of catastrophic wrongs inflicted by private transnational actors against vulnerable individuals of the global south. Typical cases involve ascendant multinational corporations that hire desperate workers to work for pitiless wages under deplorable conditions. Sometimes local officials are in league with predatory corporations, and the countries themselves tend to have ineffective private law institutions. As Dagan and Dorfman point out, the absence of local judicial remedies has led to the adoption two strategies—one based on private international law, the other on public international law—that seek redress in jurisdictions with more effective legal institutions.[3]

The approach grounded in private international law seeks to deploy an expansive version of private international law's public policy exception. In particular, this approach looks to an idea of transnational public policy that reflects "the shared values of the international community."[4] Dagan and Dorfman note that transnational public policy is in its infancy, and is not present in American conflict-of-law jurisprudence. More worrisome still, the inchoate doctrine is vague and lacks a theory to explain its source and justification. As a consequence, it is unclear how exceptions or adjustments to private international law can be justified so as to impose the burden of safeguarding human rights on non-state actors. Conventionally, the state bears the burden of human rights protection, which are understood to run vertically between state and subject. Dagan and Dorfman rightly query how a transnational actor's human rights obligations are to be justified given that these are non-state actors are in a horizontal rather than vertical relationship with the putative right-holder. In other words, despite the normative appeal of human rights, there is a lack of privity between the right-holder and duty-bearer.

The second approach to redressing private transnational wrongs proceeds from public international law and seeks to commandeer private transnational actors to serve as partial guarantors of human rights. The idea under this approach is essentially to infuse corporate social responsibility

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3. *See id.* at 365–72. My summary of the two strategies is culled from these pages (Part II). I discuss them in reverse order to the way Dagan and Dorfman present them because the problem of privity is more vivid in the case of public international law.

4. *Id*. at 370 (citing n.42 Moritz Renner, *Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration*, *in* INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 117, 123–24, 130 (Walter Mattli & Thomas Dietz eds., 2014)).

with a human rights mission. One familiar justification of this strategy is that powerful transnational corporations operating in developing countries necessarily assume a public or quasi-public character, and therefore are properly saddled with human rights obligations. Another justification is that the interests protected by human rights are as vulnerable to concentrated private power as they are to public power, and thus ascendant private actors must assume some public law duties that include safeguarding human rights. But as Dagan and Dorfman explain, from the standpoint of understanding private law as a practice that makes a claim to legitimate authority over its subjects, it is not usually enough to point to considerations that apply to merely one side of the plaintiff-defendant relationship, such as the vulnerability of the plaintiff or the public-role-assuming position of the defendant. A justification must be given that establishes privity between the plaintiff and the defendant by connecting the defendant's liability to the plaintiff's right to recovery for the suffering of a wrong at the hands of defendant. Otherwise, in the absence of privity, there are "no obvious candidates for restrictions on who may be selected as duty-bearers."[5]

Dagan and Dorfman claim that "the moral underpinnings of private law provide the relational key to this missing link [of privity]."[6] And these moral underpinnings, we are told, consist in a "robust notion of relational justice, that is, reciprocal respect to self-determination and substantive equality."[7] Because relational justice governs interpersonal relations without regard to nationality, the obligations flowing from private law under the Dagan/Dorfman account do not depend on the state, leading them to assert "the core demands of relational justice as interpersonal *human* rights."[8] For Dagan and Dorfman, private law does and must take account of "our interdependence and personal difference," and this means that "private law must cast our interpersonal interactions in terms of relationships between self-determining individuals who respect each other for the persons they actually are."[9] Private law must operate with a conception of the person "as a substantively, rather than formally, free and equal agent," implying that private law cannot specify terms of interaction "in complete disregard of circumstances as well as constitutive choices—choices which pertain to people's ground projects."[10]

Prior to sketching their account of private law, however, Dagan and Dorfman say that readers do not need to adopt their private law theory in order to accept their thesis on transnational private law. All the reader must be willing to affirm, they say, is that private law "includes much more than duties

5. Dagan & Dorfman, *supra* note 2, at 367 (citing Hugh Collins, *The Challenge Presented by Fundamental Rights to Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 213, 223 (Kit Barker et al. eds., 2017). Collins makes the point in connection with the project of aligning fundamental rights with private law.

6. Dagan & Dorfman, *supra* note 2, at 361.

7. *Id*. at 373.

8. *Id*. (emphasis in original).

9. *Id*. at 374, 375.

10. *Id*. at 375.

of abstention."[11] Yet, when they turn to elaborating what they mean by interpersonal human rights, they begin with a section titled "A Floor of Just Relationships" that offers a rich defense of their theory of private law against accounts organized around the normatively thinner ideas of formal equality and freedom as independence.[12] Of course, since their idea of interpersonal human rights is essentially the application of private law to the transnational context, it is understandable that their first cut at developing their human rights theory would begin with the private law theory they know best: i.e., their own. Having said that, if we really do not need to take on Dagan and Dorfman's theory of private law to accept their argument on interpersonal human rights, then it is not obvious that we need as fulsome a defense of the private law theory as we are given. I was left with the impression that Dagan and Dorfman are ambivalent about whether the transnational private law project is fully justifiable without the help of their account of private law, or at least one that takes on board substantive equality. After all, interdependence is a hallmark of both globalization and Dagan and Dorfman's specification of private law's mission.

A more pressing question relates to the structure of their argument and its reliance on privity as the conceptual lynchpin that is supposed to justify an expansive use of private law to address private transnational wrongs. Dagan and Dorfman explain the significance of privity on formal, deontological grounds: privity is necessary to liability at private law because private law would fail as a justificatory practice that claims legitimate authority if private law could not justify *to the defendant* why her wrongful conduct alone is a sufficient ground for holding her liable for the harm suffered by the plaintiff. Notice that on this formal and interactional construal of privity and liability there is no reference to the circumstances or personal differences of the defendant or plaintiff: the doing and suffering of a harmful wrong is enough. The question this raises, then, is whether Dagan and Dorfman are entitled to help themselves to a formal account of privity without endangering their commitment to substantive equality.

Elsewhere Dagan and Dorfman boldly pin their colors to the substantive-equality mast by contesting a core tenet of contemporary private law formalism, which is the misfeasance/nonfeasance distinction.[13] In this context, they recognize that a duty "to aid a severely distressed stranger necessarily subordinates the duty bearer to the stranger's vulnerability and thereby denies the duty bearer both her independence and her formal equal standing vis-à-vis that stranger."[14] But, they argue, private law ought to impose a duty of rescue if the duty "infringes on [the duty-bearer's] formal

11. *Id*. at 373. Presumably they are referring to tort and property rules; contract law and (arguably) fiduciary law are shot through with positive obligations.

12. *See, e.g.,* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009)

13. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1451–56 (2016).

14. *Id*. at 1451–52.

freedom but does not seriously jeopardize her security or other autonomy-supporting interests."[15] The would-be rescuer is drawn into privity with the rescuee by the combination of the recuee's urgent need and the *de minimis* quality of the duty's intrusion on the rescuer's capacity for self-determination and substantive equality. If urgent need and ease of rescue can supply privity in the typical severely-distressed-stranger case, however, this would open the door to claims by the severely distressed poor against highly profitable multinational corporations operating in the global south. Whatever the merits of this proposition, we are now some distance from the formalist account of privity on which Dagan and Dorfman rely to bring private law into the transnational context. A sceptic might think they are trying to have their transnational private law cake and eat it too.

II. Are Only Private Rights Interpersonal Human Rights?

Part of the attraction of looking to private law as a way to govern transnational interactions between private parties is that is that private law applies paradigmatically to interactions between individuals considered simply as separate persons. In principle, private law is blind to citizenship status, class position, membership in a religion or ethnic group, and so on. Thus, Dagan and Dorfman say, private law can protect a range of human rights through privity as well as power-conferring doctrines from property and contract, and in doing so their private law approach shows how *horiztonal* human rights regimes between private parties are possible. Horizontal regimes are possible because private interactions potentially amenable to a human rights framework, like private law relations generally, are *interpersonal*. The interpersonal nature of private law-styled human rights allows this body of law to establish privity between the right-holder and the transnational duty-bearer, thereby justifying to the duty-bearer the prescriptions of transnational human rights.

This is a creative argument, but we need to take care specifying exactly what is meant by "interpersonal." Dagan and Dorfman seem to suggest that horizontal legal relations between private actors are interpersonal whereas vertical legal relations between the state and the individual are not. If the title of their Article were "Private Human Rights" or "Transnational Human Rights" rather than "Interpersonal Human Rights," the title would lose the direct link to privity that "Interpersonal" supplies. And, of course, the title is intended to name and specify as interpersonal a distinctive kind of human rights, i.e., those which pervade transnational interactions between private parties.

Now, conventional accounts of international human rights law (IHRL) conceptualize human rights as moral entitlements individuals possess simply in virtue of their shared humanity, with human dignity or personhood lying at or near theoretical bedrock.[16] Under international law, the state is the

15. *Id*. at 1455.

16. *See, e.g.*, John Tasioulas, *Towards a Philosophy of Human Rights*, 65 CURRENT

primary duty-bearer, since the state is the chief party that ratifies international human rights treaties and is subject to customary international law. Yet neither the abstract quality of the orthodox account of human rights nor the presence of the faceless state as duty-bearer implies that the human-rights-implicating relations between state and subject are not interpersonal. As a matter of both national and international law, the state is a legal person, albeit an artificial legal person that can act only through the representative acts of its duly authorized representatives (much like, in this respect, private transnational corporations). Like all legal persons, the state can have acts and words attributed to it, and thus can sue and be sued. It seems, therefore, that the human rights at stake in state-subject relations are indeed interpersonal, in the sense that legal persons are involved on both sides of the relationship.

So, Dagan and Dorfman must mean "interpersonal" in a more limited sense. I suspect they mean that private law relations are interpersonal in the sense that they have an interpersonal *relational* quality to them to which private law doctrines of privity apply. These doctrines (e.g., the neighbor principle in tort, offer and acceptance with consideration in contract) apply principles to fact situations to locate the relevant duties within the bounds of the privity-determined legal relationship. This understanding of "interpersonal" does distinguish the Dagan/Dorfman account of human rights from the dominant practice of IHRL. IHRL will typically determine privity by looking at the jurisdiction-conferring and obligation-imposing words of the relevant treaty, and the territorial jurisdiction of the relevant state. There is not usually a discussion of whether state A is in a particular kind of legal relationship with individual B such that obligation C follows (though the facts on the ground can make a significant different to how substantive principles are applied).

Yet here too we should not draw conclusions about distinctiveness too quickly. It does not follow from the fact that IHRL determines privity in a manner that ordinarily is different than private law that IHRL is not relational in the requisite sense. In 1996, Francis Deng developed the idea of "sovereignty as responsibility," arguing that state autonomy had to be understood as coupled with state responsibility.[17] With this idea, Deng posited a relationship between sovereign and subject to which human rights and other obligations applied. Evan Criddle and I have suggested that the nature of this relationship is fiduciary, and that IHRL itself can be explained and justified by teasing out the contours and implications of this relationship.[18] Legal fiduciary relations have their origins in private law, so unsurprisingly private law has served as a major source of inspiration for this project. In particular, the private law method of distilling private legal obligations from certain fact situations has proven an especially rich resource.

LEGAL PROBS. 1 (2012).

17. FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996).

18. *See generally* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016).

This method offers a path to showing that international law's dictates are justifiable from the standpoint of legal reasoning rather than (or in addition to) the assertion of sovereign will. By making this private law method and its outcome—privity—central to their argument, Dagan and Dorfman have brought to bear on transnational wrongs one of private law's most robust features. They are right to claim that, largely due to the way private law does privity, their project may make progress in the field of private transnational wrongs in a way that is simply unavailable to the mainstream public and private international law strategies.