Purging Private Law of the State

Mitchel Lasser†

In *Interpersonal Human Rights*, Hanoch Dagan and Avihay Dorfman ["D&D"] offer a powerful account of the interpersonal bases of legal responsibility. Faced with the legally vexing problem of grave wrongs committed by transnational actors, D&D present an ingenious proposal: Rather than search for solutions in the spheres of public and private international law, they turn instead to the relatively unmined field of private law. Private law, they contend, possesses a "normative DNA" that is sufficiently shared by the positive law of the world's legal orders to constitute a veritable *jus gentium*.[1] Properly understood, this body of precepts forms a set of interpersonal human rights that operates between individuals, regardless of jurisdiction and independently of the state. The relational justice imminent in private law crowns a system of autonomy and substantive equality that transcends the state and thus solves the problem of transnational wrongs: Inherently indifferent to the state, private law already possesses within itself all the tools necessary to redress wrongs committed between individuals across state boundaries.

For the sake of brevity, this brief Comment foregoes offering richly deserved compliments regarding the self-evident originality, brilliance and potential of D&D's analysis. Instead, it launches directly into critique. It makes three main points. First, although the Article claims that its focus is on the vexing issue of transnational wrongs, the true target of its analysis appears to be far grander: private law in general. Second, once we recognize that D&D are concerned not so much with scenarios in which the state is insufficiently present as in instances when it is all too present, the true target of the Article becomes clear: To remove the state from interpersonal affairs. Third, given the obvious difficulties involved in generating a *jus gentium* of interpersonal human rights, one is left wondering who exactly will be assigned to perform this crucial task. As the answer would likely be judges (assisted perhaps by scholars), one cannot help but wonder not only whether D&D have actually succeeded in removing the state from their proposal, but also what the political consequences might be of shifting primary regulatory responsibility from the political to the judicial branches of government.

I. Targeting Private Law

D&D open their Article with well-known transnational horror stories, including the *Pfizer* case, in which the world's largest pharmaceutical company tested a new drug on Nigerian children without their parents' knowledge or consent.[2] Underlining the tendency of globalization to generate

† Jack G. Clarke Professor of Law, Cornell University.

1. D&D use the definition provided by Jeremy Waldron. *See* Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J 361, 365–66 (quoting JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 35–36 (2012)).

2. *See id.* at 362 (citing Abdullah i v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009)).

51 CORNELL INT'L L.J. ONLINE 119 (2018)

transnational wrongs that are poorly addressed by existing legal structures, D&D begin by ruling out two potential avenues of legal reform. The first is to leverage the public international law regime by extending human rights "from the vertical dimension—as rights against the state—to the horizontal dimension, in which they operate at the interpersonal level."[3] The second is to leverage the private international law regime by extending the public "policy exception to the conflict of law apparatus, [which targets] such 'pernicious and detestable cases.'"[4] The former option requires extending the state action doctrine or public law doctrines into the private sphere.[5] The latter likely requires extending the public policy exception, which once again turns attention to the public sphere, in particular "to *collective* goals of a specific jurisdiction or of the world community as a whole."[6]

For D&D, the solution lies not in extending the public sphere into the private, but in mining the private sphere for its own promising resources. The advantage of this solution is that it offers a brilliant work-around of the problem of the parties' problematic relationships with the state: It matters not whether either or both of the parties stand in a citizenship relationship to the state, because the basis of responsibility lies quite simply in the relationship between the parties themselves. It is this private relationship and the private law regime that regulates it that provide the necessary framework for establishing and enforcing the responsibilities of the parties to each other. To derive these responsibilities, one need only plumb the existing positive law of states to uncover the common foundational private law precepts that set the minimum floor of interpersonal human rights that govern all private relationships.

This solution is so elegant and complete that one is almost left speechless. But its very simplicity prompts a nagging question: If the existing *jus gentium* of private law already furnishes the solution to such transnational disputes, then why has the proper legal resolution of the dispute posed problems in the first place? After all, since this *jus gentium* should, by definition, already exist within the private law of almost all jurisdictions, should not the dispute have been easy to resolve almost anywhere?

The problem, one suspects, is that the solution was not already there. Reading the Article for its minimum claims, one might conclude that D&D's proposal is only geared at outlier jurisdictions that have somehow never internalized the *jus gentium* that—by definition—governs most of the world: The turn to the *jus gentium privatum* and to the interpersonal human rights it manifests would be a rare corrective moment to fill in unusual gaps in the worldwide coverage of private law.

But, frankly, the Article and its aims are not so modest. D&D's turn to interpersonal human rights is by no means limited to interstitial interventions in outlier cases. Speaking instead in sweepingly general and even universal

3. *Id*. at 365.

4. *Id*. at 369 (quoting Monard G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 969 (1956)).

5. *See id*. at 367.

6. *Id*. at 371 (emphasis in original).

terms, they declare:

> Indeed, any polity that takes seriously the commitment to individual self-determination and to substantive equality cannot make these values irrelevant to our interpersonal relationships. Quite the contrary. These values are just as crucial to our horizontal interactions as they are to our vertical ones, although they entail different implications in these different dimensions. Since a just interpersonal relationship must stand for reciprocal respect of each party's claim for self-determination, relational justice cannot be exhausted by the duty of non-interference. At times it may require law to proactively facilitate people's cooperative efforts and furthermore, it may impose certain affirmative duties of accommodation founded on such a robust notion of interpersonal respect.[7]

In a process of self-perfection, legal systems must look within themselves for what they hold in common, only to then leverage this commonality "as a premise for criticizing domestic rules and as the foundation of aggrieved parties' standing vis-à-vis those who wronged them" and thus to generate change.[8] Our first conclusion must therefore be that D&D's understanding of interpersonal human rights is hardly interstitial and static; it is universal and dynamic.

II. Targeting the State

This conclusion prompts a question: If D&D's framework is so evidently universalizing (in their words, "*indispensable for any social setting* where individuals, ranging from intimates to complete strangers, recognize each other as genuinely free and equal agents"),[9] why is the Article primarily framed as addressing relatively aberrant (if increasingly common) transnational situations? The answer, I suspect, is that the unremedied transnational wrong provides D&D with a very useful framework: It presents itself as a dilemma precisely because of the difficulty of locating the case within a state-centered framework. This lack of a state-anchored legal framework for resolving the case offers D&D the opportunity to seek a solution outside of the explicit ambit of the state; hence the turn to private law.

This turn to private law is not innocent. It appears merely to offer D&D a convenient solution to the problem posed by the unavailability of the state to remedy appalling transnational wrongs: "Look," the Article effectively argues, "private law does not hinge primarily on the state either. So make use of its framework instead of the state's." But D&D put this interstitial remedial maneuver to far greater use. First, the turn to private law's "core minimal requirement of interpersonal human rights" furnishes the bases both for (a) "censorial" critique and for (b) systemic legal reform: (a) Any "state's private law prescriptions" can legitimately be "criticized or censured as violations of our interpersonal human rights when the state fails to fulfill, or even undermines, its instrumental role in securing these rights"; and (b) "growing awareness of a substantive body of law of interpersonal human

7. *Id*. at 375.
8. *See id.* at 365.
9. *See id.* at 378 (emphasis added).

rights may . . . even push towards other increasingly robust institutional venues and procedural paths."[10]

Second, relatedly, and perhaps more importantly, D&D leverage their turn to private law to transform private law itself. D&D had justified the turn to private law in the transnational context on the grounds that "at its core private law transcends the state."[11] In other words, it was precisely because "these core interpersonal obligations are fundamentally non-statist" that they could be so useful in those troublesome cross-border situations in which the status and authority of the state were most precarious.[12] But from such assertions regarding the "non-statist" nature of private law, D&D arrive at a very different sort of conclusion: Namely, that private law should be cleansed of the state and of its communitarian claims.

D&D never clearly proclaim this state-purging project in a full-throated manner. Yet, it is hard not to infer this mission from the sheer recurrence and adamance of their statements regarding the independence of private law and its core interpersonal relations from the state. A further hint emerges from the parallel that D&D draw between traditional human rights and the interpersonal human rights they wish to identify and promote:

> But just as the traditional understanding of human rights implies that there is a limit to that authority regarding the former type of rights—some rights against the state are beyond its power to abrogate even on behalf of the common good—a humanist framework must acknowledge a core set of interpersonal human rights to which states *must* comply.[13]

Although this passage never explicitly states that private law's interpersonal human rights not only establish core responsibilities as between private parties, but also establishes core interpersonal rights with which the state may not interfere "even on behalf of the common good," one cannot help but wonder if this is what D&D really have in mind.

And indeed, the inference eventually becomes more or less overt when D&D draw out the parallel a little further. Although interpersonal human rights differ from traditional human rights in that "their focus is horizontal, rather than vertical," they do, like traditional human rights, "prescribe global mandatory minimum standards—a floor that cannot be transgressed by state law (including not for the sake of promoting distributive justice or welfare)."[14] At this point, it really does seem that D&D's initial recourse to private law principles as a means to fill interstitial gaps when state authority is tenuous has been transformed into something quite different: a means to bar the state from making incursions into private relationships, regardless of its justifications for doing so, including "for the sake of promoting distributive justice or welfare."[15]

---

10. *See id.* at 381, 382.
11. *See id.* at 365.
12. *See id.* at 373.
13. *Id*. at 382 (emphasis in original).
14. *See* id. at 385.
15. *See id.* at 385.

III. Reservations

Having laid out what I believe to be the truly ambitious scope and stakes of D&D's project, let me conclude by expressing my reservations about the project as so stated. First, I confess that I am simply skeptical that there really exists some deep governing logic that undergirds the totality of private law in its positive manifestations around the globe. I sincerely doubt that if we just look hard enough, at just the right angle, and squint just right, (a) that this core logic will suddenly become visible, (b) that it was just waiting all this time just beyond the horizon of our perceptions for D&D to unearth it for us, and (c) that, lo and behold, it just happens to coincide with our ex ante philosophical and political inclinations. This strikes me as good doctrinally-oriented lawyering in the tradition of Warren and Brandeis.[16] It strikes me as intellectually intriguing. But it also strikes me as wishful thinking.[17]

Because of my skepticism on this score regarding the existence of immanent foundational principles, my attention necessarily turns to those who would be tasked to "discover" this *jus gentium* of interpersonal human rights. In these difficult times of Trump, Bibi and Fidesz, one might reasonably assume that the judges and scholars most likely to take up this creative role would be more intellectually and politically congenial than the state's elected representatives. But this must surely be a very localized and historically informed calculus, never mind a highly politically contingent one. As a legal scholar trained in the American liberal tradition, however, it is difficult not to note the strong whiff of libertarianism that permeates D&D's analysis, which seems determined above all to keep the state out of the independently ethical and freedom-loving realm of private law: "Like other (that is, vertical) human rights," D&D declare, "the notion of interpersonal human rights implies a limit to the extent of subordinating individual rights to collective concerns—significant as they may be."[18]

This mode of libertarianism need not be inherently conservative or liberal. But to claim that private law relations possess such exalted and protected status, never mind to empower judges to enforce this status under such a libertarian conception, is sure to strike fear into the hearts of U.S. progressives. For them, this scenario is eerily reminiscent of the judicially-protected "yellow dog" labor contracts of the Gilded Age and of the *Lochner* era.[19] Although, their resonance may well be quite different elsewhere, where the political branches of the state may be seen either as inherently stifling and anti-progressive or as more closely aligned with conservative social forces.

Even if one does not instinctively adopt such a classic American progressive perspective, one is nonetheless left wondering who exactly will

16. *See e.g.*, Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

17. For a classic critique of such totalizing doctrinal reconstructions, see Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1252 (1983).

18. Dagan & Dorfman, *supra* note 1, at 389.

19. *See*, *e.g.*, Adair v. United States, 208 U.S. 161 (1908) (striking down bans on yellow dog contracts as unconstitutional under the Due Process Clause of the Fifth Amendment).

be assigned to perform the crucial, delicate—and dare I say, creative—task of generating, elaborating and, of course, applying such a *jus gentium privatum* of interpersonal human rights. The answer, naturally, must be judges, who may or may not seek the assistance of enlightened private law scholars. But this leaves two parting questions. What, given historical contingency and traditions, might be the structural and substantive political ramifications of shifting primary regulatory responsibility from the political to the judicial branches of government? And finally, why would one consider such a regulatory transfer from the political to the judicial branches to represent a removal of the state from the realm of private law?

I suspect that the answer to this final question might well be that D&D's key innovation would not merely be the substitution of the judicial for the political branches of government, but also the purging of the notion of the common good from the underlying conceptual framework of private relations. But if scholars as imaginative and clever as D&D can generate a *jus gentium privatum* of interpersonal human rights out of the materials provided by positive private law, would not their students be able to generate the notion of the common good out of the materials provided by interpersonal human rights? I am quite confident that they would.