

The New, Old, Jus Gentium Privatum

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Dagan and Dorfman have, through numerous publications authored individually and jointly, enriched and sharpened our understanding of private law and its theory. In their newest article,¹ they provide us with a theory of how private law can transcend the state. Dagan and Dorfman particularly discuss how a “jus gentium privatum” can deal with issues of transnational private liability for the violation of human rights, as demonstrated by the authors’ example of Pfizer’s nonconsensual experiments on Nigerian patients.² Two existing solutions appear insufficient to them. First, Dagan and Dorfman consider the extension of human rights law into the horizontal relations of private law to be problematic because those rights were created with vertical relations in mind.³ Second, the extension of private international law to liability for grave wrongs is inadequate, in their view, because it leaves insufficient space for human rights considerations: its public-policy defense applies only exceptionally, and the tools that allow for substantive values in the choice-of-law process, notably the better law approach and the protection of weaker parties, are too vague and insufficiently grounded in the international community.⁴ Dagan and Dorfman’s own proposal is instead what they call interpersonal human rights or “jus gentium privatum,” a law they derive from what they call the “DNA of private law.”⁵ They posit certain moral foundations of private law that transcend their positive instantiations in state laws, but that nonetheless rely on states for their enforcement.⁶

This is an interesting proposal and one that deserves further elaboration. As it stands, I am not yet convinced that the most recent concept is either as novel or as useful as Dagan and Dorfman suggest. Rather, I place their idea in the long Western history of jus gentium, and I demonstrate that human rights can be viewed as part of that concept, as opposed to an alternative.⁷ Finally, despite the author’s denial, I argue that the author’s conceptualization

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1. Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT’L L.J. 361 (2018).

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

3. *Id.* at 366–67.

4. *Id.* at 370–71.

5. *Id.* at 364, 383.

6. *Id.* at 378–79.

7. I do not discuss the extent to which the same is true for private international law, assuming that this is done elsewhere in this symposium issue. *See generally* Roxana Banu, *From the Law of Nations to the Private Law of Mankind*, 51 CORNELL INT’L L.J. ONLINE 101 (2018). Nevertheless, I do want to point out that the term *jus gentium privatum* was first coined in the context of private international law, namely in Joseph Story’s seminal treatise that defined the field for modernity. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 24 (1834).

51 CORNELL INT’L L.J. ONLINE. 125 (2018)

of *jus gentium privatum* is too close to natural law, and therefore too far from a political conception, to be convincing.

I. What is the Problem to Which *Jus Gentium Privatum* is the Answer?

First, however, there is a framing issue. Dagan and Dorfman suggest that “[t]here seems to be little dispute that our current system of transnational private law faces difficulties addressing grave transnational wrongs and that remedying this predicament is a matter of significant importance and urgency.”⁸ Unfortunately, they do not precisely define these difficulties. A more precise definition would be useful, because there are two different ways in which issues could manifest. An *enforcement problem* would exist where the existence of liability is universally accepted, but the victim lacks access to institutions that protect the existing right. A *normative problem*, by contrast, would exist where the existence of liability is *not* universally accepted, and what matters is to demonstrate that existing laws that deviate from the *jus privatum gentium* are in error. The enforcement problem is a problem of *jurisdiction*: what matters here is to find a competent court or other agency. The normative problem is a problem of *choice of law*: the challenge is to find applicability of *jus privatum gentium* in deviation from possibly existing domestic law.

At times, Dagan and Dorfman seem to frame the problem as one of enforcement, when they suggest that countries in which grave wrongs are committed “usually have poor, corrupt judicial systems, frequently with complicit government officials.”⁹ Nevertheless, enforcement is not their main concern. Elsewhere in the article, Dagan and Dorfman suggest that jurisdictional issues are, “as such, irrelevant to [their] topic.”¹⁰ Indeed, most of their focus is laid on the normative problem, in particular the rules that would constitute “a floor of just relationships.”¹¹ They aim to demonstrate not the precise content but the existence of interpersonal human rights whose foundations “transcend the contingency of their positive instantiations.”¹² Institutions of the state thus play a limited role for this transnational private law. These institutions appear prior to the formulations of transnational

8. Dagan & Dorfman, *supra* note 1, at 390.

9. *Id.* at 362–63 (quoting Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT’L L. 255, 271 (2013)).

10. *Id.* at 385.

11. *Id.* at 375, 386. Also, Dagan and Dorfman identify the “floor of just relationships” as “global mandatory minimum standards—a floor that cannot be transgressed by state law.” *Id.* at 385. This language, reminiscent of human rights debates in the public realm, presupposes a vertical relation, whereas Dagan and Dorfman insist on private law relations as horizontal relations. See, e.g., ADVISORY GROUP, INT’L LAB. OFF. [ILO], SOCIAL PROTECTION FLOOR FOR A FAIR AND INCLUSIVE GLOBALIZATION 4 (2011), http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_165750.pdf. It might be better, therefore, to speak of an admissible window.

12. Dagan & Dorfman, *supra* note 1, at 379.

private law insofar as their codification serves “as [an] *epistemic* sourc[e] for the identification of what deserves to be treated as universal principles of . . . justice.”¹³ Moreover, they appear after the formulation of transnational private law insofar as they are charged with “translating these normative commitments into legal prescriptions,” which includes enforcement.¹⁴ Nevertheless, transnational private law does not derive its authority from positive state law; rather, it derives its authority from a mix between the identification of a common core between legal systems and philosophical discussions regarding the proper content of such laws.

Now, I am not sure that the normative problem is the most pressing issue with regard to transnational wrongs. Granted, this is a main problem within the Alien Tort Statute (“ATS”).¹⁵ The U.S. Supreme Court has limited jurisdiction under the ATS to actions that “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹⁶ Moreover, the U.S. Supreme Court has largely made it unavailable for actions brought against private corporations, thereby taking it out of the horizontal relationships that interest Dagan and Dorfman.¹⁷ Still, that is a doctrinal problem of a specific act (and thereby indirectly a problem of jurisdiction). The bigger practical problem is the enforcement problem. Presumably, Pfizer’s victims did not fail in court because Nigerian law prevented recovery; rather, Nigeria’s institutions were not strong enough.¹⁸ Thus, the formulation of a *jus gentium privatum* is of limited help here.

II. *Jus Gentium* and Private Law

Is it at least convincing on its own? Dagan and Dorfman call their idea “*jus gentium privatum*,” in order to distinguish it from the more public-law oriented idea of a (new) *jus gentium* that Jeremy Waldron developed for human rights law in the public realm.¹⁹ In reality, this is a transfer of *jus gentium* back to its origins in Roman law—Joseph Story’s (inexact) citation of Cicero demonstrates as much.²⁰ For *jus gentium* was, at its origin in Roman law, largely what we would today call private, not public, law. Indeed, the parallel goes further than that. When Dagan and Dorfman suggest that “the basic prescriptions of private law . . . do not depend upon our status as citizens,”²¹ they invoke, albeit without saying so, the Roman distinction

13. *Id.* at n.88.

14. *Id.* at 380.

15. *See id.* at 385–86.

16. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

17. *See Jesner v. Arab Bank, PLC*, 138 U.S. 1386, 1403 (2018).

18. *See* Ikemefuna S. Nwoye, *Litigating Abuse of Human Rights by Transnational Corporations: A Nigerian Perspective* 3, 28–29 (Working Paper) (Apr. 17, 2015), <https://ssrn.com/abstract=2595840>.

19. *See* Dagan & Dorfman, *supra* note 1, at 380–82.

20. CICERO, *DE RE PUBLICA*, III, 28–33. Coincidentally, Story also coined the term *jus gentium privatum*. *See generally* STORY, *supra* note 7.

21. Dagan & Dorfman, *supra* note 1, at 364.

between two kinds of private law: *jus civile* on the one hand, which governed the relations between Roman citizens qua citizenship, and *jus gentium* on the other, which did not so depend on citizenship.²²

Like Dagan and Dorfman's transnational private law, *jus gentium* was, purportedly, universal, a law governing all nations. In reality, however, it was Roman law made by Romans and applied to foreigners regardless of what their own laws said.²³ The Romans did not, it appears, engage in extensive comparative law research to determine the content of this *jus gentium* (just as, truth be told, Dagan and Dorfman do not really demonstrate in much detail that their transnational private law really represents all, or most, laws in the world).²⁴ To the extent that *jus gentium* purported to universality, this claim was more speculative; it owed more to (presumably Greek) philosophy—just as Dagan and Dorfman's proposal for what transnational law consists of rests more on philosophical considerations of “just relations” than on existing positive laws.²⁵ As such, it had a proximity to natural law; both terms were indeed often used indistinctively.

The specific use of *jus gentium* lost its importance; *jus gentium* was indeed later turned into what we today call public international law. The broader idea, however, of a transnational private law that transcended legislative authority, remained alive for centuries under the name of *jus commune*. The *jus commune* was grounded in Roman law, which was treated as *ratio scripta*, binding not because of its legislative authority but because of its perceived inherent rationality.²⁶ Its content was derived in part from Roman law doctrine (which worked more as a common grammar than a set of minimal standards), in part from explicit comparison of laws and in part from normative reasoning²⁷—very much so like Dagan and Dorfman's *jus gentium privatum*.

In fact, even after the rise of the state, states remained by and large uninterested in regulating private law. Where we find official statutes or codifications, they were for a long time no more than restatements of a law that was thought to emerge outside the state. In the common law, before Justice Holmes dismissed ideas of transnational law as “a brooding omnipresence in the sky,”²⁸ Justice Story formulated an idea of general commercial law in many ways not unlike that of Dagan and Dorfman:

The law respecting negotiable instruments may be truly declared in the languages

22. See FREDERICK P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 363–65, 371 (2016).

23. See W.W. Buckland, A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN 53–55 (Peter Stein ed., 3rd ed. 1963).

24. See Dagan & Dorfman, *supra* note 1, at 386–88.

25. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1430–31 (2016).

26. Helmut Coing, *The Sources and Characteristics of the Ius Commune*, 19 COMP. & INT'L L.J. SOUTHERN AFR. 483, 483, 489 (1986).

27. See *id.*

28. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

of Cicero, adopted by Lord MANSFIELD in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*²⁹

And in the civil law world, it was only with the modern codifications that law was considered to derive its authority from legislative fiat; prior to the 19th century, most private law was transnational.

III. Jus Gentium and Human Rights

If the idea of a jus gentium privatum is not new, is at least the idea of interpersonal human rights? The answer is mostly no. Dagan and Dorfman find the translation from human rights law hard because they conceptualize human rights as rights “originally conceived in vertical terms,” and therefore not easily transferrable to the horizontal relations of private law.³⁰ This is mostly because they conceive of rights as “thoroughly relational,” thereby following Hohfeld and, more generally, 20th century analytical jurisprudence.³¹ But this appears to take Hohfeld to an unwarranted extreme. It is helpful analytically to conceive of rights as jural relations and thereby understand them as strictly relational. Nevertheless, when we speak of human rights, we often speak not just of jural relations themselves but of reasons for the creation of such jural relations. It is true, and important, that my having a (human) right against the state does not imply my having a (human) right against a private party, such as a corporation. It is also the case, however, that the reasons for my right against the state may provide good reasons to grant me a right against a corporation.

It is in this broader sense that the extension of human rights to private law relations is currently being discussed, and often supported, as Dagan and Dorfman report. They may be correct that the 20th century concept of human rights does indeed concern relations with the state and does not translate easily to private relations. This is one of the reasons why the U.S. Supreme Court refuses to grant a claim under the Alien Tort Statute against private parties.³² But the history of human rights law is longer, and it arguably predates the public/private distinction. Indeed, some historians place the origins of human rights in Roman law and jus gentium. Tony Honoré has called Ulpian, a famous classical Roman Jurist, a “pioneer of [] human rights.”³³ Honoré did not only mean Ulpian’s cosmopolitan understanding of law, such as his desire to let everyone, including slaves, benefit from it—an approximation of jus civile and jus gentium; rather, Honoré also referred to Ulpian’s focus on freedom, equality and dignity as the bases of law.³⁴ Honoré

29. *Swift v. Tyson*, 41 U.S. 1, 19 (1842), *overruled by* *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

30. Dagan & Dorfman, *supra* note 1, at 363.

31. *Id.* at 384.

32. *See Jesner*, 138 U.S. at 1403 (2018).

33. TONY HONORÉ, *ULPIAN: PIONEER OF HUMAN RIGHTS IX* (2d ed. 2002).

34. *See id.*

describes these as the foundations of contemporary human rights law;³⁵ and they are also remarkably similar to the “DNA” of private law that Dagan and Dorfman propose. In addition, the concept of human rights that Honoré identifies is not confined to claims to the government; these rights are enforced against private parties, primarily through the action for wrongs (*actio iniuriarum*), the predecessor of the modern law of delict and, by extension, tort.³⁶

This thesis is not uncontested; it has been criticized, amongst others, for anachronistic use of modern concepts.³⁷ But what matters here is a broader point: to the extent that we can speak of human rights in history, human rights were, for a long time, thought as part of private law. Thus, we can find a protection of human rights as between individuals in the *jus commune*,³⁸ and we can also find such a protection in Kant’s theory of law.³⁹ In fact, we can write much of the history of private law, insofar as it was understood as natural law, as a history of private human rights. It is the idea of human rights as rights (only) against the state that is the historical anomaly.

IV. *Jus Gentium* and Politics

In many ways Dagan and Dorfman’s idea of transnational private law responds to a question of minor practical relevance. Moreover, it is not new at all: it sits on a venerable history of Western law, a history that was only interrupted with the rise of the state and which they now want to continue.⁴⁰ This is far from irrelevant. The decline of *jus gentium* and *jus commune* was no accident. The rise of national law and legal positivism took place after increasing distrust in natural law and philosophical justifications for law: democracy was considered a more legitimate authority for law than philosophy (or tradition). This also meant that differences between national laws were no longer viewed as merely different phenomena of the same ideas; instead, they represented expressions of sovereign will. The consequence was an understanding of law as not coherent but conflictual—both inside a domestic law (recall Jhering) and between legal systems—a conflict of laws.

I think an argument can be made that this shift towards understanding of private law as an expression of sovereign will has been overblown. The French Civil Code, while drawing its formal authority from legislative fiat,

35. *See id.*

36. *See id.* at 85. *See generally* REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1996).

37. *See* Jacob Giltaij & Kajus Tuori, *Human Rights in Antiquity? Revisiting Anachronism and Roman Law*, in *REVISITING THE ORIGINS OF HUMAN RIGHTS* 39–41 (Pamela Slotte & Miia Halme-Toumisaari eds., 2015).

38. *See* Richard H. Helmholz, *Natural Human Rights: The Perspective of the Jus Commune*, 52 *CATH. U. L. REV.* 301, 316 (2003).

39. *See* Ariel Zylberman, *Kant’s Juridical Idea of Human Rights*, in *KANTIAN THEORY AND HUMAN RIGHTS* 27, 38 (A. Føllesdal & R. Maliks eds., 2014).

40. This puts their approach in unexpected vicinity with the work of Reinhard Zimmermann on a new *jus commune*. *See, e.g.*, REINHARD ZIMMERMANN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY* (2001).

derived its substantive content largely from pre-revolutionary scholarship. Similarly, much “general” private law is today of low political salience, with the consequence that its formulation is often outsourced to experts. Political will and choice are confined to specific issues of public concern—*islands of* (statutory or judicial) intervention within an ocean of general private law that could, still, be understood as juridical and of low political salience.⁴¹ Insofar as this point, I would agree with Dagan’s and Dorfman’s idea. Nevertheless, although human rights law and private law share the criterion of existing, potentially, as “law beyond the state,”⁴² the reasons are very different. Human rights law is taken out of the political authority of the state not because it is, as private law was traditionally viewed, considered so apolitical as to be of little interest for the state; rather, because human rights law is considered so political that the state must be barred from its temptation to it. Such a law cannot easily be based on consensus of all states.

This leads to problems for the aforementioned theory. Dagan and Dorfman mention “the broad global convergence of the private law injunction against the violation of our bodily integrity” in their argument.⁴³ Such convergence may well exist. But there are broad differences on what counts as a violation of bodily integrity. Dagan and Dorfman point to the necessary vagueness of the standards of transnational private law and the existence of different instantiations in different legal systems.⁴⁴ But these differences are not marginal—they frequently (as here) go to the core of fundamental political and/or cultural/religious convictions. Take, for example, the issue of circumcision: is it a violation of bodily integrity that allows for an injunction, or the exercise of a protected religious practice? Views diverge dramatically, even within countries and religions. These divergences cannot, it seems to me, really be swept away with a reference to a perceived common core; they must be taken on what are ultimately political grounds.

This leads to a second problem—that of colonialism. Circumcision is opposed predominantly by Western secular laws; it is maintained by conservative cultures. Male circumcision is still found in the West, not only among Jews and Muslims but also more broadly in the United States. Female circumcision, however, is (mostly) not. Now, female circumcision is among the classical examples of activities that are thought of as clear human rights violations, often more so than the topic that Dagan and Dorfman choose, viz. interspousal rape.⁴⁵ It is also among the main examples postcolonial scholars

41. See generally Ralf Michaels, *Of Islands and the Ocean: The Two Rationalities of European Private Law*, in *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* 139 (Roger Brownsword et al. eds., 2011).

42. See Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 *AM. J. COMP. L.* 843, 868–69 (2006).

43. Dagan & Dorfman, *supra* note 1, at 383.

44. See *id.* at 371–72.

45. *Id.* at 383 (citing Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 *MICH. J. GENDER & L.* 89 (2015)). Of course, until quite recently, even Western laws allowed no claim against interspousal rape. See Sonya A. Adamo, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 *AM. U. INT’L. L. REV.* 555, 556–57 (1989).

use to demonstrate a colonialist attitude towards human rights violations in less developed countries. The critique has various parts: human rights activists are accused of denying agency to women who may actually choose the circumcision (for whatever reason). They are also criticized for their emphasis on issues of bodily integrity over issues of economic justice, borne from a very Western obsession with the body. Finally, they are criticized for claiming universality for values that are, in origin and focus, Western. There may be answers to such critiques, but Dagan, in invoking a “broadly defined humanist framework,”⁴⁶ seem to me to beg the question.

In the end, then, their theory appears to me apolitical—it is a theory more informed by natural law considerations than by the explicit political nature of law, especially including human rights law. Dagan and Dorfman would disagree, but their position seems ambiguous. On the one hand, they argue explicitly that their conception of private law is “neither pre-political nor . . . apolitical.”⁴⁷ On the other hand, they place private law within the sphere of “the social, a realm that is irreducible to the political (by which we mean the realm occupied by the polity).”⁴⁸ In other words, their private law is political, and regardless of whether its foundations “transcend the contingency of their positive instantiations,”⁴⁹ it rests on a consensus of positive laws that exists and nonetheless can be used to trump those institutions that disagree with it. What they understand here by political is nothing more, it seems, than the “fundamentally political idea of being with others in the world.”⁵⁰ Still, that idea fails to create a distinction between the social and the political, and the theory does not appear to allow much space for contestation.

Ultimately, I am afraid that the proposal by Dagan and Dorfman resolves fewer problems than one could hope for. The problem they address—the normative problem—seems less relevant than the problem they do not address, viz. the enforcement problem. And the solution they propose, that is, the formulation of a transnational private law informed both deductively from the consensus of existing laws and inductive from a proposed “DNA” of private law, seems speculative and fails where it matters most, viz. in the face of actual contestation. *Jus gentium privatum* remains, in this sense, theoretical—stripped from the institutional context of enforcement and stripped from the reality of irresolvable conflict. A depoliticized transnational law like the one they propose, which may have a place for matters with low political salience, seems to me to be of limited use in the immensely political area of grave human rights violations.

46. Dagan & Dorfman, *supra* note 1, at 383–84.

47. *Id.* at 378.

48. *Id.* at 374.

49. *Id.* at 379.

50. *Id.*; see also Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402, 435 (2015).