On the Moral Commitments of Private Law and the Curbing of Global Corporate Power

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The issue that the authors tackle here with great talent and clarity is the law's notoriously weak responses to the horrifying legacy of globalization in terms of industrial disasters and abuse involving (1) multinational corporations and (2) innumerable individual victims in developing countries (in a large number of well-known instances, involving pharmaceutical testing, extractive industries, textile manufacturing and much more). In this respect, they identify a "missing link" in existing (unsuccessful) attempts to remedy transnational corporate misconduct through the channels provided by either public or private international law. On the one hand, the former, as we know, is still structurally inhibited from extending to private actors the duties it imposes on states. The missing link here is the lack of extraterritoriality of human rights law. On the other, the latter, according to the authors, offers very little beyond the indeterminate and otherwise unsatisfactory exception of public policy. As they see it, this leaves a gaping hole in the form of an unasked question: what are the moral (and legal) grounds on which the putative victims may assert claims for reparation against putative corporate defendants transnationally?

To better understand the terms of the question, it is important to see that such claims are framed here as potential human rights violations, so that the issue as presented by the authors is how to justify the imposition on non-state actors of "vertical" obligations usually incumbent upon states under public international law. While various theories and mechanisms exist by way of response in the language of *public* law ("horizontal effect" in the European context, "state action" requirement in the United States), the better answer, the authors assert, lies in a renewed understanding of the resources of *private* law. Private law's approach is "relational" rather than "top-down" or "vertical," and thus, far better equipped to address the issues of transnational harm arising between non-state actors. Therefore, the idea that the challenges to which international law (including its private side) has been unable to rise could be overcome by turning to the common core or DNA of private law. Here, they claim, private law's "profound commitment to reciprocal respect to self-determination and substantive equality" would provide a moral foundation (presumably along with an operational legal response) to the issue

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51 CORNELL INT'L L.J. ONLINE 133 (2018)

of corporate liability for what have been known since the *Bhopal* tragedy[1] in the early 1980s as transnational "toxic torts."

Any academic enterprise that opens avenues in law for reducing multinational corporate impunity for horrific abuse (torture, environmental destruction, land grab, modern slavery, etc.) occurring in countries of which the tragic fate is the need to remain attractive to foreign capital at all costs, is obviously to be welcomed (well, by anyone who is not a corporate tortfeasor or an unscrupulous investor). This is all the more so in the case of the authors' attempt to address the (otherwise well-rehearsed) issue of transnational enterprise liability from a jurisprudential angle, which leads them beyond this sole (albeit crucial) question to revisit, far more broadly (perhaps too far, as we shall see below), the very foundations and values of private law *as such*, that the contemporary trend towards the constitutionalization of private law has tended to leave behind. In this respect, the article undoubtedly deserves careful attention and certainly provides food for thought in a context where the public/private divide, whether in domestic or international law, seems to be disappearing to the detriment of the latter (even if studies in law and globalization, under the heading of "global legal pluralism," tend to understand "private" law as the sum of norms made by private actors rather than, as here, state-made law addressing relationships between non-state actors).

Nevertheless, the authors' proposal to extract the essential values of private law in order to provide the moral grounds for imposing liability for transnational corporate abuse raises a series of questions or doubts.

1. Firstly, as a brief preliminary point, there seems to be an ambiguity as to the status of the authors' own proposal and a correlative misunderstanding of existing academic stances on the same point. The position that critiques private (international) law for being too narrowly technical and indeed, from the point of view of its existing political economy, very much "part of the problem," comes under fire for underestimating private law's *potential* to respond to some of the most egregious corporate abuses and disastrous inequalities linked to financial capitalism. Yet, such a position denounces the very failures in comparative judicial practice and mainstream scholarship (in those hitherto largely Western countries that house multinationals with foreign industrial activities, or that are at the receiving end of global value chains, or that encourage investment in developing countries through investment treaties) that the authors themselves are attempting to remedy. As they acknowledge, there is undoubtedly a missing link—more usually and perhaps more accurately described as a black hole—which affects private law's current aptitude to provide satisfactory individual remedies before the courts (leaving aside its potential role in ensuring structural change).

However, this observation in no way excludes an ideational elaboration of private (international) law. In such cases, one

1. In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986).

(unabashedly normative) way forward that has considerable currency in private (and public) international law scholarship (and some very partial echoes and applications in judicial practice), is that states should be under a duty to provide a "natural" forum for human rights violations. In the (unrealistic) hypothesis of a universal understanding of the legal foundations of such claims, any court exercising jurisdiction would no doubt be ready to provide a remedy. Indeed, were this to be the case, it is quite likely that national tort law could then do its job quite happily, irrespective of national legal-technical differences that create conflicts of laws. Now, instead of framing the problem as humanrights violations, it might be said, alternatively and as the authors suggest, that the ethical core of private law common to all (liberal?) polities (supposing that its essential commitments can be indeed be identified in a meaningful way) requires the same provision of universal access to justice. This excavatory enterprise is as normative as they come, and as such, open both to disagreement as to its own premises and to the charge of lacking realism.

2. This leads to a second comment that concerns the relevance of this excavatory enterprise for the problem at hand. The authors' claim is that private law's relational heart promises a foundation for the transnational extension of certain universally-understood values, a *jus gentium* made of private law (along the lines proposed by Jeremy Waldron). At this point, there is potentially much (and too much for this space provided in this Symposium) to be said (or resaid) on a jurisprudential plane about the legal-naturalistic idea of a universal private law (whether it is framed as a pre- or post-political phenomenon, and even if it is entirely true, as any critical legal scholar can agree, that private law is just as constitutive of social institutions as its public counterpart). One may also question the authors' findings as to the values that constitute such a core. Here, they identify the *jus gentium* of our private laws as a profound commitment to reciprocal respect to self-determination and substantive equality. There could be considerable debate as to what these liberal values mean, what they hide, in turn, and whether there are other candidates. It may also be that different cultural understandings of what private law actually covers (like family law and bioethical issues in continental Europe) would lead to very different conceptions of the values involved.

But this may not actually be the point. What the authors are trying to put across, through the double idea of universality (*jus gentium*) and the autonomy/equality axis of private law, is the latter's *interpersonal* dimension (that differentiates it from public law, while remaining profoundly enmeshed within the latter). In sum, the very existence of private law as a body of relational precepts presupposes both a vision and an ethic of human interdependency, from which can be drawn the moral foundations of obligations incumbent upon private actors in transnational context. The important feature of this relational vision of private law (which also explains that for the purposes of the authors' demonstration, there is no need to dive more deeply into its concrete content) is that insofar as its very object is to constitute and regulate the relationships between private actors, it is quintessentially independent of vertical state authority and by the same token indifferent to the scope of state jurisdiction. Hence, the *jus gentium* idea that would provide the key to the *transnational* scope of a (albeit minimal) core of

obligations binding upon private actors: a universal, state-free norm creates no conflict and therefore no need for a conflict of laws.

However, as in the case of human rights, a (supposedly) universal skeleton core of moral obligations is always going to generate legal differences whether of implementation, judicial interpretation, evidence or more. What is missing, therefore, in the authors' study is the lens of private international law through which to view the transnational reach of interpersonal private law. The latter discipline's contribution on this point is not confined to the contours of the exception of public policy (as the authors seem to suggest), but extends to the very geography of the responsibility of communities as much as of individual liability, that is, to the design of the overarching scheme under which the determination of rights and duties is allocated to various national laws. It is difficult to see how the authors' own account of the transnationality of private law, even supposing a universal common core, could possibly economize on a reference to this scheme.

Indeed, the problem of corporate misconduct in a globalized world has long been the focus of critical thinking in private international law, whose traditional, overly technical stance has largely hindered the provision of any appropriate reparation for the underlying disasters caused by delocalized industries, foreign investment, land grabbing, unregulated extraction, and much more. The territorial division of jurisdiction, associated with the legal compartmenting of corporate personhood, has been a deadly mix: to date, and with the sad example of the Rana Plaza still in mind, very few cases have overcome this jurisdictional ordeal. However, as in the game of corporate social responsibility (excellently mapped by Ronen Shamir), the state of the law under neo-liberal globalization is the result of a dialectic between hegemonic and counterhegemonic moves.[2] Well-known cases such *Total* or *Nike* have shown that corporate codes initially designed to avert liability can be used, on the contrary, as legal grounds for imposing an obligation to repair through private law techniques such as estoppel or misrepresentation so as to protect third parties.[3] Likewise, rather than having an essence as the authors claim, state-made private law is the theater of a similar dialectic. Obviously, if a legal-theoretical account such as the one the authors propose in the form of a private law *jus gentium* can trigger an emancipatory countermove within the law towards the curbing of corporate power, there can be no quarrel with it. Nevertheless, until the unlikely recognition of such moral commitments by the international community, it might seem at least as promising to follow up on contemporary developments in critical private international legal thinking, towards the better use of concepts and tools

2. Ronen Shamir, *Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony*, *in* LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 92, 92–117 (Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005).

3. For the effect of Nike's code of conduct under consumer law, see *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *cert. dismissed*, 539 U.S. 654 (2003); for the Erika pollution case involving the Total group and its self-regulating vetting procedure, see Court of Appeals of Paris, 30 March 2010, D 2010, 967, obs S Lavric, and 2238 obs L Neyret.

designed specifically with the transnational context in mind.

3. A third and connected observation in this respect is that their account probably gives insufficient attention to various existing moves in private law which, coupled with private international law's allocatory scheme, do already seek to give transnational "teeth" to private law. Thus, national courts at the headquarters of the corporate tortfeasor do actually use ordinary tort law in instances of alleged transnational corporate abuse (as in the spectacular 2017 *Vedanta* case)[4], where more dramatic attempts such as the ATS have failed. Legislatures have followed suit. The 2017 French "devoir de vigilance" instituted a private law duty of care for the parent company towards third-party victims abroad, which includes the actions of all of its subsidiaries and sub-contractors[5] Sometimes judges have actually gone beyond such initiatives harnessed to monitoring, duty of care and liability, and borrowed concepts from public regulatory law (such as the need to discipline market power), enriching a less pungent private law reasoning with a view to curbing corporate power. In this respect, in order to condemn the use of modern slavery in global value chains, judges (as in *Doe v Nestlé*)[6] have asserted that corporate capitalism (and contract as its legal expression) cannot justify the pursuit of profit to the detriment of ethical values. In this respect, rather than searching for elusive universal moral commitments of private law, a political economic analysis of the legal institutions that constitute our global economic system offers a more promising strategy for regulating corporate power ex ante.

In conclusion, the article inspires sincere admiration for the jurisprudential project it contains while raising two series of questions. The first are linked to the specific issue of corporate liability in transnational situations and lead us to wonder how the proposal relates to existing moves in the same direction on the private law front, where there are not only other attempts to give transnational "teeth" in this context to apparently more innocuous or subtle forms of legal constraint, but also strands of critical thinking within private international law which cannot be passed over lightly. A second set of doubts relate to the broader question of the values identified here as lying at the heart of private law. For example, private international law understands liberal private (tort) law as built upon a principle of reciprocity of rights and duties, or the correlation between authority and responsibility, that should inform any allocation of jurisdiction.[7] It is certainly interesting that the authors' legal-philosophical inquiry on this point

4. Dominic Liswaniso Lungowe v. Vedanta Res Plc., [2017] EWCA (Civ.) 1528 (Eng.).

5. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017, on the Duty of Care of Parent Companies and Ordering Companies] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017, available at https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000034290626.

6. Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1017–19 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 798 (2016).

7. *See e.g.*, Gunther Teubner, *Quod Omnes Tangit: Transnational Constitutions Without Democracy?*, 45 J.L. & SOC'Y 5 (2018).

was triggered by law's practical failures in addressing the claims of putative victims of transnational disasters. However, it may be that there is a certain disconnect between the broader ambition of exploring the axiological foundations of private law (however understood) and the various issues that arise in a transnational context where the ordeal of judicial jurisdiction will exist whatever the potentially universal content of the applicable private law.