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ARTICLE

Civil Courts and Delocalized Justice: Reflections on the Shell Nigeria Cases in Light of Theories of Communication and Constitutionalization

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Abstract
In conversation with several chapters of Stefan Grundmann's, Hans Micklitz's, and Moritz Renner's book on *New Private Law Theory*, this paper reflects on contributions that theories of communication and constitutionalization can make to our understanding of the changing role of private law in a globalizing world. More abstract ideals are checked against an assessment of recent judgments of Dutch courts in cases regarding oil company Shell's responsibility for environmental pollution in Nigeria. Such theoretical readings of case law, it is held, in the spirit of *New Private Law Theory*, show new directions that private law theories may choose in order to understand and strengthen the private-legal framework for societal questions of our times.

Keywords: Private law theory; fundamental rights; corporate liability; constitutionalization

A. Beginnings

In the introductory chapters to their book on *New Private Law Theory*, Stefan Grundmann, Hans Micklitz, and Moritz Renner indicate several times that their work is "only a beginning"[1] and a "starting point"[2] for much broader discussions on private legal questions in an inclusive academic community. One can understand the authors' careful wording in light of the inherent limitations of what is possible within the scope of one book, as well as their awareness of the inevitable preconceptions that are due to—legal—education in a certain culture and tradition.[3] At the same time, these thoughtful opening statements create space for the development of a new private law theory that in some ways is more ambitious than any previous work in this area.[4] Adopting not only one theoretical view on the rules of law that govern relations between private actors—individuals, companies, and sometimes public authorities acting in a private capacity—but embracing a plurality of

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[1]Stefan Grundmann, Hans W. Micklitz, & Moritz Renner, New Private Law Theory: A Pluralist Approach 4 (2021) [hereinafter NPLT].

[2]*Id.* at 32.

[3]*Id.* at 3.

[4]*Id.* at 10. Apart from the "law & economics" approach discussed by the authors, *id.* at 11–12, 15–17, one may also think of other "law & . . . " perspectives, such as law & politics, law & sociology, and law & philosophy.

perspectives, *New Private Law Theory* invites academic analyses of private-legal questions that combine insights from different disciplines. The authors, thus, propose a consistently comparative and interdisciplinary approach to foundational questions of private law, including negotiations, liability, non-discrimination.[5] Each chapter of the book, accordingly, presents a discussion of a landmark case in light of different theoretical views, inviting the reader to join the conversation on how private law should further develop in order to address societal questions.

The following pages may be read as one contribution to that conversation. In line with the *New Private Law Theory*'s premises, I will address a specific question of private law from a theoretical point of view that integrates insights from various disciplines. My reference texts, in this case, will be selected chapters from the book, which speak to the topic at hand. Being aware of my own limitations as an author who is also schooled in the European tradition,[6] the analysis does not aim to give final conclusions, but—in the spirit of *New Private Law Theory*—to contribute a small piece to a much bigger debate and, perhaps, a beginning to new conversations.[7]

As an object of study, this contribution will look into recent developments in case law concerning obligations for companies to address and prevent the infringement of human rights when conducting their business. In particular, it will address the democratic legitimacy of adjudication in this area. While human rights due diligence obligations are being discussed and developed on the global,[8] European,[9] and national level,[10] it is quite striking to observe the dynamics between jurisdictions in which harm occurs and those where legal proceedings eventually take place. A "delocalization" of justice-seeking processes may be discerned, insofar as cases on human rights violations that were in some way facilitated or made possible by the activities of multinational companies are being brought in the home jurisdictions of these corporate actors.[11] Accordingly, a dynamic results in which questions on liability for damage that primarily occurs in the Global South is adjudicated in the Global North, primarily Western Europe and the United States.[12] Although in many cases there are good reasons for a delocalization of justice—for example, substantive, procedural, and institutional limitations to human

[5] *Id.* at 10–11 (referring to Foundations of European Private Law (Roger Brownsword, Hans-W. Micklitz, Leone Niglia, & Stephen Weatherill, eds. 2011)).

[6] My training is in Dutch private law, which builds on both the French and German traditions, complemented by experience with comparative and interdisciplinary research in the field of European private law.

[7] Hannah Arendt, The Human Condition 230–236, 244–247 (2d ed. 1958, reprt. 1998).

[8] Open-ended Intergovernmental Working Group Established Pursuant to Human Rights Council Res. 26/9, U.N. Doc. A/26/9 (July 14, 2014), Third Revised Draft *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Aug. 17, 2021), https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

[9] *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022), https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf.

[10] Including the UK's Modern Slavery Act 2015, c. 30, https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted; France's Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Journal Officiel de la République Française [J.O.], Mar. 28, 2017; the Netherlands' Wet zorgplicht kinderarbeid 2019, Stb. 2019, 401, https://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken, and the proposal of law on human rights due diligence obligations for companies that is currently pending in the Netherlands, *Elections,* Eester Kamer https://www.eerstekamer.nl/wetsvoorstel/35761_initiatiefvoorstel_ceder (last accessed May 20, 2022).

[11] Several colleagues brought these developments to my attention. See, for example, these two blog posts by Nina Mann and Nicky Touw on the developments in both tort law and criminal proceedings: *Business and Human Rights Symposium: Third Party Human Rights Harms and the Duty of Care*, Opinio Juris (June 23, 2021), http://opiniojuris.org/2021/06/23/business-and-human-rights-symposium-third-party-human-rights-harms-and-the-duty-of-care/; *Transitional Justice and Foreign Criminal Prosecutions: Delocalizing Justice?*, Afronomicslaw (Oct. 11, 2021) [hereinafter *Transitional Justice*], https://www.afronomicslaw.org/category/analysis/transitional-justice-and-foreign-criminal-prosecutions-delocalizing-justice.

[12] Thanks for the joint exploration of these dynamics are due to my colleagues in the Working Group on due diligence that is part of the Expert Group in Göran Sluiter's project, Rethinking Secondary Liability for International Crimes (Dutch Research Council (NWO) Vici), https://rethinkingslic.org/expert-group: Debadatta Bose, Laura Burgers, Giovanni Comandè, Russell Hopkins, Nwamaka Okany, Joëlle Trampert, and Rodrigo Vallejo Garretón.

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rights protection in host countries—the question arises whether the dynamics as such should be endorsed or questioned. From the perspective of those seeking justice for human rights violations, in particular, the question is whether and under which conditions judges in courts located in the Global North, in particular Western Europe and the United States, are legitimized to decide on their cases.[13]

In conversation with several chapters of *New Private Law Theory*, I will submit that an explanation and justification for delocalized private law adjudication on human rights obligations of businesses may be found in an approach combining aspects of political philosophy—chapters four and six; discussed in part B[14]—and theories of constitutionalization—chapters seven and eight; part C. The comparative and interdisciplinary perspectives offered by these theories, it is held, may strengthen new private law theory's contributions to a more inclusive private-legal approach to societal problems with a global dimension—part D.

B. Communication as a Problem and an Answer

The first connection that is explored here concerns the one between communication theory and private law, in line with chapter four of *New Private Law Theory*. The question posed is to what extent private legal claims brought against multinational companies in their home countries for human rights violations abroad allow for transnational conversations on the responsibilities of businesses towards those affected by their activities. Communication theory, it is presumed, may contribute to the understanding of the role of civil courts in the facilitation of such conversations.[15]

The judgments in the Dutch cases concerning *Shell Nigeria* offer an example.[16] They are based on tort claims of four Nigerian farmers, supported by the Dutch non-governmental organization Milieudefensie ("Friends of the Earth"), against oil company Shell for compensation of damage sustained because of oil spillage in the Niger Delta. The claims were brought not only against daughter company Shell Nigeria, but also against the former UK and Dutch parent companies and the current holding Royal Dutch Shell (RDS). After having established its competence according to rules of private international law, the District Court in The Hague found that Nigerian law was applicable to the disputes.[17] While the District Court then dismissed the claims, the Court of Appeal of The Hague in the second instance held that, in two of the cases liability of Shell Nigeria

[13]*See also Transitional Justice*, *supra* note 11 (warning Global North framing erodes Global South agency).

[14]My analysis builds on JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996), discussed in NPLT *supra* note 1, ch. 4, and the work of Nancy Fraser. *see* Fraser, *infra* note 35 and accompanying text.

[15]For an earlier investigation of this premise in the context of EU private Law, see Chantal Mak, *Civil Courts as Constitutional Courts: Polity-Building through Private Law in Europe*, 28 EUR. REV. PRIV. L. 953 (2020) [hereinafter *Civil Courts as Constitutional Courts*].

[16]Hof Den Haag 29 Jan. 2021, JA 2021, 62, ECLI:NL:GHDHA:2021:132 (Oguru/Shell Petroleum NV) (Neth.), https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2021:1825; Hof Den Haag 29 Jan. 2021, JA 2021, 63, ECLI:NL:GHDHA:2021:133 (Dooh/Royal Dutch Shell PLC.) (Neth.), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:1827. Discussions of the judgments include: Steef Bartman & Cees de Groot, *De Shell Nigeria-arresten van het hof Den Haag, een doorbraak bij internationale milieuschade?*, 2021 ARS AEQUI 384 (Apr. 2021), Ger van der Sangen & Anne Lafarre, *Transnationale ondernemingen en concernaansprakelijkheid*, 2021 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE (WPNR) 747 (2021) [hereinafter *Transnationale ondernemingen I*], Ger van der Sangen & Anne Lafarre 2021 WPNR 778; *See also*, in English, Cees van Dam, *Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms*, 18(5) EUR. CO. & FIN. L. REV. 714 (2021).

[17]*See* ECLI:NL:GHDHA:2021:132 (Oguru) paras. 3.1–3.2 (giving a summary). See also the judgments of the District Court of The Hague of 30 Jan. 2013, ECLI:NL:RBDHA:2013:BY9850 (Oguru), ECLI:NL:RBDHA:2013:BY9845 (Dooh), and ECLI:NL:RBDHA:2013:BY9854 (Akpan). Due to the rules of private international law, it is not uncommon in such cases to require judges in European countries, where such companies are headquartered, to have to apply the law of the country in which the damages occurred in the case. For a comparative overview and analysis of the question on applicable law, see Catherine Kessedjian, *General Report*, *in* PRIVATE INTERNATIONAL LAW ASPECTS OF CORPORATE SOCIAL RESPONSIBILITY 45–48 (Catherine Kessedjian & Humberto Cantú Rivera, eds. 2020) (explaining law applicable to tort cases).

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under Nigerian law could be established; a third case is still pending.[18] In one of the cases, that of *Oguru*, moreover, the Court of Appeal held that parent company RDS was under a duty of care to ensure that a detection system was installed on the pipelines from which oil had leaked.[19] While awaiting the final rulings of the Dutch Supreme Court, where an appeal is pending,[20] the first comments on the judgment of the Court of Appeal have underlined the innovative nature of this finding, since for the first time legal responsibility of a parent company for damage elsewhere in the world was recognized.[21] Perhaps more importantly for the present analysis, this example from case law shows how the interaction between different legal traditions through the mediation of courts in civil cases contributes to conversations on the responsibilities of businesses.

New Private Law Theory's chapter four, written by Moritz Renner, provides a wonderfully clear introduction of the theories of Niklas Luhmann and Jürgen Habermas and discusses the contributions these may make to private legal analysis.[22] Both theoretical views understand legal systems in terms of social communication, though in different ways. The systems theory developed by Luhmann places courts at the center of legal systems and explains how they mediate between legislation, contracts and other norm-setting mechanisms.[23] As such, systems theory may to some extent clarify the interaction among civil courts in the Global North and the search for justice for damage occurred in Global South countries. As Renner rightly points out, however, this theoretical perspective does not give much normative guidance on what *should be* the role of civil courts in a globalizing world. A theory of communication that is more likely to provide such guidance, is Habermas' discourse theory. This theory looks into the legitimacy of normative expectations generated in law-making processes, reconstructing the normative foundations of legal systems on the basis of individual—human—rights and collective decision-making.[24] A central element in Habermas' theory is the co-originality of these two components, defined as public and private autonomy: Collective autonomy presupposes individual rights, while such rights can only be established in collective decision-making processes.[25] From this perspective, democratic legitimacy of law-making is not found in shared values as such, but based on communicative processes among participants.[26] As Renner observes, Habermas himself has mostly focused on the procedural legitimacy of law-making in democratic nation-States like Germany and the United States, thus understating the potential contributions his theory could make to, for instance, private governance or public-private regulatory constellations.[27]

A Habermasian framework, in my opinion, may partly serve the assessment of delocalization of justice in cases like the ones on *Shell Nigeria*.[28] In Habermas' view, courts take part in discourses of application of the law, which may be distinguished from discourses of justification of legal norms that are typically a matter for legislative processes.[29] The two types of discourses are connected in several ways. One of these concerns the potential for adjudication to contribute to a public sphere

[18]This concerns the appeal in ECLI:NL:RBDHA:2013:BY9854 (Akpan), *see supra* note 17.

[19]*See* ECLI:NL:GHDHA:2021:132 (Oguru) para. 7, 26.

[20]*See* Van Dam, *supra* note 16, at 724.

[21]*See* van der Sangen & Lafarre, *supra* note 16, at § 3, Bartman & De Groot, *supra* note 16, at 390–91, Van Dam, *supra* note 16, at 723, 73940.

[22]*See* Sanne Taekema & Wibren van der Burg, *Legal Philosophy as an Enrichment of Doctrinal Research—Part II: The Purposes of Including Legal Philosophy*, L. & METHOD (2022), https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2022/01/lawandmethod-D-21-00010.

[23]*See* NPLT, *supra* note 1, at 103–104.

[24]*See* HABERMAS, *supra* note 14, at 5–7, NPLT, *supra* note 1, at 104–105.

[25]*See* HABERMAS, *supra* note 14, at 120–123, NPLT, *supra* note 1, at 107.

[26]*See* HABERMAS, *supra* note 14, at 126–128.

[27]*See* NPLT, *supra* note 1, at 107–108.

[28]In the following, the focus will be on the theory of communication developed by Habermas, in combination with Nancy Fraser's work. While recognizing the value of Luhmann's theory for transnational private law, a further elaboration of insights on the *Shell Nigeria* cases in light of systems theory falls outside of the scope of this contribution.

[29]*See* HABERMAS, *supra* note 14, at 172–173.

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from which topics may be brought to the attention of the legislature.[30] Public spheres, in Habermas' theory, comprise debating rooms, cafés—social—media, and other venues that allow for public deliberations on societal questions.[31] Adjudication has a special place in relation to such public spheres, insofar as it may confirm, on the basis of legal reasoning, that a certain topic requires intervention from legislative powers.[32] The Court of Appeal of The Hague's judgment in the case of *Oguru* against Shell Nigeria and RDS may be read in this light: It translates the question of responsibility of a Europe-based parent company for damage abroad in terms of a private-legal duty of care.

At the same time, the *Shell Nigeria* cases show the limitations of a strict Habermasian reading. How can this theoretical view account for the application of Nigerian tort law in a Dutch civil case? And how can it safeguard the private and public autonomy of all actors involved in the case, including the Nigerian farmers who suffered harm? Arguably, the first question could be answered on the basis of the rules of Dutch private international law, which have been enacted by the national legislature and, thus, provide a legitimate basis for resorting to the law of a foreign country. An answer to the second question may be found in rules of civil procedure that give legal standing to tort victims in Dutch courts. Both answers, however, only explain the viewpoint from the—European—jurisdiction in which the cases are assessed, while not giving much space to the perspective of those actors in other parts of the world whose interests are at stake.[33]

My recent work explores theoretical insights that allow for a more inclusive legal framework, in which the mediation of courts plays a leading role.[34] It takes inspiration from Nancy Fraser's critical review of Habermas' theory and her understanding of transnational public spheres.[35] Fraser seeks to remedy the limitations of Habermas' conceptualization of the public sphere by questioning its basis in the model of the Westphalian nation-state and broadening it to transnational constellations. Like Habermas, she tries to find a balance between articulating a plausible explanation for empirical realities and providing normative standards for political constellations.[36] Fraser's work is, thus, of clear relevance for the understanding of private law's contribution to solutions for societal problems that transcend national borders, such as climate change,[37] investment projects,[38] and business' responsibilities for activities abroad, as in the *Shell Nigeria* cases.[39]

[30]*Id.* at 373.

[31]*Id.* at 373–374.

[32]*Id.* at 371–372, 381. For an elaboration of a theory of supranational adjudication that builds on Habermas' work, see AIDA TORRES PÉREZ, CONFLICTS OF RIGHTS IN THE EUROPEAN UNION: A THEORY OF SUPRANATIONAL ADJUDICATION (2009).

[33]For a similar critique of climate cases and the elaboration of a theoretical framework, inspired by Habermas, that does include people abroad, see Laura Burgers, Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-making in European Private Law Cases on Climate Change (Nov. 11, 2020) (Ph.D. dissertation, University of Amsterdam), https://hdl.handle.net/11245.1/0e6437b7-399d-483a-9fc1-b18ca926fdb5.

[34]*See* Mak, *Civil Courts as Constitutional Courts*, *supra* note 15, Chantal Mak, *Reimagining Europe Through Private Law Adjudication*, *in* CIVIL COURTS AND THE EUROPEAN POLITY: THE CONSTITUTIONAL ROLE OF PRIVATE LAW ADJUDICATION IN EUROPE (Chantal Mak & Betül Kas, eds. Hart Pub., forthcoming 2022).

[35]*See, e.g.*, Nancy Fraser, *Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World* [hereinafter *Transnationalizing*], *in* TRANSNATIONALIZING THE PUBLIC SPHERE 8 (Kate Nash, ed. 2014), NANCY FRASER, SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALISING WORLD 8–9 (2008) [hereinafter SCALES], Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56 (1990).

[36]*See* Fraser, *Transnationalizing*, *supra* note 35, at 20.

[37]*See* Burgers, *supra* note 33, Laura Burgers, *Should Judges Make Climate Change Law?*, 9 TRANSNAT'L ENV'T L. 55 (2020), Candida Leone, *New Private Law Theory and Sustainable Legal Education*, this issue.

[38]*See, e.g*, Kinnari Bhatt, Jennifer Lander, & Sanne Taekema, *Introduction: The Rule of Law in Transnational Development Projects—Private Actors and Public Chokeholds*, 17 INT'L J.L. CONTEXT 91 (2021), and other contributions to this special issue of the *International Journal of Law in Context*.

[39]*See* Eghosa Ekhator & Ibukun Iyiola-Omisore, *Corporate Social Responsibility in the Oil and Gas Industry in Nigeria: The Case for a Legalised Framework*, *in* SOVEREIGN WEALTH FUNDS, LOCAL CONTENT POLICIES AND CSR: DEVELOPMENTS IN THE EXTRACTIVES SECTOR 439 (Eduardo Pereira, Rochelle Spencer, & Jonathon Moses, eds. 2021).

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With Fraser, a critical eye may be cast on the limitation of public spheres to bounded national political communities,[40] in particular, when assessing the role of courts in European private law. In order to provide theoretical underpinnings for legitimate and efficacious public opinions to emerge from transnational public spheres, Fraser submits that conditions for such legitimacy and efficacy should be rethought:[41] Legitimacy should be based on inclusiveness and participatory parity of actors,[42] supported by new transnational institutional structures.[43] In my view, such conditions may to some extent already be found in cases like *Shell Nigeria*. Private law adjudication in Europe may be seen to develop certain conditions for inclusion of underrepresented voices in a process that is often referred to as "constitutionalization of private law." This leads to the next theoretical strand of this reflection piece.

C. Constitutionalization as a Compass

A second connection with *New Private Law Theory*'s themes can be found in the exploration of the "constitutionalization of private law," which runs through all chapters in Part II of the book.[44] The authors present constitutionalization as a "core example" of the monograph, highlighting its potential to "offer new orientation" in private law theory.[45] Continuing my conversation with the book, questions to address with regard to delocalization of justice in cases like the ones on *Shell Nigeria* is what constitutionalization means in this context and what guidance it may offer for a better understanding of the legitimacy of case law.

In line with *New Private Law*'s understanding of the concept, "constitutionalization of private law" may be accepted to go beyond the study of the impact of fundamental constitutional and human rights on private legal cases.[46] While this is one important aspect, which is discussed in Micklitz's chapter eight of the book, a broader understanding is helpful for the analysis of topics such as delocalization of justice. "Constitutionalization" in a broader sense may refer to: i) institutional structures and hierarchies of decision-making power, which includes governance of a multilevel private-legal order;[47] and ii) private law's role in the constitution of a political community.[48] The latter definition directly links to the politicalphilosophical debate on transnational discursive communities and the imagination of an inclusive public sphere. The legitimacy of delocalization of

[40]*See* Fraser, *Transnationalizing*, *supra* note 35, at 16.

[41]*See id.* at 20.

[42]*See id.* at 2022, Fraser, Scales, *supra* note 35, at 28–29.

[43]*See* Fraser, *Transnationalizing*, *supra* note 35, at 22–24.

[44]*See* NPLT, *supra* note 1, at 4, 131.

[45]*Id.* at 4.

[46]For studies on this theme, see, for example, Aurelia Colombi Ciacchi, Gert Brüggemeier, & Giovanni Comandé, Fundamental Rights and Private Law in the European Union, Volumes I and II (2010); Olha Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party (2007); Chantal Mak, Fundamental Rights in European Contract Law (2008) [hereinafter Fundamental Rights], Constitutional Values and European Contract Law (Stefan Grundmann, ed. 2008); European Contract Law and the Charter of Fundamental Rights (Hugh Collins, ed. 2017), Constitutionalization of European Private Law (Hans-W. Micklitz, ed. 2014).

[47]In this sense, the academic debate on constitutionalization of private law links to the more general discussion on the EU's constitutional structure. *See, e.g.* Joseph Weiler, The Constitution of Europe (1999); The Worlds of European Constitutionalism (Gráinne de Búrca & Joseph Weiler, eds. 2012); Constitutional Pluralsim in the European Union and Beyond (Matej Avbelj & Jan Komárek, eds. 2012). For European Contract Law, see also Lucinda Miller, The Emergence of EU Contract Law 191 (2011); Vanessa Mak, Legal Pluralism in European Contract Law 4547 (2020).

[48]Stefano Rodotà, *The Civil Code within the European 'Constitutional Process,' in* The Politics of a European Civil Code 118, 121 (Martijn Hesselink, ed. 2006) (referring to contribution of codifications of private law to constitution of nation-States in continental Europe and envisaging "the transition from a Europe of the market to a Europe of the rights"). On the failure to provide a private-legal basis for a European community through the enactment of a European Civil Code, see Hans-W. Micklitz, *Failure or Ideological Preconceptions—Thoughts on Two Grand Projects: The European Constitution and the European Civil Code*, European University Institute (EUI) LAW Working Paper No. 2010/04; Miller, *supra* note 47, at 220–223.

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justice from the perspective of tort victims abroad, such as the farmers in the *Shell Nigeria* cases, in light of public sphere theories depends on the possibilities for private-legal actions in companies' home countries to foster a transnational deliberative process that is inclusive of the victims. Only a possibility for victims abroad to participate on par with actors in the jurisdiction in which the case is adjudicated can legitimize outcomes of transnational deliberations. The following observations will, accordingly, focus on the contribution that a further "constitutionalization of private law" could make to the theoretical elaboration of conditions for inclusive polity-building.

Stefan Grundmann's chapter on "Societal Order and Private Law"—chapter six of *New Private Law Theory*—connects four theoretical views with one prominent example from case law to discuss the "'justified' distribution of rights, duties and opportunities (particularly via law)" and "the role of private law in bringing about such a distribution."[49] These four perspectives originate from writers representing different national backgrounds and ideas, which Grundmann brings into conversation with one another: Franz Böhm's ordo-liberal theory is complemented by Luigi Mengoni's exploration of—private—law's function in economic activity, and John Rawls' abstract theory of justice as fairness is contrasted with Amartya Sen's context-oriented and pluralistic idea of justice. Grundmann links these views to a case deriving from the German constitutional tradition, drawing more general conclusions from the reading of this case in light of the four theories. It is the well-known *Lüth* judgment of the German Constitutional Court that he chooses to illustrate the constitutional dimension of private law in a societal order.[50] The case, which dates from 1958, concerned a tort claim brought against Lüth for having called for a boycott of a movie by a director who during World War Two had made anti-semitic movies. In its judgment, the German Constitutional Court famously held that the open norm of tort law had to be interpreted in alignment with the "objective order of values" laid down in the German Constitution.[51] Accordingly, the tortious nature of the call for a boycott had to be assessed on the basis of limits that tort law could justifiably place on freedom of expression against the background of the legal order and the value it attached to free speech.[52] As Grundmann observes, the *Lüth* case shows that "even the fundamental political freedoms are dependent on economic power situations."[53] Accordingly, the law, including private law, plays an important role in defining a societal order that comprises both political and economic spheres.[54]

Relating the insights from the chapter to the matter of legitimizing a delocalization of justice, one may perceive a potential for private law to contribute to processes of societal ordering, insofar as it is further aligned with human rights standards. Cases like the ones on *Shell Nigeria* could, arguably, serve the inclusion of all relevant actors in a process of collective decision-making that does justice to individual rights.[55]

In this context, still, a nuance is in order: It should be noted that the Court of Appeal of The Hague in the *Shell Nigeria* cases did not award the claims that were based on the fundamental right to a clean living environment.[56] This was mostly due to the fact that it could not be established that the oil leak had been caused by Shell Nigeria or RDS themselves—sabotage was a more likely cause.[57] The liability of Shell Nigeria and duty of care of the parent company were based on the

[49]*See* NPLT, *supra* note 1, at 131.

[50]*See* NPLT, *supra* note 1, at 132.

[51]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198, 205.

[52]*Id.* at 208–209.

[53]*See* NPLT, *supra* note 1, at 151–152.

[54]*Id.* at 152, 154.

[55]Note that the premises here remain the ones laid out in the previous section, based on Fraser's elaboration of Habermasian public spheres for transnational settings. The private law theory presented in this chapter thus presumes democracy as an underlying value.

[56]Hof's-Den Haag 29 Jan. 2021, JA 2021, 62, ECLI:NL:GHDHA:2021:132 paras. 9.1–9.6 (Oguru/Shell Petroleum NV) (Neth.), https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2021:1825.

[57]*Id.* at paras. 5.30, 9.3.

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omission to install a leak detection system to contain the damage. Yet, also in the absence of a more explicit link to fundamental rights, the extension of a duty of care to the parent company for preventing further environmental damage reflects a shift in responsibilities, which has distributive consequences. Victims in the Global South now can, to some extent, obtain compensation for damage to their living environment from a parent company based in the Global North. The inclusive protection of human rights in a transnational setting has been forged through a tort claim.

A further point to be considered is that the extent to which the interpretation of private law in light of human rights can structurally provide a common language for transnational discourses remains a contested topic. In an optimistic reading, as provided by Grundmann, lawyers might agree that "the notion of fundamental rights is the one set of rights that has achieved a worldwide constitutional prominence like no other and thus constitutes the most fundamental value order on which to ground private law theory."[58] His Kantian reading resonates with the work of Seyla Benhabib, who emphasizes the link between law and morality that is reflected in human rights and underlines the emancipatory power of these rights.[59] A more skeptical view, such as the one held by Samuel Moyn, is that human rights lack programmatic force and cannot sufficiently address inequal distributions of wealth and power.[60] From a constitutional point of view, furthermore, Loughlin affirms that human rights are likely to be integrated in existing schemes of governance and may, thus, not be able to change the status quo.[61] My own view is closer to that of Grundmann and Benhabib, while it remains mindful of the limitations of human rights reasoning.[62]

Finally, the democratic underpinnings of transnational processes of constitutionalization of private law deserve consideration. Transnational constellations are often portrayed as suffering from a democratic deficit, in the absence of a political community in which actors can participate on equal footing in collective decision-making processes.[63] For the EU, constitutional-theoretical approaches that address this deficit include, for instance, the idea of demoicracy, developed by Kalypso Nicolaïdis, that respects the separate polities of Member States while at the same time requiring national institutions and politics to open up to each other.[64] Other theories, such as the one proposed by Sionaidh Douglas-Scott, present a cosmopolitan, rule-of-law-based theory of justice for the EU.[65] Still other approaches, like the one brought forward by Michael Wilkinson, seek to conceptualize the constitutional nature of the EU not in terms of a *demos* or shared moral principles, but rather as a dynamic process of polity-building on the basis of a contextualized reading of foundational texts.[66] A further elaboration of the insights that these

[58]*See* NPLT, *supra* note 1, at 150.

[59]*See* Seyla Benhabib, *Moving Beyond False Binarisms: On Samuel Moyn's* The Last Utopia, 22 QUI PARLE 81, 86–88 (2013); Seyla Benhabib, *Transnational Legal Sites and Democracy-Building: Reconfiguring Political Geographies*, 39 PHIL. & SOC. CRITICISM 471, 474 (2013).

[60]*See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); *see also* Samuel Moyn, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

[61]*See* Martin Loughlin, *The Constitutional Imagination*, 78 MOD. L. REV. 1, 24–25 (2015).

[62]*See* MAK, FUNDAMENTAL RIGHTS, *supra* note 46 (combining insights from Ronald Dworkin's theory of adjudication with a critical analysis of the influence of fundamental rights reasoning in private law, inspired by Duncan Kennedy's critique of adjudication).

[63]For Europe, for example, see Fritz Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL'Y 18, 19–23 (2011). On the substantive democratic deficit of European Private Law, see Marija Bartl, *The Way We Do Europe: Subsidiarity and the* Substantive *Democratic Deficit*, 21 EUR. L.J. 23 (2015).

[64]*See* Kalypso Nicolaïdis, *The Idea of European Demoicracy*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 247 (Julie Dickson & Pavlos Eleftheriadis, eds. 2012) [hereinafter PHILOSOPHICAL FOUNDATIONS].

[65]Sionaidh Douglas-Scott, *The Problem of Justice in the European Union: Values, Pluralism and Critical Legal Justice*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 64, at 412. Her concept of critical legal justice is not only meant for the EU, but "ultimately commits itself to an attempt for global justice." *Id.* at 434, SIONAIDH DOUGLAS-SCOTT, LAW AFTER MODERNITY ch. 8, 10 (2013).

[66]Michael Wilkinson, *Political Constitutionalism and the European Union*, 76 MOD. L. REV. 191 (2013); MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 310–11 (2010).

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views may bring to the constitutionalization of private law seems to be fully in line with *New Private Law Theory*'s aspirations.

Considering the delocalization of justice through the lens of constitutionalization of private law, in sum, does not provide definitive answers, yet can provide a "new orientation"—or, pluralistically, new orientations—in the sense indicated by the authors of *New Private Law Theory*. It complements the analysis of role of courts in private law in light of communication theories. While these theories mostly address the procedural conditions for meaningful transnational discourses to take place, theories of constitutionalization of private law allow for a further engagement with the substantive norms, embodied in human rights, that provide a language for the legal conversation. Constitutionalization, thus, does not dictate one direction for the further development of private legal solutions to societal problems. Rather, it provides a compass for finding orientation points in the changing landscape of European and transnational private law.

D. Where to Go from Here

The previous pages have explored the potential contributions of theories of communication and theories of constitutionalization to the development of a more inclusive private-legal approach to societal problems with a global dimension. Both strands of thought offered insights for the further elaboration of private law theory on such cases as the ones in *Shell Nigeria*. In the first place, theories of communication elucidate in which ways delocalized human rights cases can be framed so as to be inclusive of those who suffer harm. Private law theory, in this view, may learn from the work of Jürgen Habermas and Nancy Fraser. In the second place, an exploration of the constitutional dimension of private law made clear how human rights reasoning relates to the normative foundations underlying such cases. This also offered some starting points for defining the community that should be involved in law-making processes. While theories of justice are often understandably considered to find their limits in capturing the transnational sphere because of a lack of community,[67] the process of constitutionalization of private law could, in theory, work the other way around: Deliberative processes anchored in universal values expressed in human rights and their application in private law,[68] in my view, may contribute to a continuous process of building a community.[69]

This is not the end of the theoretical inquiry, of course. The reflections presented here raise many further questions. In particular, the comparative dimension of *New Private Law Theory* deserves attention.[70] The comparative study of delocalized human rights cases in light of a combination of the theoretical approaches of communication and constitutionalization could provide further insights into such questions as which human rights can fulfil an emancipatory role in transnational private-legal constellations, what are conditions for meaningful communication on underlying values in private law, and what are the limits of processes of constitutionalization of private law in a transnational setting. *New Private Law Theory* does not provide decisive answers to these queries, and does not aspire to do so. Most importantly, it invites further reflection on new directions that private law theories may choose in order to understand and strengthen the private-legal framework for societal questions of our times.

[67]*See generally* NPLT, *supra* note 1, at 150, Klaas Eller, *Transnational Contract Law*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 515–516 (Peer Zumbansen ed. 2018).

[68]Hugh Collins, *Cosmopolitanism and Transnational Private Law*, 8 EUR. REV. CONT. L. 311 (2012).

[69]*See* Wilkinson, *supra* note 66, at 193, 207–208; *see also* LOUGHLIN, *supra* note 66, at 311.

[70]In line with NPLT, *supra* note 1, at ch. 5.

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