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A RELATIONS-FIRST APPROACH TO CHOICE OF LAW

TONI MARZAL AND GEORGE PAVLAKOS

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Toni Marzal** **& George Pavlakos*****

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I. Introduction

The question of applicable law remains central in the doctrine and practice of private international law (PIL), raising a host of disagreements around the criteria that govern its determination. Paradoxically, this question is commonly approached through a positivist lens, whilst at the same time being guided by a commitment to individual autonomy. In this paper we propose, against mainstream practice, to frame the issue of applicable law as involving a series of questions about relational morality, which ought to be answered independently of any established legal order, and from a concern for the common good.

We will proceed in four parts. First, we will first demonstrate that a purely positivist understanding fails to properly account for today's practice. This is due to the propensity of positivism as a whole to exclude normative considerations as irrelevant to the determination of legal facts, i.e. facts about what the law requires,[1] which leads it to resort to such considerations under the cover of hopelessly circular reasoning. That failure is particularly manifest in the context of PIL, despite traditional attempts at analyzing it through a positivist lens, and it is for this reason that we will argue that PIL can serve as a particularly illuminating test case, a 'litmus test' if you will, for the weaknesses of positivism in general (Part II).

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** Senior Lecturer at the University of Glasgow: antonio.marzal@glasgow.ac.uk.

*** Professor of Law and Philosophy at the University of Glasgow: georgios.Pavlakos@glasgow.ac.uk.

[1] Here we follow standard vocabulary according to which legal facts are true propositions about what the law requires (in terms of obligations, prohibitions, and permissions). For example, 'it is the law in Greece that the police cannot enter university grounds unless a special permission has been granted by the Senate'; or 'According to UK law, killing is forbidden'. Accordingly, for the purposes of the present discussion, we adopt the following working definition of a legal fact: 'for every proposition p, system s, if p is law (valid) in s, we can state truly that it is a fact that p is law in s, and call this a "legal fact"'. The formulation goes back to work developed in Samuele Chilovi and George Pavlakos, 'Law-determination as grounding: A common grounding framework for jurisprudence' (2019) 25.1 LT 71, 71-74. See also the related definition by Mark Greenberg, 'How Facts Make Law' (2004) 10 LT 157, 162 & 167.

Having shown that positivist approaches inevitably 'run out', and thus legal practice must reach out, somewhat covertly, for some pre-institutional normative requirements, we will then examine how dominant practice within current PIL accomplishes this operation. Indeed, in order to mitigate for its own circularity, the mainstream approach smuggles into legal reasoning a pre-institutional notion of individual autonomy, which implicitly guides the determination of applicable law.[2] This paints a standard picture of pre-institutional relations among parties which divorces individual autonomy from any enquiry as to any considerations of relational morality, as well as from ideals of the common good that usually reside in the public structure of institutionalised legal orders. Thus, the legality of cross-border relations is decomposed into two different dimensions – the private one, which is pre-institutional and thus explanatorily more fundamental to the intervention of the applicable legal system, and the dimension of publicity, which relies on the latter for its enforcement (Part III).

Against this mainstream position, and aligning ourselves with recent attempts at developing a relational approach to PIL that reclaims Savigny's intellectual legacy (against the misguided tendency to present mainstream practice as profoundly Savignian)[3], in this chapter we emphasise the independent value of addressing the question of legal relations in pre-institutional terms and propose a fresh way of understanding the legality of such relations among private parties, without begging the question in favour of the mainstream positivist accounts. Thus, we will suggest that parties to PIL disputes can be embedded in fully-fledged legal relations which obtain antecedently to the determination of applicable law. In fact, and on the basis of a revised reading of Kantian right, we will be defending the stronger claim that, when it obtains, it is this pre-institutional legality that guides the determination of the applicable law. But in opposition to others who also try to challenge the current practice of PIL but who do so on the basis of a commitment to individual autonomy, we maintain that pre-institutional legal relations are sources of public or omnilateral requirements as opposed to private (or even bilateral) ones (Part IV).

Finally, while our account is rooted in foundational issues, its purpose is ultimately practical, i.e. to contribute answers to 'downstream' questions on the choice of law. Obviously, we are not aiming to provide a full range of solutions to such questions, but only to offer an indication of how our 'relations-first' approach can push in that direction. It is also our hope to offer a reconstruction of certain directions in current practice. To illustrate this, we will consider the topical question of

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[2] A good example of this strategy is found in Sagi Peari, 'The Normative Structure of the Choice of Law' (chapter in this volume). In a nutshell, it takes state law as its departing point and proceeds – in the light of the limitations of positivist legal reasoning we diagnose in Pt II – to avail itself of the remedy of pre-institutional natural rights of individuals.

[3] Roxana Banu, 'A Relational Feminist Approach to Conflict of Laws' (2017) 24 Michigan J Gender & L 1.

applicable law to claims against parent/buyer companies for the harm caused by their subsidiaries/providers overseas (Part V).

II. Choice of Law and the Limits of Positivism

We suggest that due to a theoretical shortcoming, positivist legal reasoning fails to apprehend legal relations when those are not already governed by established institutional rules. While in municipal legal systems the failure of positivism remains largely invisible, in PIL the need for judges to appeal to pre-institutional normative standards to characterise legal relations and determine the applicable law is considerably more manifest.[4] Far from claiming that the practice of PIL delivers a knock-down argument against positivism, we use it as a test case to reaffirm the theoretical case against the latter and show that judges need to appeal to pre-institutional standards in order to determine the legality of relations between parties.[5]

From a typically positivist perspective,[6] the judge, when faced with a new case, will look to attribute legal significance to some fact, event, or relation by subsuming it under a legal fact, i.e. a fact about what the law requires[7]. At the same time, legal facts are understood by positivism as being about the content of some institutional rule whose validity is grounded exclusively in social sources. Thus, the legal characterisation of the elements of a case ultimately requires that judges ascertain the obtaining of the relevant institutional rule by reference to its sources.

On this understanding, positivism is a view about the determinants of legal facts.[8] Most lawyers would agree that legal facts are not fundamental parts of the (social) environment, but instead are composed

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[4] In this section we only explore the effects of the failure of positivism, with a focus on the context of PIL. A more detailed discussion of the pre-institutional standards, appeal to which the failure of positivism necessitates, are discussed in the next section.

[5] Ultimately the argument generalises to every instance of legal reasoning; the focus of this paper, however, will only be PIL.

[6] We are here adopting the version of positivism that was developed by H.L.A. Hart in his *The Concept of Law* (OUP 1961). For other variants of positivisms appropriate adjustments would need to be made.

[7] For a working definition of 'legal fact', as we use it in the chapter, see (n 1) above.

[8] The reconstruction of positivism and non-positivism in terms of the metaphysical determinants of legal facts is owed to the seminal paper 'How Facts Make Law' by Mark Greenberg (n 1); since its inauguration the view has found widespread acceptance and has generated a burgeoning literature: see Emad Atiq, 'There Are No Easy Counterexamples to Legal Anti-Positivism' (2020) 17.1 J Ethics Soc Philos 1; Chilovi and Pavlakos, 'Law-determination as grounding', (n 1); Andrei Marmor, 'What's left of general jurisprudence? On law's ontology and content' (2019) 10.2 Jurisprudence 151; Andrei Marmor and Alexander Sarch, 'The Nature of Law' in Edward N Zalta (ed), Stanford Encylopedia of Philosophy (Fall 2019) URL = <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature>; David Plunkett, 'A Positvist Route for Explaining How Facts Make Law'. (2012) 18 LT 139; David Plunkett and Scott Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch on Metanormative Inquiry' (2017) 128.1 Ethics 37; Gideon Rosen, 'Metaphysical Dependence: Grounding and Reduction' in Bob Hale and Aviv Hoffman (eds), *Modality: Metaphysics, Logic, and Epistemology* (OUP 2010); Scott Shapiro, *Legality* (HUP 2011); Nicos Stavropoulos, 'Legal Interpretivism' in Edward N Zalta (ed), Stanford Encylopedia of Philosophy (Summer 2014)

by more elementary (social) facts.[9] Yet, there is widespread disagreement over the constituents of legal facts, e.g. whether those include social facts only or, in addition to those, some normative facts also. Positivist lawyers submit that legal facts are determined, at the most fundamental level, exclusively by social facts, even though a legal system might incorporate other normative (e.g. moral) considerations, on the condition that the standards of incorporation are laid down in a rule of recognition whose existence can be traced back to sources that are exclusively social.[10]

A key worry about the positivist picture is that it brackets out an important question: why exclude normative, pre-institutional considerations from the most fundamental level of the determination of legal facts?[11] Doing so might have the detrimental effect of begging the question in favour of social sources and, consequently, positivism. Indeed, positivist methodology requires that the characterisation by the judge of a relation as generative of legal effects, relies on the application of standards that are ultimately determined by the test of recognition of her own system. During this process any pre-institutional normative standards, which cannot be determined according to the ultimate standards of legality set out in the *lex fori*, cannot bear on the characterisation of the relation between the parties. Once the characterisation has taken place, pre-institutional standards can be involved only to the extent to which the domestic system recognises them on its own terms, to wit *incorporates them by law*. [12] As such the positivist method imposes a constraint on the legal characterisation of relations between parties, i.e. that their legality be determined on grounds determined *lege fori*. It is precisely this constraint that raises the powerful objection that positivist reasoning is ultimately circular because it is question-begging.[13]

Contemporary critics of positivism do not thus focus on the classical problem posed by a clash between positive law and natural, as epitomised in the Antigone story, to argue that the former is ultimately subject to an additional test of validity contained in higher morality. Instead, they appeal

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URL = <https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/>; Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130 HLR 2082.

[9] This is common ground among positivist and non-positivist authors: see instead of others Shapiro, *Legality* (n 8); Greenberg, 'How Facts Make Law' (n 1).

[10] For a detailed discussion of this position, which has come to be known as inclusive legal positivism, see Kenneth Eimar Himma, 'Inclusive Legal Positivism' in Jules L Colemann, Kenneth Einar Himma and Scott Shapiro (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004).

[11]Greenberg warns that relying on explanations that exclude pre-institutional evaluative facts would be question-begging in Greenberg, 'How Facts Make Law' (n 1) 159.

[12] The maneuver of incorporating external standards on the basis of a systemic pedigree test can be justly regarded as the distinctive contribution of inclusive positivism; see instead of others, Himma, 'Inclusive Legal Positivism' (n 10); for a forceful criticism, see Joseph Raz, 'Incorporation by Law' (2004) 10 LT 1.

[13] Elsewhere one of us has argued that the circularity can be represented as an instance of placing *the site,* of the judge's own institutional forum, before the *normative scope* of the relation between the parties is an instance of circular reasoning about the applicable law. See George Pavlakos, 'Redrawing the Legal Relation' in Jorge L Fabra-Zamora (ed), *Jurisprudence in a Globalised World* (Edward Elgar 2020).

to a gap between social sources and legal facts in order to explain the question-begging character of positivism.[14] The charge they level at positivism is that it cannot bridge the gap between social sources and the content of the law, in order to explain how the latter obtains. The thrust of these strategies is an argument *that social practices cannot determine their own relevance to the content of the law unless further elements are added*. As the argument goes, there are multiple (epistemically) possible mappings from the social facts of legal practices to the content of the law, the result being that what we know about the facts of the practice cannot settle which of the alternative candidate mappings from a set of social facts to possible meanings is actual.[15] This indeterminacy is then used as a *reductio* of the positivist notion of validity. Conversely, to counter the threat of indeterminacy the proposed solution is to add substantive moral principles which can determine the relevance of social facts and, thus, block the possible deviant mappings.[16]

Crucially for our purposes, this diagnosis introduces a constraint on the identification of relations as generative of legal requirements between parties, which runs in the opposite direction of the positivist constraint: i.e. that the existence of any relational requirements be determined by reference to pre-institutional normative considerations.[17] The stringency of this requirement may elude us in the context of municipal law for an obvious reason. There is no additional constraint in the domestic practice of judges which would reflect the theoretical point against reasoning from the system's criteria of validity to the characterisation of legal relations between parties, quite the opposite. Consequently, it would take a painstaking and detailed argument to establish the non-positivist constraint, much along the lines of the sophisticated arguments that non-positivists have time and again put forward over the years.[18] Conversely, and taking the domestic practice of legal reasoning as a starting point, lawyers of a positivist mindset would find it easy to rebut the theoretical constraint,

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[14] Greenberg, 'How Facts Make Law' (n 1); Mark Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006); Mark Greenberg, 'On Practices and the Law' (2006) 12 LT 113; Stavropoulos, 'Legal Interpretivism' (n 8). For critical discussion see, Hasan Dindjer, 'The New Legal Anti-Positivism' (2020) 26 LT 181.

[15] See for detailed discussion, Chilovi and Pavlakos, 'Law-Determination as Grounding' (n 1).

[16] See Greenberg, 'How Facts Make Law I' (n 1) and Greenberg, 'How Facts Make Law II' (n 14). It remains an open question, whether such moral facts are to be included together with other fundamental social facts in the 'grounding' base of legal facts; or whether they should form bridging principles which link the social determinants of the law with legal facts. But that need not concern us here. See for a more detailed discussion Samuele Chilovi and George Pavlakos, 'The Explanatory Demands of Grounding in Law' [2021] PPQ (early online view at: https://doi.org/10.1111/papq.12393).

[17] Presently we leave it open whether institutional facts must be included in the determination of legal facts. Most mainstream non-positivists (eg Dworkin, Greenberg, Alexy and Finnis) would confirm their inclusion, because they presuppose that the relevance of pre-institutional considerations is triggered by the actions of state officials. Even though the point cannot be argued in full here, at least one of us is inclined to resist this conclusion; see Pavlakos, 'Redrawing the Legal Relation (n 13). However, we should guard against a reading of our view that implies a strong natural law view, on which the legal facts could be determined independently of the interactions between the parties to a particular legal relation (including interactions with any given institutional legal order that is implicated). For this issue see also (n 75).

[18] The list is exuberant. Just to offer a sample that cuts across some of the major legal traditions: Robert Alexy, *The Argument from Injustice* (OUP 2010); Ronald Dworkin, *Law's Empire* (HUP 1986); John Finnis, *Natural Law and Natural Rights* (OUP 1980).

as failing to represent the phenomenology of the domestic legal practice of judges, whose starting point for establishing the existence of legal obligations is the subsumption of facts and relations under established rules. The dialectical equilibrium in the domestic context is one that favours the positivist constraint: even if it turned out that domestic law is (partially) grounded on pre-institutional morality, it would still be true that the legal characterisation of parties' relations is a function of domestic law. Add to that the firm conviction of most judges that domestic law is determined by its social sources and it becomes rather onerous to create any space for arguing in favour of the non-positivist constraint.

Meanwhile the situation is rather different in PIL, and it is for this reason that PIL offers an illuminating, more accessible demonstration of the failure of positivism and the need to appeal to pre-institutional standards. There the practice of judges suggests that there exists an additional constraint which, *prima facie* at least, supports the non-positivist constraint. Contrary to its counterpart in purely domestic settings, legal reasoning in PIL operates under a demand *not to use domestic law* from the outset to determine the legal relevance of the parties' relation. For doing that, would amount to an instance of begging the question in favour of the *lex fori* and circularly reasoning to the legality of the case at hand. Indeed, the very question that the judge must address in PIL is which is the applicable law, which may well end up being that of a foreign legal system.[19]

PIL scholars have nevertheless found ways to provide a positivist explanation for the application of foreign law, despite its formal lack of validity in the judge's legal system. The vested rights theory is a classic attempt, but it consists in basically denying that the problem exists. The theory's core proposition was that a judge never applies foreign law, but merely enforces rights acquired abroad.[20] The existence of such vested rights is a matter of fact, an objective reality that the judge cannot but recognise, which means that the normativity of foreign law simply disappears.[21] The theory reproduces exactly the same problem that we identified earlier with positivism more generally – it is guilty of question-begging since one cannot determine which rights have been acquired without first establishing which law will determine their possible acquisition. Scholars have therefore tended to shirk the vested rights theory, to instead explain the application of foreign law through the conflicts

[19] Ultimately, the argument of the chapter supports the revival of a type of monism in PIL, partly in agreement with the recent enquiry into PIL and monism by Michael Green, 'Legal Monism: An American History' in Christoph Bezemek et al (eds), *Vienna Lectures on Legal Philosophy* (Hart Publishing 2018). In contrast to Green's suggested reconstruction, our conception of monism relies on the idea of a unified structure, which is common to all legal relations and can be accounted for in pre-institutional terms (see below Pt IV and V). Significantly, however, the suggested monism allows for the involvement of plural values and normative considerations, depending on the context of instantiation of the legal relation.
[20] See eg RD Carswell, 'The Doctrine of Vested Rights in Private International Law' (1959) 8 Int'l & Comp L Quart 268.
[21] Horatia Muir Watt, 'Quelques remarques sur la théorie anglo-américaine des droits acquis' (1986) Revue critique de droit international privé 425.

rules of the forum. It is on the positivity of these rules that hangs the preservation of the positivist account, as emphasised by various classic PIL authors. Already in the 19th century, Wächter[22] and Dicey[23] insisted on the fact that a judge has no choice but to refer to positive laws of her own legal system, which will include conflicts rules, and therefore only apply foreign law if referred to it by the latter. This opinion became more consolidated and developed in the early part of the 20th century, where other classic authors such as Ago[24] or Cook[25] argued, through a somewhat complicated construction, that conflicts rules ultimately serve to *incorporate* those foreign standards, thus transforming them into domestic ones. As explained by the latter:

> *the forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in normal cases, and subject to the exceptions to be noted later, the rule of decision which the given foreign state or country would apply, not to this very group of facts now before court of the forum, but to a similar but purely domestic group of facts involving for the foreign court no foreign element. The rule thus incorporated into the law of the forum may for convenience be called the 'domestic rule' of the foreign state, as distinguished from its rule applicable to cases involving foreign elements. The forum thus enforces not a foreign right but a right created by its own law.*[26]

Beyond the artificiality of reclassifying foreign law as purely domestic, such views are built on the highly reductive assumption that the judge can only be bound by her own domestic legal system, to the exclusion of any other sources. In any case, based purely on the practice of PIL, the incorporation theory's effectiveness at preserving the positivist account immediately runs into problems. The most obvious is that the authority of the forum's conflicts rules is not always upheld by judges, which again creates the need to reach out beyond the forum to justify the applicability of foreign law. Through several well-known PIL doctrines, such as *renvoi* (which involves consideration of the foreign legal system's own conflicts rules), the non-applicability *ex officio* of conflicts rules, the need to prove the content of foreign law or the intervention of internationally mandatory rules, the conflicts rule may be undermined or shortcircuited. In the more recent European context, the so-called method of 'recognition of situations' allows the judge to avoid altogether the forum's conflicts rules, to instead recognise a legal status as legally constituted under a foreign legal system.[27] The positivity of conflicts

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[22] Carl Georg von Wächter, 'On the Collision of Private Laws of Different States' [translated by Kurt H. Nadelmann] (1964) 13 Am J Comp L 417.
[23] See also Albert V Dicey, 'On Private International Law as a Branch of the Law of England' (1890) 6 LQR 1.
[24] Robert Ago, 'Règles générales des conflits de lois' (1936) 58 RCADI 243.
[25] Walter W Cook, 'The Logical and Legal Bases of the Conflict of Laws' (1924) 33 Yale LJ 457.
[26] Ibid 469.
[27] Paul Lagarde (ed), *La reconnaissance des situations en droit international privé* (Pedone 2013).

rules is therefore a highly precarious support for a positivist understanding of the field. Such rules cannot solve the problem of circularity faced generally by positivist theory, inasmuch as their own relevance must also be demonstrated.

At any rate, constructions such as Cook's incorporation theory can mask only thinly the reality of PIL operating under an explicit demand against the circular application of institutional rules, and in favour of keeping that question open to pre-institutional grounds of legality. As such PIL can do something that the domestic practice is not well placed to deliver: it can support the constraint of non-circularity which is the result of the theoretical objection to positivism, because it already operates under a constraint of non-circularity that forces the judge to make reference to pre-institutional considerations. Although the constraint applies equally to domestic law, the practice of PIL is ideally placed to highlight its presence, given the nature of the question of determining applicable law put to judges in cross-border cases.

III. The Dominant Appeal to Individual Autonomy

In this section we turn to discuss in more detail both the content of pre-institutional considerations and how they operate in PIL legal reasoning. We will begin by identifying a dominant practice within current PIL, before turning to its critique – namely, that it flouts the requirements of a relational conception of morality.

We cannot hope here to offer a sufficiently nuanced portrait of modern-day PIL practice, in all its complexity. For present purposes, however, it is fair to say that said practice is generally characterised by the fact that it is pulled in two different directions: in one by those that call for a greater and more exclusive focus on private interests[28], and in another those that advocate for PIL to take up a broader 'regulatory function'[29] or 'governance function'[30] in the pursuit of various public values. As we will see below in greater detail, current PIL practice reflects this tension through a somewhat awkward compromise: on the one hand, there is a disciplinary commitment to individual autonomy as a guiding, pre-institutional requirement when approaching the choice of law problem; on the other hand, the ex-post intervention of institutional systems is nevertheless desirable and does occur in order to enforce contingent public policies or morality (such as the protection of the environment,

[28] See eg Pierre Mayer, 'Le phénomène de la coordination des ordres juridiques étatiques en droit privé' (2007) 217 RCADI 9.
[29] See eg Robert S Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 Columbia J Transnat'l L 209.
[30] Horatia Muir Watt and Diego Fernández Arroyo, *Private International Law and Global Governance* (OUP 2014).

consumers, minors, etc.). We then show that this leads to a de-composition of private-public, and ultimately side-lines the demands of relational justice.

To begin with, it is no doubt true that PIL scholarship has long abandoned any serious attempt at constructing its discipline on the basis of a logically ordained system of abstract concepts. As argued by various authors of different traditions,[31] it is now a basic assumption that conflicts rules are functionally oriented, much like any other rule. This has not however resulted in PIL becoming entirely agnostic about values and policy goals. Indeed, the discipline remains committed to a very particular (and reductive) view of its own functionality. At all levels, PIL practice is dominated by an appeal to maximising individual autonomy as a guiding normative principle, which is crucially viewed as pre-existing institutional conflicts rules. It is on this basis that the content, structure and interpretation of conflicts rules tends to be justified. Other more 'public' or 'collective' values, such as environmental protection, are introduced ex post, through the exceptional intervention of established legal orders. By smuggling into legal reasoning a pre-institutional idea of individual autonomy, which functions like a regulative ideal in orienting the legal reasoning about the applicable law, PIL practice manages to steer clear of the twin dangers of positivism – the Scylla of the gap and the Charybdis of circularity.[32]

What do we mean by individual autonomy? Roughly speaking (or: for present purposes), we understand individual autonomy to be premised on the less demanding idea of negative freedom, which merely requires the absence of any external obstacles on the deliberate agency of individuals. On this conception, any claims or entitlements that flow from individual autonomy are prima facie justified, but can become conclusive and binding on other individuals only after they have been authorised omnilaterally, i.e. in a manner that involves all parties concerned. A mainstream reading[33] submits that omnilateral authorisation requires the contribution of public institutions which embody the will of a collective subject that can legitimately enforce said individual claims as binding for everyone. In this picture, the constitution of an institutional legal order is condition *per quam* conclusive legal rights and obligations obtain (conversely, in part IV we pursue a picture which reverses the received order of explanation: relations between individuals may also acquire legal quality prior to and independently of an institutional framework of the kind stipulated by the mainstream

[31] Bernard Audit, 'Le caractère fonctionnel de la règle de conflit (sur la « crise » des conflits de lois)' (1984) 186 RCADI 219; Lea Brilmayer, 'The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules' (1995) 252 RCADI 9.

[32] See above Pt II.

[33] We refer here to Arthur Ripstein's analysis of omnilaterality in his seminal *Force and Freedom* (HUP 2009). See further the discussion below Pt IV sec B.

solution – to render this idea plausible, we resort to an alternative notion of freedom, 'freedom as independence' and the cognate notion of omnilaterality or publicity that it engenders).

The term 'individual autonomy' does not usually appear in PIL. However, the importance PIL places on this notion is manifested in its disciplinary commitment to the protection of the legitimate expectations of private parties. This means that the determination of the applicable law should correspond with what the private parties involved predicted. It is somewhat of a defining commitment, without which the very unity of the discipline of PIL is said to be threatened.[34] From it flow several key tenets of modern PIL practice, such as what is often referred to as the principle of 'proximity' (i.e. that the cross-border relation should be subject to the law with which it has the closest connection, since this is the law that the parties can naturally expect to apply),[35] the preservation of international harmony of solutions (i.e. that the relation receive the same legal treatment in different jurisdictions, as parties cannot expect to, say, be married in one country but not in the other)[36] or the now extremely widespread principle of party autonomy (i.e. that the parties, particularly those in a cross-border contractual relation, should be able to choose the governing law, since by definition that law then aligns with their expectations).[37]

It is of course true that the notion of legitimate expectations is not unique to PIL. In this context, however, it proves to be particularly problematic, in a way that reinforces the argument against strictly positivist positions. In a purely domestic relation, it can be easily argued that the legitimate expectations of parties simply refer back to the positive rules of the legal system: they will thus be reduced to an application of the substantive rules of that legal system that is clear and devoid of judicial creativity. The possibility of this explanation disappears, however, in the context of an international relation, which forces PIL lawyers to provide a pre-institutional justification. Indeed, what does it mean to say that the application of any particular law is the most predictable, or most consistent with the parties' legitimate expectations? In a cross-border context, there is not one legal system that can claim authority in shaping what the parties to the relation can expect, since by definition several legal systems are involved and the question is precisely which should govern. It may well be that the courts of several jurisdictions, each with their own conflicts rules, are potentially called upon to adjudicate the dispute. It is not therefore possible to rely on any particular institutional legal system to define which law can be expected to govern. Thus, to argue that e.g. the *lex loci delicti*

[34] Paul Lagarde, 'Le principe de proximité dans le droit international privé contemporain' (1986) 196 RCADI 9, 28.
[35] Ibid.
[36] See eg Bertrand Ancel, 'Droit international privé', in Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique* (Quadrige/Lamy-PUF 2007) 493.
[37] Alex Mills, *Party Autonomy in Private International Law* (CUP 2018) ch 2.3.1.

is the law that most closely aligns with the parties' expectations is necessarily based on some substantive idea about what those parties are entitled to expect[38]. The omnipresent reference in PIL to the protection of legitimate expectations therefore refers to some pre-institutional requirement, present before the intervention of any legal system, that is said to impose the application of a particular law as the most 'predictable' one.

What is key is that, when determining the content of these expectations, PIL practice will focus on how each individual party stands in relation to institutional legal systems, rather than to each other. In other words, the notion of legitimate expectations is understood as unilateral, rather than reciprocal. Instead of an assessment of relational justice or morality, the guiding consideration will be the preservation of individual agency, specifically to protect it from the specific danger, inherent in entering into relations that cut across multiple legal orders, of seeing itself subject to a positive legal regime that it could not anticipate and prepare for. This may of course prove a difficult exercise, given that a relation involves several people, each of which may have different expectations. In practice, this is often solved by prioritising the perspective of one of the parties (e.g. in relation to product liability, by focusing exclusively on the ability of manufacturers to foresee the applicability of a law other than that of its place of business).[39] It may also be possible to take both parties into account, but it will be done in order to come to a conflicts rule that strikes a correct balance between their respective interests.[40] Those expectations will be deemed identical where the parties have reached an agreement on applicable law, but they will nevertheless remain individual (in the sense that they originate in unilateral, but converging, points of view). In any case, a relational point of view, focusing on the reciprocal expectations and responsibilities of e.g. tortfeasor and victim, will usually be lacking. The starting point will instead be a commitment to individual autonomy.

Furthermore, this view of pre-institutional morality interacts with institutional legal systems, and particularly with those identified as applicable through the operation of the choice of law process, in grounding the legal relation. In general, it would seem that the grounds of legal obligations should be understood in pre-institutional terms even though their 'fleshing-out' and enforcement might require a fully institutionalised legal order to implement them. Indeed, the preference for pre-institutional private morality (in the commitment to the protection of individual expectations) can arguably be

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[38] Ibid.

[39] See eg CJEU, C-343/19, *Verein für Konsumenteninformation v Volkswagen AG* [2020] ECLI:EI:C:2020:534 (focusing on the ability of manufacturers to foresee claims against them in jurisdictions where they have commercialised their products).

[40] See eg the preamble to the Rome II Regulation (EC) No 864/2007, para 16: 'Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage'.

said to reflect a suspicion that conventional or other institutional constructs are too contingent to serve as proper grounds of normative/legal relations, as well as a threat to the unity of the PIL discipline. The upshot of this view is that institutionalised legal orders stand in an instrumental relation to some pre-institutional moral requirements that are of an exclusively private nature.[41] Institutional arrangements might offer an advantage when it comes to the conclusive determination and enforcement of the law but are not a secure ground for legal relations and the obligations those engender.

At this point, it can be seen that, ultimately, the dominant approach defends a *decomposing view* of the law applicable to legal relations by drawing up a sharp distinction between a private and a public dimension of legality. By leaning on the thin notion of negative freedom this view divorces the question about the grounds of someone's rights from the one about their public dimension, i.e. their bindingness on everyone else. Unsurprisingly, this false dichotomy saddles legal rights with a defect whose remedy must be postponed to a later stage: legal rights can initially arise only as inconclusive normative demands of individuals which, to develop a public effect, must be linked to a collective agent that renders them binding or effective.[42]

In this picture, the private dimension or privacy is lined up with the pre-institutional requirements, those that are necessary for avoiding circularity in answering the question of applicable law; the public dimension or publicity, on the other hand, is identified with post-institutional arrangements which aim at effectiveness but are bound to remain contingent and optional. This dialectic is amply reflected in the practice of PIL where privacy and publicity are treated as engendering conflicting standards for determining the applicable law. Advancing a certain choice of law argument will often consist in emphasising the importance of a particular interest over another – typically, the protection of the legitimate expectations of private parties (i.e. individual autonomy), against the achievement of a certain result in the public interest (e.g. the preservation of the environment or the promotion of international commerce) or the protection of a particular group that is deemed to be vulnerable (such as minors, consumers or workers).[43] Various techniques will be used to reach some sort of compromise between the two. Usually, one will be seen as operating as a filter/mitigating factor on the other. Thus, private morality will be implemented first, in order to determine the normal operation of conflicts rules, but publicity will be brought in to mitigate extreme results, notably via the *ordre*

[41] Sagi Peari's account in 'The Normative Structure of Choice of Law' (n 2) puts forward a sophisticated instance of the strategy we criticise.
[42] Painting with a broad brush, this is the account offered by Arthur Ripstein, *Force and Freedom* (n 33) 85, 106, 145-147. For further discussion refer to below Pt IV, sec B.
[43] See below Pt V for a concrete example.

public exception or the mechanism of overriding mandatory rules. However, such efforts usually remain hostage to the pre-conceptions of the dominant approach, for they still regard the role of institutional law as posterior to some pre-established private morality that generates pre-institutional obligations, and which thus is granted some sort of priority.[44] And crucially, the intervention of post-institutional requirements will not usually allow for an assessment of the requirements of relational justice: as stated, its focus will be to advance certain collective interests over purely individual ones.

Anticipating some of the discussion that follows, we advance an understanding of publicity which relies on the alternative notion of freedom as independence, which we contrast to negative freedom. Freedom as independence, in the sense we use it, situates individual agency in the context of cross-cutting relations between individuals who interact under a normative requirement to act consistently with each other's freedom. As such, freedom as independence ultimately relies on the *interdependence* of interacting individuals because compliance with the demand of consistency of freedom requires that each of the interacting parties be under a duty to help every other party to realise their freedom. This key insight lends to publicity or omnilaterality a fresh angle: publicity is not premised on an act of setting up a 'common' structure that unites disparate individuals; instead, it obtains as the result of the requirement to act for the sake of each other's freedom. This will be done in the Part that follows, through a revision of Savigny's intellectual legacy for PIL.

IV. Reinstating a Savignian Focus on Relational Justice through a Revised Reading of Kantian Right

A. Reclaiming Savigny's relational heritage

It is often said that modern day PIL practice is 'Savignian'. This description is based on the perceived contribution of Savigny to so-called choice of law methodology, i.e. the reasoning by which applicable law should be determined.[45] Against the traditional 'statutist' school, which would focus on the substance of the laws in conflict to determine the unilateral scope of application of each, Savigny argued in volume VIII of his famous 1849 opus *System des heutigen römischen Rechts* for the method later known as 'bilateralism' or 'multilateralism'.[46] This consists in distinguishing different categories of relations (matrimonial, succession, contractual, etc.), and identifying a 'seat' for each of them (such

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[44] Which in turn contributes decisively to the role played by PIL in global governance: see Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 Transnat'l LT 347.

[45] Florian Rödl, 'Necessary Unity' (chapter in this volume)

[46] Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (2nd reprint of the 1840 edition, Scientia Verlag Aalen 1981); see English translation of vol. 8 by William Guthrie, *Private International Law* (Edinburgh, T&T Clark Law Publishers 1880).

as place of celebration of the marriage, domicile of the deceased, place of contracting, etc.). When confronted with a cross-border case, a judge will first categorize the case as pertaining within one of those PIL-specific categories, and then apply the law of its seat (or connecting factor in modern parlance). Because each relation can only have a single seat (i.e. located in one jurisdiction), this method necessarily leads to a single applicable law. This also means that it operates without any form of preference for any particular system (including the *lex fori*), and without consideration of the contents of the potentially relevant laws (and it is for this reason that the 'Savigny method' is praised for its 'neutrality').[47]

The reverence for Savigny in current PIL scholarship sometimes borders on the semi-religious.[48] More importantly, it seems to be reflected in conflicts rules found in positive law, including treaties (e.g. the Hague Conventions on choice of law), legislation (e.g. the EU Rome Regulations) and case law (e.g. the judicially elaborated rules in the common law world). In all of these, there is a clear preference for determining the applicable law through bilateralist rules that link particular categories of cases to certain connecting factors. It is for this reason that some have described modern PIL as 'Savigny's triumph'.[49] However, as pointed out by various scholars,[50] current PIL practice can only be said to be Savignian in a highly attenuated sense – and should for this reason be described more appropriately, at the most, as 'neo-Savignian'.

Indeed, key features of current PIL practice are hard to reconcile with Savigny's work. Against the widespread positivism, the German scholar rejects the politics inherent in sovereign acts as irrelevant to PIL. In his work, conflicts rules are not created through legislative fiat (contrary to more modern attempts by authors like Ago or Cook at a positivist reading, as already explained), but should be discovered by scholars through an examination of the 'nature of things'.[51] More specifically, the focus of their examination should not be individual autonomy, but legal relations, their inner logic and needs, as found in common in a particular community (in Savigny, that of Christian nations). Thus,

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[47] See eg Mathias Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1999) 39 Va J Int'l L 571, 594.

[48] Pierre Mayer, Vincent Heuzé and Benjamin Remy, *Droit international privé* (12th edn, Montchrestien 2019) (para 68: 'Savigny a fait jaillir la lumière de la vérité au sein d'une quasi-obscurité. Et bien que les ténèbres ne se soient pas imédiatement dissipées, bien aussi qu'aujourd'hui des critiques véhémentes, venues notamment d'Outre-Atlantique, cherchent à la voiler, c'est cette lumière qui éclaire tout le droit international privé contemporain').

[49] Reimann, 'Savigny's Triumph*?*' (n 47).

[50] See in particular Andreas Bucher, 'Vers l'adoption de la méthode des intérêts ? Réflexions à la lumière des codifications récentes' [1994-1995] *Travaux du comité français de droit international privé* 209, 211; Ralf Michaels, 'Globalizing Savigny? The State in Savigny's Private International Law and the Challenge from Europeanization and Globalization' in Michael Stolleis and Wolfgang Streeck (eds), *Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung* (Nomos 2007) 119, 126.

[51] This is precisely the notion that draws severe criticism against Savigny by positivists such as Wächter (n 22). On Savigny's appeal to the nature of things from a PIL perspective, see Henri Batiffol, *Aspects philosophiques du droit international privé* (Dalloz 1956) 163.

his approach can be described as 'relational', inasmuch as relations, and the interpersonal justice requirements that weigh upon them, are the primary unit of enquiry on which his conflict of laws system is built.[52]

It is therefore possible to claim Savignian thought as the basis on which to build an alternative approach to the determination of applicable law, one that is both anti-positivist and relational. This is consistent with recent scholarship, which has engaged in detailed reconstruction of Savigny's work within the intellectual context of his age, to convincingly demonstrate that his account of legal rights resists a direct subsumption to ideas of pre-institutional individual autonomy.[53] Accordingly, the thesis has gained in prominence that the sources of legal rights in Savigny's account are not pre-institutional entitlements of individuals, but entirely dependent on and linked to interpersonal normative principles of peoples and their social organisation.

Moreover, Savigny's appeal to the vague notion of 'the people' might be explained by his reluctance to drive a wedge between the interpersonal dimension of legal relations and the political institutions of a society. Indeed, there is clear evidence that Savigny intended to arrive at a more nuanced position that transcends the dualist thinking we encountered earlier (which aligns pre-institutional morality with individual autonomy and public or interpersonal morality with political institutions), when in his exploration of the nature of legal relations he introduces a distinct level of analysis that makes appeal to principles of interpersonal morality.[54] Along these lines we suggest that his references to 'the people' far from reviving a statist account of legal relations, should be understood in the direction of an effort to introduce the dimension of a relational morality which is pre-institutional and non-individualist, and at the same time meets the circularity objection to positivism.

It becomes appropriate, for these reasons, to take Savigny's work as the starting point of our alternative approach to PIL, as one based on relational justice. However, in order to support and elaborate our suggested interpretation of Savignian legal relations we turn to another illustrious but earlier German thinker, Immanuel Kant, and his account of legal right.[55] Such appeal is supported both by the intellectual debt that Savigny's own system owes to Kant, but also by the fact that his

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[52] See Roxana Banu, *Nineteenth-Century Perspectives on Private International Law* (OUP 2018).
[53] Ibid 189-201.
[54] Ibid 200.
[55] The question whether Savigny can be interpreted in line with the Kantian tradition has been debated hotly in the German-speaking literature. Although we cannot hope to resolve such a complex debate here, there are sufficient grounds to suggest that a Kantian interpretation of Savigny is both plausible and represents a coherent position in terms of intellectual history. For a detailed account of the relevant debate, see Knut W Nörr, *Eher Hegel als Kant: Zum Privatrechtsverständnis im 19. Jahrhundert* (Schöningh, 1991). We are indebted to Alexander Somek for cautioning against oversimplification and pointing at the relevant literature.

account proposes to explain the concept of legal right through an interpersonal or relational principle of action, i.e. the universal principle of right (for short UPR), which consists in the following: 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'[56]

We suggest that UPR expresses the meaning of freedom as independence, which we earlier contrasted to the dominant paradigm of individual autonomy. Notably, UPR considers legal relations to be explanatorily antecedent to rights and proceeds to derive legal rights from legal relations, which are understood as pre-institutional and interpersonal relations between agents. In contrast, more mainstream liberal understandings of Kantian right have relied on the priority of rights, as pre-institutional entitlements, from which legal relations between parties are derived, usually with the help of the institutional apparatus of state law. The importance of the proposed move is hard to understate: if the priority of relations over individual rights can be supported by an argument based in Kant, then the Savignian idea of the legal relation would be restored to its earlier prominence as the key conceptual tool of the theory of PIL.

B. A Quasi-Lockean Reading of Kantian Right

We need first to clear some conceptual ground and anticipate some objections, before embarking on our proposed interpretation. Traditionally, UPR has been understood in a quasi-Lockean manner that grounds it in a more fundamental principle of individual freedom, which partly overlaps with Kant's idea of innate right: 'Freedom (independence from being constrained by another's choice) […] insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.'[57]

The quasi-Lockean reading of Kantian right affirms the ideal of negative freedom and functions as a principal source of appeals to individual autonomy which undergird the dominant approach in PIL as we encountered it earlier. In its more sophisticated version, the quasi-Lockean reading introduces an interpersonal dimension to Kantian rights by suggesting that, although grounded in an absolute innate right, they cannot materialise independently of the public institutions of a political community. To that extent, legal rights take hold in virtue of reciprocal legal relations between individuals which

[56] Immanuel Kant, 'The Metaphysics of Morals' in Mary Gregor (ed), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (CUP 1996) 6:230.
[57] Ibid.

obtain because of actions of state institutions.[58] On this more refined scenario, pre-institutional individual autonomy (innate right) plays the role of a background structuring ground of legal relations, which however can only be fully constituted by the public institutions of state-based law.[59] Thus, we read in Ripstein: 'People are entitled to independence simply because they are persons capable of setting their own purposes.'[60] And elsewhere, '[…] the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from a public legal order.'[61] Taken together, these statements amount to the standard liberal understanding of independence and freedom, according to which law is a legitimate external constraint on a pre-existing, unconstrained notion of individual autonomy.[62]

The picture encouraged by the quasi-Lockean reading of Kantian right, resists a reading that would put legal relations on the centre stage of PIL. The difficulty is clearly illustrated by domain-specific accounts in PIL that are sympathetic to the sophisticated quasi-Lockean interpretation of Kantian Right. A recent powerful statement understands PIL rules as a body of universal guidelines that assign jurisdiction among states to publicly determine the existence of private law claims.[63] Although these rules derive their validity from domestic sources, their content remains neutral toward the private rights of particular domestic systems. To reconcile these demands, the account must resort to a universalist conception of individual autonomy, which ends up taking priority over publicly constituted rights:

> Ultimately [PIL is] founded on the idea of the universality of the basic private-law concepts […] All private laws are about private rights, rights that subsist in one's own person, in things or in another's deeds, and

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[58] The *locus classicus* is Arthur Ripstein's, *Force and Freedom* (n 33), which has set the agenda of the debate on Kant's philosophy of right. Although Ripstein proposes to understand Kantian right in a relational manner, his focus on innate right ultimately renders his account a version of the quasi-Lockean reading. See for related criticism of the philosophical premises of the quasi-Lockean reading: Katrin Flikschuh, 'Non-Individualist Innate Right', in her *What is Orientation in Global Thinking?* (CUP 2017); Katrin Flikschuh, 'Human Rights in Kantian Mode: A Sketch' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015); Katrin Flikschuh, 'Justice without Virtue in 'Justice without Virtue" in Lara Denis (ed), *Kant's Metaphysics of Morals. A Critical Guide* (CUP 2010); and the contributions by Katrin Flikschuh and George Pavlakos to a symposium on Force & Freedom: Katrin Flikschuh, 'Innate Right and Acquired Right in Arthur Ripstein's *Force and Freedom*' (2010) 1 Jurisprudence 295; George Pavlakos, 'Coercion and the Grounds of Legal Obligation: Arthur Ripstein's *Force and Freedom*' (2010) 1 Jurisprudence 305; as well as Ripstein's response there, 'Reply to Flikschuh and Pavlakos' (2010) 1 Jurisprudence 317. In a similar critical vein, but less explicitly, see AJ Julius, 'Independent People' in Sari Kisilevsky and Martin J Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017).

[59] This appears to us to be the rationale underpinning the account of legal rights in Sagi Peari (n 2). As such it functions as the theoretical analogue of the dominant practice in PIL which views institutions as instrumental in 'fleshing-out' pre-existing moral facts of individual autonomy; see above Pt III.

[60] Ripstein, *Force and Freedom* (n 33) 17.

[61] Ibid 9.

[62] For a recent statement of the standard quasi-Lockean interpretation of Kant, see Louis-Philippe Hodgson, 'Kant on the right to freedom' (2010) 120.4 Ethics 791; and critical discussion in Katrin Flikschuh, *What is Orientation in Global Thinking?* (n 58) 76.

[63] Rödl, 'Necessary Unity' (n 45).

> about the claims that result from the infringement of these rights. This is what constitutes private law […], even if the individual provisions differ in substance from one legal order to another[64]

Here as before, relations between parties are understood as subsisting on a notion of freedom according to which law is a legitimate external constraint on the antecedently unconstraint freedom of each, or the notion we earlier described as negative freedom. Unsurprisingly, within this framework legal relations are derived from pre-existing rights, together with the contribution of state-institutions. Thus, '[t]he choice of law rules […] submit a private-law claim to the prescriptive jurisdiction of a certain state. The existence and contents of the claim are then to be evaluated under the law of the state.'[65]

Ultimately, legal relations are relegated to the role of a subsidiary for individual autonomy and are further rendered dependent on the sources of the legal system of the judge. No sooner has this picture set in, than the horns of a familiar dilemma loom large: either legal relations become redundant as meaningful pre-institutional sources of legal rights or they are circularly grounded in positivistic sources.

C. A Progressive Reading of the Universal Principle of Right

Is there room for an alternative reading of Kantian right that grounds rights in pre-institutional relations, with an eye to overcoming both positivism and the dominant approach in PIL? Two desiderata must be met by any such reading: first, that it be grounded in pre-institutional normative considerations; and that, second, these considerations be public or interpersonal, as opposed to based on individual autonomy.

The most productive place to start is the relation between the two central principles of Kant's account of legal rights, i.e. the UPR and innate right. On widespread agreement, UPR is understood as a pre-institutional moral principle that specifies conditions of rightful interaction among a plurality of persons.[66] The relational and pre-institutional structure of UPR offers considerable resources for explaining interacting parties' relations as legal, while resisting the temptation to subordinate them to

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[64] Ibid 8.
[65] Ibid.
[66] Thus, both the representatives of the quasi-Lockean reading of Kantian right and their critics agree on this. See, instead of others, Ripstein, *Force and Freedom* (n 33) 9 and Flikschuh, 'Human Rights in Kantian Mode' (n 58) 662. It cannot be overemphasised, however, that this view is far from mainstream. There is a large body of important literature that disputes the moral character of UPR. See, instead of others, the influential paper by Marcus Willaschek, 'Which Imperatives for Right?' in Mark Timmons (ed), *Kant's Metaphysics of Morals. Interpretative Essays* (OUP 2002).

any antecedent demands of individual autonomy. The main potential block is the claim that UPR is subordinate to innate right, which would involve that individual autonomy operates as an additional ground of the relevant relations. To remove the block the first task is to inverse the explanatory priority between the two principles, as Katrin Flikschuh has insightfully suggested in recent work.[67]

On this proposal, UPR is a moral principle which structures the relations between interacting parties in a manner that subjects them to standards that secure the consistency of the action of each with the independence of everyone else.[68] Meanwhile, innate right does not constitute an additional ground of UPR or the relation it specifies, but merely announces the moral status enjoyed by anyone who is subject to the requirements of UPR, i.e. the status of an agent as independent of the choice of others, because everyone is under an obligation of acting on principles that secure consistency with each other's independence. Providing ample textual evidence, Flikschuh argues convincingly that UPR specifies the central moral relation in Kant's account of legal rights, while innate right captures the moral status that pertains to anyone who stands in that moral relation.[69] Accordingly, the general concept of right pertains to a 'formal, external, strictly reciprocal moral relation'[70]:

> [T]he concept of right, insofar as it is related to an obligation corresponding to it, has to do, *first*, only with the external and indeed practical relation of one person to another […] But *second*, it does not signify the relation of one's choice to the mere wish of the other, but only in relation to the other's *choice*. *Third*, in this reciprocal relation of choice no account at all is taken of the *matter* of choice […] All that is in question is the *form* in the relation of choice on the part of both…[71]

While liberal accounts that endorse the dominant approach agree with Flikschuh that UPR grounds a pre-institutional relation, they consider innate right as an additional ground of the relation which is more fundamental than UPR. In contrast, when the order of explanatory priority between UPR and innate right is inversed, a completely new understanding emerges of the relation between rights and legal relations. Under the priority of innate right, legal relations are demoted to tools for 'realising' antecedent claims of individual autonomy.[72] Not so when UPR takes over as foundation of legal rights: rights are then grounded in the pre-institutional relation specified by UPR, the legal relation.

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[67] Flikschuh, 'Non-Individualist Innate Right' (n 58).
[68] We should add here: in the absence of any more particular agent-relative requirements – such as the morality of family or friendship.
[69] See Flikschuh, 'Human Rights in Kantian Mode' (n 58); also 'Non-Individualist Innate Right' (n 58) 82-87, where however the emphasis is on showing the interdependence between innate and acquired right.
[70] Flikschuh, 'Human Rights in Kantian Mode' (n 58), 662.
[71] Kant, 'The Metaphysics of Morals' (n 56) 6:230, as edited by Flikschuh, 'Human Rights in Kantian Mode' (n 58) 662.
[72] Here law enters the picture as legitimate external constraint on the antecedently unconstraint innate right of each.

In this context innate right functions merely as a signpost for the moral status of each of the interacting persons, *once they are parties to legal relations*.[73]

There is one more hurdle to iron out before we can rely on the suggested reconstruction of Kantian right. Assuming, arguendo, the explanatory priority of UPR over innate right, in virtue of what does UPR render legal relations interpersonal or public, as opposed to merely uni- or even bi-lateral?[74]

Recall our discussion of freedom as independence from earlier. Freedom as independence is premised on a particular kind of *interdependence* from others: one when each of the interacting parties is acting with a view to the freedom of everyone else. As we have argued in this section, UPR makes this capacious notion of freedom into a pre-institutional standard of interaction which enjoins agents in legal relations. The question of publicity arises about the range of those who can partake in relations of freedom as independence. It asks: 'who can be included in the scope of groups whose members act on a set of obligations that help each to act with a view to each other's freedom?' In line with an earlier suggestion in Part III, a typical route for answering this question looks to identify a 'collective' agent in whose name the said set of obligations can become binding for all those involved.

A common strategy submits that publicity and omnilaterality would require the institutionalisation of the demands of UPR through acts of public legislation.[75] In this manner, a collective 'we'-agent is called to life, on whose name individual claims can become binding on every interacting party. This suggestion meets with two potential objections: first, the objection from the circularity of positivism as we encountered it earlier: if the requirements of legal relations are ultimately grounded in institutional sources, then a fresh need to appeal to pre-institutional considerations will arise, in order to counter the indeterminacy of institutional sources, and so on *ad infinitum*.[76] The second objection

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[73] In often overlooked work, Karl Larenz has argued for a view that supports our interpretation of Kant. Relying on passages from the *Metaphysics of Morals*, he appeals to a pre-institutional, fundamental legal relation [*das rechtliche Grundverhältnis*] to specify who may count as a person, in the sense of becoming the subject of regulation through legal norms. Importantly for our purposes, Larenz understands the relevant relation to be based on a reciprocal duty between interacting agents to respect each other, which obtains antecedently to the institutions of any state-based legal order. See Karl Larenz, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts* (CH Beck, München 1967) 56-61.

[74] Omnilaterality indicates that the obligations arising from the relevant relations are tendered 'in the name of everyone' who is part of the relation. We assume here that bilaterality is not sufficient for legal requirements. For more on the omnilateral scope of legal obligations, in a Kantian mode, see Ripstein, *Force and Freedom* (n 33) ch 6, 148-156.

[75] Ibid; Flikschuh, *What is Orientation*? (n 58) ch 3 and 'Justice Without Virtue' (n 58).

[76] Although we cannot discuss in detail, this seems to us to be the upshot of Flikschuh's account. After having disentangled UPR from innate right, she reverts somewhat puzzlingly to public institutions. Flikschuh's move seems to proceed on the assumption that UPR requires that the obligations it imposes on the parties of the relation be institutional. But this is too quick; UPR, as she has argued, is a moral principle that explains what counts as rightful action among a plurality of persons and should not be collapsed into the conditions of an institutional legal order. The two issues should be kept analytically distinct, even though UPR can be employed to support the Kantian duty to enter the civil condition. Ultimately, her suggestion invites two criticisms: apart from reviving the thread of circularity, it is also redundant, as we explain next. See Flikschuh, 'Non-Individualist Innate Right' (n 58).

points out the redundancy of institutionalisation in the context of the relational reading: why turn to institutional facts if we have already established that legal relations are grounded in pre-institutional inter-personal considerations?

As discussed, the quasi-Lockean interpretation requires an appeal to institutional sources to mitigate its overreliance on individual autonomy and explain how the antecedent individual entitlements of each party can be authorised *vis-à-vis* everyone else.[77] But there is no symmetric demand to resort to an institutional public order once we have adopted the relational interpretation of legal rights. For, the UPR bestows on the requirements of legal relations an interpersonal or public dimension by recommending them 'in the name of' anyone who is party to the relation.[78] It does so because the requirement of freedom as independence stipulated by UPR, defines those requirements as the features of a pattern of interaction whose subject is the joint agent made up by everyone who is under the general, abstract obligation to help those with whom she is interacting to realise their freedom.[79]

In contrast to the liberal reading, legal rights are not antecedent entitlements that need to be mutually reconciled within an institutional matrix that is acceptable to all. Legal rights, on the relational reading, are grounded from the outset on the interpersonal normative demands of the legal relation.[80] Although a more detailed analysis of these demands escapes the confines of this chapter, they will typically include a principle of fair distribution[81] and a collective duty of care, alongside the class of

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[77] See Ripstein, *Force and Freedom* (n 33); and Rödl, 'Necessary Unity' (n 45). Cf with discussion in Flikschuh, *What is Orientation in Global Thinking*? (n 58).

[78] There are other recent attempts to understand law's normative force with reference to a public dimension, consisting in a collective or joint subject, in whose name the demands of the law are claimed. Seminal among them is Hans Lindahl's, *Fault Lines of Globalisation* (OUP 2013), where the issue of publicity arises in the context of a more ambitious project to understand the boundaries of legal obligations independently of the Westphalian legal order. In their insightful work, Avihay Dorfman and Alon Harel, 'A Public Conception of Law' (MS), also propose to explain legal obligations by reference to the public dimension of law. However, their view is distinctly different from ours, as they argue that law's publicity requires antecedent actors (officials) who speak in the name of their citizens. In contrast, our view tackles these issues in the reverse order: for anyone to count as speaking in the name of a plurality, one must first explain in virtue of what its members stand in the relevant legal/political relation. Our relational account of Kantian right aims precisely to provide such an explanation.

[79] To put it differently: on our account it is not possible, on pain of begging the question, to 'construct' the requisite public agent antecedently to the requirements of freedom as independence as stipulated by the UPR.

[80] Figuratively speaking, while the liberal reading sees rights as part of a Natural Private Law, the relational reading we propose defends the idea of a Natural Public Law. See in the same vein, Julius, 'Independent People' (n 58); Pavlakos, 'Redrawing the Legal Relation' (n 13); Pavlakos, 'Agent-Relativity without Control: Grounding Negligence on Normative Relations' in Veronica Rodriguez-Blanco and George Pavlakos (eds), *Negligence, Agency and Responsibility* (CUP 2021) 118. Alexander Somek has put forward a sophisticated account of legal relations which shares with ours two at least features: it is non-positivist and is inspired by a conception of freedom that is grounded on relations of mutual dependence. For all the similarities, however, Somek's account departs from ours in interpreting mutual dependence as the result of a prudential argument: 'You make yourself into an instrument for the realization of […] others […] for the reason that you have to make room for others to be given room by them in return' (Alexander Somek, *The Legal Relation* (CUP 2017) 127.

[81] Demands of fair distribution arise because, on our account, legal relations may include not only the parties that appear before the court but also anyone else whose actions affect or are affected by the parties. As we seek to demonstrate below in Pt V, an expansive understanding of the scope of legal relations has considerable advantage when compared with the

responsibilities that apply reciprocally to each party to avoid engaging in wrongdoing and other *pro tanto* unjustifiable acts that one person might commit against another on a particular occasion.[82] Taken together these standards formulate the central qualitative features of patterns of action through which each of the parties to the legal relation acts consistently with the principled actions of the others.[83]

V. Downstream Implications for Choice of Law Practice: The Example of Claims Against Parent/Buyer Companies

A full consideration of the downstream implications of the approach defended here is beyond the scope of the chapter. We shall nevertheless conclude by pointing out the general direction in which this approach should push PIL practice, with some brief illustrations from a highly topical issue, and one presenting a strong moral dimension – the law applicable to claims against parent or buyer companies for harm caused by their subsidiaries or providers overseas. This issue, perhaps more than any other in contemporary practice, illustrates the need to refer to interpersonal principles of justice, which is what the relations-first approach has recommended.

Let us begin with a brief presentation of this controversial area of PIL practice. The current focus of debate is the idea, behind which there is considerable impetus, that parent companies within multinational groups, and buyer companies sitting atop transnational value chains, should contribute to the prevention of serious human rights violations or environmental harm, even if caused directly not by them but by actors abroad over which they exert some form of control. PIL plays an important part in this debate, given its contribution to historically cementing a general impunity for these acts, the Bhopal disaster being the most sadly representative example.[84] Indeed, it has traditionally been the case that courts at the place where the multinational is based have refused to exert jurisdiction over such claims (thus leaving victims with no choice but to resort to their own local courts, which are often less well-resourced), and these claims have been subject exclusively to the law of the place

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dominant positivist approach, in explaining the courts' appeal to principles of fairness or other re-distributive considerations in PIL. We thank Roxana Banu for pressing us to clarify this point.

[82] Cf with Aaron James' account of the morality of social practices. Essentially, James develops principles of interpersonal morality which regulate interactions of a plurality of persons, when those interactions constitute a social practice, in virtue of passing a threshold test. Aaron James, 'Distributive Justice Without Sovereign Rule: The Case of Trade' (2005) 31.4 Social Theory & Practice 533.

[83] See Julius, *Reconstruction* (book MS, version 7 December 2013, at www.ajjulius.net/reconstruction.pdf) 107. Notice that on the reconstruction we propose the requirements of legal relations are structural principles which authorise agents to engage in patterns of action that are mutually consistent. Legal rights in this context aim more about safeguarding such 'authorised' patterns of action rather than defending individual entitlements against others.

[84] Thousands of people died and many more injured in India as a result of a toxic spill by a subsidiary of the American corporation Union Carbide. Claims brought to US courts by the victims were famously dismissed on the basis of forum non conveniens, as Indian courts were deemed to be the proper venue: *In re Union Carbide Corp Bhopal Gas Plant Disaster*, 634 F Supp 842 (SDNY 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir 1987).

of injury (which typically contains lower standards of protection). To correct this perceived injustice, there is movement in favour of granting competence to the courts where the parent or buyer company is headquartered, and of allowing the law of that jurisdiction to govern the merits of the dispute. It is not possible to do justice here to such a complex question, which is currently the subject of much controversy, rapidly evolving case law in several jurisdictions, multiple legislative proposals some of which have become law, and about which so much ink has been spilled.[85] We will nevertheless use it to illustrate more concretely the interest of our approach – namely, that it allows us to frame more appropriately discussions on this issue (in contrast to mainstream approaches to choice of law), and thus feeds into the elaboration of novel conflicts rules, the (re)interpretation of those currently in force, and the development of alternative methodologies.

First of all, how do mainstream approaches frame discussions around the content and operation of conflicts rules on this issue? These discussions tend to be structured in a familiar way, with policy-driven arguments meeting invocations of predictability or parties' expectations. Take for instance the debate around the reform of the EU Rome II Regulation. It has been proposed that the victim should be able to choose the applicable law, from a menu of legal systems with some connection to the dispute. The new conflicts rule would thus be 'result-oriented', as it would naturally lead to the most victim-friendly law within the menu on offer.[86] Such a proposal is usually justified on the basis of its contribution to the pursuit of a vague policy goal or substantive value such as 'the protection of victims'.[87] On the opposing side, concerns will be articulated about the resulting unpredictability – in particular, it is argued that replacing the time-tested principles of *lex loci delicti* or *lex loci damni* in favour of a choice by the victim will prevent corporations from being able to anticipate the law that would eventually govern.[88]

Both perspectives have in common their focus on the interests of one of the parties – either that of the victim of that of the perpetrator. They also lack much explanatory potential. On the one hand, as argued earlier, appeals to predictability are necessarily hollow or circular without some pre-

[85] See eg Giesela Rühl, 'Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective' (European Yearbook of International Economic Law 2021, forthcoming); Matthias Weller and Alexia Pato, 'Local Parents as "Anchor Defendants" in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends' (2018) 23 Uniform LR 397; Valérie Pironon, 'Le devoir de vigilance et le droit international privé. Influences croisées' [2018-2020] *Travaux du comité français de droit international privé* 223; Etienne Pataut, 'Le devoir de vigilance – Aspects de droit international privé' (2017) 10 Droit social 833.

[86] Olivera Boskovic, 'La loi applicable aux actions pour violations des droits de l'homme en matière commerciale' [2021] Recueil Dalloz 252.

[87] Ibid.

[88] Giesela Ruhl, 'Human Rights in Global Supply Chains: Do We Need to Amend the Rome II Regulation' (Conflictoflaws.net, 9 October 2020) <https://conflictoflaws.net/2020/human-rights-in-global-supply-chains-do-we-need-to-amend-the-rome-ii-regulation/>.

institutional conception about the extent of the legitimate entitlements of the parties. They should therefore be read as a pre-institutional vindication of the individual autonomy (i.e. negative freedom) of defendant corporations, but they do not contribute in any way to defining the proper extent to which their interests should be seen as legitimate and institutionally fleshed out. On the other hand, an interest in protecting victims also does not tell us much. To what extent and against what should victims be protected? And more importantly, why should this responsibility fall on the seemingly remote parent or buyer companies?

Mainstream approaches thus lead us to an impasse. The reason is their tendency to sidestep any relational enquiry, since answering these questions necessarily involves ideas about the responsibility of specific actors with regards to other specific individuals or groups, given the nature of the interaction between the two.[89] It is therefore more appropriate to read current debates as ultimately about, first whether the interaction between multinational companies and victims overseas is sufficient to qualify as a legal relation (which in the past may have seem doubtful), and second, if that legal relation did indeed exist, the requirements of relational morality weighing on it (to the effect that the company has some sort of a duty of care to prevent harm from befalling the local populations, particularly given the profits it reaps from these harmful activities). Discussions around the appropriate conflicts rules on this issue should therefore be explicitly framed and approached as fundamental debates about the proper extent of the transnational responsibility of corporations, and how choice of law may shape their relationship with the local communities overseas that are potentially affected by their profit-seeking activities.[90]

Having said this, the fact that we are appealing to pre-institutional requirements of relational justice *qua* constituents of party relations should not be seen as a call to disregard positive conflicts rules. We pointed out in Part II that our critique of positivism is not based on an Antigone-type appeal to a higher law that trumps the positive rules of the polity. Indeed, we are not arguing here for some sort of a super-constitution containing a superior set of conflicts rules or substantive standards.[91] Our appeal to relational justice, in line with the role classically attributed to natural law in PIL by

[89] On recent discussions around the revised notion of responsibility that may lie behind these moves, see generally Alain Supiot and Mireille Delmas-Marty, *Prendre la responsabilité au sérieux* (PUF 2015).
[90] See Banu, 'A Relational Feminist Approach to Conflict of Laws' (n 3) (considering how the application of *the lex loci delicti* may entrench the asymmetrical nature of the relationship between multinational corporations and local communities).
[91] In contrast to what others have done: see Hanoch Dagan and Avihay Dorfman, 'Interpersonal Human Rights' (2018) 51 Cornell Int'l LJ 361, 385 (arguing for 'global mandatory minimum standards' governing transnational private relations, as 'a floor that cannot be transgressed by state law').

Francescakis[92] and more recently by Perry Dane[93], should be seen as serving to shape judicial reasoning and generally PIL practice when confronted with the inevitable limits of any strictly positivist approach to the application of conflicts rules formally in force[94].

Thus, a relations-first approach is not only relevant to the legislative or judicial elaboration of novel conflicts rules. The interpretation of traditional principles or conflicts rules currently in force may also be impacted. For instance, the principle of the *lex loci delicti* could be re-interpreted as pointing to the headquarters of the parent/buyer company, as the place where it failed to take appropriate preventative measures, on the argument that such a location, which in the past may have seemed remote from the perspective of the victim's claim in tort, should now be recognized as central to the newly acknowledged relation between the said parent/buyer company and its subsidiaries/providers and/or the local victims. Other moments of the operation of choice of law rules may be impacted too, such as categorization (e.g. to transcend the specificities of the *lex fori* in search of categories of relations that capture the specificities of the cross-border relation between multinational and affected local communities), the interpretation of foreign law (e.g. to adapt its treatment of those relations to the transnational context), or the *ordre public* exception (e.g. to prevent the application of a foreign law that denies basic requirements of relational morality, for instance if conducive to negating any responsibility of multinational groups).

Nevertheless, even if a relational approach appears apt to illuminate the elaboration and interpretation of conflicts rules, it may also contribute (and herein lies perhaps its richest potential) to alternative methodologies. As mentioned earlier, one of the key features of traditional conflicts rules is a clear separation between their operation and that of substantive domestic rules, and therefore between conflicts justice and substantive justice.[95] In our context, this suggests that one should not confuse considerations on the appropriate choice of law rule for claims against multinationals for their harmful activities overseas, with considerations about the best way to adjudicate those claims at the

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[92] Phocion Francescakis, 'Droit naturel et droit international privé' in *Mélanges offerts à Jacques Maury, Volume I: Droit international privé et public* (Dalloz 1960) 113.

[93] Perry Dane, 'The Natural Law Challenge to Choice of Law' in Donald Earl Childress III (ed), *The Role of Ethics in International Law* (CUP 2011) 142.

[94] The relational account we defended in Pt IV is particularly apt as an understanding of natural law whose role is to intervene in the interstices. More traditional accounts of natural law tend to appeal to metaphysically heavy-weight notions of pre-institutional values, goods or aspects of human Nature (eg dignity), which then function as additional tests of validity for the rules of positive law in the guise of a filter that determines their moral quality. In contrast, our account of pre-institutional legal relations rejects heavy-weightism and instead proposes to merely re-locate the requirements of legality, as already understood in legal practice, to any pre-institutional interactions among parties that stand under a requirement of rightful conduct. As such the proposed account succeeds in including both private and public elements within the idea of rightful interaction, instead of subjecting 'rightfulness' or 'legality' to an external test of moral quality, as most traditional versions of natural law would do.

[95] See *supra* Pt IV.A. As explained there, it is essentially this feature of conflicts rules that justifies claims about current PIL practice being 'Savignian'.

substantive level. A relations-first approach, however, requires that we do consider the (pre-institutional) requirements of relational justice that weigh on that particular cross-border relation. The separation between choice of law and substantive law is therefore much less neat. This suggests that a relational approach may push PIL practice in different directions than simply novel or revised conflicts rules.

What such directions may look like is best illustrated by certain notable aspects of current PIL practice in relation to claims against multinationals, which can be said to *already* reflect a relational turn. We will offer two examples. The first is the development of overriding mandatory rules, specifically tailored to burden parent or buyer companies with duties of care that extend to the potential victims of their activities overseas. The most notable example is the 2017 French statute that imposes on large companies a 'duty of vigilance' ('*devoir de vigilance*') to prevent their subsidiaries, subcontractors and suppliers from causing serious harm, and imposing civil liability where this duty has been breached.[96] Given how firmly the statute views the requirement of a duty of vigilance as rooted in basic notions of justice and responsibility, it is agreed by most that it should be classified from a PIL perspective as an overriding mandatory rule ('*loi de police*'), which thus circumvents the application of standard bilateralist rules. However, where overriding mandatory rules are usually presented as functionally oriented to the achievement of a certain public policy goal, here the problem that this legislation seeks to address is framed in essentially relational terms, as the starting point is the view that the specificity of certain relations should trigger particular inter-personal requirements.[97] Thus, the duty of vigilance imposed by the French law is made to depend on a series of considerations, such as the characteristics of the defendant corporations (related essentially to its magnitude, but also its formal organisation) and the type of relation that they maintain with their subsidiaries / providers / subcontractors (with whom must be maintained an 'established commercial relationship')[98]. Crucially, the law also incorporates the extra-territorial dimension of the duty, by extending it to relations that go beyond French borders. The example of the 2017 statute thus illustrates how a relational approach, by pushing PIL practice to consider how the specificities of certain cross-border relations trigger particular requirements of interpersonal justice, may best be embodied through the mechanism of overriding mandatory rules.

The second and final example hails from common law jurisdictions, and is now led by courts rather than the legislator. It concerns yet another alternative to traditional conflicts rules, in the form this

[96] Loi n° 2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre.
[97] Horatia Muir Watt, 'Devoir de vigilance et droit international privé. Le symbole et le procédé de la loi du 27 mars 2017' (2017) 50 Revue internationale de la compliance et de l'éthique des affaires 48.
[98] Rühl, 'Human Rights in Global Supply Chains' (n 88); Pataut, 'Le devoir de vigilance' (n 85).

time of a search for common principles specifically applicable to cross-border relations. In jurisdictions such as the UK[99] or Canada[100], judges have debated (and reached differing conclusions) on whether the traditional tort law notion of a duty of care can be extended to cover the rather non-traditional scenarios under discussion. Technically, this analysis has only been possible after a straightforward application of the traditional *lex loci delicti* conflicts rule, which has happened to lead to various countries pertaining to the common law tradition and recognizing the existence of such a duty. Interestingly, however, the substantive analysis has largely overshadowed any traditional choice of law analysis.[101] This has been so because the jurisdictions concerned all belong to the common law world. To take the Loblaws case decided by Canadian courts, which concerned claims by Bangladeshi victims of the Rana Plaza disaster, Bangladeshi law was held to be applicable as the law of the place where the wrong occurred. However, this law was interpreted in line with jurisprudential developments in both England and India. The Ontario Court of Appeal's analysis thus became a sort of deterritorialised comparative enquiry to locate common principles to support the existence and content of a duty of care.[102] Moreover, that enquiry has led courts to again focus on the specificity of the relations at stake, as relevant to the content of the requirements weighing upon the parties. Most noteworthy within that analysis is the condition of sufficient 'proximity' that the relationship must meet to trigger the duty. Even if this has long been part of the traditional test for the existence of a such a duty in English tort law,[103] it is here put to use to consider the extent to which the cross-border dimension affects the content of the requirements of relational justice.

VI. Conclusion

The key aim of the chapter has been to revive a relations-first approach to questions of choice of law. We have taken aim at currently dominant practice, which is both positivist and individualist. Reclaiming Savigny's relational legacy, which was synthesised with a progressive understanding of Kantian right, we have sought to deliver a more dynamic conception of the legal relation, one that outruns established legal orders and instead encompasses any interaction among parties that advances interpersonal demands of justice. At the most abstract level our model allows us to reconstruct a wide array of transactions between individuals as generating relational requirements beyond and across the established institutional orders. This would direct the judge to engage in substantive reasoning about

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[99] *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors* [2019] UKSC 20; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
[100] *Das v George Weston Limited*, 2018 ONCA (CanLII) 1053.
[101] Horatia Muir Watt, 'Vers un nouvel imaginaire juridique' in *Le tournant global en droit internatinal privé* (Pedone 2020) 833.
[102] This is not unlike what arbitrators do in the commercial context when elaborating a *lex mercatoria*, as a body of rules specific to transnational commercial relations, through comparative analysis (see eg Emmanuel Gaillard 'Comparative Law in International Arbitration' (2020) 1 *Ius Comparatum* 1).
[103] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

the content and requirements of the (pre-existing) legal relation between the parties *as if those were involved in a public system of obligations*. These 'reconstructed' obligations would guide the choice of applicable law. Thus the 'assembling' of applicable law from various legal systems would not be merely an instance of instrumental cherry-picking of institutional norms, but a guided operation – the guiding idea being that the independence of each of the parties requires reference to interpersonal principles of justice.