From Conflicts of Sovereignty to Relationships: Recovering Nineteenth Century Relational Internationalist Perspectives in Private International Law

by

Roxana Ioana Banu

A thesis submitted in conformity with the requirements
for the degree of Doctor of Juridical Science

Faculty of Law
University of Toronto

From Conflicts of Sovereignty to Relationships:

Recovering Nineteenth Century Relational Internationalist Perspectives in Private International Law

Roxana Ioana Banu

Doctor of Juridical Science

Faculty of Law
University of Toronto

2016

Abstract

This thesis seeks to demonstrate that contrary to conventional histories of the discipline, 19th century writings on Private International Law included an internationalist strand that focused on the individual, rather than the state, but adopted an account of the individual as social and relationally constituted. The thesis dispels two common assumptions about the 19th century intellectual history of the field: first, that all individual - and private law – centered perspectives were overly liberal and individualistic and second, that the association between Public and Private International Law enabled the latter to focus on global public goods and global justice generally. By contrast, the thesis shows, on the one hand, that many 19th century theories focused on the relationship between Public and Private International Law injected much of the formalism and alleged neutrality of today's Private International Law and on the other, that several individual-centered perspectives adopted a relational, rather than individualistic image of the individual.

By recovering academic debates in Private International Law between the mid 19th to the mid 20th century, the thesis traces how this "relational internationalist" perspective was misunderstood and eventually disappeared from the memory of the field. Through a detailed analysis of the writings of the three main protagonists of the "relational internationalist" perspective, namely Joseph Story, Carl von Savigny, and Josephus Jitta, the thesis recovers the analytical foundation of this lost theoretical perspective with respect to rights, legitimate authority and the cosmopolitan dimensions of Private International Law. This thesis both tells a different history of 19th century Private International Law than the conventional one, and suggests that its "relational internationalist" component could provide a platform on which to now build a humanist perspective in PrIL which focuses both on the recognition, as well as the social responsibility of individuals in their transnational relationships.

Acknowledgments

It is a great pleasure for me to acknowledge and thank those who have helped, supported and guided me through the process of writing this dissertation.

For this dissertation I benefitted from funds provided by the Law School of the University of Toronto, the Ontario Graduate Scholarship, and the Strauss Fellowship in International Law.

I am indebted to Toni Fine without whose mentorship and support I might have never embarked on the journey of pursuing an SJD.

For valuable discussions, comments and suggestions on different parts of the thesis I am thankful to Eyal Benvenisti, Hanoch Dagan, Martin Flaherty, Stepanie Francq, Benedict Kingsbury, Jan Kleinheisterkamp, Horatia Muir Watt, Liam Murphy, Annelise Riles, Jeremy Waldron, the SJD students in residence at the NYU Law school in 2014-2016, the 2014-2015 visiting doctoral researchers at NYU law school, especially Stef Feyen and Bartosz Marciniak, the participants in the 2015 IGLP workshop and conference and the participants in the 2013 conference at Windsor Law School.

For their wonderful friendship and moral support I am grateful to my SJD colleagues Danielle Bertollini, Lidsey Carson, Joanna Langille, Andrew Martin and David Sandomierski.

I could have never hoped for more remarkable academics and wonderful people than those in my SJD committee. I will never be able to adequately thank my supervisor, Professor Karen Knop, for the relentless support and mentorship she has offered me throughout these years. She remains a role model for me. Her unparalleled knowledge, creativity, thoughtfulness, remarkable hard work and elegance never cease to amaze me. I am especially grateful to her for supporting and encouraging me to allow enough time to be a mother, daughter and wife while also focusing on my dissertation.

Professor Catherine Valcke has been a rock of support and inspiration for me from the very beginning of my SJD. I have learned enormously from her thoroughness and her kindness. Every comment or suggestion I ever receive from her is a true gift.

Professor Robert Wai has pushed and molded my thinking on this project in remarkable ways. His expertise and patient guidance have allowed me to think about this topic in more ways than anticipated.

I am especially grateful to Prof. Diego Fernández Arroyo who served as an external examiner and has offered tremendously helpful feedback and suggestions, and Prof. David Dyzenhaus who served as an internal examiner and who has been incredibly kind and supportive.

I am particularly grateful to my family, especially my sister Diana Petrovszki, my parents Marilena and Ion Popescu, my parents in law Laura and Marin Banu, Ema Iancu, and Rodi and Tataia Vasile. Their love and faith have motivated and pushed me forward.

Above all, I am grateful to my husband, Andrei Banu, who stood by me, helped and supported me at every trying moment during these years. His love and patience have kept and keep me going.

TABLE OF CONTENTS

Introduction

> Intellectual history does not merely unravel the structure of what we have inherited but can also unearth what we have lost: ways of speaking and ways of seeing the world, once current, now exotic and (perhaps) full of possibility.[1]

> In trying to unravel the mental worlds of the past, we give ourselves the opportunity to re-weave our own.[2]

On a daily basis, courts all over the world hear cases involving an incredibly wide range of inter-individual relationships with a foreign element: international contracts or accidents; marriages, adoptions, divorces involving different nationals or individuals domiciled in different jurisdictions; and so on. Some of these relationships sound unfortunate but mundane, such as a minor car accident involving individuals domiciled in different states. In other cases, the high stakes are evident, such as when multinational corporations engaged in massive mining operations in developing countries cause serious environmental and health problems for the indigenous population. In today's extremely inter-connected world, a staggering proportion of our inter-personal relationships escapes the purely national context and exhibits links to various national communities.

It is at this fragile border between the national and the transnational reach of inter-personal relationships that the 'stakes' increase dramatically. As an inter-personal relationship floates somewhere in the transnational sphere, it appears simultaneously to implicate the correlative expectations of the individuals within the relationship, their relationships to various other individuals and communities, and the interests and regulatory needs of the states affected by the dispute, as well as broader notions of inter-

[1] See Annabel Brett, "What is Intellectual History Now?" in D Cannadiene, *What is History Now?* (New
[2] *Ibid* at 128.

personal and inter-state international justice. This makes it difficult not only to understand how such various considerations should be weighed or reconciled when they lead to different results. It also makes it particularly difficult to integrate them into a coherent theoretical and methodological framework.

Take, for example, the couple that entered into a same-sex marriage in Canada and subsequently sought a divorce in Ontario in 2011.[3] At the time of entering into the marriage the couple appeared "local": two individuals wishing to enter into a marriage legally permissible in Canada. At the time of divorce the matter had to be revisited through the transnational lens of the couple's existence: the Ontario court's jurisdiction over their divorce was complicated by the fact that the spouses had established their domicile in Florida and the United Kingdom.

The same-sex marriage they entered into in Canada had been recognized in neither Florida, nor the United Kingdom. The Attorney General noted that

> in order for a marriage to be legally valid under Canadian law, the parties to the marriage must satisfy both the requirements of the law of the place where the marriage is celebrated (the lex loci celebrationis) with regard to the formal requirements, and the requirements of the law of domicile of the couple with regard to their legal capacity to marry one another.[4] […] In this case, neither party had the legal capacity to marry a person of the same sex under the laws of their respective domicile – Florida and the United Kingdom.[5]

As a result of this blend of international elements, "their marriage is not legally valid under Canadian law" - even thought it was entered into in Canada.[6] The rule was based on the assumption that only the law of the place of domicile would have the authority to determine an individual's right to marry and to divorce.[7] Therefore, allowing

[3] Application for Divorce of V.M. and L.M., available at http://s3.documentcloud.org/documents/283180/l-and-m-application-amended.pdf [Divorce Application]. For an overview of the general legal context in which this case arose, as well as the legal changes made after it see Martha Butler, Cynthia Kirkby, "Same-Sex Marriage, Divorce and Families: Selected Recent Developments" (2013), online: Library of Parliament Research Publications http://www.lop.parl.gc.ca/content/lop/ResearchPublications/2013-74-e.htm.
[4] Statement of the Attorney General of Canada, 2.a., court file number FS-11-367893 (on file with author) at para 4.
[5] *Ibid* at para 5.
[6] *Ibid*.
[7] *Ibid*

the parties to divorce according to Canadian law might offend the foreign states of domicile and their respective sovereignty. As an inter-state matter, this consideration weighed heavily.

In contrast, none of this was immediately apparent or relevant to the spouses. To them, marriage and divorce appeared as "a central component of the freedom to live life with the mate of one's choice" and were "intensely personal decisions that engage a complex set of social, political, religious and financial considerations;" their relevance flowed "from the incalculable value placed on public recognition of the marital relationship."[8] From the parties' perspective, the fact that their marriage was not valid outside Canada and that they could not get a divorce was not a reason to invalidate the marriage in Canada as well, but instead a factor arguing in favor of recognition as an element of international justice and judicial recourse. The parties stressed that "they are prevented from severing the legal and psychological bonds of marriage in a way that other couples routinely take for granted."[9]

The couple asked the court to consider the equality of treatment between the spouses. "Even if the United Kingdom was prepared to dissolve the union as a civil partnership, it is unfair to place all of the responsibility with her [the spouse domiciled there]. Either party should be able to initiate and participate in her own divorce proceedings."[10] Furthermore, they asked the court to consider the implications that this decision would have for their relationship to their various communities and family members. They could not move to Canada, "a new country, alone and isolated, to engage in the already lonely and isolated process of obtaining a divorce."[11] One of the spouses "has a close relationship with her family, all of whom reside close to her Clearwater home" and the other spouse's "parents live within fifteen minutes of her home; this is especially important as her father's health is currently deteriorating and she has no siblings to assist her with his care."[12]

Furthermore, regardless of their individual affiliations to Canada, their marriage itself could be thought of as embedded in Canada, the country in which the relationship

[8] Divorce Application, *supra* note 3 at para 14 & 15.
[9] *Ibid* at para 16.
[10] *Ibid* at para 22.
[11] *Ibid* at para 23.
[12] *Ibid*.

was entered into and which changed the lives of the spouses in significant ways.[13] Obtaining a divorce in the country where they got married was a means to "afford them respect and dignity to legally end their marriage. Without this, they cannot move on from this chapter in their lives. The fact that they continue to be connected by the legal institution of marriage impinges their ability to pursue new relationships and to feel comfortable doing so."[14]

Juxtaposing the couple's application for divorce with the Attorney General's submission reveals two very different ways of describing the transnational context of an inter-personal relationship: one fundamentally premised on a division of sovereignty in the international realm and a sense of the inter-state accommodation of sovereign control, the other focused on various and complex elements of individual self-determination and relational considerations.

Private International Law (PrIL) operates in the realm of these different normative justifications and policy implications. The field is central to any private law relationship involving foreign elements. Its norms designate which state's court should adjudicate a cross-border legal relationship (jurisdiction), which state's law (not necessarily that of the forum) should determine the rights and liabilities of individuals involved in the relationship (choice of law) and in which courts the resulting judgment can be recognized and enforced (recognition and enforcement of judgments). In the same-sex marriage case, the residency required for the Ontario court to have jurisdiction over the divorce and the ability of the spouses to enter into a same sex marriage according to the law of their domicile were the key factors in determining the legal fate of the marriage. Furthermore, the recognition of the court's decision outside Ontario, regardless of its specific contours, would carry the legal determination to various other jurisdictions, including the place of domicile of the spouses.

Although crucial to the regulation of inter-personal cross-border relationships, PrIL is repeatedly criticized harshly for failing to "offer any systemic vision, or sense of meaning, to the changes affecting law and authority in a global environment" and for

[13] *Ibid* at para 24.
[14] *Ibid*.

"leaving untended the private causes of crisis and injustice."[15] For Horatia Muir Watt, for example, the future direction of the field should be to adopt a "planetary perspective" that would "connect up with the politics of international law."[16] Jacco Bomhoff proposes that PrIL be thought of "as a constitution" to strengthen it "as a site for deliberation and contestation over the identity and boundaries of polities,"[17] while Alex Mills aims to re-envision PrIL as a set of rules for a kind of global federalism.[18]

These and other critical projects in PrIL converge less on the solution than on the problem of PrIL's "tunnel vision." The perception is that the autonomy of private individuals is unfettered in PrIL and that this is due to its individualism as a form of *private* law.[19] Furthermore, the repeatedly referenced "neutral" and unpolitical dimensions of PrIL are thought to keep PrIL unaware of the systemic, global implications of the world's current injustices and abuses brought or sustained by the operation of its norms.[20]

I. The Fault of History

In diagnosing the problems and portraying the solutions, the normative critical project intersects, directly or indirectly, with a particular, by now conventional, account of PrIL's historical development. Much of this "tunnel vision" is blamed on PrIL's 19th

[15] Horatia Muir Watt, "Private International Law Beyond the Schism" (2011) 2 Transnatl Leg Theory 347 at 347, 350.
[16] *Ibid* at 347.
[17] Jacco Bomhoff, "The Constitution of the Conflict of Laws" in Horatia Muir Watt & Diego Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford University Press, 2015) 262 at 263.
[18] Alex Mills, *The confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (New York: Cambridge University Press, 2009).
[19] See e.g. Bomhoff, *supra* note 17 at 262: "the appeal to constitutionalist ideas pursued in this chapter is one attempt to restoratively invoke some form of 'the public' in the face of increasing threats of private hegemony." Muir Watt, *supra* note 15 at 387 describes the individualistic tenets of the private law paradigm: "the liberal paradigm favours an approach to legal problems in terms of the 'micro' or the individual – individual civil or political rights; private property; discrete contracts; non-mass torts. In addition, 'private' law adopts a backward-looking perspective, providing the tools for solving inter-subjective conflicts *ex post*, on a case-by-case basis. Issues relating to collective goods often tend to be confiscated or occulted by private conflicts. Private international law has internalized these limitations and disconnected from the macro-perspective which focuses on the surrounding social and political context."
[20] See e.g. Horatia Muir Watt, *supra* note 15 at 360, n 62: "The supposed 'naturality' of the principles of private international law owes an initial debt to Von Savigny's great *Treatise of Roman Law System des heutigen Römischen Rechts, 1849,* whose famous chapter VIII is believed to be the fount of modern conflicts methodology."

century history for two reasons. First, since the main PrIL theories were developed in the 19th century, the common assumption is that they inevitably borrowed from the then dominant liberal ideology and incorporated the private/public, market/government, and individual/state dichotomies. The main target is German legal scholar Carl von Savigny (1779-1861), who, we are repeatedly reminded, wrote at the height of liberalism.[21] Secondly, by the end of the 19th century PrIL disconnected from Public International Law (PublIL) and it is generally assumed that this division has enabled PrIL to remain oblivious to global public concerns.[22]

These two common intuitions inform much of the discourse about reform in PrIL today. 19th century intellectual history is portrayed as the "classical" liberal legacy that PrIL must shed; courts and scholars often appeal to reversing the historical split of Private from Public International Law; and much of the critical literature pleads for restoring the lost political and regulatory space by refocusing on state interests rather than individual rights and interests. Inevitably, PrIL is now divided between the "classicists" and the critical scholars, between individualistic theories focusing on individual autonomy and state-centric theories focusing on state interests and regulatory policies.

While PrIL's intellectual history looms large in the critical normative project, there is little examination of that history up close.[23] This is not so surprising. If 19th

---

[21] Many references could be included here. See e.g. Henri Batiffol, "Les intérêts du droit international privé" in Alexander Lüderitz & Jochen Schröder, *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende?* (Frankfurt: Alfred Metzner, 1977) 11 at 15.

[22] Joel R Paul, "The Isolation of Private International Law" (1988) 7 Wis Int Law J 149. For Muir Watt the separation of the two fields led to "the construction of the closet."

> Indeed, gradually disconnected from the substance of public international law while espousing the limits it prescribed, private international law closed in on itself. Inhibited from interfering with interstate clashes of power, it continued to focus on private and domestic issues, developing for that purpose a specific methodology which consolidated its axiological neutrality and widened the breach between itself and international politics. Muir Watt, *supra* note 15 at 375-377.

In contrast, in this dissertation I argue that theories that connected PrIL with PublIL did not connect it "with the substance of Public International Law" and did not focus on "interstate clashes of power" in the way that we understand these terms today. Therefore, the schism between the two fields cannot be understood as a move away from politics or from a focus on global public goods, since these were not the themes of the 19th century PrIL-PublIL association.

[23] Notable exceptions are Ralf Michaels, "Story, Joseph" in J. Basedow et al, eds, *European Encyclopedia of Private International Law* [forthcoming, 2016]; Ralf Michaels, "Waechter, Carl Georg" in J. Basedow et al, eds, *European Encyclopedia of Private International Law* [forthcoming in 2016]. Another more recent study of PrIL's pre-classical history, to which I did not have access while developing this project, is

century PrIL, and Savigny as its main protagonist, are viewed as marked by individualistic liberalism it seems easy, indeed advisable, to not dwell on the period. Similarly, if the intellectual "height" of the period is thought to have been the association between PrIL and PublIL, it seems that we could bring it back by simply reclaiming the association today, rather than examining it in its own time.

Throughout this dissertation, I will show that this analysis is wanting as matter of historical method, because it involves a certain atemporal essentializing of concepts. This essentializing prevents a thorough engagement with the theories of 19th century PrIL scholars, or of any period for that matter, on their own terms. Our contemporary skepticism about private autonomy - which is well founded for the society we inhabit today - makes it difficult to image that 19th century scholars might have referenced private autonomy and might have focused on individuals rather than states in a different intellectual, as well as socio-political context. And if we now assume that joining PrIL with PublIL would increase the public and political dimensions of PrIL, we feel entitled to both condemn any 19th century scholars for having fought against such program, as well as to praise those who pled for it. The meanings we attribute to an individual-centered or a state-centered theoretical perspective in PrIL today are projected into 19th century intellectual history and then carried forward, unaltered, over two centuries.

From the perspective of historical methodology, recasting PrIL's intellectual history through contemporary biases is problematic on its own. But this lack of contextual engagement with PrIL's intellectual history also contributes, I believe, to discrediting PrIL in various ways. It tends to encourage the perception of PrIL as an impoverished legal discipline, built on superficial analytical ground.[24] It also makes it possible to argue that we are still and perpetually marching in the footsteps of Savigny, even as the footprint is highly contested and not at all easy to discern.[25] More important,

---

Nicholas Hatzimihail, *Pre-classical Conflicts of Laws*, forthcoming. Among the earlier historical studies on PrIL see Maurits Meijers, "L'histoire des principes fondamentaux du droit international privé a partir du moyen age, spécialment dans l'Europe occidentale" (1934) 49 Recueil des Cours 547; Rodolfo de Nova, "Historical and Comparative Introduction to the Conflict of Laws" (1966) 116 Recueil des Cours 437; Max Gutzwiller, "Le développement Historique du Droit International Privé" (1929) 29 Recueil des Cours 237.

[24] See Horatia Muir Watt, "Future Directions?" in Muir Watt & Arroyo Fernandez, eds, *supra* note 17 at 363 (questioning whether this should still be a legal field or whether we should instead start discussing about "the end of choice of law").

[25] For a very interesting discussion and refutation of the thesis that PrIL is always walking in Savigny's footseps see Klaus Schurig, "Das Fundament trägt noch" in Heinz-Peter Mansel, ed, *Internationales*

the lack of engagement with PrIL's intellectual history allows us to overlook the vast jurisprudential ground that PrIL covered every time that it constructed and re-constructed itself. Because of the nature of the problems it is meant to solve, PrIL had to struggle with questions of authority, sovereignty, individual autonomy, the nature of a legal system and many other questions that are at the forefront of jurisprudence. This is not to say that PrIL necessarily found either any one uniform or several different satisfactory answers to any of these questions, but it is to say that there have been and continue to be intense academic discussions about all of these topics.

II. The State, The Individual and The Relationships

In this dissertation I wish to recast a succession of such intense academic discussions, which focused on whether PrIL should take the individual or the state as the analytical point of departure in constructing the field. This general question of course dissolved into a myriad of other questions: Does PrIL deal with inter-personal or inter-state relationships? Is PrIL interested in the rights and interests of states or the rights and interests of individuals? Does PrIL "answer" to individuals or to states? What space of contestation is allowed to each? How does taking the state or the individual as the reference point impact PrIL's techniques and methodology? And so on.

In recent times these questions have become increasingly relevant, especially to those interested in emphasizing PrIL's global regulatory dimensions and PrIL's 'social dimensions' generally. But these questions are far from novel. They have marked PrIL as a legal field since its inception. Contemporary PrIL scholars generally recognize this, but they tend to assume that the field operated with only two extreme positions, which I will call individualistic and state-centric, respectively.

PrIL theories that conceptualized PrIL by reference to private law and focused on the individual are believed to have adopted an individualistic self-interested image of the individual in her transnational existence. This perspective allegedly entailed a sharp distinction between private and public law and between law and politics, and excluded

---

Privatrecht im 20. Jahrhundert, Der Einfluss von Gerhard Kegel und Alexander Lüderitz auf das Kollisionsrecht (Tübingen: Mohr Siebeck, 2014) 9 at 17.

any meaningful element of the social responsibility of individuals in their cross-border dealings.[26] By contrast, state-centric theories are generally associated with the desire to curb private power and to emphasize the public and political dimensions of transnational legal matters. This then translates into a general aim to recover state-centric theories, especially if they could re-connect PrIL with PublIL.

19th century PrIL then represents both the problem and the solution for contemporary projects to reform the field. It appears desirable to recapture the PrIL-PublIL association and to refocus the field on states and state sovereignty, but only if one could simultaneously discard the perceived overly liberal individual-centered, private law-focused theories, which also marked the field in the 19th century.

In this dissertation I recover what I believe to be the "untapped resources" of PrIL's 19th century intellectual history. I argue that insofar as current scholars have recourse to this history, they tend to idealize the 19th century relationship of Private to Public International Law, on the one hand, and to demonize any individual-centered perspective, on the other. The result, I demonstrate, is that we have lost sight of an important position of the 19th century, which I term "relational internationalist." I show that this perspective was meant to be a reaction to both the state-centric and the libertarian position, and as such would be extremely useful for contemporary debates on rethinking the regulatory function of PrIL in light of our increasingly inter-connected world.

I argue that in its current depictions, the 19th century is as much the "history of an illusion" for PrIL as it is for PublIL.[27] Far from injecting an awareness and concern for

---

[26] See e.g. Schurig, *supra* note 25 at 8 discussing and refuting the thesis that Savigny's theory should be seen as unpolitical and removed from public considerations:

> One also needs to immediately refute the legend which emerged in the second half of the previous century under the influence of the so-called political school and which can still be seen today for several authors and which appears ineradicable. This thesis argues that the so conceived PrIL [in Savigny's theory] is unpolitical and removed from the state and which disconsiders material goals, especially those of political economy and social goals." [Translated by author. All materials cited in this thesis, originally published in a language other than English are translated by the author, unless otherwise specified.]

See also Bomhoff, *supra* note 17 at 275: "But classical private international law is also importantly incomplete in this respect, for example in the way notions of responsibility are almost entirely absent from its dominant mode of discourse."

[27] I take this line of argument from David Kennedy, "International Law and the Nineteenth Century: History of an Illusion" (1998) 17 Quinnipiac L Rev 99.

global public goods or restraining private power and abuse, the association of Private with Public International Law during the 19th century injected much of the formalism and isolation of today's PrIL. By constructing PrIL as the field dealing with the universal distribution of sovereign authority, the PrIL-PublIL analogy discouraged any engagement with individuals' interests and pleas for justice, as well as any reflection on the consequences of the distribution of sovereignty on global justice and global public goods.

I also argue that the contemporary lament for the "lost" relationship between Private and Public International Law is misplaced. In keeping with the idea that our contemporary impressions of 19th century PrIL are "the history of an illusion," I suggest that the "classical" relationship between PrIL and PublIL is actually quite well entrenched in PrIL theory and methodology — so well entrenched, in fact, that whenever PrIL tries to move closer to PublIL, many of the tenets of the 19th century association are revived. As Kennedy said of 19th century PublIL, it has never been as thoroughly rejected as the usual account suggests, but instead "survives in the most progressive of contemporary polemics for a new international law."[28]

Contrary to the other common attitude to the PrIL of the period, I further suggest that the demonization of all 19th century individual-centered perspectives is too quick and too shallow. Many of the 19th century authors who argued for an analogy between PrIL and domestic private law or for a focus on individuals' interests were not simultaneously pleading for a private/public, market/politics distinction. Rather, they were countering the formalism and injustices of the state-centric internationalist perspective, which emerged from the Private-Public International Law association. Since the Private-Public International Law analogy did not represent the enlightened quest for the public good it is portrayed to have been, 19th century theories that dispelled the association should not be understood as a reaction against the pursuit of global public goals or global justice generally.

Rather, my historical analysis aims to show that many 19th century individual-centered perspectives can be viewed as motivated by insights similar to those raised by

[28] *Ibid* at 102; See also Roxana Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013) 31 Windsor YB Access Just 197 (arguing that the Canadian Supreme Court's attempt to "adapt Private International Law to modern realities" can, in fact, be best understood as a recasting of the 19th century Private-Public International Law association).

various contemporary global justice debates. Central to these perspectives was the appeal to disaggregate state interests or appeals to sovereignty, in order to allow for the voice of various individuals and groups. Furthermore, they encouraged courts to consider the level of consideration, respect, dignity and care that individuals owe each other in their cross-border private law relations. Similarly, they were particularly attuned to the way in which individuals pursue particular claims in particular courts as part of their quest for recognition and integration in various communities. Finally, they contented that courts have fiduciary duties towards the litigating parties directly, and are therefore bound to an equitable weighing of interests of domestic and foreign parties alike.

I reconstruct this lost "relational internationalist perspective" primarily from the writings of three scholars, each developing and refining their predecessors' relational insights: Joseph Story (1779-1845), Carl von Savigny (1779-1861) and Josephus Jitta (1854-1925). I show how each of them developed and refined the relational insights of their predecessors and, in turn, how traces of this perspective, culminating in Jitta's writings, were recast and refined in a different context by the American legal realist school in the 1930s and by several continental European scholars after World War II. In the case of Story and Savigny, I offer new readings of canonical authors. While both are famous in PrIL and beyond, I incorporate thus far overlooked writings and historical accounts to suggest new interpretations of their PrIL theses. Jitta does not figure in the historical memory of PrIL and I recover his writings to show the surprising relevance of his theories for PrIL and beyond.

I do not mean to suggest that the three authors to whom I have ascribed a "relational internationalist" perspective fully acknowledged or deliberately set to create a "relational internationalist" perspective. Both the label, as well as the reconstruction of their theories as a "relational internationalist" perspective are my own. What can be discerned from their writing is that all three authors rejected both individualism and state-centrism in PrIL. What emerges as an alternative to individualism and state-centrism following a thorough engagement with the theories of these authors, I argue, is an attempt to theorize various levels of relationships amongst individuals and with various communities and groups in the transnational realm.

I argue that the distinctive feature of the "relational internationalist perspective" is the attempt to bring out an increasingly broad range of factors, as constructing the transnational context of a particular inter-personal relationship. The "relational internationalist perspective" avoids the libertarian image of the isolated individual, as well as the image of the individual inevitably subsumed under the notion of a state or a particular community. I show how this enables the "relational internationalist perspective" to outline a view of relational, rather than individualistic vested rights in a transnational context. Furthermore, it departs from the consent-based or state sovereignty-based theories of legitimacy, drawing instead on a variety of sources to determine the level of inter-personal responsibility within a particular private law relationship and beyond. Lastly, it situates itself within the two extreme positions of universalism and relativism. It blends natural law and *jus gentium* insights with an appreciation for national particularities.

Overall, the relational internationalist perspective I aim to recover constructs the individual as a social being, whose existence is embedded within a variety of relationships, including her relationships to the other party(ies) in the private law relationship, with the community(ies) in which this private law relationship is embedded, as well as with humanity generally. Because of this relational perspective it seemed less plausible for the authors I discuss in this project to create a strict separation between the individual and larger social communities, between private and public, and between freedom and social responsibility.

III. History and Theory

1. Historical Context

For the reasons given, arguing that a relational image of the individual and a relational internationalist perspective existed in PrIL, especially in the 19th century, might come as a surprise for scholars both within and outside the field. This is understandable given the way in which we have come to associate different authors in PrIL with particular ideologies dominant at particular times and the way in which we have

separated the field between various large camps of nationalist/internationalists and positivists/non-positivists. These two excessively broad depictions of the field's trajectory are precisely the ones obscuring the nuances I aim to recover in this project.

To give one example of such historical generalization, Arthur Nussbaum maintained that "nearly all of the leading continental writers of the period [from 1870 to 1930] espoused the Law-of-Nations conception"[29] which in his view represented "a virtually unified conception […] despite some quibbling differences between the Savignyan and Mancinian schools of thought."[30] This unified front of legal scholarship is then simply defined by a "cosmopolitan feature" and a "focus on international in Private International Law."[31] There are many ambiguities in this remark, including the reference to "leading" writers and the extremely large period of time to which such ideological uniformity is attributed.

But it is the allegation of the ideological uniformity of internationalism in PrIL that is most problematic, and Nussbaum was hardly alone in making it.[32] The fact that internationalism was constructed differently depending on whether these internationalists took the state or the individual as the point of reference – a central thesis in this project - is simply lost either in the alleged "unity" of internationalism or subsumed under the "quibbling differences." Internationalism was portrayed as being grounded in the association between PrIL and PublIL and having as its point of departure "the community, based on international law, of the nations (independent states) having intercourse with one another."[33] Universalism was defined by its state-centric variation and we inevitably lost sight of any individual-centered internationalist perspectives. By contrast, throughout this thesis and especially in the first chapter I aim to break this unity

[29] Arthur Nussbaum, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws" (1942) 42:2 Columbia Law Rev 189 at 198.
[30] *Ibid* at 194.
[31] *Ibid* at 195, 198.
[32] Frank Kahn initially introduced the divide between internationalism and nationalism. See Franz Kahn, "Gesetzeskollisionen, Ein Beitrag zur Lehre des Internationalen Privatrechts" (1890) 30 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 & (1898) 39 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 & (1899) 40 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1. For a discussion of the impact of Kahn's analysis on the development of PrIL see Chapter 2. See also Otto Kahn Freund, *The Growth of Internationalism in English Private Internatonal Law* (Jerusalem: Magnus Press, 1960); Henri Batiffol, "Les tendences doctrinales actuelles en droit international privé" (1948) 72 Recueil des Cours 1 at 9-33.
[33] Nussbaum, *supra* note 29 at 195.

of universalism by showing the philosophical questions that divided universalists between those taking the individual and those taking the state as their point of reference.

But in order to be attuned to such "philosophical" quarrels within the internationalist school and with their critics, one must avoid a second historical generalization that is quite prominent in PrIL. For example, in his project, while trying to recover a certain kind of internationalism in PrIL, Alex Mills distinguishes between an "intrinsic" and an "extrinsic" perspective from which to tell the story of universalism in PrIL.[34] He describes the extrinsic perspective he adopts as one which "looks at the role played by broader ideas of international law and international order" in the development of PrIL.[35] In this context he describes the role of certain legal and political currents first in the development of PrIL as a branch of international law, and then in its development as an extension of national private law.[36] This perspective helps him characterize the fall of universalism merely as a historical contingency. It can always be re-challenged at the same time as legal positivism, the relationship between private and public law, and the description of international law as the law of sovereign states, are also challenged.[37] In other words, internationalism can simply be brought from an era in which it was lost and re-adapted, regardless of the many critiques brought against it during the centuries. In contrast, Mills describes an intrinsic historical perspective as one that sees developments of PrIL as particular to this field of law, without linking them to broader developments in our view of law and legal order.[38]

It is generally with reference to an extrinsic perspective that PrIL is thought to have aligned itself with the dominant liberalism or natural law thought, positivism, or any other theoretical perspective dominant at particular times. The idea that PrIL academic debates might reference ideas and perspectives particular to its development at particular times is challenged as an overly intrinsic perspective.

For my part, I see the extrinsic and intrinsic background as simply referencing different contexts, which one can use as a plausible gateway to understand the meaning

[34] Mills, *supra* note 18.
[35] *Ibid*.
[36] *Ibid* at ch 2.
[37] *Ibid* at 68.
[38] *Ibid* at 27.

the original authors wished to attribute to a particular text.[39] Each one or both can appear more or less plausible in deciphering the meaning of such text. To the extent the distinction is made simply to show that there is a variety of contexts to which one can refer to, I think this is an important observation.[40] But it seems misleading to suggest that an extrinsic perspective is better or more helpful for intellectual history in general and PrIL intellectual history in particular.[41]

For example, Phocion Franceskakis, whose PrIL theory I outline in chapter 3, challenged a Marxist interpretation of the statutory school of thought in PrIL on the basis that the statutory theory developed and survived as a product of PrIL theorists, without much connection to the general socio-economic background.[42] Furthermore, I show throughout this thesis that labeling Savigny as a natural law scholar as Mills did,[43] or a Kantian as Peari did[44] misrepresents the context of the historical school of thought which grounded Savigny and which was a reaction to both Kantian philosophy and natural law.

---

[39] Note that the intrinsic/extrinsic distinction usually carries a different meaning in intellectual history. The former is associated with a purely textual analysis of different writings, while the latter represents a contextual analysis of text. The context, however, can capture both the socio-economic and political situation at the time of the writing of the text and the academic debates within a legal field. For an argument that neither a purely textual analysis nor a reading of texts exclusively as corollary to the socio-political context of the time are appropriate see Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8:1 Hist Theory 3. For an argument that there are multiple contexts which can and should be employed in the reading and interpretation of texts see also Dominick Lacapra, "Rethinking Intellectual History and Reading Texts" (1980) 19:3 Hist Theory 245 at 254: "An appeal to *the* context is deceptive: one never has - at least in the case of complex texts – *the* context."

[40] See Brett, *supra* note 1 at 116: "context can be multidimensional: a specific political situation, a social or cultural milieu, an institutional context like a courtroom."

[41] See Skinner, *supra* note 39.

[42] See Phocion Franceskakis, "De coflictu legum, Melanges offerts a R.D. Kollewijn et J. Offerhaus a l'occasion de leur soixante-dixieme anniversaire", review of "Théorie des statuts à la lumière générale de l'évolution de la société" by M. Blagojeviç in Phocion Francescakis, *La pensée des autres en droit international privé: comptes rendus bibliographiques (1946-1984) réunis en hommage à leur auteur* (Thessalonique: Université Aristote de Thessalonique, Faculté de droit, 1985) at 211. See also Skinner, *supra* note 39 at 42-43:

> It is my essential contention, however, that none of this panic or equivocation is at all well-judged, since the methodology of contextual reading, in both its Marxist and Namierite versions (they are oddly similar) can itself be shown to rest on a fundamental mistake about the nature of the relations between action and circumstance. Despite the possibility, therefore, that a study of social context may *help* in the understanding of a text, which I have conceded, the fundamental assumption of the contextual methodology, that the ideas of a given text should be understood *in terms of* its social context, can be shown to be mistaken, and to serve in consequence not as the guide to understanding, but as the source of further very prevalent confusions in the history of ideas.

[43] Mills, *supra* note 18 at 68 & ch 2.

[44] Sagi Peari, "Savigny's theory of choice-of-law as a principle of 'voluntary submission'" (2014) 64:1 UTLJ 106.

Similarly, as I show in chapter 5, Mills's characterization of the Dutch school or of Story as positivist would ignore or misrepresent Story's numerous references to natural duty, morality, general principles of justice etc.[45]

I consider it equally misleading to suggest, as Nussbaum and others did, that an idea – such as internationalism – may have retained a unitary morphology during an entire century, and that the various authors I discuss in this thesis must, as Mills suggests, be understood in light of the dominant view of law and justice.[46] Instead, I subscribe to Skinner's remark that "there *is* no history of the idea to be written, but only a history necessarily focused on the various agents who used the idea, and on their varying situations and intentions in using it."[47]

On this premise I make certain arguments about the intellectual history of PrIL. First, I argue that internationalism cannot be understood as a unitary theory, especially when looked at throughout an entire century. There are indeed many nuances and perspectives which differentiate internationalists, and which are significant on their own. In this dissertation I wish to underscore one such significant difference and argue that internationalism, especially in the 19th century, was conceptualized differently depending on whether its proponents took the individual or the state as the point of departure in their theories. I also highlight the difference between both individual-centered and state-centric internationalist perspectives of the second half of the 19th century and those of the 20th century. The individual-centered internationalist perspectives of each period can only be understood in light of the state-centric internationalist theories of their time, since they are typically thought of as a reaction or an alternative to them.

Second, I claim that not all 19th century individual-centered internationalist theories endorsed an individualistic ideology. That is, not all individual-centered international theories of a century referencing autonomy and liberty should be understood, especially when this understanding is informed by our contemporary biases, as premised on an atomistic image of the individual or a libertarian perspective.

---

[45] Mills, *supra* note 5 at 68 & ch 2.
[46] See Skinner, *supra* note 39 at 46: "Even if we could decode what a given statement must mean from a study of its social context, it follows that this would still leave us without any grasp of its intended illocutionary force, and so eventually without any real understanding of the given statement after all. The point is, in short, that an unavoidable lacuna remains: even if the study of the social context of texts could serve to *explain* them, this would not amount to the same as providing the means to *understand* them."
[47] *Ibid* at 38.

Third, I argue that any one PrIL author's statements or theories has a particular context(s) that helps us understand what he intended to say, two of which contexts I propose to focus on. When available and especially in Savigny's case, I try to read one author's PrIL theory in connection with his writings on law and justice more broadly. I find Blaine Baker's reading of Story's PrIL theory in light of his general writings and court decisions, especially in constitutional law, persuasive.[48] Similarly, I find it helpful, indeed necessary to read Savigny's PrIL theory in light of his general theory about law and in light of the various schools of thought to which he subscribed or explicitly denied. At the same time, I focus very much on the general academic context in which these authors were writing, their conversations with one another, their descriptions and mis-descriptions of each other's theories and the general academic directions that they meant to dispel or to react against.

PrIL as a field, and especially that of the 19th century, is characterized by intense discussions among scholars, who were reacting to one anothers' writings. It is almost impossible to understand the direction of reform an author intended to introduce into PrIL without paying attention to the way in which they described their opponents' or allies' theories. In the first chapter, for example, I show that Antoine Pillet (1857-1926) understood Savigny's theory as overly vague and unstable and thought his own theory, referencing sovereignty and PublIL, in contrast, managed to provide a truly universal and intransigent theory. It would be hard to understand what the PrIL-PublIL association meant for PrIL at the end of the 19th century without understanding how this association was used as an alternative to other theories of the time, including Savigny's.

2. Dialogues as Entry Points

In an attempt to capture the questions with which PrIL scholars struggled as they were developing the field, the intense debates that occurred between PrIL scholars, either directly, or through their various reviews of one another's works, are of paramount

[48] Blaine Baker, "Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws" (1993) 35 McGill LJ 454.

importance for my study.[49] For intellectual dialogues indeed serve as windows onto the ways in which PrIL scholars understood and re-conceived the field at various times in its history. In the second chapter I analyze three articles between Josephus Jitta and Ludwig von Bar (1836-1913) written in 1899 and 1900, in which they debate and contest each other's internationalist theoretical positions focused on the individual or the state. This exchange provides not only a good basis for understanding the positions of the two authors, but also an insight into the way in which the field was struggling to find itself alongside PublIL at the end of the 19th century.

In the third chapter I describe the way in which Henri Batiffol (1905-1989) in France, Gerhard Kegel (1912-2006) in Germany and RH Graveson (1911-1991) in England were, intentionally or not, aligning their theories in combining the description of PrIL as a co-ordinator of legal systems with remnants of the vested rights doctrine. This explains, I suggest, not only the way in which Batiffol's and Kegel's theories increased the technical nature of the field but also how this combined with an increased focus on an atomistic overly liberal image of the individual after World War II.

In the fourth chapter I introduce the 1957-1958 letters between two prominent American legal realists, David Cavers (1902-1988) and Brainerd Currie (1912-1965), as they shed new light on the motivations behind Currie's focus on state interests in PrIL. This correspondence also provides an entry point into the intense, often overlooked debates within the American realist school over the proper balancing of individual and state interests in PrIL in the 20th century.

Whereas chapters 2, 3, and 4 focus on dialogues between scholars who were contemporaries, the last three chapters reveal the analytical contours of the 19th century relational internationalist perspective by placing it in dialogue with modern scholars. In chapter 5 I relate Horatia Muir Watt's account of current debates on the individuals' rights to the recognition of their inter-personal relationships in the EU to the way in which recognition featured in the 19th century relational-internationalist perspectives centered on rights and reasonable expectations. In chapter 6 I relate Lea Brilmayer's

[49] See LaCapra, *supra* note 39 at 263: "In this sense, the history of critical response, including the book review, is an important chapter in the history of social impact, especially with reference to the constitution and development of disciplines. One can often learn more about the operative structure of a discipline from its book reviews and from their differential distribution in different sorts of journals than one can from its more formal institutional organization."

account of political legitimacy in PrIL to perspectives on legitimate authority under the state-centric and the relational-internationalist perspectives of the 19th century. In the final chapter I compare and contrast ways of underscoring the cosmopolitan dimensions of PrIL and the relationship between private interests and broader theories of justice within the 20th century German interest jurisprudence, as opposed to the 19th century relational internationalist perspective.

3. International Themes within an International Dialogue

This dissertation aims to highlight the way in which PrIL scholars were struggling with extremely important theoretical themes of international interest by engaging in an international conversation, if not collaboration. The fact that in this study I reference the writings of authors from six different jurisdictions is a reflection of the international nature of the process of thinking and rethinking PrIL's theoretical foundations.

While the way in which Savigny influenced the development of PrIL in Germany, or Story the development of PrIL in the US are certainly important studies on their own, I am particularly interested in the way in which these ideas migrated across jurisdictions, thereby creating an international dialogue over the proper theoretical fundaments of PrIL. This cross-reference between authors in different jurisdictions is explicitly included in the writings of the authors referenced in this project. Savigny acknowledges having read and been influenced by Story's writings. Jitta, Pillet, and others explicitly construct their theories by reference to or distinction from Savigny. Therefore, these references themselves form part of the context through which to understand the writings of these scholars.

The dialogue of course is international also thanks to the international nature of the themes being discussed. As these authors were trying to identify the contours of rights claims in the transnational context (chapter 5), the basis of legitimate authority for inter-human transnational legal matters, and the contours and limits of individual autonomy (chapter 6), or else the proper blend of national particularities and universal justice principles, and cosmopolitan dimensions of PrIL generally (chapter 7), they inevitably

found themselves in an international dialogue on international themes. I propose to take on and pursue that international nature of their conversation directly in this project.[50]

4. Time, People, Places

The starting point of this genealogy of individual and state-centric internationalist perspectives in PrIL is in many ways the present. What prompts a return to 19th century PrIL scholarship is the fact that we nowadays identify individualistic and state-centric theories as the only ones available in PrIL's intellectual history and that we trace the construction of both these extremes to the 19th century. My goal is to show that we have lost sight of a possible individual-centered internationalist perspective that constructed the individual not as an atomistic, but rather as a relational being and that did not create a strict separation between the individual and the state, and between liberty and social responsibility.

It is also in the 19th century that the conceptualization of PrIL as a conflict of sovereignties was first articulated.[51] It is with the help of this conceptualization that the association between PrIL and PublIL was created. Furthermore, it was in the 19th century when the major theories underlying contemporary PrIL scholarship were formulated.

This is not at all to say that the individual/state duality was not discussed or did not influence earlier theories and perspectives, which in turn impacted the 19th century authors I am including in this thesis. Rather, I believe that it is primarily in the 19th century that the early articulations of individual autonomy, state sovereignty, comity, etc. triggered the emergence of broader theories on the nature and methodology of PrIL and it was primarily those 19th century treatises which have marked the development of PrIL in its current variations.

The series of the main 19th century studies on PrIL began with Joseph Story's 1840 *Commentaries on the Conflict of Laws* and that work also marks the beginning of my proposed intellectual history account. Savigny, the second protagonist of the

[50] For an excellent exposition of a study of international intellectual history, including the description of its methodology see David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013).

[51] André Bonnichon, "La notion de conflit de souverainetes dans la science des conflits de lois" (1949) 39 Rev crit dr int privé 615 & "La notion de conflit de souverainetes dans la science des conflits de lois" (1950) 40 Rev crit dr int privé 11.

relational internationalist perspective, had read and admitted to having been influenced by Story's Commentaries in the writing of the 8th volume of his System in 1848.[52] I argue that what united those two PrIL scholars was the attempt to construct a relational image of the individual who is both in need of autonomy and self-determination and socially responsible, as she is embedded in a large web of relationships. This conceptualization, I argue, was picked up and refined in 1880 by the Dutch scholar Josephus Jitta, the third protagonist of the relational internationalist perspective.

At the end of the 19th century Jitta recast the relational internationalist perspective as an attempt to counter the dominant state-centric theories of his time, which associated PrIL with PublIL. Among these state-centric theories I focus on those of the French scholar Antoine Pillet (1857-1926) and the German scholar Ernst Zitelmann (1852-1923) because I consider them to be most representative of the state-centric internationalist perspective of the late 19th century. Gutzwiller viewed Zitelmann's doctrine as the only one truly developed out of PublIL and founded on the international community of states.[53] Similarly, Pillet's theory was praised as one of the most original internationalist theory.[54]

There is of course a wealth of scholars apart from those here singled out as protagonists of the state-centric and the relational internationalist perspectives. The writings of some of them are discussed in the first four chapters of this project, as I trace the rise and fall of the state-centric and relational internationalist perspectives. But many authors are inevitably left out. This study therefore should not be read as a purported complete historiography of the field spanning over a century and several jurisdictions.[55]

---

[52] Gerhard Kegel, "Story and Savigny" (1989) 37:1 Am J Comp L 39 (for a general discussion of the commonalities between Story's and Savigny's PrIL theories).

[53] Max Gutzwiller, "Zitlemann's völkerrechtliche Theorie des Internationalprivatrechts" (1923) 16 ARWP 468 at 474,473.

[54] A V Dicey, *A digest of the law of England with reference to the conflict of laws* (London: Stevens and Sons, 1908) at 13, n 1 (citing Pillet's theory as a very good exposition of how to conceptualize the relationship between PrIL and PublIL, while maintaining the concept of vested rights).

[55] Because this study focuses on the theories, which have marked and defined the contours of PrIL primarily in the 19th century, it references primarily Western European and American theories. The way in which these theories have influenced PrIL in a variety of other jurisdiction beyond Europe and the United States would, of course, be worthy of a thorough examination, but is beyond the scope of this dissertation. In Chapter 3 I briefly discuss, by reference to Duco Kollewijn's scholarship, the Eurocentic and imperial dimensions of 19th century PrIL and the way in which the individual-centered/state-centric duality mapped onto the recognition/misrecognition of colonized territories as legal systems.

5. The Dialogue Between Past and Present

In his 2007 Hague course Spyridon Vrellis invited us not to lose sight of the fact that the subject of law in general and PrIL in particular "is the human being, a moral being; 'a subject worthy of esteem and respect.'"[56] But Vrellis clarifies that taking the individual as the point of departure does not need to translate into an individualistic normative theory:

> From this point of view, law, all law in its entirety, expression of politics or one of the expressions of politics, both in its origin and in its finality, is at the same time *private*, because it only exists for the human being and because of her, and *public*, because the interest of the human being finds its perfection in the general interest, in the general good, and the individual only becomes virtuous, that is highly moral, as part of a human society. This is why the tendencies manifested in the field, among others, of PrIL which interests us in particular, which insist either on the interests of states (for example, Currie), or on the interests of individuals in isolation, are only partial. Those tendencies are correct, but only partially correct. The entire truth is found in their synthesis.[57]

Andreas Bucher also observed in his general Hague Course that "the interest of the person and individual liberty are surrounded by the general interest of the society and of the state. Conflict of laws rules should be equally inspired by this orientation."[58] The "social dimension of PrIL" then rests on this constant rebalancing of the relationships between individuals and between the individual and the broader social community.[59] Yet both Bucher and Vrellis write about this recalibration, rather than radicalization of the individual-centered and state-centered positions as a normative direction PrIL failed to construct.

In this dissertation I suggest that there is much intellectual work in the history of the field that constructed such perspective and from which one could now be reconstructed. Yet I do not mean to suggest that simply bringing this 19th century writing

[56] Spyridon Vrellis, "Conflit ou coordination de valeurs en droit international privé a la recherché de la justice" (2007) 328 Recueil des Cours 189 at 196.
[57] *Ibid* at 198-199.
[58] Andreas Bucher, "La dimension sociale du droit international privé: cours general" (2009) 330 Recueil des Cours 1 at 99.
[59] *Ibid.*

into our intellectual and socio-political context of today would immediately solve PrIL's problems as the current critics see them. More important, I do not suggest that relationality as it was seen and conceptualized by these 19th century authors maps onto current strands of relationality in jurisprudence, private law, or feminist writings. As I conclude this dissertation I contemplate how the relational internationalist perspective might relate, but also what might need to be traded off in light of contemporary insights. Yet I leave for a future project a more thorough analysis of how the 19th century relational internationalist perspective could reform today's PrIL and what might need to be traded off in light of newer strands of thought on relationality.

I am, in other words, much in agreement with Annabel Brett when she argues that "intellectual history does not merely unravel the structure of what we have inherited but can also unearth what we have lost: ways of speaking and ways of seeing the world, once current, now exotic and (perhaps) full of possibility"[60] and that "in trying to unravel the mental worlds of the past, we give ourselves the opportunity to re-weave our own."[61] The relational internationalist perspective, which I believe we have lost sight of, might give us a frame of reference for the way in which PrIL could once again recover the image of the individual whose autonomy is embedded and constructed through a variety of relationships and affiliation and whose liberty and social responsibility are constantly interwoven in the transnational realm.

[60] Brett, *supra* note 40 at 127.
[61] *Ibid* at 128.

Chapter 1 - Individual- and State-Centric Perspectives in Nineteenth Century Private International Law

I. Introduction

Erik Jayme opened his book on the intellectual history of PrIL focused on the work of Pasquale Mancini and Anton Ehrenzweig with the proposition that "the embededdness of history in the present is nowhere more obvious than in PrIL. The methods and instruments currently used were developed and tested much earlier, primarily in the 19th century."[1]

Franz Kahn summarized the fervor and significance of 19th century academic debates in PrIL in his famous statement: "The battle of opinions in Private International Law starts already from the title page.[2]" This dispute was not over terminology. It was one over identity, self-expression, and recognition of a legal branch, struggling to find its place within the legal system. The hybrid nature of PrIL, at the crossroad between private and public law, and between national and international law was and still is indicative of the "fighting contradictions typical of private international law."[3] In recent times these contradictions have taken center stage, as PrIL underwent major changes, including the intense national codifications of PrIL, as well as the remarkable efforts to harmonize PrIL within the EU and globally under the Hague Conventions.

But as Jayme remarked, those newer developments, as well as the deficiencies and contradictions that they reveal within PrIL as a field, are often disconnected from PrIL's own intellectual and methodological past.[4] For example, Jayme suggested that one must stop and consider the distinction EU PrIL makes between disputes involving EU

[1] Erik Jayme, *Internationales Privatrecht: Ideengeschichte von Mancini und Ehrenzweig zum Europäischen Kollisionsrecht* (Heidelberg: C.F. Müller, 2009) at 1.
[2] Franz Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts* (Jena: G. Fischer, 1899) at 5.
[3] Pavel Kalenský, *Trends of Private International Law* (Prague: Czechoslovak Academy of Sciences, 1971) at 158. See also Arthur Nussbaum, *Principles of Private International Law* (Oxford: Oxford University Press, 1943) at 3 (stating that the definition of PrIL as that part of private law dealing with foreign relations is accurate at least "in that it embodies the actual indefiniteness in past and contemporaneous literature").
[4] Jayme, *supra* note 1 at 1.

nationals and those involving "third state nationals."[5] This level of injustice, he argues, was precisely what past PrIL theories had tried to avoid: "Classical PrIL was built upon the principle of equality [between nationals and foreigners]."[6] In particular, Jayme argued that we had lost the particular humanist perspective of "classical" PrIL, which he found in Mancini's theory.[7]

I agree both with Jayme's plea to bring back to light PrIL's 19th century intellectual history, and with his proposition that we tend to underestimate and fail to underscore the particular humanist tenets of various 19th century PrIL theories and even that we might have lost them altogether. In this thesis, I aim to restore precisely the humanist perspective of various 19th century scholars.

But my account of humanism within 19th century PrIL introduces two analytical dimensions. I wish first to underscore the particular context and intense academic debates from which humanism rose and fell at different moments in the development of PrIL. It is hard to understand what the various facets of humanism within PrIL were and what remained from them without taking account of the intense academic debates of the 19th century and onwards. This rich spectrum of debates around the construction and contestation of both individual-centered and state-centered perspectives which has remained remarkably unexplored in PrIL's intellectual history provides a gateway to understanding the value and the premises of both perspectives within the development of the field.

I also wish to underscore the complexity as well as the variations within individual-centered theories. Even within the "classical" period, as Jayme calls it, assuming this refers to the 19th century generally, the "humanist" perspective was hardly uniform and highly contested. The 19th century represented a time of intense academic discussion for and against individual-centered perspectives, as well as a time where much of the misunderstanding of the individual-centered perspective was solidified and carried through to the 20th century and possibly to contemporary PrIL.

But the 19th century was also a time when the various ways in which PrIL might take the individual as the focus point were considered, even among those who generally

[5] *Ibid*.
[6] *Ibid.*
[7] *Ibid*.

subscribed to a humanist paradigm. In other words, I not only want to underscore the existence of a humanist perspective within several 19th century PrIL as such, but also to reveal the complex range of its conceptualization among various theorists. The humanist perspective that Mancini takes via the principle of nationality is different from the humanist perspective that Savigny takes via private law, and in turn Savigny's humanist perspective is different from that of several earlier German scholars focusing on individual liberty and vested rights.

Within this range of conceptualizations I am interested in a particular variation of the humanist perspective, which I will call relational-internationalist and will try to recover from the writings of Joseph Story, Carl von Savigny, and Josephus Jitta. I argue that in many ways each of these scholars built upon the insights of their respective predecessor to construct a theory, which was profoundly individual-centered, yet not individualistic. All scholars, I argue, try to integrate the individual within a private law relationship and then embed the individual and the private law relationship in various social spheres and ultimately within humanity.

While Josephus Jitta espoused the latest and possibly most elaborate such relational internationalist perspective, I do not aim to present his theory in isolation. Rather, I start this chapter by broadly underscoring the thinking of the first two "giants of the 19th century,"[8] Joseph Story and Carl von Savigny, since Jitta's thinking is very much influenced by Savigny and in turn Savigny was also influenced by Story's writings. The full scope of relational internationalist thinking, I believe, can only be fully appreciated by tracing this academic triad.

While Story's and Savigny's writings have had a profound influence on the development of PrIL, they have not remained unchallenged. The rise and fall of the humanistic underpinnings of Story's thinking in the development of PrIL in the US will become apparent in Chapter 4. In this chapter I wish to show the way in which the individual-centered perspective underlying Story's and Savigny's writings was challenged in Europe under the rise of the association between PrIL and PublIL. Within this school of thought, Mancini's nationality principle kept the humanistic premises but,

[8] I take this metaphor from Kurt H Nadelmann, "Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws" (1980) 28:1 Am J Comp L 67.

as I will show below, Mancini both diminished and enlarged the scope of freedom and self-determination envisioned by Story and Savigny. In contrast, the predominantly state-centric theories within the school of thought associating PrIL with PublIL eliminated almost entirely and occasionally quite explicitly denounced humanistic premises in PrIL.

As the 19th century comes to an end, Josephus Jitta will make a remarkable attempt to recover the humanistic underpinnings of Savigny's theory and to counter what he perceived as the excessively state-centric development of PrIL in complete disregard of individuals' interests and appeals to justice. To the extent Josephus Jitta even registers in the memory of PrIL's intellectual history, he is known as the founder of the political school of thought in PrIL in Europe, which is generally associated with an anti-individualistic position, a focus on legislative and social policies, as well as with the unilateral method in PrIL.[9] The fact that Jitta was simultaneously the most vigorous individual-centered theorist of the 19th century shows precisely the way in which an individual-centered perspective in PrIL can be reconciled and indeed integrated within a social justice framework and the unilateral method.[10]

Jitta was also called both a disciple[11] and a critic of Savigny.[12] As I will show in this chapter and throughout the thesis both labels are to a certain extent accurate. Jitta

---

[9] Thomas Decker, *Das kollisionsrechtliche Werk Ernst Zittelmanns (1852-1923)*, dissertation Osnabrück University [unpublished] at 109 (on file with author).

[10] According to the unilateral method each state would determine the extraterritorial reach of its norms. This is in contrast to the multilateral method, which determines the reach of norms irrespective of the country they pertain to. The most well known account of the unilateral method is probably Pierre Gothot, "Le renouveau de la tendance unilatéraliste en droit international privé" (1971) 60 Rev crit dr int privé 1, 209 & 417.

[11] Josephus Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind* (The Hague: Martinus Nijhoff, 1919) at 90: "I have been called, by a benevolent critic – he was too benevolent, I should think – *the best* disciple of Savigny." In this passage Jitta refers to the fact that he embraced Savigny's focus on the juridical relationship. Yet he points to the fact that he does not subscribe to Savigny's focus on the community of nations and instead focuses on the community of people. I argue below that Savigny also focused on the community of people and that it was a common misreading of Savigny to suggest he focused on the community of nations or states:

> In one of my works published some years ago, on the *Method of Private International Law*, I have respectfully but decidedly rejected the basis, assigned by Savigny to private international law. According to the opinion of this illustrious predecessor, private international law should be based on the community of *the nations*, united by regular intercourse. My conviction, however, is that the community of nations may exist, but that it is not the basis of private international law. The real basis of the said law is the juridical community of *mankind*. […] It was also said that there was no essential difference between my view and that of the illustrious scientist. The last objection has induced me to make new investigations." Jitta, *The Renovation* at 1.

very openly and explicitly takes on Savigny's individual-centered premises and encourages PrIL as a field to reconsider them at the end of the 19th century. But he simultaneously reconstructs Savigny's individual-centered premises to emphasize even more the social, relational image of the individual that he wishes to integrate within PrIL theory and methodology. So while the 19th century relational internationalist perspective might be said to culminate in the writings of Josephus Jitta, many of its premises can be traced to Savigny and Story.

II. The First Two Giants of the 19th Century

1. Joseph Story

In his inaugural lecture at Harvard, Joseph Story introduced what would become one of the most influential writings in PrIL. He announced:

> I shall adventure far more than has been usual with publicists into those general principles of jurisprudence which affect the contracts, govern titles, and limit the remedies of the subjects of independent powers who acquire rights or contract obligations or succeed to property or are in any measure subjected to the municipal law in a foreign country. This will include a variety of delicate and interesting topics belonging to the operation of foreign jurisprudence or, as it is sometimes called, the *lex fori et lex loci*.[13]

Story wrote his Commentaries on the Conflict of Laws in 1834, at a time when despite a growing body of case-law on inter-state conflicts matters, there was virtually no in depth analysis of the field of conflict of laws.[14] Livermore, a Louisiana lawyer, had

---

[12] G.J. Steenhoff, "Daniël Josephus Jitta" (1854-1925) in *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C Asser Instituut, 1995) 237 at 240-241.
[13] Nadelmann, *supra* note 8 at 77, n 69.
[14] Joseph Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*, 1st ed (Boston: Hilliard, Gray, 1834) at 9: "The subject has never been systematically treated by writers on the common law of England; and indeed, seems to be of very modern growth in that kingdom; and can hardly, as yet, be deemed to be there cultivated, as a science, built up and defined with entire accuracy and precision of principles. More has been done to give it form and symmetry within the last fifty years, than in all preceding time. But much yet remains to be done to make it what it ought to be, in a country of such a vast extent in its commerce, and such universal reach in its intercourse and polity."

written a treatise defending the European theory of statutes as a response to a case in which such defense was unsuccessful.[15] Livermore's book did not have much of an impact on the development of PrIL and Story did not adopt the European school of statutes per se.[16] But Livermore had donated his library to Harvard Law School and Story was able to incorporate much of the existing European literature, although he criticized it for its "theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtleties, which perplex, if they do not confound, the inquirer."[17]

One of the most impressive aspects of Story's treatise was precisely the way in which he navigated between, and paid equal due regard to an extensive body of European literature as well roughly 500 American conflicts cases.[18] Yet indeed, as Ralf Michaels remarked, despite its comparative nature, the treatise "remains explicitly Anglo-American in its focus" rather than "a general theory or an assumed universal law of conflicts."[19]

Despite its focus on case-law, Story had postulated Ulricus Huber's three maxims[20] as the theoretical anchor for the field: 1) every nation possesses an exclusive sovereignty and jurisdiction within its own territory;[21] 2) no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons or residents

---

[15] Rodolfo de Nova, "The First American Book on Conflict of Laws" (1964) 8 Am J Leg Hist 136 at 137. See also Story, *supra* note 14 at 10, n 2 (praising Livermore's dissertation "as very able and clear" and for "enumerating the principal continental writers, who have discussed this subject at large").

[16] De Nova, *supra* note 15 at 136, n 1. For Story's discussion of the statutory school see Story, *supra* note 14 at 11-18 & 17 ("It is not my design to engage in the controversy, as to what constitutes the true distinction between personal and real statutes, or to examine the merits of the various systems propounded by foreign jurists. It would carry me too far from the immediate purpose of these commentaries, even if I felt myself possessed (which I certainly do not) of that critical skill and learning, which such an examination would require, in order to treat the subject with suitable dignity"). See also Gerhard Kegel, "Story and Savigny" (1989) 37:1 Am J Comp L 39 at 51.

[17] Story, *supra* note 14 at 10 (acknowledging however that "the civilians on continental Europe have examined the whole subject in all its bearings with a much more comprehensive philosophy, if not with a more enlightened spirit").

[18] According to Kurt Nadelmann's count. See Nadelmann, *supra* note 8 at 67.

[19] See Ralf Michaels, "Story, Joseph" in J. Basedow et al, eds, *European Encyclopedia of Private International Law* [forthcoming in 2016] at 5 (on file with author). See Story, *supra* note 14 at 17-18: "My object is rather to present the leading principles upon some of the more important topics, and to use the works of the civilians, to illustrate, confirm, and expand the doctrines of the common law, so far at least, as the latter assumed a settled form."

[20] Ulrich Huber, "De conflict legum Diversarum in Diversis Imperiis" in *Praelectionum Iuris civilis tomi tres*, 2nd ed, Title 3, Part 2, Book 1 (Naples: Expensis Iosephi et Ioannis Roland fratrum: 1788). For a translation and discussion see Ernest G. Lorenzen, "Huber's de Conflictu Legum" (1919) 13 Ill L Rev 375.

[21] Story, *supra* note 14 at 19.

therein, whether they are natural born subjects or others;[22] 3) whatever force and obligations the laws of one country have in another depends solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity and upon its own express or tacit consent.[23]

On the premise of these axioms Story had further postulated that states did not have a duty to apply foreign law. Rather, "the true foundation, on which the administration of [private] international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of inconvenience, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return."[24] Story was clear that even moral duty should only be seen as one "of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded."[25] He concludes that "there is, then, not only no impropriety in the use of the phrase "comity of nations," but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another."[26]

Indeed it would be primarily the theory of comity with which Story would be associated, and the contours of his PrIL philosophy would be examined around his exposition of the comity theory. On the one hand, Alan Watson blamed Story for distorting the universalist implications of Huber's comity theory and for turning it into a discretionary and primarily nationalist direction.[27] The comity metaphor also led to the interpretation of Story's theory as primarily state-centric and even as an early exposition

---

[22] *Ibid* at 21.
[23] *Ibid* at 24.
[24] *Ibid* at 34.
[25] *Ibid* at 33. See also at 34: "And, here again, every nation must judge for itself, what is its true duty in the administration of justice. It is not to be taken for granted, that the rule of the foreign nation is right, and that its own is wrong" & 35: "But of the nature, and extent, and utility of the recognition of foreign laws, respecting the state and conditions of persons, every nation must judge for itself, and certainly is not bound to recognize them, when they would be prejudicial to its own interests."
[26] *Ibid* at 37.
[27] Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (Athens, GA: University of Georgia Press, 1992).

of Brainard Currie's state interest analysis.[28] On the other hand, Joel R. Paul praised Story as a proponent of the association between PrIL and PublIL and for incorporating primarily a public law dimension to PrIL.[29]

Indeed Story not only presented himself as a "publicist" venturing in the domain of the private, but he repeatedly referred to PrIL as a branch of public law:

> The jurisprudence, then, arising from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse, is a most interesting and important branch of public law. […] This branch of public law may be fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or national controversies.[30]

In his introduction to the second edition of his Commentaries Story also invites "the genius and learning and labors of more gifted minds" to "mould and polish and expand" his writings "into an enduring system of public law."[31] Story also occasionally references the notion of "law of nations" even though it often seems to stand for a general sense of global justice, or customary practice and legal principles.[32]

But it would be a mistake to think that Story's references to sovereignty, comity and the law of nations translate into a state-centric theory. Blaine Baker argued forcefully that one should read Story's *Commentaries on the Conflict of Laws* in line with his *Commentaries on the Constitution of the United States* and with his general views on the scope of state sovereignty. Through this association, *Commentaries on the Conflict of Laws* become "a heuristic, constitutional essay on the correlative scope of private and

---

[28] See Donald Earl Childress III, "Comity as Conflict: Resituating International Comity as Conflict of Laws" (2010) 44 Univ Calif David 11. See also Ernest G. Lorenzen, "Commentaries of the Conflict of Laws – One Hundred Years After" (1934) 48 Harv L Rev 15 esp. at 35.
[29] Joel R. Paul, "The Isolation of Private International Law" (1988) 7 Wis Int'l LJ 149.
[30] Story, *supra* note 14 at 9.
[31] Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Successions, and Judgments,* 3rd ed (Boston: Charles C. Little & James Brown, 1846) at ix.
[32] Story, *supra* note 14 at 4. See also at 5: "New rules, resting on the basis of general convenience, and an enlarged sense of national duty, have been, from time to time, promulgated by jurists, and supported by courts of justice, by a course of juridical reasoning, which has commanded almost universal confidence, respect, and obedience, without the aid, either of municipal statutes, or royal ordinances, or international treaties."

public sovereignty."[33] And through this lense one becomes attuned to the fact that Story makes a distinction between the justification for the mere possibility of applying foreign law – which he grounds in comity – and the regulatory scope of PrIL – which he grounds in weighing and securing peoples' rights and reasonable expectations in the transnational realm:

> Indeed, in the present times, without some general rules of right and obligation, recognized by civilized nations to govern their intercourse with each other, the most serious mischiefs and most injurious conflicts would arise. Commerce is now absolutely universal among all countries, the inhabitants of all have such a free intercourse with each other; contracts, marriages, nuptial settlements, wills, and successions, are so common among all persons, whose domicils are in different countries, having different and even opposite laws on the same subjects; that without some common principles adopted by all nations in this regards there would be an utter confusion of all rights and remedies; and intolerable grievances would grow up to weaken all the domestic relations, as well as to destroy the sanctity of contracts and the security of property.[34]

PrIL matters are described as issues of "mixed rights"[35] and the goal is to analyze and secure the various rights and reasonable expectations of individuals as they cross national boundaries, while being mindful of the social context in which they are exercised. Overall, the aim was to eliminate "the grossest inequalities which will arise in the administration of justice between the subjects of the different countries."[36]

At the same time Story's "conception of national sovereignty prevented him from admitting directly the universality of private rights."[37] Therefore, a state's obligation to enforce rights and reasonable expectations in PrIL cases had to be explained in a different way. First, in accordance with his views of constitutional law, Story relied on a theory of limited state sovereignty, which meant that in a national context the state has a direct

---

[33] Blaine Baker, "Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws" (1993) 35 McGill L J 454 at 488: "As Story said repeatedly, his choice-of-law rules were designated to regulate the domestic behavior of states and nations, and thereby secure the mixed private rights of citizens operating in national or international markets."
[34] Story, *supra* 14 at 5.
[35] *Ibid* at 3.
[36] *Ibid* at 6.
[37] Baker, *supra* note 33 at 496.

obligation towards its constituents to respect and secure their rights and reasonable expectations.[38] Secondly, as a corollary to this "internal" obligation, the state acts as the agent of its nationals in an international realm to ensure that other states extend such recognition to the rights of its nationals. Emerging from their 'internal/constitutional' obligations, states had the 'external/PrIL' obligation to negotiate rules of PrIL, which would ensure the widest possible recognition of "naturally vesting rights."[39]

Comity was thus used in a loose sense, both as the recognition of this unrestrained sovereignty of states in relationship to each other, and as an indicator of a "rational" basis of co-ordination of PrIL among states to fulfill their internal obligations towards their nationals. Comity in Story's doctrine is thus the point of connection between individual-centered and universalist tendencies. As a state-centric concept, comity confirms that in PrIL states have no direct duties towards each other. However, as a loose concept signifying a sort of implied reciprocity,[40] comity can serve as a "function of the security of mixed private rights."[41] This implied consent of states to co-ordinate their rules to ensure the stability of private rights in an international context would translate in what Baker referred to as a sort of 'imaginary confederation' among states on PrIL matters.[42] "Nation- states participated in Story's imaginary convention as agents of their citizens, authorized to compromise national independence in specific instances of interstate conflict to secure extraterritorial protection for the private rights of their citizens."[43] For Story co-ordination of PrIL rules with a view to secure private rights becomes "an enlarged sense of national duty."[44]

But just as it would be wrong to assume that Story adopted a state-centric theory from his references to comity, it would be equally wrong to assume that Story meant to

---

[38] *Ibid* at 494.
[39] *Ibid* ("With regard to other nations, the United States could also claim sovereign status. Unlike its citizens, the United States enjoyed no inherent sovereignty vis-à-vis other nations, but only those powers conveyed to it by its citizenry in an express social contract").
[40] Story, *supra* note 14 at 37 ("in the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests").
[41] Baker, *supra* note 33 at 505.
[42] *Ibid* at 495 ("Much like the signatories of the United States' Constitution, nations acceded to a circumscription of their juristic sovereignty in conflicts matters to provide institutional safeguards for the private rights of their citizens").
[43] *Ibid* at 496.
[44] Story, *supra* note 14 at 5.

subscribe to an individualistic theory because of his many references to private rights. First, as I will show in chapter 5, Story does not set particular boundaries between individual interests and expectations and larger public values, and fluctuates indiscriminately between the two. Second, Story incorporates a broad notion of "public policy" to secure both general principles of morality and justice, as well as political goals:

> No nation can be justly required to yield up its fundamental policy and institutions in favour of those of another nation. Much less can any nation be required to sacrifice its own interests in favour of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty. In the endless diversities of human jurisprudence many laws must exist in one country, which are the result of local or accidental circumstances, and are wholly unfit to be engrafted upon the institutions and habits of another. Many laws, adapted to heathen nations, would be totally repugnant to the feelings, as well as to the justice, of those, which embrace Christianity. A heathen nation might justify polygamy, or incest, contracts of moral turpitude, or exercises of despotic cruelty over persons, which would be repugnant to the first principles of Christian duty. The laws of one nation may be founded upon a narrow selfishness, exclusively adapted to promote the personal or propriety interests of its own subjects, to the injury or even ruin of those of the subjects of all other countries. A nation may refuse all reciprocity of commerce, rights, and remedies to others. It may assume a superiority of powers and prerogatives for the very purpose of crushing those of its neighbours, who are less fortunate or less powerful. In these, and in many other cases which may easily be put, without any extravagance of supposition, there would be extreme difficulty in saying, that other nations were bound to enforce laws, institutions, or customs, so subversive of their own morals, justice, interest, or polity.[45]

This extended account of public policy shows, I believe, two distinctions, which Story makes in his account. On the one hand, comity is not equated with particularism. In Story's own words, "mutual utility presupposes that the interest of all nations is consulted, and not that of one only."[46] Comity does not mean a preference for national interest, but rather a principled analysis and weighing of all interests involved. On the

[45] Story, *supra* note 14 at 26.
[46] *Ibid* at 36.

other hand, the goal of securing rights and expectations is not set in contrast to public and political goals, but rather in contrast to "despotic power."[47]

It is this last point, which becomes even clearer through an addition that Story made in the second edition of the Commentaries. In the introductory remarks to the first edition, Story had searched for "any distinct system of principles applicable to international cases of mixed rights" in the antiquity.[48] He argued that we do not have a clear understanding of how questions of mixed rights were disposed of in antiquity and that since "the Law of Nations, strictly so called, was in a great measure unknown to antiquity, and is the slow growth of modern times, under the combined influence of Christianity and Commerce,"[49] one must acknowledge that "the invasions of the Barbarians of the North, the establishment of the feudal system in the middle ages, and the military spirit and enterprise cherished by the Crusades, struck down all regular commerce, and surrendered all private rights and contracts to mere despotic power."[50]

But in the second edition Story adds a 5-page translation from Savigny's History of the Roman Law in the Middle Ages.[51] He calls Savigny "a most learned and eminent jurist" and he considers the passage in which Savigny describes the origins of personal laws as "exceedingly interesting and curious" and felt compelled to cite it at large.[52] In that passage Savigny shows that the Goths, Burgundians, Franks, and Lombards allowed the conquered people to maintain their laws and customs. Savigny argues that it is "from this state of society that arose that condition of civil rights, denominated Personal Rights or Personal Laws, in opposition to Territorial Laws."[53] Savigny refutes the "customary" explanation of these circumstances by reference to "the love of freedom" and argues instead that the recognition of personal laws by the conquerors can be best explained as a result of increased inter-personal contact between individuals belonging to the different races:

---

[47] *Ibid* at 4 ("the invasions of the Barbarians of the North, the establishment of the feudal system in the middle ages, and the military spirit and enterprise cherished by the Crusades, struck down all regular commerce, and surrendered all private rights and contracts to mere despotic power").
[48] *Ibid* at 3.
[49] *Ibid* at 4.
[50] *Ibid*.
[51] Carl von Savigny, *The History of the Roman Law During the Middle Ages*, translated by E. Cathcart (Edinburgh: Adam Black, 1829) cited in Story, 3rd ed, *supra* note 31 at 4, n 3.
[52] *Ibid*.
[53] *Ibid*.

> Further, the want of such an institution as the Personal Laws, could never have been felt, in a country without trade, and where few foreigners resided. In these circumstances, its introduction was impossible. If only a single Goth lived in the Burgundian empire, none of his countrymen could be found to administer Gothic law, and the Burgundians themselves were entirely ignorant of it. […] The truth is that the want of such an institution, and the possibility of introducing it, could occur only, after the nations were blended together in considerable masses. The internal condition of each kingdom could then produce what could never have been brought by mere benevolence toward individual foreigners.[54]

Much of this resonated with Story. In his view this significant inter-personal intercourse and trade defined the society of his time. And it was precisely the despotic disregard of peoples' rights and reasonable expectations, which PrIL had to avoid, much like the system of personal laws seemed to have contemplated. In other words, the goal of recognition of rights and reasonable expectations was meant to avoid the arbitrary disregard of human agency and reasonable expectations by different public powers. As I will show in chapter 5, Story places the reasonable expectations of individuals within a social context and shifts indiscriminately from the rights and expectations of individuals to the broader social and public context. His references to rights and reasonable expectations are meant to signal the need for "moderation" in the exercise of public power which might be inclined to entirely disregard the voice and the interests of individuals in their transnational relations.

2. Carl von Savigny

Joseph Story's treatise had a profound influence on the development of PrIL in the 19th century and beyond, both in the United States, as well as abroad.[55] Story also sent a copy of his commentaries to Carl von Savigny, whose own treatise on PrIL was published fifteen years later, in 1849.

[54] *Ibid* at 4-5, n 3.
[55] See Nadelmann, *supra* note 8.

Despite the time gap between Story's fist edition of the Commentaries and Savigny's 8th volume of the System, the discipline still appeared to Savigny "in a state of growth, incomplete and unfinished."[56] He found a striking opposition between an almost universal interest and debate on the nature of PrIL and the lack of consensus on any "universally admitted principles."[57]

Yet precisely because academic debates in PrIL had intensified since Story's writing, Savigny had more intellectual material to draw from in his own account of PrIL. Story's book was already published and two German scholars, Carl Georg von Waechter (1797-1880) and Wilhelm Schaeffner (1815-1897) had already published valuable expositions of PrIL.[58] Savigny does indeed cite to all three accounts extensively and praises Story, both in his letter of recognition for receiving Story's book,[59] as well as in his preface to the 8th volume.[60]

Yet in historical accounts of PrIL's development Story is often juxtaposed to Savigny. Gerhard Kegel described Story as a publicist and Savigny as a privatist, Story as focused on the community of states and Savigny on the community of laws.[61] From my

---

[56] Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*, translated by William Guthrie (Edinburgh: T&T Clark, 1880) at 1.

[57] *Ibid*.

[58] Karl Georg von Wächter, "Über die Collision der Privatrechtsgesetze verschiedener Staaten" (1841) 241 AcP 230 & (1842) 251 AcP 1, 161 & 361; Wilhelm Schaeffner, *Entwicklung des internationalen Privatrechts* (Frankfurt: JD Sauerländer, 1841). See also Gerhard Kegel, "Story and Savigny" (1989) 37 Am J Comp L 39 esp. at 40 (noting the influence of the two writing on Savigny). Ralf Michaels also noted the influence of Waechter's writing on Savigny. See Ralf Michaels, "Waechter, Carl Georg" in J. Basedow et al, eds, *European Encyclopedia of Private International Law* [forthcoming in 2016] (on file with author). For a discussion of Wächter's essay see Kurt Nadelmann, "Wächter's Essay on the Collision of Private Laws of Different States" (1964) 13 Am J Comp L 414.

[59] See Wm.W. Story, ed, *Life and Letters of Joseph Story*, vol 2 (London: John Chapman, 1851) at 378.

[60] See Savigny, *supra* note 56 at 43 ("A remarkable picture of this imperfect but hopeful state of things is presented in the excellent work of Story, which is also extremely useful, as a rich collection of materials, for every inquirer").

[61] See Kegel, *supra* note 58 at 58-59 (arguing that it is first with Savigny that PrIL has been truly "privatized"). Ralf Michaels also adopted this reading. See Ralf Michaels "Public and Private International Law: German Views on Global Issues" (2008) 4 J P Int'l L 121 at 127:

> Story had defined private international law as a subdiscipline of international law, and connections to public international law and/or federalism were always important in his work. This understanding of comity as concerning relations between governments established private international law as a disciplie of conflicts between different governments, and thereby lent itself nicely to 20th century conceptions of conflict of laws as conflicts of governmental interests, at heart very much a public law conception of conflict of laws. Savigny, by contrast, came not from international law but from private law.

preceding account of Story's cross-reference between comity and private rights it would have become apparent that the classification of Story as a state-centric publicist is overly simplistic. But even through the lens of Savigny's writings, the parallels to Story become quite obvious.[62] Kegel also observes that "Story's influence on Savigny went beyond the universal international connection and is stronger than the influence of other jurists. Gutzwiller even presumes that Savigny took his partiality for Hert and Boullenois from Story."[63]

Savigny references Story's emphasis on the "strict right of sovereignty" and recognizes that this "might certainly, among other things, go so far as to require all judges of the land to decide cases that come before them solely according to the national law, regardless of the perhaps different rules of some foreign law with whose territory the case in question may have come in contact."[64] And certainly, "in the first place, we must admit, that if the domestic laws give directions for the treatment of cases of conflict, there must be applied absolutely by the judges of our state."[65] There was in other words indeed no positive obligation of states to apply foreign law. Yet in fact states commonly apply foreign law and "this has resulted from that reciprocity in dealing with cases which is so

---

But see Ralf Michaels, "Story, Joseph" in J. Basedow et al, eds, *European Encyclopedia of Private International Law* [forthcoming in 2016] referencing Blain Baker's reading of Savigny that underscores Story's focus on private rights and private law (on file with author).

[62] Despite the juxtaposition between Story and Savigny, Kegel also remarks that "although civil and common law remained at the time (and further on) separate in the field of private international law, the strong links between them are striking." See Kegel, *supra* note 58 at 48.

[63] *Ibid* at 49. Boullenois had already described conflict of laws issues as "mixed questions," a term that Story used repeatedly throughout his commentaries. By virtue of this term, Boullenois explained the variety of issues which are involved simultaneously in conflict of laws issues: state-centric and individual-centered aspects, written and customary law, as well as natural law, personal and territorial elements and so on. Underscoring the variety of elements involved in conflict of laws and the attempt to reconcile and make sense of them was, in line with my reading of Story and Savigny throughout the thesis, a theoretical and methodological direction which united Story and Savigny. It seems natural then that they would both be drawn to this perspective in Boullenois's writing. See Louis Boullenois, *Traité de la personalité, et de la réalité des lois, coutumes, ou statuts, par forme d'observations* (Paris: Guillaume Desprez, 1762). Story included a quote from Boullenois on the front cover of his Commentaries. Story, *supra* note 14 at front cover citing Louis Boullenois, *Traité de la personalité, et de la réalité des lois, coutumes, ou statuts, par forme d'observations* (Paris: Guillaume Desprez, 1762) at Préface: "There will always be a constant contrariety of laws between nations; maybe it will always exist on many aspects. This makes it necessary to devise rules and principles which allow us to decide questions which arise from this contrariety of laws."

[64] Savigny, *supra* note 56 at 69.

[65] *Ibid* at 69.

desirable, and the consequent equality in judging between natives and foreigners, which, on the whole, is dictated by the common interest of nations and of individuals."[66]

At first sight this might appear as a departure from Story's theory of comity. Yet the grounds of tempering the initial postulates of sovereignty and comity are the same as in Story's theory. The gradual recognition of equality between natives and foreigners,[67] Christian morality,[68] and "the real advantages which result from it to all concerned"[69] were precisely the same grounds that Story had referenced to push his quasi-federation of states to the adoption of common rules and practices. Therefore what could at first sight be perceived as a departure from Story's comity seems at second glance much of a restatement of Story's comity. Savigny writes:

> This equalization, as contrasted with the strict law above mentioned, may be designated as friendly concession among foreign states; that is, an admission of statutes originally foreign among the sources from which native courts have to seek for their decision as to many cases (legal relations). Only this difference must not be regarded as the result of mere generosity or arbitrary will, which would imply that it was also uncertain and temporary. We must rather recognize in it a proper and progressive development of law, keeping pace with the treatment of cases of conflict between the particular laws of the same state.[70]

But Story had not postulated comity as mere charity to other states and certainly did not think that the application of foreign law as based on comity would be arbitrary and temporary and not even uncertain. He too thought there would be a progressive development of law among nations and a progressive consensus on principles of international justice.

For Savigny this translates into a community of law, which "lies in reality at the foundation of the universal customary law."[71] "Neither can it make any difference that there is a dispute as to the substance and the limits of that customary law. The general

---

[66] *Ibid*.
[67] *Ibid*.
[68] *Ibid* at 70.
[69] *Ibid*.
[70] *Ibid* at 70-71.
[71] *Ibid* at 58.

assumption that it exists, and the general attempt to determine its contents, are decisive in favour of our assertion. We cannot, however, be surprised to find wavering and conflicting opinions in a branch of jurisprudence, which, like that now before us, is presented to us in a state of growth."[72]

Kegel saw in Savigny's conceptualization of the community of law both a distinction to later theories grounded in PublIL, as well as a departure from Story's comity doctrine. As to the former he argues:

> Thus, Savigny did not derive private international law from international law (something Zitelmann will later do unsuccessfully). […] The "*völkerrechtliche Gemeinschaft"* was not a community of international law, but a legal community of peoples. For Savigny, it was, so far as private international law was concerned, the counterpart to the national legal community in which the interstate conflict of laws unfold.[73]

As to the distinction between Savigny's community of people and the later invoked community of states by the PublIL school of though, I believe Kegel is right. In the next chapter I show how Savigny was for a long time misunderstood as a precursor of the later state-centric theories, precisely because of his reference to the "*völkerrechtliche Gemeinschaft."* But Kegel believed Savigny's "principles" leading to "a common system of rules"[74] also "serve Savigny to form carefully a transition from a *comitas* doctrine, retained by Story, to a developing law, in principle universally applied, that is of advantage to the states and the individuals (in the sense of a true advantage to all parties concerned)."[75]

> With his "*völkerrechtlichen Gemeinschaft,"* Savigny left the public law context (from which the *comitas* doctrine was derived; Story subsequently viewed private international law as "a system of public law") and moved into the field of private law (where the interstate conflict of laws had been situated to start with.) The "*völkerrechtliche Gemeinschaft"* thus had the double task of privatizing private international law and of

[72] *Ibid* at 70-71.
[73] *Ibid* at 59.
[74] *Ibid* at 72.
[75] Kegel, supra note 58 at 58.

driving it toward universal uniformity (so that it will be judged according to the same law everywhere).[76]

I believe this distinction is too quick. On the one hand it underestimates Story's goal to move states to co-ordinate their rules of PrIL, while overestimating the universalist theory of Savigny. Blaine Baker's analysis identifies comity precisely as a term, which is mindful of state sovereignty, while pushing states towards an imaginary confederation and a quasi - transnational common law practice. Furthermore, in the last chapter I show that Savigny's plea for uniformity was much more restrained and nuanced than it is commonly assumed. On the universalist premises therefore, Story and Savigny were not that far from each other.

On the other hand, Kegel conflates a move away from a state-centric perspective to a move away from public law. Throughout this thesis I argue the individual/state and private/public distinctions should be kept separate in the analysis of PrIL's intellectual history. It is true that Savigny did not conceptualize PrIL matters as questions of "division of sovereignty" as many PrIL scholars would later do. And it is true that Savigny referred to a general community of law and of people, rather than a community of states. But this does not mean Savigny took what would now be thought of as public law out of the purview of PrIL.

The way in which public law rules and principles are integrated precisely within an individual-centered perspective through a relational image of the individual will be showed throughout the various chapters of this thesis. Here I merely want to introduce a few themes, which I develop in further chapters and which offer an initial glimpse into the way in which an initial individual-centered starting point does not translate into individualism in Savigny's PrIL theory.

On the one hand Savigny made famous a methodological transition from analyzing the nature of laws (as personal, real, or mixed) to analyzing the nature of legal relationships.[77] This was indeed a trademark of all relational internationalist theories. This was not a novel metaphor originating with Savigny's theory. Story had already

[76] *Ibid* at 59.
[77] For Savigny's analysis of the statutory school see Savigny, *supra* note 56 at 47-48 & 141-142. For his discussion of the legal relationship at 57, 70, 133. See also Kegel, *supra* note 58 at 57-58 with further references on writings about Savigny's focus on the legal relationships at n 129.

referenced the nature of legal relationships and frequently refers to inter-personal relationships as the unit of analysis in PrIL.[78] Furthermore, Savigny's two German predecessors, Georg von Wächter and Schäffner had already introduced the notion.[79] But Savigny made it analytically sharper and drew various new methodological conclusions from it. Yet shifting from an analysis of the nature of laws to an analysis of the nature of legal relationships does not represent a turn to individualism. When distinguishing his theory from the previous statutory school, Savigny argued that it should not make a difference whether one starts from the legal relationship and asks which law it is submitted to, or whether one starts from the law and asks whether it covers this particular legal relationship.[80] Searching for the "nature of a legal relationships" was an analytical exercise which incorporated both the extra-legal social expectations of individuals in relationship to each other, as well as the rules and principles, which regulate such relationship. As I show in chapters 2 and 5, searching for the nature of a legal relationship was a rather fluid and complex analytical step that was not anchored in an underlying concept of individual freedom.

On the other hand Savigny does reference a concept of "voluntary submission," arguing that the seat of a legal relationship would, among others, be located by reference to individuals' free submission under particular laws. Recently, this metaphor was understood as a proxy for a theory of free choice of law.[81] Yet, as I will show in chapter 5, Savigny himself distinguishes this principle from the theory of free choice of law.[82] As I show below, Mancini would praise Savigny precisely for making this distinction and

---

[78] For more on this see Chapter 5.
[79] For this notion in the earlier German writing see Kegel, *supra* note 58 at 55-56.
[80] See Andreas Bucher, *Grundfragen der Anknüpfungsgrechtigkeit im internationalen Privatrecht (aus kontinentaleuropäischer Sicht)* 22 Schriftenreihe des Instituts für Internationales Recht und internationale Beziehungen, Universität Basel (Basel; Stuttgart: Helbing & Lichtenhahn, 1975) at 40 (arguing that Savigny's focusing on both the legal relationship and the law was underappreciated).
[81] Sagi Peari, "Savigny's theory of choice-of-law as a principle of 'voluntary submission'" (2014) 64:1 UTLJ 106.
[82] Duco Kollewijn, an author I introduce in Chapter 3, pointed out that Savigny did not include "choice of law" as a connecting factor in determining the seat of a legal relationships, while in Kollewijn's time, choice of law was viewed as such a connecting factors. Kollewijn thought that even though Savigny had included a concept of voluntary submission, the fact that he did not incorporate choice of law as a connecting factor allowed him to calibrate the level of freedom allowed for different categories of private law, rather than anchoring PrIL as a field to a concept of freedom. Furthermore, this distinction allowed him to distinguish 'objective' elements that define the 'international' nature of a private law relationship from 'subjective' intentions and appreciations by the parties. See Roeland Duco Kollewijn, "Quelques considerations a propos de la doctrine de Savigny" (1968) 15:3 Nethl Int'l L Rev 237.

avoiding any individualistic theoretical and methodological premises. Rather, I argue in chapters 5 and 6 that Savigny's concept of voluntary submission is an expression of what Okko Behrends called "empirical" elements of freedom, namely the actual ability of individuals to travel, purchase things abroad, enter into contracts in other jurisdictions and so on.[83] The call is for the application of the law to be generally linked to the actual actions and expectations of individuals in the myriad of inter-personal transnational relations. But Savigny argues not only that "this link must not be regarded as unlimited," but that its value will be considered differently among a wide variety of inter-personal relations.[84]

Therefore, neither Savigny's shift to the analysis of the legal relationships, nor his reference to voluntary submission represent a shift to individualism and individual liberty. Instead, Savigny takes the equality between nationals and foreigners as an anchor for PrIL, just as Story had argued previously. This postulated equality as well as the social image of the individual he constructs makes him focus on a legal relationship, rather than an isolated individual,[85] and allowed him to argue for the possibility of an increasingly universal treatment of PrIL matters.[86] As I show in chapter 5, this was different from previous attempts of vested rights theorists to anchor PrIL and its universality in individual freedom and autonomy.

Furthermore, the fact that Savigny does not take either Kantian rationalism or an intransigent concept of individual liberty as the reference point of law is further reflected in his general theory of law and state. Particularly in chapter 6, I discuss the way in which Savigny's theory of the Volksgeist, his anti-Kantian philosophy, and the historical school of thought he grounded enabled him to construct a relational, socially constructed image

---

[83] Okko Behrends, "Geschichte, Politik und Jurisprudenz in Savignys System des heutigen römischen Rechts" in Okko Behrends, Wulf Eckart Voss & Malte Diesselhorst, *Römisches Recht in der Europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker* (Ebelsbach: R. Gremer, 1985) at 257.

[84] See Savigny, *supra* note 56 at 134-136.

[85] *Ibid* at 143.

[86] *Ibid* at 69: "For it is the necessary consequence of this equality, in its full development, not only that in each particular state the foreigner is not postponed to the native (in which equality in the treatment of persons exists), but also that, in cases of conflict of laws, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or in that." See Chapter 7 for a detailed discussion of this aspect. For a general account of Savigny's principle of equality and its relationship to PrIL's cosmopolitan premises see Egon Lorenz, *Zur Struktur des internationalen Privatrechts. Ein Beitrag zur Reformdiskussion* (Berlin: Dunkler & Humblot, 1977).

of the individual. Indeed within his PrIL volume, Savigny refers his readers to his general theoretical expositions on the concept of law and state, the various categories of law and the concept of legal relationship found in other volumes within his System.[87] Much of this parallel between his PrIL writings and his general theory of law and state will be made in later chapters, especially chapter 6. Suffice it here to note that Savigny outlines the entire method of PrIL as a search for the embededdness of individuals and legal relationship in a larger "whole:"

> In order to discover the connection by which a person is attached to a particular positive law by subjection to it, we must remember that the positive law itself has its seat in the people as a great natural whole, or in an ethnical subdivision of this whole. It is only another expression of the same truth, when we say that law has its seat in the state, or in a particular organic part of the state, because, as it is only in the state that the will of individuals is developed into a common will, it is there only that the nation has a realized existence. In pursuance of this general plan, we have then to determine more minutely how this whole is constituted, and how this unity is defined, within which the rules of law, as constituent parts of the positive law, have their seat. Thus we shall know by what tie individual persons are held together in the common possession of the same positive law.[88]

III. Conflicts of Laws as Conflicts of Sovereignty

Both Story's and Savigny's theory represented a departure from the previous European statutory school, which divided statutes into personal, real, or mixed (depending on whether they were dealing primarily with people or with territory), in order to determine their extraterritorial reach. It was both a departure from the formalist nature of the classification of laws, as well as an attempt to center PrIL on the inter-personal relationships in both their extra-legal social and legal dimensions.

But a focus on laws would make a comeback in the 19th century after Savigny, as a way of conceptualizing conflict of laws matters as conflicts of public powers. André Bonnichon traced the beginnings of this new conceptualization to the French author

[87] See e.g. Savigny, *supra* note 56 at 77, n (a).
[88] *Ibid* at 57.

Mailher de Chassat and his 1845 treaty on statutes.[89] He argued that the conceptualization of PrIL as conflicts of sovereignty can be seen as a corollary to the concomitant theories of public law, which increasingly emphasized the formal origins of law as an attribute of sovereignty, as well as PublIL theories postulating fundamental rights of states.[90]

Initially, at least in Pasquale Mancini's theory, this new conceptualization translated into a way of reflecting on the obligations of states towards individuals, especially towards foreigners. This maintained the cosmopolitan ethos of Story's and Savigny's theories, but as I show below, it also changed its contours and its premises.

Yet as the 19th century was coming to an end the conceptualization of PrIL as conflicts of sovereignty translated more and more into a focus away from the humanist premises and into an attempt to theorize inter-personal relations as particular kinds of inter-state relations. The idea emerged and the French civil code at the time adopted it as well, that every individual right would need to be claimed by his/her state.[91] Bonnichon thought this transition implied a shift, already started by Mancini, from underscoring the agency of individuals in the transnational realm to portraying the individual as subsumed under nationality or citizenship: "the political allegiance to a prince or a nation would initially not be confused with the civil condition of the individual, the one was nationality, the other domicile. But now the political and the civil are one."[92] Bonnichon thought it was telling that Maiher de Chassat had already emphatically declared "my birth gives me the quality of a French man I am thereby."[93] Progressively, from Maiher de Chassat to Mancini and his Italian disciples, the notion of personal sovereignty of the state would join the previous Dutch theory of territorial sovereignty in order to complete the imagery of conflict of laws as conflict of sovereignty.[94] It was at this junction point that Bonnichon remarked ironically:

---

[89] See André Bonnichon, "La Notion de conflit de souverainetés dans la science des conflits de lois" (1950) 39 Rev crit dr int privé 11 at 12-13 citing Mailhé de Chassat, Traité de statuts (lois personelles, lois réelles), d'après le droit ancienes et le droit modern, ou du Droit International Privé (Paris: A. Durand, 1845).
[90] *Ibid.*
[91] *Ibid* at 15 citing Joseph Beale, whose scholarship I introduce in Chapter 4 and Eugen Ehrlich, "Les tendances actuelles du droit international privé" (1908) 4 Rev dr int privé 902 at 916.
[92] Bonnichon, *supra* note 89 at 15.
[93] *Ibid* at 14.
[94] *Ibid* at 14 &16.

> Now all the conditions are united for the modern idea to emerge that the conflict of laws is a conflict of sovereignty; now we consider in the law its formal source, the imperative of a sovereign; we admit that this imperative is addressed above all towards people and that it can follow them everywhere; we imagine a wrap-around of a clear idea and by this idea we can connect PrIL with PublIL. The science of PrIL can finally come out of the limbo in which it was stuck for so long.[95]

The limbo that the PrIL-PublIL association was meant to counter was precisely that allegedly caused primarily by Story and Savigny. On the one hand, Story was famous for having explicitly argued that there is no obligation as such to apply foreign law or to apply the same law as other national courts did. That was in fundamental contradiction to the PublIL school, which worked tirelessly to ground an obligation to adopt uniform rules of PrIL derived from PublIL. Virtually all scholars pleading for the PrIL-PublIL association fundamentally rejected the comity doctrine.[96] On the other hand, Savigny was famous for having pled for situating a legal relationship according to its nature. To universalists focusing on the PrIL-PublIL relationship, this seemed a much too fluid and analytical notion, which could not possibly lead to universal rules of PrIL. It allowed for too much interpretation and nuances and was not anchored in an overarching principle of theoretical justification that could be accepted by all states.[97]

Instead, those who structured the PrIL-PublIL association thought "realizing finally that conflict of laws is a conflict of sovereignty means to finally build [PrIL] solidly."[98] To build solidly was to operate with high abstractions and very general principles around which universal consensus could be reached. The last few decades of the 19th century showed a tremendous variety of scholarly efforts to theorize the PrIL-PublIL association and thereby to build PrIL "solidly" and uniformly.[99] To show this trajectory of the PrIL-PublIL association I start by broadly outlining the philosophy of Pasquale Mancini, the "third giant" of the 19th century, alongside Story and Savigny. I underscore both the particular humanist premises of his theory, as well as distinguish

[95] *Ibid* at 16.
[96] See below for the discussion of Mancini and his reference to the way in which virtually all scholars associating the two fields refuted the theory of comity.
[97] See below for a discussion of how both Mancini and Pillet refuted the fluidity of Savigny's theory. For a more detailed discussion of Pillet's critique see Chapter 6.
[98] Bonnichon, *supra* note 89 at 14.
[99] *Ibid.*

them from those underlying Story's and Savigny's thinking. In the second section I consider the way in which Mancini's initial humanism dissipated as the PrIL-PublIL association became increasingly state-centered in the theories of the French scholar Antoine Pillet and the German scholar Ernst Zitelmann.

1. Pasquale Mancini

In his account of the contours of Mancini's nationality rule in PrIL theory, Kurt Nadelmann rightfully ranked Mancini "with the other two giants of the nineteenth century conflicts theory- Joseph Story and Friedrich Carl von Savigny," and noted his fame as both a statesman and jurist.[100] In his inaugural lecture as professor of international law, Mancini had already postulated the principle of nationality as the pillar of PublIL.[101] From a political standpoint the principle of nationality was meant to support the movement of national unity in Italy, and when Mancini became the draftsman of the committee on Legislation in the Italian Parliament during the Risorgimento, he urged that the principle of nationality become the pillar of conflicts rules in the new Civil Code.[102] The law of nationality would, thereby govern status and capacity, family relations, and successions.[103] Mancini became the president of the Institute of International Law in 1873 and at the Institute's second session in 1874 Mancini prepared a report on Private International Law, which was later published in the first edition of the Journal du Droit International Privé et de la Jurisprudence Comparée, founded by Mancini with Chretien Clunet and Chassat Demangeat.[104]

The report became the manifesto of the universalist theory for uniformity of PrIL. But as an expression of Mancini's philosophy of PrIL it went much beyond its general plea for uniformity. Mancini starts his report with the same ode to the past that Story and

[100] See Nadelmann, *supra* note 8. For a detailed account of Mancini's thought see Jayme, *supra* note 1.
[101] P.S. Mancini, *Della nazionalitá come fondamento del diritto delle genti* (Napoli : Istituto Suor Orsola Benincasa, 1988); P.S. Mancini, *Diriti Internazionale, Prelezioni* 1 (Napoli: Giuseppe Marghieri, 1873).
[102] Nadelmann, *supra* note 8 at 420.
[103] *Ibid*.
[104] P.S. Mancini, "De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de régles generales du droit international privé pour assurer la decision uniforme des conflits entre les différentes legislations civiles et criminelles" (1874) 1 Journal du droit international privé et de la jurisprudence comparée 221 & 286.

Savigny had incorporated. The time when Romans had allowed the conquered races to live by their laws and customs is presented with the same nostalgia that marked Savigny's and Story's own accounts.[105] And it was precisely this ability of individuals to maintain their national laws while within the purview of another state that Mancini wanted to recover for PublIL and PrIL alike. Yet pushing for this direction required the conceptualization of a strong theoretical foundation, which would motivate all countries to accept it as the basis for PrIL. Furthermore, it required refuting the domicile as a primary connecting factor for PrIL matters, which was incorporated in both Story's and Savigny's theories.

But the first step for Mancini was to refute the theory of comity, in order to construct a true obligation to apply foreign law generally, and the law of nationality in particular.[106] Mancini accepts the independence of states as "no more or less inviolable than individual freedom,"[107] but charges scholars like Story with having "confused the absolute legislative power of a state with the legitimacy of its exercise."[108] It would be illegitimate to apply the law of the forum in all circumstances because this could violate individual liberty and rights:

> Laws and codes, fallible works and relative expression of the truth, as it is conceived by the legislature of a state, do not create the rights and liberties of man, but have the duty to recognize them their just domain, even for foreigners. If they do not, they violate the laws of justice and at the same time the law of nations, because each state has an interest in ensuring the legitimate rights and liberties of its members and to have them respected by other nations.[109]

Recognizing rights and liberties was an actual obligation grounded concomitantly in international justice and PublIL. Thus, comity could be completely refuted and Mancini cites the overwhelming consensus of all members of the Institute[110] and many

[105] *Ibid* at 221-222.
[106] *Ibid* at 228.
[107] *Ibid.*
[108] *Ibid* at 229.
[109] *Ibid* at 231.
[110] *Ibid* at 230.

other PrIL scholars[111] for having entirely rejected the comity doctrine. To ensure the universal recognition of rights and liberty, what was needed was "the most complete equality in the extent to which each political sovereign determines the limits of the accomplishment of its duties in terms of recognizing the rights of individuals and foreign nations."[112] PrIL rules would need to be "equal and identical."[113]

But to move away from comity and ground an obligation to apply foreign law inevitably introduced a duality. This obligation was at once an obligation of justice owed to individuals directly and an obligation under the law of nations owed to the countries to which individuals belonged. To reconcile this duality, he postulated that the individual could make claims of recognition from other states via the PublIL notion of "nationality":

> Just as in the relationships of mere private law within a state, the principle of liberty protects the legitimate and inviolable autonomy of individuals and places a limit to the political and legislative power of government, in the same way the principle of nationality places a limit between foreigners and other nations or states. The reason rests in individual and reciprocal autonomy, legitimate and inviolable autonomy. And, as the law of nationality, which belongs to the entire nation, is not different in substance from the right to liberty belonging to individuals, it follows that individuals can demand of nations and states in the name of foreign nationality the same respect for his patrimony of private law, that it can demand from its own state from his co-nationals. [114]

This state/individual ambivalence was also present in Mancini's description of rights and liberty generally and the way in which Mancini subscribed some of them to the law of nationality.

First, focusing on rights, liberty, and personal laws generally, showed much resemblance to the personal statutes under the statutory school. Mancini recognized as the great merit of this theory the fact that it was "an a priori theory, conceived broadly and capable of encompassing the entire area of conflicts of laws and statutes."[115] Mancini too was in search of a highly general theory and a principle to ground his theory in order

[111] *Ibid* at 231.
[112] *Ibid* at 232.
[113] *Ibid.*
[114] *Ibid* at 293.
[115] *Ibid* at 290.

for it to be acceptable to all states. But he criticized the statutory school for having failed to "justify rationally the existence of laws which by their own and intense nature, maintain their authority over people even while abroad."[116] The highly general theory of personal statutes had to be sustained by a highly general theory of law, of the state, and of individual liberty. Mancini meant to provide precisely such a theory. This theory starts from the fact that for Mancini "the juridical order consists in the accommodation between private and individual liberty and the exercise of social power, that is in the relationship between the laws of a state and individual prerogatives, between political order and the civil order to domestic and private relations. The activity of social power stops where it meets the inoffensive and therefore legitimate liberty of individuals."[117] Mancini describes how individual liberty can extend beyond the national limits:

> Once these premises are established, if from the consideration of individual liberty of each individual within a civil society, we move a step further to the examination of the collective constitution of nations, and the relationships between them, it is easy to recognize that individual liberty is so to speak the root of the nationality of a people. In effect, if we multiply the exercise of such inoffensive liberty by the mass of individual liberty of all citizens of a nation, what result are certain constant and spontaneous qualities, traditions, requirements, tendencies and customs. This is what represents the special juridical character by which we can distinguish a people from another […] Alongside this free activity of individuals we have the activity of the public power, to which are entrusted the administration and guarantee of the public order and social progress within its entire political territory. Private laws respond to individual liberty; laws that guarantee the public order and the organization of public power belong to the sovereignty of the state. We can therefore affirm, without fear of error: just as individual liberty cannot suffer injust limitations through the recognition of rights to other individuals living in society under the same social power, the same this liberty does not cease to exercise itself when it goes beyond the sphere of such society and manifests itself within the sphere of other people and nations. In effect, such rights of private law belong to people as people and not as members of a political society.[118]

[116] *Ibid*.
[117] *Ibid* at 292.
[118] *Ibid*.

In other words "civil private law is personal and national, and, as such, must accompany the person beyond its nation; public law, by contrast, is territorial."[119] In the relationship between an individual and a foreign state, the individual's private rights and liberty are "inoffensive" and "apolitical" and therefore easily recognizable, indeed recognizable *as* human rights:

> We have substituted to these traditional formulas [of personal and real statutes] two other formulas which are easily comprehensible: *private and domestic law, public and political law*. If we make this terminological shift, we can easily understand why the laws of the first category can and must maintain all their force and rule the conditions of the person and of the family even beyond the territory; we understand why the sovereign power of a state has the duty to recognize them to all foreigners of all nations who find themselves within its territory; why, by contrast the laws of the second category rigorously rule within the limits of each state.[120]

Yet within the relationship between the individual and her own nation, private law was not entirely "inoffensive." Rather, it was broken into a "necessary" part comprising of personal status, family, and wills[121] and a "voluntary" part comprising "goods, contracts, obligations generally and things of that nature."[122] The voluntary part is "inoffensive" to both the state of nationality and the foreign state and individuals can choose whichever law they please.[123] As to the "necessary" part of private law Mancini says:

> In effect, it does not depend on the will of individuals to alter or modify this necessary part. Nobody can renounce its state or family relations that are attributed to him by the law of his nationality. An individual's status and family represent an ensemble of attributes and qualities, which are not attributes of all human beings, but of each individual belonging to a particular nationality. Attributing to a person Italian, French or German nationality is, in effect, suddenly awakening the idea of all personal rights relative to the organization of the family, which belong to all individuals as part of each

[119] *Ibid* at 297.
[120] *Ibid* at 297-298.
[121] *Ibid* at 294.
[122] *Ibid* at 295.
[123] *Ibid* at 295: "the state [of nationality] has no interest to prevent the exercise [of inoffensive liberty]."

> nationality. A person can change his nationality by accepting that of another country, but it cannot maintain it, while repudiating its conditions, since these conditions are like the mirror that reflects nationality itself.[124]

It is in this image of the private individual as "inoffensive" in relationship to foreign states, but permanently linked to his state of nationality at least in certain legal components of his "private" status that one can best discern the similarities and differences between Mancini on the one hand and Story and Savigny on the other.

On the one hand, it is true that the theories of all three authors had a profound humanist dimension and were motivated largely by the fear of despotic power exercising arbitrary power and judgment over individuals in their transnational existence. Erik Jayme has shown the strong humanist premises of Mancini and illustrated the potential of the nationality paradigm to bring human rights considerations, as well as sociological considerations under the purview of PrIL.[125] Furthermore, the theories of all three authors were premised on a strong equality between nationals and foreigners. It is also true that none of the three authors subscribed to a libertarian theory of private law. Mancini's strict duality between private and public law might surprise. But this is due primarily to the idealized assumptions about the theoretical premises of the PrIL-PublIL association. As I will show in chapter 6 with reference to Pillet's theory, the private/public distinction was in many ways much more present in the theories of those who associated PrIL with PublIL than in the theory of those who associated PrIL with private law. State-centric internationalists, including Mancini, relied heavily on the private/public distinction as a way of defining a strict, predictable and uniform division between territorial and extraterritorial application of laws and ultimately as a way of ensuring a number of

---

[124] *Ibid* at 294.

[125] See Jayme, *supra* note 1. For his emphasis on cultural affiliations see Erik Jayme, "Die kulturelle Dimension des Rechts – ihre Beudeutung für das internationale Privatrecht und die Rechtsvergleichung" (2003) 67:2 RabelsZ 211. For his discussion of the recognition of human rights within the PrIL-PublIL association see Erik Jayme, "Völkerrecht und internationales Privatrecht – eine entwicklungsgeschichtliche Betrachtung" in S Leibe & M Ruffert, eds, *Völkerrecht und IPR* (Jena: Jenaer Wissenschaftliche Verlagsgesellschaft, 2006). See also Erik Jayme "Menschenrechte und Theorie des internationalen Privatrechts" in Erik Jayme, ed, *Internationales Privatrecht und Völkerrecht* (Heidelberg: CF Müller, 2003). Jayme, together with Heinz-Peter Mansel also organized a symposium and edited a wonderful volume on the concepts of nation and state within PrIL theory and history. See Erik Jayme & Heinz-Peter Mansel, eds, *Nation und Staat im internationalen Privatrecht. Zum kollisionsrechtlichen Staatsangehörigkeitsprinzip in verfassungsrechtlicher und internationalprivatrechtlicher Sicht* (Heidelberg: C.F. Müller, 1988) [Jayme, *Nation und Staat*].

uniform rules of PrIL acceptable to all states and based on highly abstract philosophical assumptions.

Yet it would not be accurate to assume Mancini encouraged a despotic and individualistic notion of autonomy, nor that he did not allow for public law to trump private values. Rather both in his theory and in the Italian code he included a fairly large "corrective" provision stipulating that states would not need to recognize any judgments or private dispositions and conventions that would constitute a derogation from or violation of public order, good morals or the prohibitive laws of public law within a state.[126] Furthermore, while he did not subscribe to Savigny's theory of the nature of a legal relationship, which he considered too flexible and incapable of generating intransigently uniform rules of PrIL,[127] he praised Savigny for having refuted an individualistic notion of autonomy:

> [Savigny] victoriously refuted a different principle proposed especially by professor Hans de Göttingen, who elevated the autonomy of individual will to the level of the power of law, and who placed it even above the level of law of particular countries. This considers individual will almost as regulatory authority for transnational relations. This system, by interpreting in contra sens the ancient well-known juridical rule: *provisio hominis vincit provisionem legis (Arg. G. fin. C. de pact. Convent.),* pretends that, in all cases of conflict, we should apply to all juridical relations the law, which we could prove to have been chosen by the parties, and to which individuals were willing to submit their actions.[128]

Yet despite these similarities there are important nuances that differentiate the humanism underlying Mancini's theory from Story's and Savigny's theories. In his placement of the individual between his state of nationality and the foreign state, Mancini both narrowed individual liberty and ignored an important element of social responsibility.

Mancini narrowed what relational internationalists believed was a fundamental ability of individuals to immerse themselves in the social life of various communities and

[126] Mancini, *supra* note 104 at 303.
[127] *Ibid* at 287.
[128] *Ibid* at 288.

submit to their laws.[129] At least within the "mandatory" part of private law Mancini subsumed the individual under the nation. Bonichon marked the transition from Story's and Savigny's emphasis on domicile to Mancini's emphasis on nationality in these words:

> The political allegiance to a prince or a nation would initially not be confused with the civil condition of the individual, the one was nationality, the other domicile. But now the political and the civil are one.[130]

It is true that certain important nuances emerge from the fact that Mancini does not subsume the individual under the state, but rather under the nation. Erik Jayme has argued that PrIL needs to maintain the notion of nationality in addition to the notion of the state, because nationality can emphasize the "cultural belonging" of individuals, going beyond the formal relationship between individuals and the state.[131] Placing the individual within the nation bears much resemblance to Savigny's placing of the individual within the Volk. Yet while Savigny emphasized the intimate relationship between the individual and the Volk, he was also keen to avoid subsuming the individual under the Volk. And indeed Savigny,[132] and all relational internationalists, for that matter, separated the civil from the political condition of the individual and thereby introduced a distinction that Karen Knop conveyed forcefully, between private and public citizenship.[133] The individual is thereby allowed to integrate herself in a community other than her own nation and to have the laws of the foreign community applied to her. This is the case both for what Mancini described as the mandatory, as well as the voluntary part of private law, so that personal and family status, as well as contracts and property matters can be regulated by another state than that of nationality.

---

[129] See Ferdinando Treggiari, "Nationales Recht und Recht der Nationalität – Mancini" in Jayme & Mansel, *Nation und Staat* 145, *supra* note 125 at 163.
[130] Bonnichon, *supra* note 89 at 15.
[131] See Jayme, *Nation und Staat, supra* note 125 at 316.
[132] For a detailed account of the transition in Savigny's writing from the individual as the citizen part of the Volk, to the cosmopolitan individual as part of humanity see Hans-Cristof Kraus, "Begriff und Verständnis des 'Bürgers' bei Savigny" (1993) 110:1 Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung 552.
[133] Karen Knop, "Citizenship Private and Public" (2008) 71 Law & Contemp Probs 309.

But relational internationalists also held individuals socially responsible to the communities in which they immerse themselves "in proportion of their penetration" of these individuals within various communities.[134] Mancini portrayed the individual as "inoffensive" in relationship to the foreign state, but relational internationalists made no such assumption.

Furthermore, Mancini tried to dissociate himself from Savigny's analytical method of localizing the legal relationship according to its nature because he rightly foresaw that the legal relationship could be embedded in a variety of communities simultaneously, which inevitably means a simultaneous plea from several states to regulate the dispute.[135] However Josephus Jitta would later welcome this intuition to emphasize the complex dimensions of private law's social embeddeddness in the transnational realm and to plead in some cases for the application of a blend of the laws of various states in order to take full account of the transnational nature of the dispute.

Overall, while Mancini maintained the humanist underpinnings of Story's and Savigny's theories, his political commitment to ensure the national unity of Italy did not allow him to account for the full scope of individual liberty and social responsibility in relationship to foreign states. While he rightly underscored the intimate relationship between an individual and her state of nationality, which could now be transformed into

---

[134] See Jitta, *The Renovation, supra* note 11 at 103: "Nationality, as the basis of private international law, is not necessarily dependent on the same conditions as nationality in the domain of public international law, but the admission of two kinds of nationality, a private, and a public one, would accentuate the discrepancy between nationality, considered as a feeling, and nationality as a juridical qualification, so that in a State there is generally only one conception of nationality, depending on fixed juridical marks." & 106: "It is a general guiding thought that a man ought to be subjected to the civil law, in force in a local sphere of social life, *in proportion to his penetration into such a sphere.* According to this thought an absolutely reasonable rule could easily be found, if the divergences between the various laws, with regard to persons, were only founded on the differences of the local social life. Every man would then, as a rule, be subjected to the law of the local sphere of social life in which he has settled, unconditionally and durably, *cum animo perpetuitatis.* The reference to this domiciliary law would by no means be a mechanical and supernational rule for the solution of conflicts between laws, but only a guiding thought, allowing the other points of contact the influence they deserve."

[135] See Mancini, *supra* note 104 at 287. See also Eugène Gaudemet, "La thèorie des conflits des lois dans l'ouvre d'Antoine Pillet et de la doctrine de Savigny" in *Mélanges Antoine Pillet* (Paris: Rec Sirey, 1929) 89 at 91: "Savigny announces by contrast an entirely analytical method, foreign to *a priori* principles, applying to each legal relationship a rule determined by reasons particular to this relationship. And this is in effect the line of reasoning he will follow, refuting deliberately the old categories of real and personal statutes, eliminating the theory of territoriality, to mold its doctrine to the infinite variety of most complex problems which juridical life had to offer to legal science. Due to this characteristic, Savigny rests in such stark contrast to the Italian school, founded two years after the publishing of his book, through Mancini's famous discourse in 1851. Just as the principle of territoriality of law, the antithetical Italian rule of personality, is an a priori general rule: Savigny's method refutes it as such."

the relationships between an individual and a cultural community, little further reflection has been given to the wider range of affiliations of individuals in her transnational existence.

2. Antoine Pillet and Ernst Zitelmann

In his universalist manifesto for PrIL, Mancini repeatedly referenced the cohort of internationalists which was part of the movement to connect PrIL with PublIL.[136] And indeed his PrIL account was part of a larger intellectual movement to unite the two fields and provide a philosophical justification for this connection. While for Mancini the philosophical justification for the unity between the two legal fields was premised on liberty and national unity, the association between the two fields was progressively premised on a reconceptualization of PrIL as conflict of sovereignties. At least incidentally, Mancini had contributed to this reconceptualization by introducing personal sovereignty as the flipside of territorial sovereignty, which had already been heavily referenced in the Dutch school and Story's theory.[137]

Progressively, the conceptualization of PrIL as conflict of sovereignty became such a powerful imagery that in 1899 the French scholar Etienne Bartin wrote: "this assertion is nowadays not contested by anyone."[138] Batiffol described this imagery in the following words:

> In a world divided into independent states, all relationships, even between individuals, which cross the borders of a particular state, involve the relationship between states: the international society is one made up of states; if an individual enters into a relationship, even a purely commercial one, with another individual pertaining to another state, this relationship is considered to belong to public international law because no relationship can

[136] Mancini, *supra* note 104 at 230: "Without referencing additional authorities, all the members of the commission named by the Institute already had occasion to offer similar views on this question [of refuting the notion of comity and pleading for a universal obligation to apply foreign law]. (Bruntschli, Heffter, Beach Lawrence, Massé, Westlake)."
[137] Bonnichon, *supra* note 89 at 14, 16.
[138] Etienne Bartin, *Études de droit international privé* (Paris: A. Chevalier-Marescq, 1899) at 146. Bonnichon notes ironically: "the universality of this reconceptualization was so powerful that even those who do not directly subscribe to this view (such as Arminjon) simply deny it in passing." See Bonnichon, *supra* note 89 at 615.

> be established between individuals belonging to different states but within the framework of inter-state relationships, in other words within the framework of public international law.[139]

Conceptualizing PrIL as conflict of sovereignty inevitably required several analytical steps. On the one hand, it required a certain extrapolation from inter-personal relationships to inter-state relationships. This in turn created a progressive attempt to think away the individual from within the purview of PrIL matters. Now one had to argue that when a court is asked to recognize the application of foreign law and rights granted by such law, the request does not come from "a person, a simple individual", but rather "a foreign sovereign," and failure to apply this law would result in "an infringement of the public law of the foreign sovereign."[140] This transition from thinking about the rights of individuals to the rights of states was facilitated by the concomitant efforts to develop a theory of fundamental rights of states within PublIL.[141] Re-conceptualizing PrIL as conflict of sovereignties meant focusing on the rights of states in relationship to each other and showing that "PrIL is not concerned with private interests but with questions of state sovereignty."[142] In other words, "even if a PrIL matter might be occasioned by a private interest, this interest has been considered so important that it has been elevated to the level of a public interest."[143] Private matters become state matters and questions of mixed rights as Story will call them[144] become questions of mixed sovereignties.[145]

It is precisely its focus on state sovereignty that might suggest to contemporary scholars that the PrIL-PublIL association focused on regulatory goals and the global public good. But this idealized assumption is far from the meaning attributed to sovereignty around which the PublIL-PrIL association was constructed in the 19th century. Rather the notion of sovereignty was almost deliberately assigned a formalistic

---

[139] Henri Batiffol, "Principes de Droit International Privé" (1959) 97 Recueil des Cours 431 at 437-438.
[140] De Chassat, *supra* note 89 at 214 referenced favorably in Antoine Pillet, *Principes de droit international privé* (Grenoble: Allier Frères, 1903) [Pillet, *Principes*] at 61, n 1.
[141] See Bonnichon, *supra* note 89 at 13. See also Gilbert Gidel, "Droits et devoirs des nations, théorie classique des droit fondamentaux des États" (1925) 10 Recueil des Cours 537 at 559.
[142] Antoine Pillet, "Droit international privé consideré dans ses rapports avec le droit international public" in Annales de l'enseignement superior de Grenoble (Grenoble: F. Allier Père & Fils, 1892) 309 at 336 [Pillet, "Rapports"].
[143] *Ibid* at 345.
[144] Story, *supra* note 14 at 3.
[145] Pillet, "Rapports", *supra* note 142.

meaning as part of a perceived need to introduce easy and clear concepts into PrIL in order to achieve its systematic coherence and uniformity.[146] Focusing on the intransigent element of the imperative character and source of law meant avoiding the flexibility of the notions of justice, comity, nature of legal relationship etc.[147] Furthermore, the notion of sovereignty employed in PrIL was often explicitly apolitical. Bartin had been explicit that one must "dissociate political sovereignty in Public International Law from legislative sovereignty in civil law."[148]

One of the first scholars to provide a theory grounded in the association between PrIL and PublIL that illustrates the formalistic underpinnings of the notions of sovereignty was the German scholar Ernst Zitelmann. In 1897 Zitelmann portrayed his state-centric internationalist theory as entirely novel.[149] While the PrIL-PublIL had been postulated by Mancini, virtually all members of the Institute, and many other PrIL and PublIL scholars, no one, in Zitelmann's view, had provided an entire theory grounded in this association and nobody had been able to "prove" that this association had a solid philosophical foundation.[150] This philosophical foundation started from an emphasis of the "true danger" which exists if every judge makes a case-by-case determination "based on the nature of things," without any guidance in the positive law.[151] For this reason, the only way to develop uniform rules of PrIL would be to commit PrIL to an overarching principle, which all states agree on and are committed to. Such principle can only be found in PublIL,[152] and it was the responsibility of scholars to develop unified principles of PrIL from general and universal concepts of PublIL.[153]

Two general postulates were needed in order to anchor PrIL in PublIL. First, one had to center the analysis on states rather than individuals by acknowledging that objective law precedes subjective rights and that individual freedom becomes legal freedom only because it is granted by the state through the legal order.[154] Story and

[146] Bonnichon, *supra* note 89 at 13.
[147] *Ibid* at 14-15.
[148] Bartin, *supra* note 138 at 224-225. Bonnichon found this impossible to understand precisely because those authors argued that the bases of PrIL are set within public law. See Bonnichon, *supra* note 89 at 30.
[149] *Ibid* at 27-28.
[150] Ernst Zitelmann, *Internationales Privatrecht* (Leipzig: Dunkler & Humblot, 1897) vol 1 at 24.
[151] *Ibid* at 6.
[152] *Ibid* at 17.
[153] *Ibid* at 20.
[154] *Ibid* at 60.

Savigny had distinguished between a pre-political notion of liberty as an attribute of humanity and the liberty within private law categories, which had a profound political dimension.[155] For relational internationalists liberty would be a highly complex and nuanced concept, but under the PrIL-PublIL association the nuances had to be downplayed in order to operate with highly abstract and intransigent concepts. If individual liberty were granted by the state, the shift from the individual to the state would be relatively easy to make.

But one still had to openly acknowledge that PublIL deals with inter-state relationships. Therefore, there could not be a direct relationship between the subjective private rights of individuals, which PrIL seemed to reference, and PublIL.[156] To demonstrate such relationship one had to determine a relationship between private rights and the state, and then a relationship among states with respect to private rights.[157]

Such determinations culminated in the conclusion that "private rights can be created with a well-founded claim to international recognition by that state only which possesses the general governmental control, recognized by the principles of international law, over the subject with respect to which the subjective private law confers authority and that state alone can revoke such private rights again."[158] In effect PrIL would be concerned with conflicts of legislative jurisdiction of states in the international realm.[159] Such rules of division of jurisdiction in the international realm could only be deduced from general principles of PublIL, recognized by and binding on all states.

The only two such principles that could prove useful in PrIL as well, were territorial and personal sovereignty.[160] All questions of PrIL could be solved by determining for each category of cases whether "proper jurisdiction" existed based on broad appreciations of a state's territorial or personal sovereignty.[161] Zitelmann admitted that PublIL does not directly offer rules delimiting the legislative authority of states according to these principles.[162] However, to establish a relationship between PublIL and

---

[155] See Chapter 5.
[156] Zitelmann, *Internationales Privatrecht*, *supra* note 150 at 41.
[157] *Ibid.*
[158] *Ibid* at 68.
[159] *Ibid* at 25 & 40.
[160] *Ibid* at 66 & 83.
[161] *Ibid.*
[162] *Ibid* at 97.

PrIL, allegedly one did not need to prove that PublIL offers norms of PrIL. One only had to prove that the norms of PrIL must be based on principles of PublIL, and this can only be the case if PrIL relations have the same scope as those of PublIL. To extract PrIL norms from PublIL principles was the "responsibility of the legal scientific community."[163]

Since no norms of PublIL could directly determine which of the two types of sovereignty takes precedence in a particular case or category of cases,[164] this distribution of authority had to be deduced primarily from state practice. For example, Zitelmann talked about "a consensus amongst states that the state, which has territorial sovereignty must give way to the one with personal sovereignty."[165] To Zitelmann, personal authority was subsidiary to territorial (in a clash between citizenship as the personal link and domicile as the territorial link) only to the extent that the state of domicile must exercise authority over the domiciled individual to fulfill its public order functions.[166]

This intransigent a priori choice between territorial and personal sovereignty in large category of cases became inevitable once the PrIL-PublIL association was forged. PrIL would now learn from PublIL that "each state is obliged not to attribute to itself a legal authority, which is not recognized by public international law"[167] and that "a state's authority is always exclusive."[168] No other state can claim the same authority. Once PrIL was grounded in PublIL and was described as a clash of sovereignties, it seemed obvious that the decision of which law to apply in a particular case must always be the same.[169] Any deviation from the uniform division of authority would imply a breach of sovereignty and a breach of PublIL. Of course, such uniformity was not possible if states had an interest in widening their legal authority in relationship to other states. Even though this was possible in other fields, Zitelmann believed that in PrIL states had less of an interest to increase the area of legal authority in private law matters than to achieve

[163] *Ibid* at 20.
[164] *Ibid* at 97.
[165] *Ibid* at 107.
[166] *Ibid* at 99.
[167] *Ibid* at 70.
[168] *Ibid* at 73.
[169] *Ibid*.

uniform solutions. "This community of interests makes a legal community not only possible but also necessary."[170]

Once it was shown that the legal relationships governed by PrIL were the same in nature as those governed by PublIL, the connection between the two branches became uncontestable. However, having its roots in PublIL, PrIL now borrows from PublIL's possible uncertainty, lack of development and incoherence. Thus, on the one hand, these unified principles of PrIL derived from PublIL could only have subsidiary effect until they are incorporated into national law.[171] Until then, national rules of PrIL trump those unified principles, even though states are under a moral obligation to act in conformity with PublIL.[172] On the other hand, "once one understands the dependence of private international law on public international law, the attainable can be easily distinguished from the unattainable. If public international law does not provide for clear principles of division of legal authority among states, no uniform principles of private international law can be found. If uniformity in private international law is missing it is entirely attributable to the state of play of public international law."[173]

Furthermore, the pool of states among which such absolute uniformity of PrIL would be achievable would also need to be discerned by reference to PublIL. This is because a pre-requisite of harmonization was that states considered themselves as equals in the international community.[174] PrIL could include this as a postulate and PublIL would need to determine the conditions and extent of such equality among states.[175]

Overall Zitelmann had provided the platform for the reconceptualization needed in order to associate PrIL with PublIL. But the French scholar Antoine Pillet thought it was entirely wrong to suggest that this was indeed a "reconceptualization." If PrIL relationships were ever described in another way than as inter-state relationships, it was due to a misunderstanding of the "true nature of PrIL" and a rather superficial examination of the relationship between PrIL and PublIL.[176]

---

[170] *Ibid* at 80.
[171] *Ibid* at 74.
[172] *Ibid*.
[173] *Ibid* at 78.
[174] *Ibid* at 16.
[175] *Ibid* at 6.
[176] Pillet, "Rapports", *supra* note 142 at 325, 329.

In 1892 the French scholar Antoine Pillet started what he perceived as a fundamental investigation in the nature of the PrIL-PublIL association and was keen to portray the perplexing state of academic debates trying to establish this association.[177] On the one hand the question had been "dealt with a hundred times, a commonplace because we can say that there is no author who does not consider himself obliged to dedicate it a few lines."[178] Yet after a thorough examination of the variety of European authors who had touched upon the association between the two fields he concluded that "the majority of them considered it as an object of curiosity, rather than an aspect the full understanding of which is essential for the mere intelligibility of the field [of PrIL] and for the establishment of a proper method of its study."[179] He thought what had confused scholars most in their attempts to associate PrIL with PublIL was the apparent difference in the subjects of the two fields: PrIL dealing with inter-individual relationships and PublIL dealing with inter-state relationships. Yet for Pillet this distinction "emerges from a superficial and erroneous analysis and the truth is, on the contrary, that both private international law, as well as public international law deal with relationships between states."[180]

According to Pillet, any question or conflict of authority or state law in an international context was a form of conflict of sovereignties[181] because any law is based solely on the legislative sovereignty of the state.[182] The question PrIL must answer is which sovereign to grant the authority to govern the particular legal matter.[183] "The conflict is between two sovereigns and it involves one of their essential attributes, namely their legislative functions; such conflict of sovereignties automatically falls under the scope of Public International Law."[184] No private interests are involved because the limit

[177] Pillet, "Rapports", *supra* note 142 at 312.
[178] *Ibid.*
[179] *Ibid* at 320.
[180] *Ibid* at 329.
[181] *Ibid* at 339
[182] *Ibid* at 333; Antoine Pillet, *Recherches sur les droits fundamentaux des états dans l'ordre des rapports internationaux et sur la solution des conflits qu'ils font naitre* (Paris: A. Pedone, 1899) at 63 [Pillet, *Droits fundamentaux*].
[183] Pillet, "Rapports", *supra* note 142 at 333.
[184] *Ibid.*

of the authority of law is nothing more than a limit of the "public power of a state" in relationship to another.[185]

The more challenging question for Pillet was to describe this "public power" and the various ways in which the public powers of states could collide. He thought it was astonishing that this question had not been thoroughly examined in PublIL before.[186] It was precisely because this clash of state interests/public powers had not been noticed and properly examined that the organic relationship between PrIL and PublIL had been overseen.

To explain the nature of states' interests involved in both PrIL and PublIL, he employed a functionalist theory of the state.[187] All states must perform the same functions for their individuals.[188] These state functions could and often do collide in the international realm. PrIL was but one example of such a clash.[189]

Employing a functionalist theory of the state was not just one more way of describing state sovereignty, but rather a necessary answer to what Pillet thought was the main question of the PublIL school: on which basis to establish the relationship between the two fields.[190] He disagreed with Bruntschli that the association could be made on the basis of human nature mandating equality, because "we are not dealing with individuals, but with states."[191] For the same reason, Mancini's theory was unacceptable as well, even though Pillet praised the clarity of Mancini in establishing a firm relationship between PrIL and PublIL.[192] But Mancini had failed to realize, according to Pillet, that "among states individual rights only have the force derived from the authority of the state, under the control of which they are exercised and that individual liberty, which within a state, can only manifest itself through a permission granted by the law, should not have a higher force vis-à-vis foreign states."[193]

---

[185] *Ibid* at 335.
[186] Pillet, *Droits fundamentaux*, *supra* note 182 at 69.
[187] Antoine Pillet, "Le droit international public, ses elements constitutifs, son domaine, son objet" (1894) 1 RGDIP 1 at 4.
[188] *Ibid.*
[189] *Ibid* at 34 (Pillet conceived of PrIL as an instance of conflict between one state's territorial sovereignty and another state's right to international commerce).
[190] *Ibid* at 4.
[191] *Ibid*.
[192] Pillet, "Rapports", *supra* note 142 at 318.
[193] *Ibid.*

As I show in chapter 6, despite this theoretical controversy, Pillet adopted Mancini's private/public and individual/social duality as a way of determining the extraterritorial scope of laws. Yet the theoretical controversy itself was important for Pillet, because these distinctions would not be made via individual liberty, human nature, nationality or even individual expectations generally. Rather, the distinctions were introduced through an analysis of the law as public power and taking the law as an initial point of departure was necessary since the relationship between PrIL and PublIL was based on the assumption that both fields deal with inter-state relationships.

Pillet had argued that individuals are connected to "three societies": the national, the international and humanity.[194] Each society has to have its own law and the three societies correspond to three types of law: national, international, and the law of humanity.[195] PrIL corresponded neither to national law, nor to the law of humanity. Those who associated PrIL with national law, including with national private law, were wrong.[196] But to the extent Mancini would have meant to reference a notion of human rights or pre-political rights and liberty as the anchor point for PrIL, he was wrong too. He had failed on the "philosophical method."[197]

As I show throughout the thesis, for relational internationalists liberty was a complex notion having both a political and a pre-political dimension and one that manifested itself differently depending on the PrIL relationship involved. The individual was simultaneously embedded in all three societies Pillet referenced and the intensity of one's affiliations which each one would need to be determined based on the circumstances, the type of PrIL relationship involved, elements of justice, social reality and so on. For Pillet, this image was too fluid. One needed to commit to clear and intransigent distinctions. PrIL was not about individuals or liberty, but about states. And it operated neither in the relam of the national, nor in that of mankind, but rather in the realm of the international. And the international was made up of states and comprised of two kinds of laws: those which do not require consent because consent is implicit in the fact that states have to perform certain functions together, and those which required

[194] Pillet, *Droits fondamentaux*, *supra* note 182 at 3.
[195] *Ibid* at 7.
[196] This is what Pillet thinks of Jitta for example. See Pillet, "Rapports", *supra* note 142 at 317.
[197] *Ibid* at 318.

consent because the state functions are not necessary, but desirable.[198] PrIL belonged to the first category.[199] Through these sets of analogies it would now be clear that the individual is not a subject of international law, neither private nor public. The individual is an international subject only under exceptional circumstances or because of an express delegation that he is performing a state function.[200] It was therefore clear that no association between the two fields could be established through the individual or a general concept of human nature.

But it was equally wrong to establish the relationship between the fields on a postulate of equality among states. Pillet took stock of the constant enlargement of the international community and was critical of it. He noted that at some point we have replaced the idea of a Christian community with that of a European community and nowadays we think this is restrictive as well. To Pillet, this was entirely wrong because "as much as we can speak of the natural equality among individuals there is no corresponding exact equality among nations. In fact the degree of a state's civilization is the measure of its right."[201] Pillet adopted Lorimer's classification to argue that no full rights can be recognized to semi-civilized states by fully civilized states.[202]

Consequently anchoring the PrIL-PublIL association in the concept of state functions, rather than human or state equality, was necessary and quite innovative.[203] Pillet proposed that a judge ruling in a PrIL matter apply the law of the state whose function/interest is most significant.[204] Both PublIL and PrIL allegedly aimed to apply the law of "least sacrifice,"[205] namely that which causes the least amount of intrusion of state sovereignty understood as public power/public function.[206]

---

[198] Pillet, *Droits fondamentaux*, *supra* note 182 at 7-8.
[199] *Ibid* at 8 & 28-30.
[200] *Ibid* at 32.
[201] *Ibid* at 24.
[202] *Ibid* at 27. Since Pillet established the relationships between PrIL and PublIL by reference to inter-state relationships he incorporated Lorimer's distinctions with respect to states, rather than Lorimer's discussion about "the private citizen." For an illuminating accout of Lorimer's account of the private citizen see Karen Knop, "Private Citizens of the World: Subjects in Lorimer's the Institutes of the Law of Nations," [forthcoming in 2016 in the EJIL].
[203] For an account of the way in which Pillet's theory was situated within the internationalist school of the time see Maurice Bernard, "Review of Antoine Pillet, Principes de Droit International Privé" (1904) 31 Journal de Droit international privé et de la jurisprudence comparée 769 esp. at 770-771.
[204] Pillet, *Droits fundamentaux*, *supra* note 182 at 41.
[205] *Ibid* at 42.
[206] *Ibid*.

Pillet was careful to distinguish his "interest methodology" from the German *Interessenjurisprudenz*, and implicitly from the modern American interest analysis methodology.[207] In Pillet's theory, the state interests that are at stake and collide with one another both in PublIL and in PrIL should be found based on a general classification.[208] Included in the classification should be only those interests that are indispensable to a state in performing its functions. It cannot be left to the discretion of the judge to determine and weigh the interests on a case-by-case basis.[209] This is too uncertain and can lead to arbitrary decisions and abuses. Furthermore, such classification is possible because only a handful of pre-determined interests that are essential for the performance of state functions can be reasonably claimed by states under PublIL principles. Pillet therefore purported to achieve such classification of state interests and their conflicts both for PublIL[210] and for PrIL.[211] The determination of the applicable law in PrIL matters is a direct result of these pre-determined solutions to conflicts of state functions.[212] Pillet criticized Zitelmann for having produced an abstract division between personal and territorial sovereignty and between territorial and extra-territorial application of law. He argued that in order to "choose" between sovereignties one must use another concept at a higher level of abstraction. For Pillet, the social scope of the law would determine whether it applies territorially or extra-territorially. In chapter 6 I show how Pillet used a highly formalistic and abstract notion of "the social scope of the law" precisely as a way to ensure absolute uniformity and systematicity for PrIL. Bonnichon described Pillet's focus on the social scope of the law in these terms:

> Since this is a conflict of equal sovereignty, to choose between them you need a notion external to the notion of sovereignty. In essence this notion is social justice, or the nature of the legal relationships. But in order to make sure that the test can easily be associated with sovereignty, we talk about the social scope of the law. In so doing, we do not even realize that we have narrowed the analysis.[213]

---

[207] *Ibid* at 68-69. See also Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law (1870-1960)* (Cambridge: Cambridge University Press: 2004) at 282.
[208] Pillet, *Droits fundamentaux*, *supra* note 182 at 68-69.
[209] *Ibid*.
[210] *Ibid*.
[211] *Ibid.* See also Pillet, *Principes*, *supra* note 140.
[212] *Ibid.*
[213] Bonnichon, *supra* note 89 at 22.

Yet the analysis had to be narrowed because much like Zitelmann, Pillet thought "uniform rules of conduct among states are the unifying element of public and private international law."[214] Both are concerned with clashes of state sovereignty, which can only be solved in a uniform manner. Furthermore, if the distribution of sovereignty were deduced from PublIL, any deviation from such distribution would constitute a violation of PublIL. The distinctive line of arguments in state-centric universalist doctrines ends up conceptualizing uniformity as a right of states. It all proceeds from the realization that PrIL cannot be uniform unless states have an obligation to pursue such uniformity. However, states can only have an obligation towards each other.[215]

> Either private international law is not truly law and has no mandatory character for states or it does have a mandatory character but then it becomes a part of public international law and according to Rolin, becomes a doctrine which settles relationships between states and establishes the limits of their respective legislative competence with respect to rights and private interests.[216]

Once this link is created, individuals cannot claim or choose that a certain law be applied, let alone claim uniformity, because states and not individuals are the subjects of PrIL.[217] Furthermore, the individual did not dispose of what is at stake in PrIL, namely state sovereignty. Both Pillet and even more so Zitelmann commence their studies with an overview of the hardship created to individuals absent uniformity in PrIL. Uniformity is certainly meant at least *also for* individuals. If it ends up being described as a right of states, this is for two reasons. First and most important, only states are "equals" with rights and obligations towards each other in an international community.[218] Second, for Pillet, in the context of a conflict of laws, any law, including private law is a form of public authority. It is an attribute of the public power of a state, regulating for the entire

[214] Pillet, "Rapports", *supra* note 142 at 327.
[215] Pillet, *Droits fundamentaux*, *supra* note 182 at 20: "states are the only ones able to deal from equal to equal within a foreign community."
[216] Pillet, *Principes*, *supra* note 140 at 56.
[217] Pillet, *Droit fundamentaux*, *supra* note 182.
[218] *Ibid* at 20, 36.

community.[219] "The litigating parties disappear for a while."[220] Allegedly it is "entirely wrong to assume that the individual has a right to the application of a certain law, because the limits of the authority of law are not fixed by consideration to private interests, but result from the limits of the public powers which enacted them."[221]

Zitelmann's and Pillet's theories were variations on the same theme: the reconceptualization of PrIL as conflict of sovereignties and the implicit association of PrIL with PublIL. By the end of the 19th century this theme had become nearly universal. According to Bonnichon:

> The vast majority of authors view in this conception of conflict of sovereignty the best way to frame the issue and the central principle that will offer the solution. The idea can incorporate around it the most diverse tendencies: and this explains in part its success. You can use the idea of sovereignty to link PrIL to PublIL as Pillet did. But if you want to turn PrIL into national law the idea of sovereignty can serve that purpose too.[222] Bartin uses the idea of sovereignty in another way saying that it is up to each state to define for itself the restrictions it accepts to its own sovereignty.[223] This is also a sovereign prerogative. And if you want to group the entire field around the idea of sovereignty you can do that with Mancini: the personal link, which unites the individual to the national. This would be personal sovereignty. The many exceptions to bring to the application of the national law would be founded on the idea of a public order imposed in the name of the general interest of the state which stands for territorial sovereignty.[224]

V. Josephus Jitta

The conceptualization of PrIL matters as conflicts of sovereignty was indeed predominant within PrIL academic circles of the late 19th century. The Dutch PrIL

---

[219] *Ibid* at 83.
[220] Pillet, "Rapports", *supra* note 142 at 335: "The litigating parties disappear for a while: instead there are two sovereigns in attendance and their respective rights and obligations can only be determined by Public International Law."
[221] *Ibid.*
[222] J.P. Niboyet, *Traite de droit international privé français,* t 1 (Paris: Rec. Sirey, 1938) at 61 (for the proposition that PrIL can only be national because the formal source of its rules can only be national).
[223] Bartin, *Etudes*, *supra* note 138 at 14-16. See also Étienne Adolphe Bartin, *Principes de droit international privé selon la loi et la jurisprudence françaises*, t 1 (Paris: Domat-Montchrestien, 1930) at 113.
[224] Bonnichon, *supra* note 89 at 18-19.

scholar Josephus Jitta would react precisely to this dominant way of conceptualizing PrIL.[225] He purported to show at the end of the 19th century that the PrIL-PublIL association leads to highly questionable methodological conclusions for PrIL.[226] An outcast of his time, placing himself both outside the dominant law of nations theory and the particularistic school of thought,[227] Jitta's scholarship remained outside the canons of PrIL theory.[228]

Although his works are little known today, Jitta's scholarship was very well received in common law jurisdictions.[229] Yet the value of his scholarship was put "on hold." His extreme departure from the Austinian theory of state sovereignty as applied to PrIL,[230] his plea for a modern "jus gentium," his analysis of the scope of a legal relationship, his countering of mechanical rules and solutions, and his focus on the ultimate substantive result of the dispute[231] made Baty think that "Professor Jitta's exposition of a novel and eminently natural principle is well worthy of attentive consideration, even if the time is not ripe for the immediate adoption by our Courts of his doctrine."[232]

---

[225] For a biography of Josephus Jitta see Steenhoff, *supra* note 12.
[226] Josephus Jitta, *La methode du droit international privé* (The Hague: Belifante Fréres, 1890) [Jitta, *La Methode*].
[227] See Steenhoff, *supra* note 12 at 256 showing how Jitta incorporated both the unilateral and the multilateral, the national and the supranational perspective: "Jitta, when faced in 1890 with the two trends distinguished by Kosters (the nationalist and the internationalist one), made no choice. […] Jitta acknowledged a right to exist for both branches."
[228] See for example Comp. J. Offerhaus, "L'Université d'Amsterdam et le Droit international privé" in *Ius et Lex – Festgabe zum 70. Geburtstag Max Gutzwiller* (Basel: Helbing & Lichtenhahn, 1959) at 283-302: "However brilliantly conceived and written, Jitta's publications have failed to influence legal practice significantly. His views did not properly link up with the current legal thinking of his time in which the concepts of nationality and sovereignty were the dominant elements."
[229] In the United States, Ernest Lorenzen thought his "remarkable" works "will remain landmarks in the science of private international law." See Ernest G. Lorenzen, The Renovation of International Law by D. Josephus Jitta (1920) 29 Yale LJ 700 at 700. In England, Baty thought Jitta's works take "one out of the electrically-lighted salons of conventional theory, heated and illuminated regardless of expense, and a little stuffy, into the dim, fresh dawn of open air." Thomas Baty, "A Modern Jus Gentium" (1909) 20 Jurid Rev 109 at 109.
[230] See Jitta, *The Renovation*, *supra* note 11 at 7 ("According to the reasonable principles of international social life, sovereignty, the paramount power in the juridical community of the human species, belongs to mankind, the personification of the human species, and, strictly speaking, exclusively to mankind").
[231] See Steenhoff, *supra* note 12 at 238 (Jitta was against the idea that one should apply the law of the forum in all cases because "this is false; this is not a proper criterion. You might as well say: take the oldest law, that is the wisest; or take the youngest, for it has benefitted from the others.") See also at 241: "Jitta rejected all neutral choice of law rules. […] A reasonable solution should be sought not by means of abstract rules and general principles, but by means of comparison of law in each separate case."
[232] Baty, *supra* note 229 at 120.

For state-centric internationalists, situating PrIL above national private laws and safe from the particularist tendencies of national legislators and courts was the ultimate triumph. However, for Josephus Jitta, thought to be "one of the most original thinkers" in PrIL,[233] it was particularly worrying that if PrIL must establish harmonious relationships between laws, "our science becomes a species of supreme law, a law of laws, placed to such extent above the individuals, that it can disregard them."[234] Jitta argued that the conceptualization of PrIL as conflicts of sovereignty and its association with PublIL made the field openly disinterested in the way in which the distribution of sovereignty affects individuals, that it has become increasingly formalistic, lacking any sense of regulatory perspective, and that it became obsessed with uniformity at all cost.

He acknowledged that the "contradiction of adjectives" in the term "private international law" is not easy to explain.[235] However, to the extent the term "international" has led authors to conclude that PrIL is similar to PublIL in that it deals with "conflicts of states, or relationships between states and individuals, or conflicts of laws," it must be the "limits of our modern terminology" that have led scholars to such erroneous conclusions.[236] He explained "there is nothing per se in the name "international" that leads PrIL to PublIL."[237] Instead, he thought our conceptualization of PrIL matters as conflicts of laws can be explained historically and traced back to the statutory theory, in that "the interpreters of our science, who did not have a clear idea of PrIL's goal, but who were perfectly aware of the obstacle created by territorial sovereignty, placed all their attention on the obstacle, and ignored the more distant goal."[238]

Jitta thought it was a mistake to think that PrIL resembles PublIL more than private law.[239] Associating PrIL with PublIL would inject the illusion that PrIL deals with some abstract notion of sovereignty, rather than real life problems of people. Also he

[233] See Lorenzen, *supra* note 229.
[234] Jitta, *La methode*, *supra* note 226 at 5.
[235] *Ibid* at 4.
[236] *Ibid* at 34-35.
[237] *Ibid* at 36.
[238] *Ibid* at 41.
[239] See e.g. Jitta, *The Renovation, supra* note 11 at 119: "In searching such a solution, we must bear in mind that private international law is not the science relating to the conflict of laws or lawgivers, but the science of the juridical relations between men in a community larger than a State."

though that the mere term "conflict of laws" encouraged overly mechanical solutions and turned PrIL into a "conflicts guillotine." PrIL's obsession with uniformity was also attributed to the conceptualization of PrIL as conflict of sovereignty: if the field was viewed as settling conflicts between sovereignty and between states, then a uniform "settlement" of such conflicts appeared an ideal outcome. In contrast, analogizing PrIL to private law would make all these assumptions appear ridiculous.

For Jitta, in line with the scope of private law, the purpose of PrIL is not to determine some law as applicable, but rather to analyze the social purpose of a legal relationship[240] and to determine what rules of law would be most suitable for the attainment of its social purpose in the international society.[241] "Private international law is not the science relating to the conflict of laws or lawgivers, but the science of the juridical relations between people in a community larger than a State."[242]

Because in Jitta's view PrIL should regulate the international existence of mankind, it could not be limited to choosing between laws with complete disregard for the actual result of the application of such law.[243] "It is an erroneous idea that private international law has attained its objective when it has chosen from among the laws that touch upon a legal relationship…It is this idea which has converted our science into a conflicts guillotine and has produced these badly chosen questions that the legislator can only resolve by a 'sic jubeo' (so ordered)."[244]

The association between private law and PrIL made the proposition that PIL performs a "structural function" of merely choosing between different national laws seem even more ridiculous. "Who, we ask, ever dreamt to see in private law the science which

[240] *Ibid* at 90.
[241] Jitta, *La methode*, *supra* note 226 at 217.
[242] *Ibid* at 119
[243] See C.C.A. Voskuil, "A Survey of Dutch Scholarly Practice Concerning Private International Law from 1938 till Present" (1970) 17 Nethl Int'l L Rev 11 at 12: Jitta argued "that in the universal legal community of man – the pattern of legal relations between individuals, as looked upon by Jitta – the rights and interests of the individual should not be judged by common national or domestic rules and principles, but by standards which might be regarded as *reasonable* from an international or rather universalist point of view."
[244] Jitta, *La methode*, *supra* note 226 at 44; Friedrich K. Juenger, "The Lex Mercatoria and Private International Law" (2000) 60 La L Rev 1134 at 1139.

has as its aim the settlement of possible conflicts between different articles of a civil code and deciding which one is applicable in each case?"[245]

In Jitta's view, linking PrIL to private law would allow the field to escape many misconceptions. First of all, it would bring back a profoundly humanist perspective. PrIL could no longer fail to examine the results the operation of its rules has on the lives of people. Second, it would eliminate the overly technical focus on settling conflicts and encourage PrIL to focus directly on its regulatory function. To Jitta, private law had a strong and complex regulatory function, and PrIL qua private law would need to recover precisely the strongly normative direction of a "substantive" area of law like private law, rather than the highly abstract nature of PublIL. Third, understanding and transplanting the regulatory dimensions of private law into PrIL methodology would temper the abstract universalist tendencies of the time. If one understood the various regulatory dimensions of private law norms and concepts one had to develop any degree of universalism from a thorough comparative analysis, rather than any abstract pursuit of uniform general rules.

This was in many ways a revolutionary shift in the PrIL of the late 19th century. Jitta was indeed perceived as overly revolutionary, completely changing the landscape of PrIL in ways that were almost incomprehensible for the scholars of the time.[246] Jitta himself was convinced that future generations would be in a much better position to understand his message and his vision.[247] At the same time, Jitta thought the building blocks of his philosophy were already found within the history of the field.

In particular, Jitta pled for a return to the analysis of a legal relationship proposed by Savigny. He thought focusing the analysis on legal relationships, rather than statutes, was "the dawn of the modern development" of PrIL and had to be recovered and

[245] Jitta, *La methode*, *supra* note 226 at 43. To use Friendlich Juenger's classification, Jitta is therefore not a "conflictualist", but an "internationalist. See Juenger, *supra* note 244.
[246] See Steenhoff, *supra* note 12 at 244: "The method presented by Jitta was received very critically. The idea of a 'legal community of the human race' was generally rejected by all reviewers, whereas the method itself was considered to be too little factual to entrust legal practice to it."
[247] *Ibid* at 237: "Jitta himself was convinced that he was ahead of his time, and that future generations would be more appreciative of his views. He was in fact a visionary who lived more in the future than in the present, regarding it as his duty to awaken the consciousness of his contemporaries and to prepare them for a concept of private international law based on the 'legal community of mankind,' a concept he himself never gave up, notwithstanding the terrible First World War and its aftermath."

rethought.[248] Jitta would try to forge precisely that recovery and reconstruction of many of Savigny's precepts and to underscore their significant implications.

First, focusing on legal relationships meant a revival of the humanist spirit. "Not the will of a sovereign, but the requirement of a reasonable social intercourse of people, is the decisive element."[249] The applicable law in PrIL cannot possibly be determined in accordance with the sovereign's perception of the reach of its law in defiance of the consequences of its application for the private international relations between individuals. "The community of nations may exist, but that is not the basis of private international law. The real basis of the said law is the juridical community of mankind. A system of reasonable principles for the international intercourse of people can only be built on such a community."[250] Jitta blamed Savigny for having been unclear about the contours and implications of a humanist perspective: "Savigny stopped one step away from the truth, by conceptualizing the need for universalism in PIL by reference to the community of states, as opposed to a juridical community of mankind."[251]

Second, recovering a humanist foundation in PrIL by focusing on inter-human relationships also meant that one could fundamentally challenge the notion of sovereignty, which was used to link PrIL to PublIL. To Jitta, the limitations of state sovereignty in PrIL are not explained in relationship to other states, but rather in relationship to the international community of mankind. "The sovereignty of the State is a derived, a relative and a limited one. It is derived from the sovereignty of mankind, and, as such, it is only a relative one."[252] Therefore, "the state must abstain from measures constituting a violation of the reasonable order of the international social life and it has to act when the said order is requiring an action."[253] Jitta started from the premise of the existence of a "juridical community of mankind."[254] He thereby concluded that the

[248] Jitta, *The Renovation*, *supra* note 11 at 90.
[249] *Ibid* at 125.
[250] *Ibid* at 1.
[251] Jitta, *La Methode, supra* note 226 at 55.
[252] Jitta, *The Renovation, supra* note 11 at 9.
[253] *Ibid* at 10.
[254] *Ibid* at 3. How inclusive the juridical community of mankind would have been is not entirely clear. As I show in Chapter 2, Jitta disavowed the civilized/non-civilized distinction and pled for equality between men and women. Yet in a wonderful biography of Jitta, G.J.W. Steenhoff argued Jitta most likely had in mind precisely the European environment of the 'mobile' individual with multiple affiliations and that the European community would represent a regional counterpart to his universal community of mankind. See

sovereignty of the state is derived, relative and limited.[255] There are limits on state sovereignty, in the state-citizen, state-foreigner, and state-state relationships.[256] His theory focuses almost exclusively on a thorough understanding of the limits of state sovereignty in the first two relationships, rather than those in the state-state relationship. This is because in Jitta's theory "the duties of the State towards individuals exist, even when the individuals are not its "subjects". The State has direct duties towards the individuals, only because they are people, members of the human species, and not because they are subjects of another State; therefore the said duties are independent of reciprocity and do not admit retortion."[257] For Jitta, this was a departure both from the comity and the state-centric theories:

> Even in the relations between the State and its own subjects, also in the domain of the pure municipal law, the existence of juridical limits of the sovereignty of the State is scarcely admitted, and, as to the relations between the State and aliens, positive law does not go any farther than the admission of the so called *comitas juris gentium*, a latin, not easily translatable expression, originally implying only a kindliness *between States*, so that reciprocity was a condition and retortions were absolutely lawful. We shall see however, in many parts of the system, that the *kindliness towards nations* is gradually evolving in the direction of the *conscience of a duty towards people.* The interest of the State is a moving-spring in this evolution, but not its basis.[258]

Following his analysis of state sovereignty, he argues that the focus on conflict of laws, as opposed to the nature of legal relationships, is caused by a misperception of the social nature of inter-human relationships. Allegedly, "within the sphere of national

---

G.J.W. Steenhoff, "Daniël Josephus Jitta" in *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C Asser Institute, 1995) 238 at 267-268. In that way, certain parallels between Jitta's theory and contemporary debates around the notion of EU citizenship might be made. On the concept of EU citizenship see e.g. Percy B. Lehning, "European Citizenship. Towards a European Identity," online: (1999) 2:3 Working Paper Series in European Studies http://aei.pitt.edu/8995/1/lehning.pdf ; Dimitry Kochenov, "European Citizenship and the Difficult Relationship Between Status and Rights" (2009) 15 Colum J Eur L 169. For the recognition of rights and relationships as a corollary to the mobility of individuals within the EU see Muir Watt, "European Federalism and the New Unilateralism" (2008) 82 Tulane L Rev 1983; See e.g. Louic Azoulai, "The European Individual as Part of Collective Entities (Market, Family, Nation)" [unpublished] (on file with author).

[255] Jitta, *The Renovation, supra* note 11 at 8.

[256] *Ibid* at 9-11.

[257] *Ibid* at 10: Jitta admits that "I am fully aware of the fact that positive law is not in accordance with the principles."

[258] *Ibid*.

private law, the role of the statute is not disputed. It is not the source, but the product of "law" and law itself is the normal rule of social life, the ensemble of precepts which allow the individual to enter into relations with other members of the human species, by limiting his liberty against those of others, and the liberty of others against his own."[259] Why then, he asked, "once we enter the larger scheme of private international law, everything changes and the statute takes the place of honor, placing law and life at the back-end? Is it that within humanity social life is manifested differently than within a nation? Within humanity, are relationships between individuals established through public authorities or directly, from individual to individual?"[260]

This analysis made him conclude that the applicable law is determined based not on the will of the sovereign state, but on the social scope of the legal relationship as "a link between two persons or juridical subjects, a link formed and maintained by the social public power, the link being at one end a duty, and at the other end a claim corresponding to the duty."[261]

The practical application of the way in which Jitta re-constructed the notion of sovereignty is best exemplified in his explanation of the citizenship versus domicile debate in PrIL. Jitta thought that the absolute imposition of the law of citizenship for individuals who have established their domicile abroad disregards the limits of state sovereignty in relationship to its own citizens. He is appalled by the fact that "many lawgivers, moved by religious or social-philosophical considerations, have such a high idea of their own absolute and unlimited sovereignty, that they regard themselves entitled to impress the rules of their own laws on their own subjects as an indelible mark."[262] It would be wrong to associate the scenario in which "individuals have established their home abroad, cum animo perpetuitatis" to the idea of "the evasion of law," "sometimes qualified as a fraud."[263] Because the state is the organizing framework of a particular people, but also the local representative of mankind, the free choice of individuals to move to a new state and thereby submit to a different law is not felt by a state as an affront to its authority. Because Jitta sees the juridical community of mankind as the basis

[259] Jitta, *La Methode*, *supra* note 226 at 43.
[260] *Ibid.*
[261] Jitta, *The Renovation*, *supra* note 11 at 89.
[262] *Ibid* at 106.
[263] *Ibid.*

of states' sovereignty, a state encourages rather than restricts individuals' tendency to enter into another local sphere of social life: "All individuals have the right to participate in the universal social life by submitting themselves to the laws of different social groups which constitute humanity, and they will be regulated by them to the degree of the penetration of their activity within the social life of these groups."[264]

On the one hand, unlike in Mancini's theory, the individual is not subsumed under any particular social community, but rather linked to and thereby regulated by various social communities in proportion to the respective social links, including domicile, residence, citizenship, place of contracting etc. Every element of an inter-personal relationship is therefore perceived as a social link, which in turn generates various regulatory needs. On the other hand, the individual was also not subsumed under a larger and more vague notion of humanity either. Jitta did not feel the need to separate nationality from other social links or to separate the national from the international, and from mankind. Rather, individuals' existence implicated all these affiliations and all these levels of social embededdness simultaneously, but to different degrees and of varying intensity depending on circumstances and the relationships involved. The individual was an inherently social being and it is his relational nature which makes him simultaneously embedded in smaller communities of families, friends, nations etc., as well as in a larger notion of humanity.[265] Jitta, as well as Story and Savigny, were both highly skeptical of pushing for universal fraternity given the example of the French revolution, as well as of inhibiting the individual from engaging in cross-border relationships.

Focusing on legal relationships then meant focusing back on the people whose life in the transnational realm is in dire need of a regulatory framework. It means transferring the focus from an abstract notion of states and state sovereignty to real people. But this did not mean shifting the focus to isolated individuals or to an abstract notion of human reason or individual liberty. Rather, Jitta thought that PrIL needs to focus on inter-personal relationships and their social scope. In essence, every PrIL

[264] Josephus Jitta, *La substance des obligations dans le droit international privé*, t 2 (The Hague: Belifantes Fréres: 1906) at 505.
[265] For a more detailed analysis of this aspect of Jitta's theory see Chapter 7. For a brief exposition see Steenhoff, *supra* note 12 at 242.

determination meant the projection of a particular social goal for particular relationships between people in the transnational realm.

However, Jitta directly acknowledged that judges in different states might have different understandings of the "social nature" of each legal relationship in the transnational realm, because they are inevitably influenced by their national legal and socio-economic background.[266] Since every judicial determination is influenced by and becomes a symbol of each state's historical, political, social and judicial individuality, PrIL decisions could vary widely.[267] Yet this did not mean national judiciaries and legislatures would offer arbitrary solutions to PrIL matters. In their PrIL decisions national judiciaries would neither set their national legal system as a procrustean bed for transnational private law relationships,[268] nor would it be realistic to assume that they will not be influenced by their own legal system.[269] They had to analyze the social scope of legal relationships of various degrees of internationality and therefore consult and weigh the policies and legal appreciations of these relationships in all states concerned.[270] It is true that individual judges pertaining to different states might reach different decisions on the applicable rules of law, in spite of the fact that they share the same goal and duty towards the international community of mankind.[271] But this divergence was a direct result of different appreciations of the social nature of particular transnational inter-personal relationships, and could not be overridden by a blind uniform designation of a particular law as applicable, regardless of the social implications.

It is this "absence of universal certainty" with respect to the social scope of a legal relationship,[272] which obliges states to cooperate and achieve legal certainty in PrIL.[273] "Each State is bound to collaborate with the other States, and to take by mutual agreement the measures required for the maintenance of the reasonable order of

---

[266] This problem is reflected in today's analysis of "characterization."
[267] Jitta, *La Methode*, *supra* note 226 at 75.
[268] Josephus Jitta, "Le Droit commun international comme source du droit international privé" (1908) 4 Revue de droit international privé et de droit pénal nternational 553 at 569-570.
[269] *Ibid* at 568.
[270] Jitta thought the primary method of analysis in PrIL should be comparative law. For a detailed account of the use of comparative law see Josephus Jitta, "Le Droit commun international comme source du droit international privé" (1908) 4 Revue de droit international privé et de droit pénal nternational 553 & (1909) 5 Revue de droit international privé et de droit pénal nternational 485.
[271] Jitta, *La Methode, supra* note 226 at 177-179 & 455.
[272] *Ibid* at 456.
[273] *Ibid* at 456, 457.

international social life"; this duty is the expression of a juridical limitation of the State's sovereignty in relationship to individuals.[274]

For Jitta, the universality of PrIL did not rest in the absolute uniformity of PrIL rules at all cost. The universality of PrIL was the expression of a common regulatory goal shared by all states and courts. Because the purpose of PrIL is to apply the law most appropriate for the nature of the legal relationship, meaning that law which allows it to develop in the universal community according to its social scope, "every state, even when it is acting in isolation, is bound to recognize, as a source of a duty correlative to a right, every juridical relation established in conformity with the requirements of the reasonable order of international social life."[275]

The stability of these juridical relations and their universal recognition is the symbol of states' direct duty towards individuals and the international society as a whole. This universality is no longer felt as an infringement upon the forum's sovereignty and the judge does not need to find a political justification for applying foreign law as a symbol of respect for another sovereign. The judiciary simply performs a universal duty to submit the legal relations to the law most appropriate for its social purpose. The universal recognition of these relationships follows directly from that duty.

Juxtaposing the eminently regulatory nature of PrIL with the universal nature of the judicial task in PrIL is an important way in which Jitta incorporated universalist elements while at the same time challenging the abstract focus on uniformity within the PrIL-PublIL association. Another important way of looking for this balance was to rethink Savigny's principle of localizing inter-personal relationships. On the one hand, Jitta added to the social lens brought into PrIL by focusing the analysis on inter-personal relationships, a social theory of localizing transnational inter-personal relationships. He argues that localization represents the analysis of "the link that may exist, in a social sense, between the fact and a local sphere of social life."[276] Localization "is a matter which requires a thorough analysis of its [the inter-personal relationship's] social aim."[277] A transnational inter-personal relationship can only be definitively localized in one

[274] Jitta, *The Renovation*, *supra* note 11 at 11.
[275] *Ibid* at 91.
[276] *Ibid* at 97.
[277] *Ibid* at 99.

jurisdiction "if it has a predominant social element and if that element caused the legal relationship to penetrate in a local sphere of social life."[278]

On the other hand, Jitta opposed the idea that all legal relationships can be localized in one jurisdiction.[279] If localization was defined as searching for the social link between an inter-human relationship and a particular sphere of social life, and if this analysis was guided by an analysis of the social scope of that relationship, it seemed natural that one relationship could have a social impact in a variety of jurisdictions. This was precisely the insight that made Mancini avoid the entire analysis of the "nature of juridical relationships," in order to ensure intransigently uniform rules of PrIL. But to Jitta this was simply an insight that could not be brushed aside, but rather should form the center stage of the method of localizing PrIL matters.

Allegedly, "it is perfectly reasonable to submit a juridical relation to the civil law of the local sphere of social life, to which it belongs in accordance with its peculiar nature, provided that the relation belongs to such a local sphere."[280] If a legal relation is not predominantly localized[281] in a national social sphere, one cannot arbitrarily choose an applicable state law simply to give authority to some sovereign. "The juridical relation is submitted to the international-common rules of law if these are to be found, and when they are not, to the reasonable principles of the international social life,[282] as a subsidiary source of positive law."[283]

Jitta admitted that this injects quite a high degree of uncertainty in the law and therefore pleaded for the development of treaties on uniform rules of private law or on matters of PrIL, but with a focus on the substantive result to be achieved by the adoption

---

[278] Josephus Jitta, *La substance des obligations dans le droit international privé*, t 2 (The Hague: Belifantes Fréres: 1907) at 498 [Jitta, *La substance*].

[279] Jitta's methodology focused on individual legal relationships, rather than on the nature of whole private law categories. He therefore viewed choice of law rules developed for entire private law categories as mere presumptions, "a guiding thought". See Jitta, *The Renovation*, *supra* note 11 at 106.

[280] *Ibid* at 91.

[281] *Ibid* at 97 (For Jitta, localization represented the analysis of "the link that may exist, in a social sense, between the fact and a local sphere of social life"). As to contracts, for example, Jitta explained that the localization of a contract "is a matter which requires a thorough analysis of its social aim…. This restriction is the main difference between the principle of localization and the classical rules for the solution of the conflicts between the national laws, relating to contracts." Jitta, *The Renovation*, *supra* note 11 at 99.

[282] In Jitta's theory the judge uses her "judicial consciousness" to find those principles. Jitta, *La substance*, t 2, *supra* note 278 at 501-503. Jitta recognized that the judge is intrinsically connected to the national legal consciousness, which guides her in determining the social scope of a legal relationship and the appropriate rules to be applied. Jitta, *La Methode*, *supra* note 226 at 75.

[283] Jitta, *The Renovation*, *supra* note 11 at 91.

of particular choice of law rules.[284] When such uniform provisions are absent and when PrIL legal relationships do not penetrate in a local sphere of social life,[285] but rather belong to the international social life, to ask the judge to apply a particular law based on pre-determined assumptions about the reach of laws in broad private law categories, in defiance of the ultimate result, would be to "put a judge's judicial consciousness to sleep."[286]

VI. Conclusions

PrIL has always been in search of its place within the legal system, as well as of its particular regulatory function. During the 19th century, this search was part of larger attempts to connect PrIL either to PublIL or to private law and to focus the theoretical and methodological analysis either on the individual or on the state. To date, the swing of the pendulum between individual-centered and state-centered premises in PrIL has not been thoroughly analyzed in the field, whereas this chapter has shown that it was at the core of PrIL academic debates during the 19th century. As 19th century PrIL scholars considered the extent to which PrIL should take the individual or the state as the analytical point of departure, they reveal the contours and implications of an individual-centered or state-centric perspective in PrIL. Many of our current perceptions of the PrIL-PublIL association, or of individual-centered theoretical premises within PrIL can be revisited through a thorough engagement with the 19th century academic debates.

What emerges from revisiting this 19th century academic context within PrIL, I have argued, is that in the theories of the main figures of the 19th century, in particular Joseph Story and Carl von Savigny, the individual-centered theoretical direction introduced neither an individualistic notion of individual liberty and autonomy, nor an abstract notion of free choice of law. Rather, the individual-centered premises referenced both a concern for human agency and self-determination opposing potentially "despotic"

[284] Josephus Jitta, "The Development of Private International Law Through Conventions" (1920) 29:5 Yale L J 497 at 50.
[285] Jitta clarified that a PIL legal matter can only be localized if it has a predominant element and if that element caused the legal relationship to penetrate in a local sphere of social life. Jitta, *La substance*, t 2, *supra* note 11 at 498.
[286] *Ibid* at 503.

state power and a social, relational context for individual agency and self-determination in relationship to other people and social communities. Much of PrIL analysis is centered on the inter-personal relationship as an analytical unit evoking both extra-legal social expectations and national regulatory policies. In turn, this inter-personal relationship is linked to particular national communities, as well as to a general notion of humanity and enlarged community of laws. Because of its more complex image of the individual's transnational existence, the methodology proposed in both Story's and Savigny's accounts is highly analytical and sequential, engaged in a constant back and forth between liberty and social responsibility, between the extra-legal social and the legal domain, and between the spirit of the *Volk* and national sovereignty, on the one hand, and the international legal community and humanity, on the other.

It was in large part the complex, analytical background of the individual-centered analysis that prompted state-centric internationalists to switch their focus to the state. In the second half of the 19th century the search was for abstract, unchangeable and uniform philosophical premises from which uniform PrIL rules were to be constructed. State sovereignty and public authority were among the terms on which PrIL as a field could allegedly "build solidly." The meaning attributed to these notions however remained unclear. And while PrIL would be linked to PublIL, "jurisdictional" sovereignty in PrIL would still be separated from "political" sovereignty in PublIL. This meant that sovereignty in PrIL could be used as a much more abstract notion that appeared not only to overlook, but to explicitly avoid a thorough engagement with policy considerations and political goals. In the PublIL school of thought, the *international* would be set as the priority, and the *public* would be allowed only to the extent that it did not disturb the international. While the association with PublIL did not manage to retain the public dimensions, it did manage to exclude the private, especially in Pillet's and Zitelmann's theories. In those theories, sovereignty and public power are set in opposition to the individuals involved expressing their own expectations for the application of one law or another, or broader appeals to justice. Once PrIL becomes a species of inter-state division of sovereignty, it seemed only logical that the individual had no role to play.

At the end of the 19th century the Dutch scholar Josephus Jitta aimed to restore the field back to its humanist foundations. In his view the conceptualization of PrIL as a

conflict of sovereignty made the field increasingly formalistic and openly disinterested in the needs and wants of individuals in their transnational existence. But in re-focusing the analysis from states to individuals, Jitta did not introduce an atomistic image of the individual, nor did he disconnect private law and PrIL from politics and state regulatory goals. Rather, he reconciled the two by referencing a social, relational image of the individual. He pleaded for a return to Savigny's focus on the legal relationship between individuals, which he used as an anchor to situate the individual within ever wider spheres of relationships: in relationship to the other party(ies) of the private law dispute; in relationship to other individuals and communities, and finally embedded, through their relationships, within one or more communities and within a broader notion of humanity. To achieve that, Jitta departed from what he perceived as a somewhat "essentialized" localization in Savigny's theory. Instead, he created a theory of the "social" localization of private law relationships and differentiated between various degrees of internationality of private law relationships. Furthermore, he built upon Savigny's analytical method of searching for the nature of private law relationships by shifting back and forth from extra-legal social considerations to political and policy considerations revealed through a comparative analysis.

Chapter 2 - Individual- and State-Centered Perspectives in Nineteenth Century Europe

I. Introduction

In the next three chapters I consider the trajectory of the individual-centered and the state-centered perspectives in the intellectual history of PrIL until roughly the mid of the 20th century. Specifically, I attempt to create a transnational genealogy of these perspectives as they rose and fell while being transplanted, re-interpreted and incorporated within various countries over several periods in the development of PrIL. I show that individual-centered perspectives were often ignored, misunderstood or unduly associated with an individualistic, overly liberal ideology. In order to recover and partly reconstruct the individual-centered perspective that I term "relational internationalis," as I seek to do in this dissertation, it is therefore necessary to explain why.

The first of these three chapters focuses on the main academic debates in 19th century Europe that reflected on PrIL's relationship to private law and PublIL, as well as on the extent to which individual or state interests should be the focus of PrIL theory and methodology.

My analysis proceeds in four parts. I first show the way in which Savigny's scholarship has been interpreted and incorporated in German PrIL theory and transnationally. In particular, I argue that initially his theory was stripped of its individual-centered underpinnings and occasionally even interpreted as entirely state-centric. This interpretation is significant, given the wide-ranging influence of his scholarship in a large number of countries.

Second, by looking at an academic debate between Josephus Jitta and the German 19th century PrIL scholar Ludwig von Bar (1836-1913), I show that 19th century internationalists failed to fully engage with or even acknowledge the individual-centered perspective. With this example and others, I suggest that the very academic debates among internationalists contributed to the overshadowing of the distinction between

individual-centered and state-centered perspectives. By misunderstanding, misstating, or completely ignoring each other's arguments, they made the distinction less sharp and less relevant for scholars outside the internationalist school.

This, among other factors, made it possible for Franz Kahn to split PrIL theory at the end of the 19th century between internationalists and particularists without there being a sense that any distinctions were lost within the internationalist school of thought. In the third section, I show how creating the divide between nationalists and internationalists solidified the lack of engagement of the discipline with the particular relational internationalist perspective I aim to recover. Also, I show that the nationalist school of thought was making a name for itself by associating PrIL with domestic private law, failing to acknowledge the private-law focused internationalist argument of the previous generation and offering a new meaning for this association, which remained engrained in the consciousness of PrIL.

Last, I look at the way in which the individual-centered vs. state-centered distinction crystalized in the beginning of the 20th century in England, and whether this was a reflection or even a transplanting of the continental debates. In particular, I am interested in how English 19th century PrIL scholars reasoned on the conflicts that may arise between considerations of private justice and state sovereignty.

Overall, then, I try to map how the European academic discourse in the second half of the 19th century reflected on the way in which PrIL should incorporate and respond to state or individual interests and rights. In this and the following two chapters I attempt to create a transnational genealogy of these perspectives as they rose and fell while they were transplanted, re-interpreted, and incorporated within various countries and several periods in the development of PrIL.

II. Savigny's Legacy

Savigny's PrIL theory is considered one of the most important, if not the most important, PrIL theory of the 19th century, having influenced an impressive number of

scholars, national courts and codifications.[1] It might therefore be assumed that, at least since the English translation of his 8th volume, the individual-centered aspects of his PrIL theory have been part of that virtually worldwide influence. Yet, as I noted in the first chapter, PrIL theory appeared predominantly state-centric, particularly in continental Europe in the 19th century.[2]

In this section I explain how the predominantly state-centric underpinnings of PrIL theory can not only be reconciled with, but partly explained by the way in which Savigny's PrIL theory was received and interpreted in the 19th century. In particular, I aim to show that as opposed to the individual-centered underpinnings of his theory, it was mostly his brief reference to an "ever-growing community of states" and his formal maxim of the "seat of a legal relationship" that were influential in the shaping of 19th century PrIL theory and methodology. State-centric theories have referenced and heavily relied on the notion of the "community of states" in ways that can hardly be reconciled with Savigny's own theory.[3] Similarly, the concept of the "seat of a legal relationship" was brought to a much higher level of abstractness, which in contrast to Savigny's own theory, disconnects this principle from both the individual interests and rights at stake in PrIL relationships and the principles underlying the laws which regulate them.[4]

---

[1] For a detailed account of this influence of his theory on the development of PrIL in Germany, the US and the UK, France, and Belgium see Max Charles Gutzwiller, *Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts* (Freiburg, Switzerland: Gschwend, Tschopp, 1923).

[2] See André Bonnichon, "La Notion de conflit de souverainetés dans la science des conflits de lois" (1949) 38 Rev crit dr int privé 615 & (1950) 39 Rev crit dr int privé 11 (noting in 1949: "it is a common statement among the modern scholars of PrIL that the conflict of laws boils down to a conflict of sovereignties," at 615).

[3] See Gutzwiller, *supra* note 1 at 42-44 (arguing that "while this notion [of the community of states] has exercised a significant influence on PrIL theory and methodology, Savigny himself drew virtually no conclusions from this notion for his own theory").

[4] See Andreas Bucher, *Grundfragen der Anknüpfungsgrechtigkeit im internationalen Privatrecht (aus kontinentaleuropäischer Sicht)* 22 Schriftenreihe des Instituts für Internationales Recht und internationale Beziehungen, Universität Basel (Basel; Stuttgart: Helbing & Lichtenhahn, 1975) at 10-14 (arguing that Savigny's principle of the seat of the legal relationship was unduly interpreted as overly abstract and individualistic. Bucher argues that Savigny's notion of the "seat of a legal relationship" focused on individual interests and rights, as well as the policies and principles of the various national laws relating to specific PrIL relationships). See also Gutzwiller, *supra* note 1 at 44-45 (arguing that post-Savigny, his notion of the seat of the legal relationship is used without recourse to any normative considerations).

1. The International Community of States

Although Savigny constructed an individual-centered theory to determine the applicable law in a transnational legal matter, he did not argue directly that the application of a particular foreign law is mandated by a direct obligation of states towards individuals. Whereas Savigny argued that the application of a particular law must reflect the litigating parties' submission under that law,[5] Pillet noted that Savigny offered no explanation for why states must recognize such submission.[6]

Rather, Savigny suggested that the mutual recognition and application of different national laws is grounded in the constantly evolving community of states.[7] Yet, while he invokes the community of states in order to construct a universalist theory that moves states to recognize one another's laws, he does not derive any choice of law rules from

---

[5] For my non-formalist interpretation of Savigny's concept of "voluntary submission" see Chapter 5.

[6] Antoine Pillet, "Droit international privé consideré dans ses rapports avec le droit international public" in Annales de l'enseignement superior de Grenoble (Grenoble: F. Allier Père & Fils, 1892) 309 at 336 & 367-368 (Pillet agreed with the principle of "the unity of successions" meaning that the entire estate had to be distributed according to the personal law of the decedent, irrespective of the type of property. However, he thought that it would be impossible to oblige states to respect this principle by reference to the individual's personal autonomy. This would change, however, if it could be showed that "the unity of successions is a natural consequence of the nature of laws of this sort and that a certain state cannot refuse the recognition of this unity without implicitly rejecting the authority of the foreign law and offending the sovereign which enacted the law and its interests of seeing it enforced"). For the way in which Pillet tried to reach similar results to Savigny, while justifying them by reference to state sovereignty see Bonnichon, *supra* note 2 at 22:

> By the nature of things, we are left with what we have called the functional or essential principle. We search for a just and useful solution; we examine the nature of the legal relationship in dispute. But in order to remain faithful to the line of reasoning we have adopted, we disguise such motives under the cover borrowed from the term sovereignty. This way, for example, the social scope of a law will reveal whether the attribute of permanence of this law will make way to that of generality. This can be examined from the angle of justice or the nature of a legal relationship. But we add: this way [by referencing sovereignty] the necessary sacrifice will be demanded from the sovereignty, which will incur the least detriment. In reality this is reverting to a criterion of justice or social utility, but at the same time attributing the term of reference, not without sacrifice, to the concept, allegedly fundamental, of conflict of sovereignty.

[7] Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*, translated by William Guthrie (Edinburgh: T&T Clark, 1880) e.g. at 44 ("community of legal convictions"), at 45 ("community of different nations"), at 59 ("community of laws"), at 71 ("community of law among independent states"), at 76 ("community of law obtaining between different states").

it.[8] Gutzwiller noted that "Savigny's reference to the community of states and his concept of the seat of the legal relationship run parallel to each other and are not brought into connection by any legal construction."[9] Savigny did not seem "to derive any of the many possible conclusions from his reference to a community of states. In particular, he does not derive his own theory from it."[10]

Despite the fact that Savigny did not construct a state-centric theory from his concept of the "ever evolving community of states," Gutzwiller was able to observe in 1923 that "Savigny's Public International Law starting point has been universally recognized."[11] PrIL theories everywhere started referencing in one form or another Savigny's maxim of the "ever evolving community of states."[12] However, rather than being used, as in Savigny's theory, as a convenient slogan to push states towards universalism, it later became the basis for PrIL theory and methodology. Most universalist theories developed in the centuries following Savigny were not only primarily state-centric, but portrayed their theories as a continuation of Savigny's doctrine by referencing his "community of states."[13] Yet the community of states finds a very different place in these theories, both conceptually and analytically.[14]

At the end of the 19th century the "community of states" is even more explicitly linked to and included in a theory of PrIL elaborated on the basis of PublIL, primarily by Zitelmann and Pillet.[15] Pillet and Zittelmann constructed their theories as a reaction both to previous universalist theories relying on Savigny and to emerging nationalist skeptics. As to the former, they charged universalists with being overly vague about the way in

---

[8] Gutzwiller, *supra* note 1 at 44. This also mirrors Blaine Baker's observation that while Story uses comity to push states to co-operation, he does not derive a state-centric PrIL theory from it. See Blaine Baker, "Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws" (1993) 35 McGill Law J 454. For a discussion of Baker's interpretation of Story see Chapters 1 & 5.

[9] Gutzwiller, *supra* note 1 at 44.

[10] *Ibid* (Gutzwiller also includes references to previous works by other PublIL and PrIL scholars that mention the community of states. Yet he argues that this reference and the relationship between PrIL and PublIL remain quite vague until the post-Savigny literature, at 38, n 23).

[11] *Ibid* at 44.

[12] *Ibid* at 45.

[13] *Ibid.*

[14] See Gutzwiller's description of how the French scholars Frantz Despagnet and Jules Valery, refer to Savigny's community of states as well as his maxim of the seat of a legal relationship, but use those concepts in very different ways and draw different conclusions. Gutzwiller, *supra* note 1 at 140.

[15] *Ibid* at 45.

which PrIL connects to PublIL.[16] They saw themselves as the first ones truly carrying Savigny's universalist credo to fruition by establishing a theory entirely relying on the PrIL-PublIL association.[17] In arguing this way, it appeared as though this association was implicit or inevitable for the internationalist theory of PrIL. What they did was simply to explain in a more substantiated way why it was correct to invoke the association and how it could translate into a PrIL methodology. Success in this endeavor was also meant to counter the nationalists who were arguing that a universalist theory in PrIL via the PrIL - PublIL association was not conceptually tenable.[18]

Whether acknowledged or not by universalist writers themselves, these developments created a shift in perspective from Savigny's writings.[19] Savigny's choice of law methodology was modeled according to what he perceived to be the rights and interests of the "community of individuals" which could be discerned through an analysis of individual legal relationships.[20] Those individual rights and interests were the basis on which his choice of law rules are constructed. The "community of states" appeared as a convenient construct that enabled the universal recognition and enforcement of individual reasonable expectations and interests.

With Pillet and Zitelmann the relationship between the community of states and community of mankind within PrIL theory is reversed. The interests and rights of the states within a community become the basis for choice of law rules. The community of individuals is merely the beneficiary of the uniform distribution of authority, which is otherwise based on the rights and interests of states.

---

[16] For a description of Pillet's and Zittelmann's theories see Chapter 1.
[17] See Gutzwiller, *supra* note 1 at 45.
[18] See Franz Kahn, "Gesetzeskollisionen, Ein Beitrag zur Lehre des Internationalen Privatrechts" (1890) 30 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1; Franz Kahn, "Abhandlungen aus dem internationalen Privatrecht" (1898) 39 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 [Franz Kahn, "Abhandlungen 1898"] & (1899) 40 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 [Franz Kahn, "Abhandlungen 1899"].
[19] See Bonnichon, *supra* note 2 at 11-13 (Describing the transition from Savigny's theory to the theory of conflict of sovereignties).
[20] Gutzwiller, *supra* note 1 at 42.

2. The Seat of the Legal Relationship

Legal scholarship not only relied on Savigny's concept of the ever - increasing community of states in ways that depart from Savigny's own theory. They also overwhelmingly incorporated his maxim of the "seat of the legal relationship," while disconnecting it from his normative justification both by stripping it off of its individual-centered tenets and by raising its level of abstraction.[21] Gutzwiller noted that "the concept has become so widely used,[22] that one would be inclined to see a worldwide spread of the Savignian doctrine, while at a closer look the concept has lost almost any relationship to Savigny's own theory."[23]

First, the maxim of the "seat of the legal relationship" was disconnected from its individual-centered justification and occasionally directly linked to a view of PrIL as the

[21] For a general account of Savigny's use of the term see Paul Heinrich Neuhaus, "Savigny und die Rechtsfindung aus der Natur der Sache" (1949) 15 RabelsZ 364.

[22] Gutzwiller, *supra* note 1 ("The Savignian principle of the seat of the legal relationship has become a common good of the jurisprudence. The concept of the "seat" has been so widespread that it appears as though it would have something to do with the technical concept of the law or with an old inventory of the common science. The idea that each legal relationship has a seat and that only the law of the seat must be applied has become a common sense principle for which there is no need of a justification for the jurisprudence," at 84).

[23] *Ibid* at 84-89. Andreas Bucher reaches the same conclusion arguing that the concept has reached such a high level of abstraction that it has lost virtually any normative grounding (either individual-centered or policy-centered). Bucher, *supra* note 4. See also Theodor Niemeyer, *Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts* (Leipzig: Duncker & Humblot, 1895) ("the Savignian theory [of the seat] has been adopted by the scholars and courts of most civilized states and in particular in Germany (here primarily through the influence of von Bar's writing) and it has reached such influence that its principles have become the customary law," at 59). Some of the large number of PrIL scholars who came after Savigny have replaced Savigny's term of the "nature of the legal relationship" with the concept of the "nature of things," drawing fundamentally different conclusions and different methodologies than Savigny. See Ludwig von Bar, *The Theory and Practice of Private International Law* translated by George Robertson Gillespie (Edinburgh : W. Green & Sons, 1892). For Gutzwiller's account of von Bar's theory, see Gutzwiller, *supra* note 1 at 62ff & 85. For a discussion of the distinction between Savigny's term of the nature of a legal relationship and von Bar's term of the nature of things see Eugène Gaudemet, "La théorie des conflits de lois dans l'ouvre d'Antoine Pillet et la doctrine de Savigny" in *Mélanges Antoine Pillet* (Paris: Rec Sirey, 1929) 89 at 101, n 1: "We must also observe that Savigny's formulation: *nature of a legal relationship* is more precise than than of von Bar: *nature of things*, with which Pillet seems to confuse it (*Principes,* p. 281), and is not that different from Pillet's. There is without a doubt a strong similarity between the *nature of a legal relationship* and *the social scope of the law* which regulates it").

division of sovereign authority among states.[24] In his account of Savigny's influence on the development of PrIL Gutzwiller noted that "for the most part only the convenient and graphic term of the 'seat' remained from Savigny's theory. Nobody concerned himself anymore with the individual-centered analysis which led Savigny to his concept."[25]

In Savigny's theory, the "seat of the legal relationship" was not an entirely abstract, normatively empty concept, but rather centered on the way in which he viewed the relationship between the individual, the legal relationship, and law.[26] Savigny was clear that objective law predates subjective law and that the state and state law are an absolute necessity for the legal expression of the people.[27] However, while acknowledging and reinforcing the state and state law, he did not conceptualize PrIL as the delimitation of sovereign authority between states.[28] Rather, his conceptual point of departure is the individual and the "community of individuals," rather than a community of states.[29] Savigny framed the PrIL question in dual terms: one could start from a legal norm and ask what its sphere of application is, or start from the legal relationship and ask what norm it is governed by.[30] He believed the two questions should lead to the same answer because both ways of framing the question capture the same link between the individual, the legal relationship and the state.[31]

In other words, regardless of how the question is framed, both the analysis of a PrIL matter and the ultimate answer to the dispute must consider the way in which individuals have decided to structure their legal relationships, the way in which they relate to each other and to various communities, as well as their substantive aims and expectations.[32] "Only through this detour to the individual and only because Savigny localizes the legal community of individuals in the actual territory to which they submit

[24] See Gutzwiller, *supra* note 1 at 45. This mirrors a distinction I make in Chapter 5 between state-centric and individual-centered perspectives pertaining to the concept of vested rights.
[25] *Ibid* at 40.
[26] *Ibid* at 43.
[27] Savigny, *supra* note 7 at 57.
[28] Gutzwiller, *supra* note 1 at 41.
[29] *Ibid* at 42.
[30] *Ibid* at 41; Savigny, *supra* note 7 at 47.
[31] Bucher, *supra* note 4 at 40 (arguing that Savigny's double starting point had been underappreciated and might have caused us to interpret Savigny's theory as overly individualistic).
[32] See Chapter 5.

(unterworfen), rather than the state that grants them citizenship,[33] does he come to ask which territorial law must be applied to each legal relationship. The seat of the legal relationship is therefore a concept that connects individuals with the legal relationships they enter into and, in turn, connects the latter to a geographical space and its laws. The mere confluence with the traditional question of choosing between different national laws is not the obvious point of departure for the Private International Law problem for Savigny, but rather the result of a much larger construction that starts off with the individual."[34]

Second, post-Savigny, his concept of the seat of the legal relationship not only lost its individual-centered premises, but was also brought to a much higher level of abstractness than he envisioned.[35] The process of finding the "seat" would either be portrayed as quasi-scientific and therefore objective, or simply common sensical and therefore not requiring much justification.[36] Gutzwiller noted that in Savigny's theory, the process of localizing a legal relationship according to its nature instructs the judiciary or legislator to "consider the legal (maybe even actual) elements of the legal relationship, the subjective rights, etc. and to draw conclusions from these elements which can be useful for the PrIL question. From this point of view, the "nature of things" is simply a helping element in the process of interpretation. Yet a quick look at the jurisprudence shows that it has not used the concept in this harmless way, but that it has turned this into a heuristic principle, which can easily lead to very different conclusions. Now the concept should be used with much more care."[37]

For Savigny the seat of the legal relationship was to be justified and determined by an analysis of the way in which the legal relationship was constructed, its defining elements, the legal rules which apply to it and so on.[38] Later, it was transformed into a

[33] Savigny refers consistently to the concept of the people ("das Volk"), which would suggest that nationality would be an important concept of his theory. For an explanation of how and why Savigny adopted domicile as the most relevant connecting factor for private law and PrIL see Hans-Christof Kraus, "Begriff und Verständnis des 'Bürgers' bei Savigny" (1993) 110 Zeitschrift der Savigny Stiftung für Rechtsgeschichte Römische Abteilung 552.
[34] Gutzwiller, *supra* note 1 at 42.
[35] See Bucher, *supra* note 4; Gutzwiller, *supra* note 1 at 40, 85, 140. For an account of German jurisprudence relying on the concept in a variety of ways see Gutzwiller, *supra* note 1 at 84, n 13.
[36] Gutzwiller, *supra* note 1 at 84, 85.
[37] *Ibid* at 85.
[38] Bucher, *supra* note 4 at 9-17.

maxim that surreptitiously leads to a variety of conclusions while necessitating almost no analysis and no justification.[39]

III. The Debate Among Universalists

At the end of the 19th century Josephus Jitta took stock of the state-centric direction in which PrIL theory was developing. He too argued that Savigny's ambiguous use of the term "community of laws" had made him "stop one step away from the truth" and had overshadowed and made less apparent the individual-centered tenets of his theory.[40] In his first book on PrIL[41] and an article published in the *Archiv für Öffentliches Recht* in 1899,[42] Jitta argued that PrIL scholars continuously failed to realize the different directions in which PrIL could develop, depending on whether the individual or the state becomes the conceptual point of departure.[43]

Ludwig von Bar, one of the most prominent PrIL scholars in Germany at the time, reviewed the "new principles and methods" in late 19th century PrIL, including Jitta's work, in order to determine whether they were truly bringing fundamental critiques of the prevailing theories (including his own).[44] This led to an interesting academic exchange between Jitta and von Bar in three articles published in the *Archiv für Öffentliches Recht* in 1899 and 1900. This exchange offers a valuable glimpse into the way in which the individual-centered/state-centered distinction was perceived at the time within the universalist school. It represents a rare occasion in which the distinction itself is brought to the surface for discussion and critique. I will therefore present in some detail both Jitta's description of how the initial point of departure in PrIL theory changes its analytical framework and von Bar's engagement with those arguments.

In 1899, Jitta published an article in the *Archiv für Öffentliches Recht* on the "nature of PrIL," in which he tried to contest the leading view that PrIL should produce

[39] Gutzwiller, *supra* note 1 at 88.
[40] Daniel Josephus Jitta, *La Méthode du droit international privé* (The Hague: Belinfante, 1890) at 111.
[41] For a discussion of Jitta's theory, as espoused in his first book on PrIL see Chapter 1.
[42] Josephus Jitta, "Das Wesen des internationalen Privatrechts" (1899) 14 AOR 301 [Jitta, "Das Wesen"].
[43] Ibid.
[44] Ludwig von Bar, "Neue Prinzipien und Methoden des internationalen Privatrechts" (1899) 14 AOR 1 [Von Bar, "Neue Prinzipien"].

rules that choose between different national laws.[45] He argued that this view's insistence on describing PrIL rules as fundamentally different from private law norms had made scholars oblivious to the fact that PrIL norms nevertheless regulate inter-human relationships, rather than relationships between states qua relationships between their laws.[46] Jitta invited us to think of PrIL as a sort of private law itself, just as focused on the regulation of inter-human relations as private law. The only one, albeit highly relevant, factor that distinguishes the two fields is that while PrIL is supposed to respond to and incorporate the legitimate interests and expectations of a wider society, domestic private law will consider primarily the national society's interests.[47]

In light of this analogy with private law and the underlying emphasis on PrIL's regulatory function for individuals, it should become clear, in Jitta's view, that devising rules of legislative jurisdiction (i.e., choice of law rules) is one method that PrIL could employ to respond to the legitimate interests of a wider society, but it is simply one such method and as such, it must always be subordinate to the actual goal of regulating a society wider than the national one.[48] In other words, PrIL's goal is the regulation of a society of individuals beyond the national borders, and choosing between the laws of different states is simply one of many possible means to achieve this goal. Jitta believed that only the state-centric framing of PrIL matters made it appear as though choosing between different national laws is itself the goal.[49] Jitta pleaded "not for norms of choice between laws but for norms of application (Anwendungsnorm) for a wide law of interactions (Verkehrsrecht)."[50]

Furthermore, Jitta argued that shifting from a state-centric to an individual-centered perspective on PrIL meant that states, individually as well as collectively, had direct obligations towards the international society as a whole. One would no longer justify a decision to apply a certain law in terms of comity or reciprocity, but rather directly as an obligation towards individuals.[51] It is important to note that Jitta generally does not refer to the obligation of states or courts towards the litigating parties alone, but

[45] Jitta, "Das Wesen," *supra* note 42 at 304.
[46] *Ibid* at 307.
[47] *Ibid* at 309.
[48] *Ibid* at 309.
[49] *Ibid* at 310.
[50] *Ibid* at 326.
[51] *Ibid* at 314.

rather to the international society as a whole.[52] Because he believed that private law relationships and norms were always embedded in a larger social context, implicating not only the litigating parties, for Jitta the social scope of each legal relationship referenced the international society. In his theory, not only the litigants, but international society as a whole, had a legal claim, an interest, in a legal dispute being decided in a certain way.[53] This implicitly acknowledged that adopting certain approaches to solving private law and PrIL matters had systemic implications for the whole society (national in the case of private law and international for the international society).[54] In this sense, "Private international law must analyze each legal claim of international society in itself, and if one agrees that private law must be social, then PrIL must be *doubly social*."[55]

Last, while most internationalists embraced the PrIL-PublIL association as progressive, Jitta believed that breaking the relationship would be liberating for PrIL. Freeing PrIL from PublIL meant that PrIL would detach itself from the many ambiguities and concerns at the heart of PublIL.[56] Connecting PrIL to private law, in Jitta's view, would make PrIL more analytical than structural, and more directly focused on individuals' rights and interests in the international context.

As such, Jitta's critique of PrIL's common path up to that point appeared quite crushing of previous PrIL scholars, as well as of several of his contemporaries. Ludwig von Bar was one of the authors to whom Jitta's critique is often quite directly addressed. He described von Bar's methodology in the following way:

> For each legal institution Von Bar creates a patterning of the different laws and legal systems with which it might be connected, for example the lex domicilii or originis personarum, the lex rei sitae, fori, actus or contractus etc.; then he makes a choice between those identified laws, based on different rationales, sometimes reason, sometimes custom, sometimes by reference to other authors or rules set up by international congresses. This choice represents the law that each judge of the world,

[52] *Ibid* at 307, 309, 321.
[53] *Ibid.*
[54] See Chapter 1; Josephus Jitta, "Alte und neue Methoden des internationalen Privatrechts" (1900) 15 AOR 564 at 568 [Jitta, "Alte und neue Methoden"].
[55] Jitta, "Das Wesen," *supra* note 42 at 321.
[56] *Ibid* at 320.

> given the alleged universal binding force of international private law must apply, as long as there are no diverging norms in the laws of its country.[57]

To Jitta this was the classical definition of creating "laws about laws," while completely failing to engage with the regulatory needs and legal claims of international society.[58] Von Bar responds to Jitta's critique in an article in the same volume of the *Archiv für Öffentliches Recht*. While defending the leading academic current of the time, of which he was clearly part, von Bar struggles to understand Jitta's claims. First, he found it astonishing that Jitta had "changed" Savigny's postulate of the international community of states to that of mankind.[59] Von Bar seemingly perceived this as a significant departure from tradition that could not be so easily made.[60]

Second, von Bar was critical of the fact that Jitta contented himself with creating an approach, a theory, without devising a catalogue of norms that courts would apply to different PrIL cases.[61] He was concerned that shifting the conceptual point of departure – from states to individuals – not only might change something in the substance and the results of PrIL decisions, but also seemed to change the contours of the methodology by injecting more complexity.[62] In some sense it seemed – even though von Bar did not overtly say so - as though the individual-centered perspective (even if one agreed that it was indeed a separate internationalist perspective) would be even more difficult to embrace if it made the field more complex.

Third, von Bar found it preposterous that Jitta was actually challenging the usefulness of the PrIL-PublIL association, and even challenged the activity of the Institute for International Law, blaming it for uncritically connecting PrIL with PublIL.[63]

---

[57] Josephus Jitta, "Alte und neue Methoden," *supra* note 54 at 574.
[58] *Ibid.*
[59] Von Bar, "Neue Prinzipien," *supra* note 44 at 2.
[60] This again shows the way in which Savigny's theory was perceived. See the previous section of this chapter on the way in which Savigny's postulate of the community of states was perceived in PrIL scholarship until the end of the 19th century. Jitta himself understood this as a departure from Savigny because he too thought Savigny had referenced a community of nations, rather than people. See Josephus Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind* (The Hague: Martinus Nijhoff, 1919) at 1. At 1 Jitta also references directly von Bar's criticism: "I was asked how I dared to disagree with such an authority as Savigny; this is a question not deserving any answer."
[61] Von Bar, "Neue Prinzipien," *supra* note 44 at 3, 8.
[62] *Ibid.*
[63] *Ibid* at 6, 9, 15. In his first book Jitta also analyzed the activity of the Institute of International Law with respect to Private International Law. See Jitta, "La Methode," *supra* note 40 at 398 (arguing that "from the

For von Bar, it was hard to see how any level of internationalism could emerge outside of the Institute and outside of PublIL. Jitta was making the more complex argument that internationalism is not useful in itself, but only if it allows PrIL to regulate the international society in a coherent and substantive way. Von Bar found it hard to understand how anybody could challenge internationalism especially on any other ground than the usual positivist critique.[64]

Von Bar was not only puzzled by the methodological changes that Jitta suggested would follow from taking the individual-centered perspective seriously. He also struggled to understand how the individual-centered perspective could be understood as different from a state-centric perspective. He believed his own principle of looking for "the influence that should be attributed to a territorial law over a legal relationship with a foreign element" is just as individual-centered as any other.[65] In broad terms, even when one "speaks of the jurisdiction of a norm, one still thinks of people."[66] Similarly "all PrIL scholars reference vested rights"[67] so it must be that under a state-centric perspective an individual-centered perspective is always subsumed. This also made it hard for von Bar to understand how the legal claims of the international society that Jitta referenced repeatedly would not find their materialization in the national laws from which one had to choose.[68] It appeared, as though for Von Bar a state was merely the aggregation of individuals; the international, the aggregation of different states; and the transnational, the aggregation of national laws, so that every state-centered approach would imply an individual-centered one. After all, even the formalism that Jitta criticized "leads to legal certainty which is for the benefit of the individuals."[69]

---

beginning and without any hesitation [the Institute] connected PrIL with PublIL, by considering it not as a series of inter-individual relationships, but as a series of conflicts that arise among the civil and penal norms and which are meant to be settled through international treaties." The Institute "does not take any account of the duties of individual states towards the international society of individuals" and it is obsessed "with general rules"). Vor Bar was worried that splitting the Institute in two parts would cast a shadow on the institute itself. See Von Bar, "Neue Prinzipien," *supra* note 44 at 15-16.

[64] In the last section of the paper Von Bar responds to the positivist critique to internationalism made by Franz Kahn. See von Bar, "Neue Prinzipien," *supra* note 44 at 39.

[65] *Ibid* at 8.

[66] *Ibid.*

[67] *Ibid* at 4,5. In Chapter 5 I describe how although many PrIL scholars of the time refer to vested rights, they create different theories of vested rights depending on their theoretical standpoint.

[68] *Ibid* at 7.

[69] *Ibid* at 9,10. (Von Bar thought that pursuing uniformity of PrIL rules meant that "one proposes individual states to give up on parts of their national legislation (sovereignty) which is not essential, in order to

Lastly, von Bar found it puzzling that Jitta resisted what he described as overly formalistic and naïve internationalist tendencies in the scholarship of the time while pleading for the recognition of a worldwide community of mankind. Von Bar was concerned that focusing on individuals everywhere would expand internationalism beyond the "civilized (Kulturstaten) states."[70] In some sense this showed that Jitta was perhaps even more naively internationalist than those he was attacking, so it seemed hard to understand what Jitta was reacting to.

In the subsequent volume of the *Archiv für öffentliches Recht,* Jitta responded to von Bar's "more stingy than decisive" critique.[71] He purported to show that von Bar failed to understand the distinction between making the international community of mankind, rather than the international community of states, the point of departure in PrIL because von Bar, like many of his contemporary PrIL scholars, was not aware of a contradiction within their own theories.[72]

Jitta argued that in the theories of most PrIL scholars of the time, including Von Bar, even if the goal of PrIL might be individual-centered, the underlying principle and method were state-centric.[73] For Jitta there was a disconnect between arguing that PrIL aims to "provide for and protect the coherent and peaceful engagement in inter-human relationship between individuals" and then providing a method that aims to "choose between different national laws according to the nature of things"[74] or on a division of sovereignty.

Jitta thought the fact that PrIL scholars maintained this duality in their writing meant either that authors did not genuinely believe in the individual-centered goal of PrIL and simply used it as rhetoric, or that they failed to understand that the goal would lead to certain conclusions incompatible with their state-centric methodologies.[75] In response to

---

achieve general legal certainty and the effectiveness of their own laws across the purely physical legal sphere").

[70] *Ibid* at 14 ("The international conceptualization of the law of marriage within the European cultured states cannot be placed in connection with that of the Negro people (Negervolke), which does not yet know the concept of a marriage, at least not in the conventional and practical way in which one deals with PrIL matters").

[71] Jitta, "Alte und Neue Methoden," *supra* note 54 at 564.

[72] *Ibid*.

[73] *Ibid* at 566-568.

[74] *Ibid* at 568.

[75] *Ibid* at 571.

von Bar, Jitta aimed to show how the latter is most likely the case and particularly damaging for the development of PrIL.

Jitta argued that if PrIL scholars agreed with him that "PrIL is the private law of mankind and that its goal is to satisfy the legal demands of this society and ensure a dignified relationship between all individuals,"[76] then one needed to develop a method that was "the road taken in full awareness of the goals and nature of the particular legal field and which is meant to find the means to achieve these goals."[77]

Jitta did not consider von Bar's appeal to the "nature of things" as a method capable of ensuring a regulatory goal for PrIL, bur rather as helpful advice in the interpretation process, thus reverting to Savigny's view.[78] Jitta argued, as Gutzwiller later would as well, that "the nature of things" was being used as a transcendental notion or as an appeal to rationality that prevented an actual analysis of the legal demands of the litigating parties and of the international society.[79] This in turn was made possible because PrIL did not perceive itself as having any actual substantive dimension, but simply a role of co-ordinating legal systems in a structural way. But if PrIL was focused on the individuals, it would be impossible to deny it a substantive dimension. Instead, Jitta argued that the structural obsession of PrIL is the result of the state-centric imagery of "choosing between laws."[80]

The concern was less to inquire into the demands of regulating international society properly and more to devise a way of choosing between laws because the latter is arguably what would interest states in relationship to each other.[81] In other words the co-ordination that may be required from a state-centric perspective may be different from the one required by individuals for their international existence. In the process of merely 'choosing' it was easy to imagine that the goal is to reconcile the field of application of those laws and the sovereignty of the states, rather than to fulfill some regulatory aim for the society.[82]

---

[76] *Ibid* at 567.
[77] *Ibid* at 566 (arguing that "only scholars who at least agree about the goals can argue about method").
[78] *Ibid* at 566.
[79] *Ibid.*
[80] *Ibid* at 572-574.
[81] *Ibid* at 573.
[82] *Ibid* at 572, 574.

Conceptualizing PrIL as the area of "laws about laws"[83] also created the impression, in Jitta's view, that the only way to regulate an international society, if that was even a uniform understanding of PrIL's goal, is through the application of one national law or the other. This in turn obscured the fact that national laws do not always take into consideration and do not reflect the international dimensions of individuals' legal existence. To Jitta, Von Bar's argument that the individual could simply be subsumed under the state and the national, under the international was just confirmation that PrIL scholarship fails to account for the divergence between the individual-centered and the state-centered internationalist perspective.[84] Similarly, if Jitta was not ready to move beyond a method to secure a catalogue of rules that would apply intransigently, as Von Bar required, it was because he was skeptical about the extent to which general choice of law rules (just as national substantive rules) would be able to fully capture the complexities of transnational legal matters, or rather would manage to prevent an actual engagement with the international society's legal requirements.[85] Furthermore, Jitta argued that the civilized/uncivilized distinction that Von Bar was eager to maintain made little sense from an individual-centered perspective.[86]

Last, Jitta addressed what seemed to be an underlying consideration in Von Bar's skepticism about the individual-centered internationalist perspective, namely the fear of discretion, complexity and lack of positivity that an individual-centered perspective might generate.[87] Jitta was aware that the PrIL rules that would result from a determination of the "ideal rules demanded by the international society" could only serve as "a norm of reason," rather than a positive norm.[88] "When the legislator has issued its command, the international society and the judges are slaves of the laws, even to the detriment of reason. If the legislator is silent, the judge must, with unrestrained freedom, determine how the state should have reasonably regulated. In such circumstances positive norms are modeled after the reasonable requirements of the international society.

[83] *Ibid* at 574.
[84] *Ibid* at 568, 572, 573.
[85] *Ibid* at 574.
[86] *Ibid* at 569; Jitta, "Das Wesen," *supra* note 42 at 315.
[87] Jitta, "Alte und neue Methoden," *supra* note 54 at 576, 577.
[88] *Ibid* at 576.

However, this is the case both for national, as well as international private law," so it should not be given additional relevance in the transnational context.[89]

Overall, in the context of this academic exchange between Jitta and Von Bar, I believe Jitta indirectly offered three possible ways of understanding the relationship between individual-centered and state-centered arguments at the end of the 19th century. It is particularly interesting to take account of them, since they might be helpful in imagining the relationship between the two perspectives today.

One possibility is that authors do not actually agree on whether PrIL's concern should be the sound intercourse of people, or the preservation of state sovereignty within inter-state relationships. If this is the case, then the divergence of methodology is a clear consequence of the different ways in which the goals are conceptualized.[90]

Another possibility is that scholars do indeed envision an individual-centered goal, but do not realize the tension between this goal and the state-centric methodologies they are offering. Of course, in the same vein it is possible that the international community of individuals was simply not a conceptual possibility at the time. When Batiffol noted that for internationalists all "inter-human relationships take place as inter-state relationships," he seemed to suggest not that scholars do not wish to make the difference between the two, but that they do not have the ability, conceptually and analytically, to separate the two.[91] It is worth thinking whether this imagery is available today.

Last, Jitta believed that the quest for positivism might explain the state-centric approach and the relationship between PrIL and PublIL. On the one hand, the positivist movement might explain the need to construct PrIL relationships as conflicts of national laws.[92] It is easy to understand why grounding PrIL analysis in existing national laws, rather than Jitta's sociological analysis of the "legal claims of the international society," would appeal to positivists. However, he believed that we must account for the fact that the tension between positivism and the reasonable requirements of social life is just as present in PrIL as in national private law, so it should not look more surprising in the

[89] *Ibid*.
[90] *Ibid* at 566.
[91] Henri Batiffol, "Principes de Droit International Privé" (1959) 97 Recueil des Cours 431 at 437-438.
[92] Jitta, "Alte und neue Methoden," *supra* note 54 at 576-577.

transnational context and certainly should not move one more towards positivism in PrIL than it would in domestic private law.[93]

On the other hand, Jitta did not think that constructing the relationship between PrIL and PublIL should be a necessary step for a positivist, because he doubted that PublIL itself fulfilled the criteria of positivism any more than PrIL did.[94] The fact that authors like Franz Kahn constructed their nationalist theory on the argument that the relationship between PrIL and PublIL does not provide PrIL with a solid positivist foundation seems to have confirmed Jitta's intuition.[95] However, within the universalist theory, Zitelmann and Pillet both believed that constructing a relationship between PrIL and PublIL would give some positivity to the obligation of states to implement one law or another. They criticized Savigny precisely for the fact that his theory, by not linking PrIL with PublIL, failed to explain why states would be obliged to apply foreign law and a particular law in each case.[96]

IV. Universalism vs. Particularism

At the end of the 19th century the three developments alluded to in the previous two sections – the alleged continuity in the internationalist school with reference to Savigny, the impact of positivism on PrIL and the lack of proper engagement with one another's arguments within the internationalist school – crystalized in what would be "a new era" for PrIL.[97] This new era was generated by Franz Kahn's splitting PrIL scholarship between nationalists and internationalists.[98]

In general terms Franz Kahn's distinction between nationalists and internationalists solidified the cover of ideological differences within the universalist school and in particular the individual-centered vs. state-centered distinction. Franz Kahn perceived the internationalist school as a unified conception. The vast differences in methodology, theoretical precepts and legal conclusions, generated by those theories,

[93] *Ibid.*
[94] Jitta, "Das Wesen," *supra* note 42 at 320.
[95] See the next section for a discussion of Franz Kahn's main insights.
[96] See Chapter 1.
[97] Gutzwiller, *supra* note 1 at 74.
[98] *Ibid*; Franz Kahn, *supra* note 18.

were likely viewed as minutia that could be subsumed under the larger umbrella of universalism. All the authors described in the first chapter were included in the internationalist school without the sense that any important distinctions were thereby overlooked.[99] Whatever disagreements existed within the international school were viewed as a sign of incoherence, rather than important normative distinctions.[100]

This leveling of ideological differences is not only the consequence of failing to properly engage with the theories of the various internationalist writers, but is also caused by the way in which Franz Kahn seems to define internationalism. Interestingly for example, Jitta is included in both the internationalist and the particularist school of thought: his plea for the co-operation of states for the good of the international society makes him an internationalist,[101] whereas the part of his writing focusing on the "individual method," namely on the individual state, places him in the nationalist school.[102] This completely overlooks the way in which Jitta argued that the state acting individually through its legislature or judiciary (the individual method) and states acting together both have the same goal of coherently regulating an international society of individuals.[103] The fact that an individual-centered perspective can create an internationalist perspective in itself seems to not be acknowledged. Rather, the split between nationalists and internationalists is made according to the level of constraint imposed on states by other states in devising their PrIL rules and methods.

I believe it is the association of internationalism with the level of inter-state obligation of co-ordination that made it possible for Franz Kahn to lay out the entire internationalist theory under the rubric of "the relationship between PrIL and PublIL"[104]

---

[99] Franz Kahn, "Abhandlungen 1899," *supra* note 18 at 20, n 1 & 2.
[100] *Ibid* at 25: "If only those theoreticians were in agreement we could at least view that, if not as an existing, at least an evolving international conviction. We would see the mountain from the sun of the emerging international law, whereas we [the particularists] would still be covered in the darkness of confusion. Yet that is not so. Our internationalist theoreticians are in the middle of the darkness. They keep fighting about the content of their international law; they are only in agreement that despite all doubt, international law exists and must exist." See also Arthur Nussbaum, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws" (1942) 42 Colum L Rev 189 at 194-195 (describing the universalist doctrine as "a virtually unified conception […] despite some quibbling differences between the Savignian and Mancinian schools of thought").
[101] Franz Kahn, "Abhandlungen 1899," *supra* note 18 at 20, n 2 and accompanying text.
[102] *Ibid.*
[103] See Chapter 1 for a discussion of Jitta's general universalist premises. See also Jitta, "Alte und neue Methoden," *supra* note 54 at 577.
[104] Franz Kahn, "Abhandlungen 1899," *supra* note 18 at 18ff.

and to often contrast it with a theory that connects PrIL with private law.[105] Allegedly, "PublIL is the law whose subjects are only states. Only the specialized PrIL theorists managed to inject some confusion into an otherwise universally recognized principle of PublIL."[106] He charged PrIL scholars for either not recognizing that PrIL deals with individuals and their interests, while PublIL deals with states, or for creating the impression that although PrIL deals with individual interests, it is still a branch of PublIL or of a larger area of international law.[107] Clearly he does not acknowledge the scholarship of Jitta and Savigny as trying to devise a universalist theory that is precisely based on the relationship between PrIL and private law and focused on individuals.

Franz Kahn is happy to make the observation (which he perceives quite novel) that if one acknowledges that PrIL deals with individuals one would connect PrIL with private law, rather than PublIL.[108] But the individual-centered internationalist authors had made this claim all along. However, Franz Kahn attributes a different meaning to the observation.

On the one hand Kahn thought that if PrIL is connected with private law, it must be domestic private law and it then becomes clear that states are acting in the realm of the national again. No constraint on their activity in the realm of PrIL can be imposed on them by other states. And, again, only constraints from other states appear relevant. The way in which states would be constrained by their duties to individuals directly, citizens and foreigners, is simply out of sight.[109] It is in this way that the PrIL-private law

---

[105] *Ibid* at 23.
[106] *Ibid* at 29. At n 2 he cites PrIL authors who, while separating international law in private and public, depending on whether they deal with states or individuals, still refer to PrIL as a law dealing with inter-state relationships regarding their laws.
[107] *Ibid* at 29.
[108] *Ibid* at 30.
[109] The obligation of "international justice" is equally refuted. See Frank Kahn, "Abhandlungen 1899," *supra* note 18 at 32 & at 34 (arguing that scholars who try to connect PrIL with PublIL would need to "prove more, namely that PublIL really does impose the recognition and enforcement of individual rights," whereas if PrIL was a form of national private law, there would be no obligations at all that the state would need to take into consideration). Frank Kahn cites favorably Thomas Erskine Holland, *The Elements of Jurisprudence* (Oxford: Clarendon Press, 1880) at 345: "It follows from the independence of each State within its own borders that it might without contravening any principles of international law regulate every set of circumstances which calls for decision exclusively by its own law." See also Franz Kahn, "Abhandlungen 1899," *supra* note 18 at 39 (alleging that the "credo of the nationalist school" is the acknowledgment that "the legislator is completely free when assessing the influence of international elements, its discretion is in no way limited by PublIL," while admitting that in extraordinary circumstances, the exclusive application of the forum's law could be seen as an "abuse under PublIL").

association gets a new meaning and becomes the emblem of a more particularistic view of PrIL that can make the field as oblivious to its global systemic implications as the state-centric internationalist perspective did.

On the other hand, Kahn is careful to remind us that the fact that PrIL does not generate substantive norms is "an undisputable fact that cannot be underscored enough." [110] While the association between PrIL and private law is useful in "nationalizing" PrIL, it is not useful if it could lead to the impression that PrIL has a direct regulatory function. Here again the 'new' PrIL-private law association is different from the one, which grounded the relational internationalist perspective, in particular for Jitta.

Similarly, for Kahn, thinking of PrIL as public law would not be useful either because it might resonate with internationalists who were trying to think of PrIL as a sort of international law of federalism.[111] PrIL therefore is "neither public, nor private," but nevertheless domestic.[112] Allegedly, only this way of thinking about PrIL would support the view that states have no obligations whatsoever in their assessment of PrIL matters, with the exception of extreme cases, which could be classified as "abuses under international law," [113] or "certain concessions that states might make towards the international community."[114]

Kahn's analysis had an almost entirely underappreciated impact on the development of PrIL. His distinction between particularism and internationalism was uncritically adopted as a way of telling the history of 19th century PrIL.[115] Kahn's leveling of nuances within the internationalist school of thought continued in subsequent accounts of internationalism versus nationalism in PrIL.[116] At the same time, the meaning he attributed to the PrIL - private law association has survived and managed to define and limit the way in which we perceive of the association today. Contemporary PrIL scholars

---

[110] *Ibid* at 52.
[111] *Ibid* at 40.
[112] *Ibid* at 53.
[113] *Ibid* at 40 & 42 ("the international community has a claim against abuses").
[114] *Ibid* at 41.
[115] Henri Batiffol, "Principes de droit international privé" (1959) 97 Recueil des Cours 431; Arthur Nussbaum, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws" (1942) 42 Colum L Rev 189; Juan Antonio Carillo Salcedo, Le Renouveau du Particularisme en Droit International Privé (1978) 160 Recueil des Cours 181.
[116] *Ibid*. See also Gutzwiller, *supra* note 1 at 74.

often suggest that PrIL's private law dimensions make the field less focused on its systemic global implications and attempt instead to recreate the PrIL-PublIL association, as the only viable internationalist route.[117] The individual-centered internationalist perspective is not conceived of as an option and in fact it is unclear whether it is even historically acknowledged as part of PrIL theory.

Aside from creating a powerful imagery of the ideological division within PrIL and of the (new) relationship between PrIL and private law, Kahn also solidified a distinction between internationalism and positivism. Theodor Niemeyer in Germany for example was building upon Kahn's ideas when he pleaded for a clear "method in the sense of a positivist theory of PrIL and a clear distinction between lex lata and lex ferenda."[118] Internationalism is now contrasted with positivism[119] and as such allowed to enter the PrIL analysis only as a gap filler. Internationalist arguments are occasionally brought to bear to temper overly nationalist tendencies or "abuses" as Franz Kahn called them. Similarly, when there is no clear guidance in positive law, scholars occasionally rely on "the spirit of the law, the legal science, legal interpretation, legal relationship, or the nature of things" as fundamentally "diluted Savignyan concepts" without any kind of unified normative understanding of PrIL's regulatory goals.[120] Rather, they reconstruct those terms to create a variety of theories that can be understood as the early expressions

[117] See Joel R Paul, "The Isolation of Private International Law" (1988) 7 Wis Int L J 149; Horatia Muir Watt, "Private International Law Beyond the Schism" (2011) 2 Transnatl Leg Theory 347; Jacco Bomhoff, "The Constitution of the Conflict of Laws" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015) (arguing that recreating the PrIL-PublIL association would be an alternative to the constitutionalist framework developed in the paper).

[118] Gutzwiller, *supra* note 1 at 74; Theodor Niemeyer, *Zur Methodik des internationalen Privatrechts* (Leipzig: Duncker & Humblot, 1894) at 5,9,26,34,38.

[119] See Franz Kahn, "Abhandlungen 1899," *supra* note 18 at 23, 24, 27, 28. This contrast is particularly pervasive in Anglo-American writing. See for example the Lord Chief Justice of England (Russel) in the speech on international law before the American Legal Congress of Saratoga Springs cited in Franz Kahn, "Abhandlungen 1899," *supra* note 18 at 24-25, n 1: "Whereas in the latter (the continental school of thought) what I shall call the ethical and metaphysical treatment is followed, in the former (the Anglo-American), while not ignoring the important part which ethics play in the consideration of what international law ought to be, its writers for the most part carefully distinguish between what is, in fact, international law from their views of what the law ought to be. Their treatment is mainly historical. By most continental writers…theory and fact, law and so-called rules of nature and of right, are mixed up in a way at once confusing and misleading."

[120] Gutzwiller, *supra* note 1 at 77.

of vested rights[121] and interest-analysis theories, [122] none of which was envisioned by or easily subsumed under Savigny's theory, as I will show in subsequent chapters.[123]

Because Kahn began the dilution of internationalism as a whole and because what was now contrasted with internationalism would be constructed by reference to private law, the PrIL-private law association becomes an emblem of the nationalist movement. It became hard to appreciate that another association with private law, in both a substantive and internationalist direction ever existed. Furthermore, a relationship between nationalism, private law, and positivism was created in a way that does not allow for the kind of elaborate reasoning and sociological observation regarding the regulatory needs of the international society that Jitta was advocating and believed would derive precisely from associating PrIL with private law.

V. Sovereignty and Vested Rights in Late 19th Century English PrIL Scholarship

The relationship between positivism and internationalism in both its state-centric and individual-centered counterparts becomes particularly relevant in late 19th century English PrIL scholarship. Positivism was an argument to resist the internationalist movement in PrIL on the continent. Dicey famously distinguished between the

[121] See for example Carl Crome, *System des deutschen bürgerlichen Rechts* (Tübingen : J.C.B.Mohr, 1900) at 218: "One must assume that the facts and inter-human relationships must be analyzed according to the moment when they arise (originate) and when they are created with legal consequences by a particular territorial law; this legal consequence must be subsequently recognized and considered everywhere else." See also Friedrich Endemann, *Lehrbuch des bürgerlichen Rechts. Einführung in das Stadium des Bürgerlichen Gesetzbuchs*, 9th ed (Berlin: C. Heymann, 1903) vol 1 at 81: "the starting point is the fact that each legal system is limited territorially by the sphere of its sovereignty. The private law elements must be distributed among the territorial legal spheres."

[122] See for example Konrad Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, 1st ed (Jena: Gustav Fischer, 1910) ("the general principle underlying the German PrIL is that a PrIL legal matter must be determined in German courts by the law of the state which has the highest interest to determine the matter according to its discretion," at 41; "If Germany has such an interest it is mandated to apply its law and reject the application of a foreign law. If Germany does not have such an interest, it must apply the foreign laws which are potentially applicable together, as long as they do not give rise to a fundamental contradiction," at 47). See Gutzwiller, *supra* note 1 at 78, n 75 (calling this early version of interest analysis the most "astonishing amateurishness").

[123] The distinction between individual-centered universalist theories and vested rights and interest analysis theories will become apparent in subsequent chapters dealing with how the different theories conceive of autonomy and legitimate authority.

Continental "theoretical" method and the British "positive method."[124] In the PrIL context, this distinguishing of the British positive method was meant to counter the assumption that "fundamental principles of private international law can be ascertained by study and reflection and that the soundness of the rules maintained, say in England, as to the extra-territorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles."[125] In other words, there neither is a "common law" nor is it possible to assume that if it did exist it was "tacitly adopted by all civilized nations" and even less so that they might have an obligation to adopt it.[126] To say that PrIL was part of some universal law was wrong. If the precepts of positivism are to be taken seriously, one had to think of PrIL as national law.

Then again, the positivist/non-positivist distinction does not entirely overlap the nationalist/internationalist distinction, as Franz Kahn occasionally suggested.[127] This is most evident in late 19th century English PrIL scholarship in two ways. First, PrIL scholars, including most prominently Dicey argued that the application of foreign law is not a matter of "caprice or option," but rather flows directly from a sense of "justice" and "inconvenience," "logical and practical necessity."[128] Second, the fact that no state is directly constrained by any other to apply a particular law does no mean that there is no convergence. Rather, there is a natural convergence,[129] "a community of the aim," which flows from the universal goal to "secure the extra-territorial effect of rights."[130] In other words, states were not in any way constrained to apply foreign law by other states, but they were constrained directly by the principles of justice associated with the concept of vested rights and these constraints might actually move them towards uniformity of decisions.

---

[124] A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens & Sons, 1908) at 16.
[125] *Ibid.*
[126] *Ibid.*
[127] Franz Kahn, "Abhandlungen 1899," *supra* note 18 (Kahn believed that positivism leads to nationalism. Extreme nationalism would then need to be tempered by some level of comparative analysis).
[128] Dicey, *supra* note 124 at 10-11. See also John Westlake, "Relations Between Public and Private International Law" in Lassa Oppenheim, ed, *The Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914) at 305 ("It is not a vague comity, but the force of reason, which binds us to recognize foreign laws and the rights which they originate").
[129] Dicey, *supra* note 124 at 11("The selection of one or more of these laws is not a matter of caprice, but depends upon more or less definite reasons which are likely to influence all courts and legislators").
[130] *Ibid* at 12.

In this way, positivism was used in late 19th century English scholarship as a means both to free the consciousness of the national judge/legislator and maintain the sovereignty of states in relationship to each other,[131] and to inject "vested rights" as a universal and presumably stable and constant concept to guide PrIL theory and practice. Thus "the application of foreign law does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners."[132]

But while positivism might have been a factor that indirectly facilitated an individual-centered reasoning for *the possibility of applying* foreign law in general,[133] it had the opposite effect when determining the *factors* to be included in choice of law rules, which is most evident in Westlake's theory. Both Westlake and Dicey argued that states have obligations directly towards individuals to apply the law of the state under which their rights vested. However, when determining where those rights vested, Westlake was clear that one could not rely on "abstract justice and moral claims."[134] Rather, one had to rely on some body of "positive law" that could establish the limits of the authority of states in enacting laws and creating rights.[135] It is at the point of *substantiating* "vested rights"[136] that PrIL reconnects to PublIL.[137] Westlake's reconstruction is worth quoting at length:

---

[131] Dicey, *supra* note 124 at 10 ("If the assertion that the recognition or enforcement of foreign law depends upon comity means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the state where it is allowed to operate, the statement expresses, though obscurely, a real and important fact").
[132] *Ibid* at 11.
[133] See for example Westlake, *supra* note 128 at 306 ("Perhaps, if we discussed this subject to a merchant, we should find that the universal validity of a right which has once accrued was his leading idea of it, as, in spite of manifold lapses in its application, it certainly has been the leading idea of courts of justice"). For a history of the development of English conflict of laws see Alexander N. Sack, "Conflicts of Laws in the History of the English Law" in A Reppy ed, *Law, a Century of Progress, 1835-1935: Contributions in Celebration of the 100th Anniversary of the Founding of the School of Law of New York University.* (New York: New York University Press, 1937) at 342.
[134] Westlake, *supra* note 128 at 296-297.
[135] *Ibid* at 297.
[136] I will elaborate in Chapter 5 on how a theory of vested rights that relies on the PublIL-PrIL association differs from the 19th century relational internationalist theory I seek to recover in this thesis.
[137] Westlake, *supra* note 128 at 297. See also Dicey, *supra* note 124 at 13, n 1 (citing Pillet's theory as a very good exposition of how to conceptualize the relationship between PrIL and PublIL, while maintaining the concept of vested rights).

> Without the help of Public International Law the problem of Private International Law cannot be solved. For if we admit that such questions [of vested rights] are not to be left to the unstable equity of tribunals, which at the command or with the support of their governments may read the law of nature by the light of prejudice and interest, then must the idea of their solution contain two things: the selection on common principles of some positive law by which the rights of parties are to be determined in their inception, and the universal recognition of rights which have once sprung from the appropriate law. […] The limits of the respective national authorities that enact laws, and any validity conceded in one country to the rights which have arisen by the law of another, must depend on the express or tacit agreement of nations.[138]

British PrIL theory of the 19th century was constructed as a middle ground: the universal validity of a right should be taken as the "leading idea of the merchant," whereas the "public law of nations" would help us "ascertain who in each case has the authority to originate a right by giving a command."[139] The determination of where a right vested is made by consideration to which state has the authority to vest it 'in its inception.' In this sense Westlake's theory represents a similar effort to create a relationship between PrIL and PublIL, as Pillet and Zitelmann attempted.[140]

In late 19th century English PrIL, there is, in other words, a blend between a non-territorial "general equity" and an individual-centered justification for the application of foreign law, on the one hand, and the territorial view of law's legitimacy and a reliance on state sovereignty in determining formal criteria for when rights vested, on the other

---

[138] Westlake, *supra* note 128 at 297.
[139] *Ibid* at 306.
[140] *Ibid* at 307-208 (While the ascertainment of the limits of legislative authority on which the concept of vested rights rests connects PrIL with PublIL "through the idea of sovereignty," there are cases that Westlake believed are either "beside" or "even opposed to a theory" connecting PrIL with PublIL. Westlake admitted for example: "I do not know that I could justify the law of the domicile, as the rule of testaments and successions, to one who did not admit the conception of a continuation of the person of the defunct. " While it seemed difficult to show that states had agreed among themselves, even tacitly, that the law of domicile should regulate all testaments and successions, Westlake argued that "the history of European law contains nothing more beautiful than the evolution of the idea of the person from that of the family and the mysterious perpetuity which clings to the former as a memory of its source. […]That it is clear that the rule must be taken from that spot to which the deceased had his most intimate and permanent attachment, where is the seat of that family from whose broken continuance the idea of his own representation is derived").

hand.[141] As I will show in the next two chapters, in the 20th century each of the two elements generated different PrIL theories derived from the notion of vested rights. In the United States, Joseph Beale relied primarily on the concept of territoriality and state sovereignty to identify formal elements that connect rights to particular jurisdictions and ensure their universal recognition once "vested" in a territory. In England the concept of "justice" became the signpost for a PrIL theory focused on a liberal recognition of rights and individual liberty.

VI. Conclusions

Despite Jitta's efforts to recover the individual-centered premises underlying Savigny's theory while emphasizing a fundamental social component, PrIL in the 19th century was moving in between the Continental theory of PrIL as conflicts of sovereignty and the British model of focusing on vested rights and often creating a mix of the two perspectives. Jitta had thought that emphasizing the social, relational component of transnational inter-personal relations would integrate the individual into ever-wider social spheres and thereby achieve a perpetual cross-reference between the interests of various individuals and social groups. Associating PrIL with private law was meant to create a more normative, regulatory and socially-focused alternative to what he perceived to be an overly formalist state-centric perspective, which explicitly eliminates any scope for individual agency and contestation.

By the end of the 19th century Jitta was not alone in attacking the PublIL school. Yet the attack coming from scholars like Franz Kahn was focused on the naivite of internationalism, rather than its dogmatism. This meant that the attack could be directed at every scholar presuming any degree of universalism for PrIL, not just those who framed universalism in state-centric terms. PrIL was then split between universalism and particularism, without there being a sense that the universalist thesis was constructed in fundamentally different terms by those whose point of departure was the individual and

[141] See Sack, *supra* note 133 at 398 (Arguing that this blend of arguments can be explained historically by the "special features of the law and of the administration of justice which left their imprint upon the course of development of the English law on conflicts of laws in the 19th century, and even upon the English law on the subject as it stands today").

those whose point of departure was the state. Whereas for Jitta focusing on private law and on the individual were cast in juxtaposition to formalism, as well as both individualistic and statist perspectives, for Franz Kahn focusing on the individual and private law meant focusing on the national, rather than the international.

Much of the critique of universalism that Franz Kahn started resonated with Dicey. From a positivist perspective there was no doubt that states had no obligation to apply each other's laws. But there was an obligation grounded in a larger sense of justice and fairness to individuals to recognize their vested rights. In turn the notion of vested rights would split in two directions. One option, favored by Westlake, was to reference vested rights to answer the question why a court would ever apply foreign law and then to reference PublIL to find out which state had the authority to vest which rights in which cases. As I will show in chapter 5 this perspective was not much different from Westlake's fellow internationalists Pillet and Zitelmann. Another option was to maintain a certain vagueness about the pool of considerations from which one could find out under which law a right vested. This meant that vested rights could also be drawn from more general notions of liberty, autonomy, and justice. One can find this way of conceptualizing vested rights in Dicey's theory. As I will show in the next chapter, this in turn made the transition to the 20th century English theory of justice focused on individual liberty.

Chapter 3 - Tracing the Relational Internationalist Perspective in Europe After World War II

I. Introduction

As seen in the previous chapter, Franz Kahn's late 19th century writing on PrIL split the scholarship into two broad camps of nationalists and internationalists, thereby writing off many of the nuances in each camp, while his nationalist premises started a new current. Both nationalism and internationalism would keep reoccurring in many variations during the 20th century. And within this recasting of an old debate the individual/state-centric duality reappears as well in a different context and with different arguments.

In this chapter I try to discern the way in which state-centric and individual-centered arguments reappear in the internationalist current of the 20th century. To explain the context of the reoccurrence of internationalism after World War II, I start by briefly describing the state-centric nationalist arguments that dominated PrIL in the first few decades of the 20th century (Part II). Understanding the contours of these state-centric arguments is important because it elucidates the arguments that individual-centered theories of the 20th century were trying to refute. Just as 19th century individual-centered internationalism was a response to a particular 19th century state-centric internationalist perspective, the 20th century individual-centered internationalist perspective is a response to its own variation of the state-centric perspective.

In the third part of this chapter, I show that the individual-centered internationalist perspective of the post-World War II period was decisively liberal and that it was structured around the combination of the vested rights theory and Henri Batiffol's "system coordination" theory. In this combination private law is often explicitly or implicitly separated from public law and the role of PrIL is described as the universal liberal recognition of vested rights and individual autonomy. Nationalism is no longer placed in tension with the needs of humanity or the international society of

mankind as Jitta saw it, but with a particular understanding of the needs of international commerce focused on order and predictability. I show how these themes circulated among three authors who exercised a decisive influence on the development of PrIL in Europe in the 20th century, namely Henri Batiffol, Gerhard Kegel and R.H. Graveson.

Inevitably, as the role of the state was shifting from facilitator to regulator, the "tendence privatiste" came under attack as well. Interestingly, the arguments used to push for national political sentiment, as well as global public concerns, are often those of the 19th century relational internationalists. In the last section of the chapter I show how the Dutch scholar Duco Kollewijn carried on Jitta's tradition, as well as Jitta's reconstruction of Savigny's theory. Similarly, one of the strongest proponents of a public dimension of PrIL, Phocion Franceskakis, will re-emphasize Jitta's critique of "the conflicts guillotine"[1] and his focus on truly international relationships.

Yet while the arguments and the directions of reform might resonate with those of the 19th century relational internationalist perspective, the justification is different. Because the individual-centered perspective of the 20th century was decisively liberal, primarily focused on methodology and overly internationalist, tempering those tendencies meant focusing away from the individual towards the state, towards national politics and towards PublIL. But even then it was unclear how national politics and even PublIL would reform PrIL.

When Phocion Franskeskakis reviewed Jessurun D'Oliveira's work on "The Polution of the Rhine and Private International Law,"[2] he was somewhat surprised by the analysis.[3] Like Franceskakis, D'Oliveira argued that PrIL was overly liberal and overly technical, as opposed to focused on the substantive result, especially with respect to

[1] Phocion Franceskakis, "De conflictu legum, Mélanges offerts à R.D. Kollewijn et J. Offerhaus à l'occasion de leur soixante-dixième anniversaire," review of "Les règles de droit international privé materiel" by M. von Overbeck (1963) 53 Rev crit dr int privé 866 at 872 ("the author teaches us immediately that the utility of the concept (of material rules) was advocated in the Dutch doctrine by the great theoretician of our field who was Jitta and that this opinion was further developed by Kosters, Hijmans and for interpersonal law by M. Kollewijn") [Franceskakis, "De conflictu legum"].
[2] Jessurun D'Oliveira, "La Pollution du Rhin et le droit international privé" in *Rhine Pollution: Legal, Economic and Technical Aspects. La pollution du Rhin: aspects juridiques, économiques et techniques* (Zwolle: Tjeenk Willink, 1978) at 81-127.
[3] Phocion Franceskakis, review of D'Oliveira, *supra* note 2 (1979) 59 Rev crit dr int privé 266 [Franceskakis, "Review D'Oliveira"].

international environmental matters.[4] But when it came to integrating a substantive environmental policy, it appeared to D'Oliveira that the "classical" PrIL rule calling for the application of the law of the place of tort was the best, the only caveat being that the plaintiff should be given the choice of whichever law demands greater compensation, as between the law of the place of the tortious act and the law of the place of damage.[5] It appeared that the common good and the international public concern were best captured within PrIL, as opposed to PublIL, and in the claims of individual plaintiffs towards tortfeasors, as opposed to an inter-state framework.[6]

II. The Various Facets of Nationalism

When Franz Kahn wrote his 'manifesto' against the internationalist movement at the end of the 19th century Kahn's own normative commitments were not entirely clear. While attacking the naiveté of internationalism, he also portrayed himself as a moderate nationalist and argued that the goal of uniformity and a concern for comparative law should still have some role in PrIL.[7] Kahn in Germany and Etienne Bartin in France,[8] the main protagonists of what became known as the nationalist movement, were, in effect, not always arguing that internationalism is not desirable, but rather that it was unrealistic. Their main goal was to show that contrary to the internationalists' theories, PublIL did not actually offer universal norms of PrIL and that there was no "universal" nature of a legal relationship.[9] Furthermore, the 'discovery' of the characterization and incidental question problematique, as well as of renvoi, was in effect a 'scientific' methodological critique, rather than a decisive normative critique of internationalism.[10] It is not surprising

[4] D'Oliveira, *supra* note 2 at 103-104.
[5] *Ibid* at 97, 100.
[6] Franceskakis, "Review D'Oliveira," *supra* note 3 at 268.
[7] See Chapter 2.
[8] Etienne Adolphe Bartin, *Principes de droit international privé: selon la loi et la jurisprudence françaises*, 3 vols (Paris: Domat-Montchrestien, 1930-1935).
[9] Phocion Francescakis, "Permanence de l'ouvre de Niboyet" in Henri Batiffol, ed, *La pensée des autres en droit international privé: comptes rendus bibliographiques (1946-1984) réunis en hommage à leur auteur* (Thessalonique: Université Aristote de Thessalonique, Faculté de droit, 1985) at 451 [Franceskakis, *La pensée des autres]*.
[10] See e.g., Etienne Bartin, "La doctrine des qualifications et ses rapports avec le caractere national du conflit des lois" (1930) 31 Recueil des Cours 561.

then that Duco Kollewijn thought Kahn's and Bartin's attacks on internationalism were still coming from a "supranational" angle.[11]

However when the French scholar J.P. Niboyet wrote the first volume of his PrIL treatise in 1938, it was clear that, for him, nationalism came with a normative agenda.[12] He wrote that "law does not have a universalist aim, like the new mesianic internationalism presupposes, but rather aims to satisfy the needs of each country through legislation, which is adapted to it as much as possible."[13] In other words, "each state, before having any obligations without reciprocity towards humanity, has obligations to itself and the interests it must cater to."[14] The theory of his contemporary Georges Scelle - that a state has a double function vis-à-vis its society and vis-à-vis international society - seemed unacceptable to him.[15]

Instead, for Niboyet, not only should the state not hesitate, it should embrace the application of its law in transnational relations. The application of foreign laws would cause too much heterogeneity, which in turn would "endanger the ethical principles of a particular nation."[16]

These reflections were particularly important for France in the context of the large wave of immigrants at the time, and Niboyet did not hesitate to reinforce France's interest to 'assimilate' the foreign population.[17] Franceskakis thought it was France's particular demographic situation that made Niboyet plead for the principle of territoriality of law, rather than the previous PublIL theory, or the vested rights theory, which were also developed on the basis of law's territoriality.[18]

Niboyet was therefore careful to point out that political interest will serve as a correcting factor for any result of the application of the territoriality principles.[19] As

---

[11] Roeland Duco Kollewijn, "Quelques considerations a propos de la doctrine de Savigny" (1968) 15:3 Neth Int L Rev 237 at 241 [Kollewijn, "Quelques considerations"].
[12] J P Niboyet, *Traité de droit international privé français*, t. 1 (Paris: Recueil Sirey, 1938) [Niboyet, *Traité,* t. 1].
[13] J P Niboyet, *Traité de droit international privé français*, t. 3 (Paris: Recueil Sirey, 1944) para 918 [Niboyet, *Traité,* t. 3]; J P Niboyet, *Cours de droit international privé: à l'usage des étudiants de licence et de doctorat, par J.-P. Niboyet* (Paris: Recueil Sirey 1946) at para 374.
[14] Niboyet, *Traité*, t. 3, *supra* note 13 at para 907.
[15] Franceskakis, *La pensée des autres*, *supra* note 9 at 448-449.
[16] *Ibid* at 451; Franceskakis, *Traité*, t. 3, *supra* note 13 para 881.
[17] Franceskakis, *La pensée des autres*, *supra* note 9 at 453.
[18] *Ibid*.
[19] *Ibid*.

Franceskakis showed, nothing prevented France from serving its political interest by applying the law of nationality for French citizens abroad and the principle of domicile for foreigners domiciled in France.[20] All of this seemed natural if states are understood to have a direct interest in how a transnational private law relationship is regulated and if private law is understood as being as much the expression of "the national genius" as any other.[21]

III. The Postwar Critique of Nationalism

In 1952 the Greek PrIL scholar living in France Phocion Franceskakis wrote a review of French international law scholar Henri Batiffol's 2nd edition of his treatise on PrIL.[22] Franceskakis took this review as an opportunity to outline the changes in the theory of PrIL from the beginning of the century until the end of World War II. He thought that "the current tendencies are the antithesis of those in 1939,"[23] and that "one day this will appear as a sudden impulse of internationalism, reversing the direction of the previous evolution."[24]

Franceskakis described the nationalist movement before World War II thus:

> In France, especially, legal thought would exhibit impatience with all juridical imperatives not emanating from the national legal order. We would proclaim voluntarily that France, as all other sovereign states, will recruit its citizens in whichever way it considers necessary, without any regard to double nationality or statelessness. We would applaud legislative restrictions of foreigners' rights. We would adopt in conflict of laws the famous statement of the councilor Denis: 'I love French law more than foreign law.'[25]

---

[20] *Ibid*.
[21] *Ibid* at 460 ("By emphasizing the necessity of maximum homogeneity in the various legal orders, Niboyet not only reminds us that private law is a powerful way of manifestation of the national genius, but also deduces from this, for the first time, consequences for our field regarding the involvement of the state in the private life").
[22] Phocion Franceskakis, "Perspectives du Droit international privé actuel a propos de la deuxième édition du Traité de M. Henri Batiffol" Book Review of *Traité élémentaire de droit international privé*, 2d ed, by Henri Batiffol (1955) 7:2 RIDC 349 [Franceskakis, "Perspectives"].
[23] *Ibid* at 359.
[24] *Ibid* at 358.
[25] *Ibid* at 351.

In contrast, Franceskakis thought the period after World War II was showing a decisive liberal tendency.[26] Access to "french justice" would be widely, Franceskakis feared "too widely," opened to foreigners; public policy would be applied with more restraint to foreign acquired rights than national ones; and French law would no longer apply to every relationship involving at least one French national.[27]

Franceskakis believed that three elements contributed to this shift in policy direction, at least in France. First, the wave of immigrants decreased substantially and the ones who immigrated were by then substantially integrated in the French society; second, after an initial socialist tendency, the involvement of the state in the international economy was substantially weakened; and third, the increasing inter-dependence of states made the nationalist ideology generally less appealing to the jurists and politicians of the time.[28]

But Franceskakis also believed that jurisprudential trends in PrIL were generally strongly influenced by scholars in the field. In particular, he believed that French jurisprudence and the PrIL scholarship of the French scholar Henri Batiffol were influencing on one another.[29] Following this insight, in the next section I briefly outline Batiffol's theory and the way in which it influenced and spilled into the scholarly trends of the time in Germany and the UK.

1.The Liberal Trio

Even more than the 19th century, the 20th century is marked by a remarkable wealth of scholarship in PrIL, and it would be impossible to pay due regard to all great scholars of PrIL in a single dissertation, much less in a chapter. In this chapter I single

[26] *Ibid* at 359.
[27] *Ibid* at 358-359.
[28] *Ibid* at 359-360.
[29] *Ibid* at 360. Franceskakis was also generally skeptical of attempts to explain PrIL theories exclusively by reference to the social context. For example, he thought that the Marxist interpretation of the statutory school of thought left out the possibility that the theory was actually produced by PrIL scholars somewhat removed from the social context. See Franceskakis, *De coflictu legum, Melanges offerts a R.D. Kollewijn et J. Offerhaus a l'occasion de leur soixante-dixieme anniversaire,* review of "Théorie des statuts à la lumière générale de l'évolution de la société" by M. Blagojeviç in Franceskakis, *La pensée des autres*, *supra* note 9 at 211.

out three European authors, the French scholar Henri Batiffol, the German scholar Gerhard Kegel, and the British scholar R.H. Graveson, primarily for three reasons. First, each of them has made a significant contribution to PrIL scholarship and had defined the direction of the field in the 20th century. Second, their insights provide if not a complete description of the state of the field after World War II, then at least a good perspective on the main directions in which the field was developing in that period. Last, the scholarship of the three authors provides a very useful insight into the way in which the main ideas of the time circulated from one author to the other and one jurisdiction to the other.

1.1. Henri Batiffol

In keeping with the main insights of the nationalist movement at the beginning of the century, French author Henri Batiffol began with the idea that an important principle of PrIL is to preserve the national interest. Yet he insisted that in private law, the state's interest is mediated through the interests of individuals.[30] Furthermore, while national private law is the expression of the national interest and conditions of life, for Batiffol there is undoubtedly an international order as well, which caters to a larger social context. However, because national society is historically antecedent to international one and because national spirit and culture are more developed than the international, the national takes precedence over the international.[31]

As a result, PrIL focuses on distinct national legal systems, rather than the international as such. This realization conjures up for Batiffol the imagery of PrIL as a "coordinator of legal systems"[32] and makes PrIL the "system of systems."[33]

On the one hand, Batiffol opposed the state-centric internationalist theories of the 19th century.[34] On the other hand, it is not entirely clear what differentiates his theory,

---

[30] Franceskakis, "Perspectives," *supra* note 22 at 354.
[31] Henri Batiffol, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956) at 229 [Batiffol, *Aspects philosophiques*].
[32] *Ibid* at 16. See Henri Batiffol, "Réflexions sur la coordinations des systèmes nationaux" (1967) 120 Recueil des Cours 165.
[33] Phocion Franceskakis, "Philosophie du droit international privé a propos du livre de M. Batiffol," Book Review of *Aspects philosophiques du Droit international Privé* by Henri Batiffol in Franceskakis, *La pensée des autres*, *supra* note 9 at 173 [Franceskakis, 'Philosophie"].
[34] For a discussion of Batiffol's placement in contrast to the state-centric internationalist theories see Chapter 7.

other than replacing the emphasis on states with an emphasis on "legal systems." It is certainly not the internationalism of the 19th century state-centric theories that he rejected, since his theory was also decisively internationalist. Rather, he seemed to believe the term "coordination" entails more and tells a richer story of the regulatory aims of PrIL than the 19th century focus on "division" of state sovereignty.[35] Nonetheless, Franceskakis believed Batiffol had not drawn as much from the term as might have been possible. While co-ordination shifted the perspective from a one-shot division of sovereignty to a "process of regulation," Franceskakis believed Batiffol did not go so far as to plead for any substantive regulatory dimension of PrIL as a "process."[36]

Batiffol's earlier work focused on the "philosophical aspects of PrIL" shows a duality in his thinking. Batiffol exhibited skepticism about any extreme theoretical position: PrIL is neither exclusively international nor exclusively national, there should be no extreme division between individual and community interests,[37] and there should be a multiplicity of methods, including Savigny's search for the "nature of the legal relationship," the sociological perspective, and the method focused on the social scope of rules and relationships.[38] Yet Batiffol was also very drawn to the "systematic" character of law.[39]

Substituting the legal system for the state as the point of reference therefore alludes to more than might be immediately apparent. Franceskakis thought it was a reference to Hans Kelsen's imagery of the ascendant organization of norms.[40] This, in turn, makes it possible for Batiffol to speak of PrIL as the "system of systems" and "the law of laws," precisely the terms, against which Jitta had positioned his entire theory. This means there must be a systematic way of assigning legal matters to legal systems, which for Batiffol translates into an assignment based on a quantitative accumulation of connecting factors,[41] even though various mechanisms remain in place to test the results of the localization in view of the values and interests of the forum.[42]

---

[35] Franceskakis, "Perspectives," *supra* note 22 at 133.
[36] *Ibid.*
[37] Batiffol, *Aspects philosophiques, supra* note 31 at 225, 264.
[38] *Ibid* at 227, 229.
[39] Franceskakis, "Philosophie," *supra* note 33 at 172.
[40] *Ibid* at 173.
[41] Franceskakis, "Perspectives," *supra* note 22 at 135.
[42] Batiffol, *supra* note 22 para 270.

Insisting on the "systematic" nature of law in general and of PrIL in particular made Batiffol extremely favorable to the variety of techniques of PrIL, including renvoi, characterization, incidental question etc.[43] Batiffol explained those techniques not as instruments to pursue or guide the analytical process to certain results, but as fundamental elements preserving the systematic nature of PrIL as a "coordinator of legal systems."[44]

A long-time collaborator of Henri Batiffol and very attentive reviewer of his work, Phocion Franceskakis, argued that the term 'system' had progressively acquired "an existential meaning" for Batiffol.[45] Although it initially appeared that "co-ordination" was meant to be a fluid term signaling a plurality of methods and perspectives in the determination of a PrIL matter, it progressively collapsed into favoring the "technical" and "conflictual" underpinnings of PrIL norms.[46] It also eventually collapsed into the old doctrine of "division of states' sphere of action" in the international realm.[47]

According to Franceskakis's reading, three ideas combine to revive an old doctrine. First, states are again the agents, the subjects of PrIL;[48] the international realm is perceived as an accumulation of national states, rather than a sphere of social life with its own particularities and regulatory needs[49] and the focus is on international "order," rather than on substantive principles of social life.[50]

By 1967 when Franceskakis reviewed the 4th edition of Batiffol's treatise on PrIL, it appeared that Batiffol's theory focused on the "mission of distributive justice, to give each law involved its role" had become universal.[51] Although he does not cite Jitta,

[43] Henri Batiffol, "Principes de droit international privé" (1959) 97 Recueil des Cours 431 at 471ff for the proposition that as the diversity of substantive rules led to the creation of norms for their coordination, so does the diversity of conflict of laws rules lead to renvoi, as the tool to determine the field of application of those different conflict of laws rules. For Batiffol the co-ordination of legal systems was operating on two levels.
[44] Franceskakis, "Perspectives," *supra* note 22 at 135-136.
[45] Franceskakis, "Philosophie," *supra* note 33 at 173.
[46] *Ibid* at 173.
[47] *Ibid* at 178.
[48] *Ibid* at 178.
[49] *Ibid*.
[50] *Ibid* at 177-178 (Franceskakis thought it was "a symptomatic change of terms" when Batiffol shifts from "the international society" to "the objective of international order").
[51] Phocion Franceskakis, Book Review of *Droit international privé*, 4th ed, by Henri Batiffol in Franceskakis, *La pensée des autres*, *supra* note 9 at 236 (attributing this method to Savigny).

whom he calls elsewhere "the great theoretician of PrIL,"[52] Franceskakis criticized Batiffol in the same way Jitta criticized the state-centric internationalists and Savigny.

He argued that the obsession with "conflict of laws" makes scholars oblivious to the results of this "division of sovereignty.[53]" He further argued that the appeal to focus on individual laws and individual states makes us oblivious to the operations of truly international economic and social conditions, such as the economic conditions of the world market[54] or matters of international environmental law.[55] He argued, as Jitta did, that the process of localization and the "conflictual approach" is only one among many possible methods (a notable one for Franceskakis, as for Jitta, were substantive international rules) to search for "just and efficacious rules for international inter-human relations."[56]

Franceskakis argued that by its 4th edition, Batiffol's writing in PrIL "ceased to be merely a treatise, but rather the expression of positive law" in France.[57] The liberal and internationalist tendencies at the end of World War II found inspiration in, and occasionally went beyond Batiffol's thesis of "coordination of legal systems."[58] In turn, the increasingly liberal and internationalist directions of the jurisprudence influenced and became incorporated in Batiffol's own writing so that "there is in this work [Batiffol's] a progressive equilibrium between his ideas and their consecration by the courts."[59]

1.2. Gerhard Kegel

The liberal and the technical aspects defining PrIL theory as found in Batiffol's theory were prevalent not only in France. The idea of coordination of legal systems seemed to be the common way of describing the goals of PrIL after World War II.[60] PrIL

---

[52] See *supra* note 1.
[53] Franceskakis, *supra* note 51 at 237.
[54] *Ibid* at 237.
[55] Franceskakis, "Review D'Oliveira," *supra* note 2 at 387.
[56] Franceskakis, *La pensée des autres*, *supra* note 9 at 237.
[57] *Ibid* at 240.
[58] *Ibid*. (Franceskakis argued that by the time the 2nd edition of Batiffol's treatise was published, French jurisprudence was even more liberal and more internationalist than Batiffol's theory, at 139).
[59] *Ibid* at 240.
[60] *Ibid* at 1 (citing the post World War II Greek author Pierre G. Vallindas, defining PrIL rules as "the ensemble of rules of law meant to regulate the parallel coexistence of multiple legal orders and organs functioning within each of these legal systems").

scholars were now merely debating the consequences, the conditions, or the tempering of such "blind co-ordination." Hans Lewald for example asked how one should understand the goals of co-ordination of legal systems when this leads to a result that is unacceptable to both legal systems involved.[61] As Franceskakis described it, "the classical case involves German spouses married without contract and subsequently acquiring Swedish citizenship. According to German marital law there is a separation of goods – according to Swedish marital law there is a communion of goods between the spouses, which dissolves at the end of marriage. For the German law of succession the surviving spouse inherits even when there are children – he does not according to Swedish law. According to German PrIL matrimonial matters are determined by German law and inheritance matters by Swedish law. So the spouse doesn't recover anything, either according to marital law or according to succession law."[62]

The preoccupation of the time was therefore to understand what to make of the clashes between "rules dividing legislative competence in space" and "a larger sense of justice."[63] One option was, as Franceskakis pointed out repeatedly, to eliminate the tension and realize that PrIL matters can be determined based on a variety of factors, including choice of law, but also direct appeal to "substantive" principles.[64] In other words, one option was to give up on Batiffol's insistence on the absolute "systematic" nature of PrIL understood as "the co-ordination of legal systems." But another option, taken up by Gerhard Kegel in Germany, was to make use of a variety of "technicalities" to justify a preferred result, even if Kegel did not explain it as such.[65]

In other words, a scholarly effort of the time, reflected in Gerhard Kegel's writings on "conflicts justice," was to outline how the co-ordination of legal systems achieved its own kind of justice and how this justice could be reconciled with more substantive versions precisely through PrIL's methodological repertoire. In effect, one would resort to renvoi, characterization, incidental questions, or even arguments relating

---

[61] Hans Lewald, *Règles générales des conflits de lois; contributions à la technique du droit international privé* (Basel: Helbing & Lichtenhahn, 1941).
[62] Phocion Franceskakis, review of "Begriffs- und Interessenjurisprudenz im internationalen Privatrecht" by Gerhard Kegel (1954) 43 Rev crit dr int privé 238 at 238-239 [Franceskakis, "Review Kegel"].
[63] *Ibid* at 239.
[64] See e.g. *supra* note 1.
[65] Franceskakis, "Review Kegel", *supra* note 62 at 241. For a more detailed account of Kegel's theory, as well as subsequent interest jurisprudence writings in Germany see Chapter 7.

to the "systemic nature of legal norms" within each legal system,[66] in order to maintain the "systematic" character of PrIL's co-ordination function while avoiding absurd results.[67]

In Germany, Kegel came to argue for the pursuit of a "conflicts justice" that operates with its own logic and arguments, independent of the substantive result and having no substantive agenda of its own.[68] Within this conflicts justice, private law is separated from public law, individual interests in private law are separated from any public goals of the state, and the "assignment" of legal matters to different jurisdictions can be made based on broad appreciations of individual "interests."[69]

Interestingly, when Batiffol reviewed Kegel's writing, he found it strikingly similar to his own and he believed any differences that might arise would be mostly on the margins of either theory, rather than being fundamental and consequential.[70] In the last chapter of the thesis I show how this preoccupation for the systematic and universal nature of PrIL norms and principles is different from the universalism underlying the relational internationalist theory.

Here I am simply interested in revealing that the idea of "co-ordination of legal systems," itself resembling to a large extent the 19th century state-centric internationalist imagery of "division of sovereignty" led to a heightened interest in systematicity and technicality and traveled freely between various European jurisdictions at the time. Critics of the "conflicts guillotine" after World War II, such as Franceskakis, were quick to refute the illusion of the "neutrality" of the "co-ordination" function and to point to the abstract and artificial methodological play within PrIL. But Franceskakis was also quick to attribute the overly technical and neutral character of PrIL norms to the Savignian legacy.[71] Yet this can be misleading.[72]

---

[66] *Ibid* at 242 (In the case mentioned above Kegel argued that matrimonial and succession norms operate within a system and so must be understood as such in each legal system).
[67] *Ibid* at 240.
[68] *Ibid* at 241-242.
[69] See Chapter 7.
[70] See Chapter 7.
[71] See numerous references through Franceskakis' review collection. Franceskakis, *La pensée des autres*, *supra* note 9 e.g. at 236.
[72] See e.g. Klaus Schurig, "Das Fundament trägt noch" in Heinz-Peter Mansel, *Internationales Privatrecht im 20. Jahrhundert: Der Einfluss von Gerhard Kegel und Alexander Lüderitz auf das Kollisionsrecht* (Tübingen: Mohr Siebeck, 2014) at 17 (explaining how for every new development in PrIL, Savigny's

First, the techniques of PrIL (renvoi, incidental question, characterization) were "discovered" after Savigny by Savigny's critics, and it is not clear how they would feature, if at all, in Savigny's theory. They were meant to question the possibility of universal rules of localization of legal relationships. When those techniques were taken up as essential to preserve the "systematic" nature of PrIL by Batiffol or Kegel, they were part of a renewed interest in the systematic structure of PrIL as such, rather than a revival of Savigny.[73]

Second, implying that the increased technical or methodological interest of PrIL scholars in the 20th century was necessarily part of moving Savigny's theory forward is also misleading. As I have shown in the previous chapter, Jitta also tried to move Savigny's theory forward while at the same time disavowing the overly technical nature of the field. Furthermore, as Karen Knop, Annelise Riles and Ralf Michaels show, PrIL's technicalities can also be embraced as means of structuring and guiding the argumentative and interpretive process, rather than as essential elements of PrIL as a legal system.[74]

1.3. R.H. Graveson

Batiffol's theory influenced not only French PrIL jurisprudence and scholarship. In a 1962 article, the British PrIL scholar R.H. Graveson[75] inquired whether Batiffol's theory and philosophy of PrIL had found any resonance in England.[76]

---

system is mentioned, "as if there had been no development of PrIL in the last 150 years." For example, the question is posed "what Savigny would have thought of Rome I-VO." "The picture of 'the closest relationship' becomes almost a fetish. That this is only a short form for the appropriate constellation of PrIL interests falls under the table. What remains is nothing more than an empty slogal").

[73] Franceskakis describes this interest: "One must remember that the end of the previous [19th] century marked for PrIL a complete renewal of its rational structure. The famous controversies over qualification and renvoi, we remember, provided this occasion. Subsequently, an intense theoretical debate was developed by scholars to outline and systematize the methods of reasoning and interpretation particular to conflict of laws." Franceskakis, *La pensée des autres*, *supra* note 9 at 181.

[74] Karen Knop, Ralf Michaels, Annelise Riles, "From Multiculturalism to Technique, Feminism, Culture, and the Conflict of Laws Style" (2012) 64 Stan L Rev 589.

[75] RH Graveson was the dean of the Faculty of Laws, University of London between 1951-1954 and 1972-1974 and the dean of the Faculty of Laws, King's College London between 1951-1970. He retired as a Professor Emeritus of Private International Law in 1978. Among his publications are RH Graveson, *Conflict of Laws,* 7th ed (London: Sweet & Maxwell, 1974); RH Graveson, "Comparative Aspects of the General Principles of Private International Law" (1963) 109 Recueil des Cours 1; RH Graveson, "The

Overall, Graveson thought that PrIL was developing very much along the lines espoused by Batiffol. First, he thought it was telling that in the United Kingdom Frederic Harrison had described the role of PrIL as the co-ordination and co-existence of legal systems, in line with the thesis later developed by Batiffol.[77] Second, Graveson believed many of the propositions about individual liberty found in Batiffol's theory could be found in the United Kingdom.[78] Third, and more important, he argued that the UK common law system had in fact materialized, perhaps more than any other legal system, the goal of the "positive coexistence of different legal systems."[79] By "positive" coexistence Graveson means the liberal recognition of vested rights and individual liberty. Here, it seems the thesis of vested rights and that of co-ordination of legal systems combined to foster and encourage individual liberty.

Graveson described the result of this combination as "the principle of justice" underlying English PrIL theory and practice.[80] He argued that there were five elements that made up "the principle of justice," namely "individual liberty; maintenance of validity of acts; equality between English and foreign rules of PrIL and between the people they apply to; the sentiment of responsibility towards the international society, which leads to a movement towards the uniformization of the law; and limiting the use of public policy as much as possible in order to allow for the normal functioning of rules of conflict of laws."[81]

Regardig individual liberty, Graveson argued that this principle is found as a justification for adopting the principle of domicile over nationality[82] in the decisions refusing the recognition of slave laws,[83] in the absolute liberty and autonomy of

---

Comparative Evolution of Principles of the Conflict of Laws in England and the United States" (1960) 99 Recueil des Cours 21.

[76] RH Graveson, "Aspects Philosophiques du Droit International Privé Anglais" (1962) 51 Rev crit dr int privé 397.

[77] *Ibid* at 399; See also Frederic Harrison & A H F Lefroy, *On Jurisprudence and the Conflict of Laws* (Oxford: Clarendon Press, 1919) at 135.

[78] Graveson, *supra* note 76 at 407-408.

[79] *Ibid* at 414.

[80] *Ibid* at 407.

[81] *Ibid*.

[82] *Ibid* at 409.

[83] *Ibid* at 407.

individuals in the area of contract law,[84] and in the absence of any principle of "fraude à la loi" in English PrIL.[85]

As to the maintenance of the validity of acts, Graveson considered it "the positive politics" of PrIL.[86] It stands "for the tendency of the English judge to say yes rather than no" when it comes to the liberal recognition of foreign rights and institutions.[87] This, he argued, is meant both to allow for the maintenance of transactions and to satisfy the reasonable expectations of individuals.[88]

As to the restrained use of public policy, Graveson considered this restraint to be "a fundamental principle of English jurisprudence."[89] He argued that it is an undeniable principle of English PrIL to show "repugnance" to the use of public policy, and instead to limit it as much as possible in order to allow for the "normal" functioning of conflict of laws rules.[90] He argued that this is not just "a play of words or etiquette," but rather represents the judges' conviction that one must "remain faithful to the rule of law, meaning the normal functioning of PrIL rules."[91]

Overall, Graveson believed that the "politics favorable to individual liberty" and "the internationalist approach" combine to ensure "the positive coexistence of different

---

[84] *Ibid* at 408 (On this point he says he is in absolute accord with Batiffol).
[85] *Ibid* at 408. He argued that the justification for not including such a principle rests in the attachment of English law to individual liberty but also in the fact that

> for the English jurist, given the general rules of PrIL and international law, there are certain limits to the legislative jurisdiction of a state. If a state edicts laws respecting such limits, it cannot complain that individuals go beyond the territory of those jurisdictions (therefore evading its jurisdiction) in order to enter into acts, which are valid according to the *lex loci actus*. The application of English PrIL rules which recognize the validity of such acts do not have to depend on the fact that the parties preferred to make those acts beyond the limits of the jurisdiction of English law. The two factors which for English PrIL, may influence the rules of conflict of laws, are the act and the intention, not the act and the motive. We are in according with Aristotle on this point. The rules of PrIL allow us to evade internal law and the judges respect the limitations that these laws impose on them, as they are interpreted in the context of the philosophy of English PrIL.

See also Ronald H Graveson, "The Doctrine of Evasion of the Law in England and America" (1937) 19:1 Journal of Comparative Legislation and International Law 21.
[86] *Ibid* at 409.
[87] *Ibid* (showing how this made it possible to recognize polygamous marriages and legitimation by subsequent marriage, even when this was not allowed in the national law).
[88] *Ibid* at 410.
[89] *Ibid* at 413.
[90] *Ibid* at 413.
[91] *Ibid* at 413.

legal systems" which he believed Batiffol had tried to pursue in his theory.[92] The principle of "justice" underlying the English PrIL theory described by Graveson is certainly liberal and undoubtedly focused on the individual and individual liberty. The relational perspective underlying the relational internationalist perspective seems much diluted. Under the individualistic perspective "PrIL is concerned only with the rights of individuals and not with the competing rights of sovereign states."[93] The way in which the individual is placed in tension with the state and the way in which PrIL's sense of justice is focused on "individual liberty" points to an individualistic, rather than a relational perspective.

The exaggerated focus on the individual and individual liberty can certainly eliminate a focus on social responsibility, and on the general context and circumstances of the exercise of liberty in a transnational context and can create a strict separation between private and public law. Yet it is also important to acknowledge that in the trajectory of English PrIL the focus on individual liberty occasionally increased and facilitated social justice. Wortley believed that the concept of justice and its underpinnings of individual liberty underlying English PrIL should be associated with Human Rights.[94] Interestingly he suggested that it is particularly at this juncture that PrIL and PublIL could reconnect. In 1947 Wortley wrote:

> The revival of interest in the rights of man is symptomatic of our deepest anxieties, so much so that even public international lawyers are becoming increasingly reconciled to the emergence of the human person as a subject of public international law, having rights and duties of his own, whilst private international lawyers who have always been accustomed to deal with human rights on an international plane, welcome the rapprochement between the two branches of international law.[95]

"Freedom of choice for matters relating to personal status" for example can certainly misrepresent the context and circumstances of the choice and can allow an

[92] *Ibid* at 414.
[93] B.A. Wortley, "The Interaction of Private and Public International Law Today" (1954) 85 Recueil des Cours 239 at 255.
[94] B A Wortley, "The Concept of Man in English Private International Law" (1947) 33 Transactions of the Grotius Society 147.
[95] *Ibid* at 148.

individual to avoid social responsibilities, but it can also empower her to evade an oppressive regime or circumstances and take hold of her life.[96] A focus on liberty can place individual property before social responsibility, but as Wortley noticed, "it has also placed liberty before property."[97] The focus on liberty has also led to "reopening a foreign judgment for the fraud of a party to a suit […] particularly in view of some of the experiences of litigants in totalitarian countries"[98] and to "enforce[ing] a high standard of conduct upon contractors, trustees and others."[99] Most notably, as Wortley points out, it has led to a wide application of the standard of care and damage underlying English tort law based on the following justification:

> We fear, however, that to accept this view might result in accepting too low a standard of human values for, to suggest that damages for a tort "should be measured according to the law of the place from which it has derived its origin," might, if some foreign laws were followed, result in an unduly restrictive view of common right and liberty, and fail to do justice as between man and man as required by our law. We see no reason why a person subject to our jurisdiction, should not be compelled to do justice according to our standards. This is especially so in actions of negligence when the claim is for damages resulting from a failure to observe the standard of conduct English law expects of a reasonable man.[100]

In the current context in which corporations that have committed tortious acts in developing countries benefit from the lower standard of care and damages at the place of tort, the British argument in favor of the application of British tort rules, while focused on individual liberty, might actually indirectly foster social justice.

---

[96] *Ibid* at 154, 155 ("First, English judges do in fact try to do right to all manner of people coming before them, by minimizing the effects of any unfree status which a foreign domicile may appear to engender").
[97] *Ibid* at 155. See also 156, 157 ("It would be attended with peculiarly serious consequences in the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country, from confiscations at home, would not be protected against the designs of artful man who could gain possession of it by any means").
[98] *Ibid* at 163.
[99] *Ibid* at 166.
[100] *Ibid* at 161.

2. Critique of the "Tendence Privatiste"

2.1. Phocion Franceskakis

The liberal and technical directions in the development of PrIL, though widely accepted, also had their critics. Phocion Franceskakis was an avid critic of both tendencies, which he considered typical of PrIL's development after World War II.[101] For Franceskakis PrIL had become almost obsessed with its methodology and its respective tools.[102] He disavowed the rigidity and often incomprehensibility of the field[103] and also the particular liberalization and facilitation of cross-border relationships that had come to accompany internationalism, as opposed to a substantive regulatory framework for such relationships.[104] He was also avidly searching for traces in the scholarship of the afterwar period trying to reconnect PrIL with PublIL. For example, in Franceskakis's more than 80 reviews of PrIL writings between 1946 and 1984, one can trace the frustration in his relentless search for any indication that PrIL scholars might be trying to reconnect PrIL with PublIL.[105]

Much like PrIL scholars trying to emphasize the global regulatory function of PrIL today, Franceskakis thought connecting PrIL with PublIL would come with a particular normative agenda. It would emphasize the public, political implications of each PrIL legal matter; it would challenge the individualistic premises of the dominant current

[101] See e.g. Franceskakis, *La pensée des autres, supra* note 9 at 48 ("I do not believe that the object of our discipline should be limited to international commerce in the sense used by Lerebours-Pigeonniere. Apart from the phenomenon of international exchange – undeniable factor of progress – our field has also focused on different phenomena. We are talking about the problem of human migration, of their transfer (or the transfer of their activity) voluntarily from one juridical order of private law to another. The private law legal order of a state is focused increasingly on the social. […] Consequently, the state is more and more directly interested in the activity of private individuals").
[102] *Ibid* at 198 ("the complication as well as the excessive proliferation of so called mechanisms"). See also at 235 ("the increased role in PrIL of the method of conflict of laws").
[103] *Ibid* at 198 ("the necessity for PrIL to internalize an ambition to become intelligible to the average jurist").
[104] *Ibid* at 134 ("for internationalists […] the immediately discernable goal is their [the legal relationships'] increased frequency and liberty").
[105] *Ibid* e.g. at 320-324, 345, 356, 358, 408, 387-389.

of his time and it would question PrIL's obsession with mere distribution of authority regardless of the substantive result.[106] But that vision was nowhere to be found.

In the relational internationalist perspective, that vision came with an argument for focusing from the individual upwards, to his relationships, his community, his state and humanity. That was because the state-centric perspective at the time was formalistic and ignored the needs and interests of individuals. In the 20th century the individual-centered internationalist perspectives were quite explicitly liberal, so it seemed implausible to argue that an individual-centered internationalist perspective could exist that would encourage, rather than diminish, social responsibility. Furthermore, because Savigny was associated with both blind distribution of authority and liberal ideology and because Jitta's development of Savigny's theory was mostly unacknowledged or misunderstood, there was no relational internationalist perspective to fall back on. Now, the only way to push for a socially just system of PrIL is to put one's hope in PublIL and focus on states and politics.

However in his attempt to push for the public, the political and social justice Franceskakis repeated the three main arguments that Jitta had made at the end of the 19th century. First, he argued that PrIL had become overly obsessed with its methodology, its systematic structure and technicalities.[107] Franceskakis believed this distracted PrIL from its direct regulatory function, the substantive goals of the international society.[108] Like Jitta, Franceskakis argued that PrIL should stop focusing on distributing legislative authority based on conflict of laws norms and instead focus on direct substantive rules for the international society, a proposition that would later be made by Arthur von Mehren[109] and Friedrich Juenger.[110]

---

[106] Franceskakis, *La pensée des autres*, *supra* note 9 at 319 & 309 ("under current conditions the distinction between private and public law becomes less and less consistent and PrIL was never easily placed within this distinction"). But see 312 ("makes one wonder whether, when the collaboration of states is exercised solely in the sense of simple tolerance of rules elaborated outside its purview, "the judicial creativity" of merchants would not operate in favor of weakening the influence of states on international economic life"). See also 323 (Suggesting that the relationship between the two fields would focus more on international public policy).

[107] *Ibid* at 198 ("The complication and proliferation of so-called mechanisms [makes it less likely] for PrIL to internalize the need to make itself intelligible to the average jurist").

[108] See *supra*, note 101.

[109] See Arthur Taylor von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1974) 88:2 Harv L Rev 347.

[110] Friedrich K Juenger, *Choice of law and multistate justice* (Boston: M. Nijhoff, 1993).

Franceskakis rehearsed Jitta's main insight that the conflict of laws norm is only a method and furthermore only one amongst many methods to achieve a just regulation of international inter-human relationships:[111]

> The procedure of direct rules implies, as we will see, a direct engagement with the purpose of international legal relationships. The generalization of this approach would lead to the perfection of the international society, which is in question. In this case, law would impose or validate human actions only by direct reference to the structure and finality of such society.[112]

Focusing on substantive goals for an international society meant, second, that Franceskakis believed the international social context has its own particularities, which lead to different regulatory needs. He therefore shared Jitta's skepticism that you could always situate a legal relationship in one jurisdiction or even that you could serve international regulatory needs by extrapolating from the national ones:

> My main argument [against the idea of conflicts justice as developed by M. Kegel] is that the conflict of laws method, by calling for the regulation of the international matter through the accumulation of national laws and by making us believe that the regulation of the international matter is a question of equilibrium between the states implicated, of their national affairs, ignores the specificity of international inter-human relationships, which cannot be accounted for merely by the application of purely national laws.[113]

It is not surprising then that Franceskakis thought of renvoi merely as a technique, rather than a principle enshrined in the very nature of PrIL as a legal system.[114]

Last, it seemed obvious and advisable to Franceskakis that each state and each legislator would need to judge for himself which PrIL rules are appropriate in each case.[115] It is not always clear whether Franceskakis thought each state would be free to

---

[111] Franceskakis, *La pensée des autres, supra* note 9 at 407.
[112] *Ibid* at 168.
[113] *Ibid* at 237 (Yet Franceskakis was certainly not a deregulator and he criticized repeatedly the idea that PrIl is too much focused on international commerce as well as the fact that international contracts would be allowed to "flow in a no man's land," at 48).
[114] *Ibid* at 238 & 217 ("in my opinion the progress of our discipline does not rest in complicating matters but rather making them accessible to the practice and why not, to the people").
[115] *Ibid* at 77.

apply its law or serve its political interests whenever it had jurisdiction over a PrIL matter,[116] or whether he believed, like Jitta, that even when the judge and the legislators act unilaterally in PrIL, they still need to have in view humanity as a whole.[117] But in his review of Maury in 1982, Franceskakis seems to have largely unknowingly adopted Jitta's general insights:

> Private International Law, national as it is according to its sources […] should not be abandoned to the goodwill of state, no less than certain sectors of PublIL. For the legal matters pertaining to it, the solution demanded from PrIL should be, for all courts and arbitrators, the result of an examination of the kind that Maury advocated for an international judge. As to the possibility of a "non conflictual" solution by formulating material rules, we are not too far from Maury in thinking that they are incumbent on an international law, understood according to its ancient term, as the jus gentium privatum.[118]

2.2. Duco Kollewijn

During his lifetime, Jitta was more or less an outcast in PrIL. In the Netherlands Jitta's PrIL theory was quite overtly undermined and marginalized, including by his colleague T.M.C. Asser.[119] But many Dutch international law scholars, knowingly or not, recast many of his insights. A prominent example is Roeland Duco Kollewijn. In PrIL circles Kollewijn made a name for himself primarily with respect to what he called "intergentiel" private law and was otherwise known as "inter-personal," "colonial law," or "inter-religious law."[120] After writing his dissertation on the concept of "ordre public"

---

[116] *Ibid* at 238 (mentioning that unlike Batiffol, he always believed the application of foreign law is exceptional: "M. Batiffol places, at least in principle, foreign law on a footing of equality with the internal law of the forum. We have, on our part, always considered the inferior position of foreign law in relationship to the law of the forum, based on the idea that the application of foreign law is merely an exceptional case to the normal application of the lex fori").
[117] *Ibid* at 77.
[118] *Ibid* at 409.
[119] For the way in which Jitta was perceived relative to other Dutch scholars of his time, especially T.M.C. Asser see G.J.W. Steenhoff, "Daniel Josephus Jitta – 1854-1925" in *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C Asser Instituut, 1995) at 231.
[120] Franceskakis, *La pensée des autres, supra* note 9 at 210.

in private international law at Leyden University, Kollewijn took the exam that qualified him for the judiciary in the then Netherlands Indies.[121]

As his biographer noted, "he came to live in a plural society, where plurality of law was prevailing within the boundaries of a single territory: the law for the several Indonesian people, for Europeans, for Chinese and others. In addition, a system of law in the colony, which even for Europeans was different in many points from that in force in the metropolis. Rich fields indeed for the study of the conflict of laws, ripe for harvesting."[122]

Kollewijn came to believe "contacts between different civilisations are a fascinating field of study"[123] and he "emphatically rejected the view, that in colonies adhering to plurality of law, priority should be accorded to one (and then of course the metropolitan) system."[124] He believed PrIL should come to terms with "conflicts of Western and Non-Western law" and give proper respect to both:

> When we are brought face to face with legal relations unknown to our own law, we may well find that we have no rules of conflict appropriate to these unknown institutions. But we ought not therefore to refuse to recognize, or even in appropriate circumstances to give effect to, an institution or status unknown in our Western countries; rather, we should work out new rules applicable to the interplay of these strange institutions with our own. International private law is not merely a static group of fixed rules confined to the legal institutions of a definite number of Christian or Western States, but a dynamic entity, which is constantly growing with the progressive integration of what is after all (and more obviously as time proceeds) a single world.[125]

He therefore dedicated his entire career to uncovering the principles, theories and norms that can be borrowed and adapted from PrIL to deal with clashes between fundamentally different laws, values, and cultures. What is most interesting for the purpose of this chapter is that in so doing Kollewijn recast many of Jitta's insights, including, without referring to him, Jitta's reconstruction of Savigny's theory.

[121] JHA Logemann, "Biography of Roeland Duco Kollewijn" (1962) 9:4 Nethl Int'l L Rev 17 at 18.
[122] *Ibid*.
[123] R D Kollewijn, "Conflicts of Western and Non-Western Law" (1951) 4:3 International Law Quarterly 307 at 324 [Kollewijn, "Conflicts"].
[124] Logemann, *supra* note 121 at 20.
[125] Kollewijn, "Conflicts," *supra* note 123 at 325.

Furthermore, it is often precisely the relational insight underlying Savigny's and Jitta's theories that Kollewijn seems to rely on. In what follows I will briefly describe the main insights of his engagement with "colonial" law and his inspiration from Jitta's work before showing the way in which Kollewijn adopts and refines Jitta's reconstruction of Savigny's theory.

A. Colonial Law

Kollewijn was most critical of "the earliest attitude of Westerners […] which is not yet wholly extinct, to regard the rules of social intercourse observed in non-Western communities as not being in any true sense law: according to this view, they may be usages or customs or they may have been imposed by force but they cannot be recognized as law. This conception has been nourished by purely material interests and defended by bombastic theories."[126] Instead, he believed that "before such law can be acknowledged it must be studied and understood; and down to the present day the failure to appreciate non-Western law at its true value is commonly based on ignorance."[127]

Kollewijn thought it repugnant that German, French, and British colonial theory for a long time maintained the superiority of the law of the colonizing state and often denied the status of law to the rules in the colonies.[128] What is more, he found it unacceptable that one would feel comfortable in "passing a sweeping judgment on the indigenous law as a whole without going into the examination of separate rules."[129] There was in other words "a generalization of ignorance."[130]

Interestingly, Kollewijn believed this blatant disregard for different cultures and values was solidified when PrIL started to be perceived as a law of sovereigns and focused primarily on distribution of sovereignty. For example, he noted a legal matter decided in 1932 by the Court of Justice of Algier, which involved an Italian woman who married a Tunisian Jew in Tunis. Her husband repudiated her by ghett under Tunisian

[126] *Ibid* at 308.
[127] *Ibid.*
[128] *Ibid* at 313 (citing the Minister for the French overseas territories, writing in 1948, 37 Rev crit dr int privé 545: "In the case of a conflict between the normal French legal system and a local legal system, it is the former that must necessarily win. That is to say, French law is the norm; indigenous law is abnormal, temporary, transient, jurisprudence d'exception, and limited in its scope.")
[129] *Ibid* at 312.
[130] *Ibid* at 310.

Jewish law, but the woman refused to accept and filed for divorce. Kollewijn had this to say:

> This conflict was not between the French law of the Civil Code and the Tunisian Jewish law, but between the Italian law of the wife and the law of the French protectorate, regarding a marriage celebrated in Tunisia in Tunisian fashion, between parties living in Tunis, the husband being a Tunisian Jew. Had this been an ordinary case of international private law, either the lex loci celebrationis or the law of the matrimonial domicile […] would have applied. In either case the result would have been the same, namely, the application of Tunisian law. But the Algerian court held that the rules of private international law presupposed a certain equality between the laws which may be applied and this equality is lacking in a conflict between European and Tunisian Jewish law. The court says that Tunisia is a protectorate and that the raison d'etre of the political position is a certain limitation of the sovereignty of the protected State and not only in matters of public law but also in matters of private law in order to secure the predominance of the European law, in this case the Italian law of the wife, over the Tunisian law of Oriental origin.[131]

Kollewijn fundamentally disagreed with this line of reasoning and praised the Dutch system of equality of all laws since "no one can ever call one legal system in itself, higher or lower, better or worse, than another, there is no standard by which to measure it. The question whether a legal system is good or not can only be considered in connection with a group of persons to be governed by it."[132]

Kollewijn therefore believed the only way to judge a matter of conflict of western and non-western law is like any other matter of PrIL, namely to inquire into the social connection between a particular relationship between individuals and a particular community and a set of norms that regulate it. He thought the idea of localization of a legal relationship had precisely this in view, a cosmopolitan understanding that no law is as such superior than another, but that a law could plausibly regulate particular people and particular relationships that fall under its purview.[133] Therefore, he thought it outrageous that French law for example would not recognize a polygamous relationship

[131] Ibid at 313.
[132] Ibid at 314.
[133] This is very well reflected in his analysis of Savigny's method. See Kollewijn, "Quelques considerations", *supra* note 11.

in which one spouse was French. "The quintessence of this position is not merely that the marriage contracted in France was governed by French law, but that it continued to be governed by French law even after the couple had made their matrimonial domicile in Annam, and consequently that a French marriage could never be converted into an Asiatic marriage permitting polygamy, no matter how long a married couple may remain in Annam."[134]

Overall, Kollewijn believed conflict of laws rules could achieve precisely the kind of cosmopolitan respect for different communities, cultures, and values that was needed when confronted with conflicts of Western and non-Western law. But that meant PrIL itself had to sustain, rather than undermine, that goal. And PrIL itself had its problems. For example, like Jitta, Kollewijn was critical of the lack of empiricism and pragmatism of PrIL. He noted that interpersonal law had been developed in the Dutch East Indies primarily by case-law: "The study of law here plays a careful and modest role. In recent years – conscious of the harm that a priori theories have inflicted on private international law – it has been more concerned to determine, summarize and explain than to be creative."[135]

Therefore, "the choice of law rules of private international law ought not to be indiscriminately applied in interregional cases. The court should be aware that choice of law rules might have been formed or created in the narrow-minded spirit of a chauvinistic legal consciousness that did not wish to take proper account of the requirements of international coexistence."[136]

Interestingly, Kollewijn's ideal view of PrIL traced four of Jitta's main insights. First, he thought a certain degree of freedom must be allowed to the judge in order to appreciate all the facets of the international relationships subject to the dispute. "Facts

---

[134] Kollewijn, "Conflicts," *supra* note 123 at 317. As to the position that the lex fori should judge the nature of marriage according to its own law, Kollewijn stated: "It would probably be agreed, first and foremost, that when the term 'marriage' occurs in a British statute territorially intended for the homeland only, it must be understood in the English sense. But I venture to suggest that if English municipal law is applied in international relations in accordance with English doctrines of the Conflict of Laws, this does not necessarily mean that the word should have in its international relation exactly the same sense as it had in its internal or municipal aspect; some modifications become necessary when the Act is applied to a situation which is not in contemplation of Parliament when it was passed," at 320.

[135] G.J.W. Steenhoff, "Roeland Duco Kollewijn – 1892-1972" in *The Moulding of International Law*, *supra* note 119 at 382.

[136] *Ibid* at 384.

themselves possess a force that to an extent determine the court's decision (the fait accompli), but only to a certain extent, for statute and justice each impose their own demands which the court must obey. Judges must in this also take heed of developments in society. If rules of law are absent, judges must follow their own personal convictions of what justice is and ought to be."[137] Often times, his view of the role of the judge is as controversial as Jitta's: "No judge can avoid that he perceives life in his own individual manner and that his judgment of the law and fact bears the stamp of his own personality. And that is good, for being called upon to participate in the development of the law of his country he must give so as he is; he should have the courage to follow the principles that he personally holds true."[138]

Second, like Jitta, he thought every principle, such as the one of nationality, should serve merely as a guiding thought rather than as an a priori tool to assign vast numbers of relationships indiscriminately to particular jurisdictions.[139] Third, Kollewijn adopts the same relational perspective as Jitta. For example, he criticized the famous French Ferrari decision in which French courts determined that the French national who married an Italian in Italy could obtain a divorce in France, although their entire married life occurred in Italy and the spouse still lived there. He argued that "the French court took account only of the French party while in fact it was concerned with a legal relationship that existed in relation to two or more persons. […] The court thereby disregarded the fact that it could not intervene in the legal relationship of the French party without also affecting the rights of the other party."[140]

Furthermore, again like Jitta, he repeatedly criticized the unilateral application of the law of domicile of the husband because this disregards the interests and community affiliations of the wife.[141] He argued repeatedly for the repeal of the provision held in the Dutch East Indies Civil Code whereby the recognition by the European parent of a child

[137] *Ibid* at 396.
[138] *Ibid* at 379.
[139] *Ibid* at 385.
[140] *Ibid* at 386 ("For Private international law is still international in the sense that it concerns international relationships and international relationships cannot be properly judged unless one calls to mind before judgment and incorporates therein the reception and consequences that the judgment will have abroad. Legislators, courts and commentators who neglect this, on the ground that private international law should after all be national, fail to recognize the task that is laid on the national body in the process of the formation of international law").
[141] *Ibid* at 392.

born of a native woman removed all civil law relations between the mother and the child.[142]

Lastly, Kollewijn subscribed to Jitta's duality between the "unilateral" and the "multilateral" method and Jitta's proposition that even when the court applies the unilateral method, it must still have in view humanity and the international dimensions of the legal relationship.[143] Much as described in the previous chapter of the thesis, Kollewijn also adopted the constant duality between particularism and universalism that underlined both Jitta's and Savigny's theories.[144]

He argued that "even States are parts of a greater whole and that therefore decisions in cases involving international relationships must also be responsible to the international community."[145] Furthermore, he blamed the academic community for the extreme focus on sovereignty and nationalism at the beginning of the century. As Steehnhoff noted, Kollewijn thought: "The fact that it was a nationalistic period in history was an explanation for that phenomenon but certainly not a justification for it. Private International Law was strongly under the influence of academic commentators who should have protected it from sub-division under national law but who instead were those same people who, far more than the courts and the legislature, made the fatal connection between application of national law and sovereignty."[146]

---

[142] *Ibid* at 384.
[143] *Ibid* at 386.
[144] *Ibid* at 387 ("I notice that even the greatest of the great, probably as a result of these combined theories, namely, that private international law is conflicts law and that private international law is national law, are led to conclusions that are less than correct. They draw the conclusion that, as it is the national legislator that defines the scope of operation of its own law and only that body has the right to do so, it is unacceptable, as Pillet says, that a sovereign should take notice of the view of another in order to discover how far the prerogatives of its own sovereignty extend, and in particular how far its law extends in order to apply its own laws. But is this nothing more than shutting one's eyes to legal conceptions from abroad even though one is faced with an international relationship? When one is of the view that, simply by querying the sphere of operation of the national law, it can be ascertained whether it must be applied or not to a relationship to which also foreign law has a claim to be applied, is this not in fact the application of a national solution to an international issue?")
[145] Logemann, *supra* note 121 at 18.
[146] Steenhoff, "Roeland Duco Kollewijn," *supra* note 135 at 390.

B. Recasting Jitta's Revision of Savigny

In 1968 Kollewijn wrote his last major article "Several Considerations About Savigny's Theory."[147] When reading the article, one has the impression that the author tried to show the way in which his entire life-long engagement with questions of PrIL and interregional law relates to, but also departs from Savigny's theory. Kollewijn also thought it was generally necessary to understand how, in his view, Savigny's theory is particularly useful for the social realities of his time, but also to what extent Savigny's theory must be refined in light of those social realities. Most strikingly, although Kollewijn cites Jitta only once throughout the article, he recasts almost entirely Jitta's revision of Savigny's theory.

Like Jitta, Kollewijn thought that the "grand and durable merit of Savigny" was to focus the PrIL analysis on the legal relationship.[148] He also thought that Savigny, contrary to the common understanding, had thought of the "nature of a legal relationship" as a fluid concept, which encourages rather than distracts from a thorough analysis.[149] He agreed with Kahn's[150] and Bartin's[151] critique that a legal relationship could not be of a universal nature of a legal relationship and instead each court and legislator would perceive the legal relationship from their national perspective. Kollewijn thought however that "the issue of qualification had been enormously exaggerated."[152] He thought, like Jitta, that "while it is self-evident that a judge is situated in her own state's

[147] Kollewijn, "Quelques considerations," *supra* note 11.
[148] *Ibid* at 258. See also 238 ("from the beginning he [Savigny] opposes the person as such […] to legal relationships in which individuals might find themselves"). For his discussion of the controversy over whether the analysis is centered on the legal or the factual relationship see 248-249.
[149] *Ibid* at 251 ("Savigny does not adopt a purely rational justification [for the nature of the legal relationship], as he brings to bear as many rationales as possible and justifies them in relationship to one another. It is the interpretation of the nature of a legal relationship and the weighing of the elements that display the talent of the jurist who finds an acceptable, even though not always easy to explain, solution to the PrIL matter").
[150] *Ibid* at 241.
[151] *Ibid*.
[152] *Ibid* at 241.

point of view and it is just as evident that the judge will apply her own PrIL,"[153] that does not mean she applies her own substantive law.[154] Rather, the conflict of laws norms must be interpreted and "it is only in contact with the figures of foreign laws that the national conflict of laws can be comprehensible."[155]

Kollewijn adopted entirely Jitta's distinction between the unilateral and the multilateral method. Absent universal consensus on the nature of the legal relationship, each court and legislator decides on the nature of an international legal relationship.[156] Yet even when courts and legislators apply the unilateral method, they still understand that they are in effect determining the nature of an international, rather than national, relationship, and that the views, values, and principles of foreign communities would need to be factored in.[157]

Furthermore, Kollewijn adopted Jitta's insight that it would not always be possible to "localize" legal relationships in only one community. Kollewijn writes:

> We have become more modest: we do not believe there is one veritable nature of a legal relationship, one veritable law for all legal relationships. But we have not lost sight of the demands of the world community[…] While Savigny so to speak tries from above to achieve the unity of conflict of laws solution through a universal nature of all legal relationships, we believe that this unity is achieved from below, through our acknowledgment of the relative value of our judgment. [158]

In this account Kollewijn outlines precisely what had become exemplary of the relational internationalist account as it culminated with Jitta. The way in which one could be "mindful of the demands of the world community" while acknowledging the "relative value of our judgment" represents precisely the restrained universalist connotations of this perspective that I outline in Chapter 7.

---

[153] *Ibid* at 241.
[154] *Ibid* at 242.
[155] *Ibid* at 242.
[156] *Ibid* at 242.
[157] Logemann, *supra* note 121 at 18.
[158] Kollewijn, "Quelques considerations," *supra* note 11 at 255-256.

IV. Conclusions

Franz Kahn's awakening of the national sentiment in PrIL at the end of the 19th century influenced the development of the field into the first few decades of the 20th century. Within that movement, the relational internationalist perspective was lost because of both its internationalist, and its individual-centered premises.

Yet the post World War II period will bring internationalist perspectives into law generally and PrIL in particular. But the internationalism of the post-war period seems connected to an awakened interest in methodology and systematicity under the label of "systems co-ordination," and a re-focusing on individual vested rights and liberty. The combination translates into a uniform recognition of individual rights and liberty across "legal systems," into Graveson's "positive co-ordination of legal systems." In other words, internationalism is linked to the atomistic image of the individual and of individual liberty and to states' alleged duty to recognize and foster this liberty as much as possible, and to suppress the application of public policy. Inevitably, the possibility of combining individual liberty and public policy under the image of relational rights and freedom is hard to find.

Normatively, though not conceptually, the arguments that rested at the core of Jitta's reconstruction of the relational internationalist perspective are often recast by critics of extreme internationalism and individualism. Yet, because of the individualistic tendencies of the international individual-centered perspectives of the time, arguments in favor of public law and social justice are often state-centered. Much as in contemporary debates, Franceskakis thought re-aligning PrIL with PublIL and focusing on state regulatory objectives might be a way to reach those goals. But like in contemporary debates, it was unclear even for Franceskakis how the PrIL-PublIL relationship would be structured and what impact it would have on PrIL as a field. Similarly, as for Brainard Currie in the United States, once Franceskakis started focusing on state regulatory interests, he inevitably argued for "the inferiority of foreign law, based on the idea that the application of foreign law would only constitute an exception of the formal

application of the law of the forum."[159] In other words, if the public, social element was to be identified with the state and state regulatory policies, it was hard to understand precisely what the international dimension of PrIL could be, if any.

[159] Franceskakis, *La pensée des autres*, *supra* note 9 at 238.

Chapter 4 - Individual-centered and State-centered Internationalist Perspectives in American Private International Law Theory

I. Introduction

In the previous chapters I described the role that the individual-centered/state-centered ideological distinction played in the development of PrIL in Europe in the 19th century and after World War II. I argued that the Story-Savigny-Jitta trio could be viewed as a progression of individual-centered internationalist arguments, which were meant to provide a counter-narrative both to the purely structural state-centric perspective, and to the individualistic perspectives of the 19th century. As it culminated in Jitta's account, the relational internationalist perspective was meant to inject a more substantive and more pragmatic engagement with the transnational existence of individuals embedded in a progressively wider social context (the private law relationship – the state(s) – humanity).

Yet as the 19th century came to an end, this perspective had disappeared from sight. The end of the century saw both the much more robust articulation of the state-centric internationalist perspective in Pillet's and Zitelmann's account and the emergence of the nationalist private law perspective of Franz Kahn and his disciples. Furthermore, I argued that after World War II, variations of the vested rights theory combined with the thesis of co-ordination of legal systems, which increased the focus on individual liberty, and the technical dimensions of PrIL.

In this chapter I follow the state-centric/individual-centered duality as it developed in American PrIL theory and methodology in the United States from the 1920s onwards. The classical account of that history is not written from the individual-centered/state-centered perspective but, read from this perspective, it gives the impression that American PrIL theory and methodology developed from Beale's rights-based perspective to Currie's state-centric perspective, which was then followed by scattered and arguably less influential attempts to temper the state-centric perspective through a

revival of rights-based discourse, most notably by Lea Brilmayer and Perry Dane.[1] In contrast, I try to inject several different perspectives and nuances in this historical account.

On the one hand, I believe we tend to mischaracterize Beale's account as individual-centered - or at least fail to articulate the contours of the vested rights ideology in light of the European state-centric internationalist arguments that Beale rehearsed in his own theory. In the first part of this chapter I present a different reading of Beale's vested rights theory, as an extension to, rather than a break from the state-centric internationalist theories of Pillet and Zitelmann.

On the other hand, I believe that the classical historical account is unhelpful because it fails to unpack the variety of individual-centered arguments, which feature both within the American realist school of thought in PrIL and in the arguments of its critics. After briefly describing the first wave of the realist theory through the writings of Cook and Lorenzen and then Currie's much more developed state-interest theory (Parts III and IV), I outline a rich and underexplored debate among the realist scholars and with their critics about the implications of choosing the individual or the state as the conceptual point of departure in PrIL theory and methodology (Part V). I underscore three different ways in which individual-centered arguments were used to try to temper Currie's state-centric premises. I distinguish between arguments focused on fairness, those based on equity and equality, and those based on a sociological notion of disaggregated state interests. When properly engaged with, each of those arguments offers an additional layer explaining the function of individual-based arguments within PrIL theory and methodology. While it is less clear what role these arguments played in the development of American PrIL theory,[2] they provide a valuable perspective on the role that they could play in rethinking PrIL's regulatory function today.

---

[1] For an account of the development of American PrIL see Symeon Symeonides, *American Private International Law* (Austin, TX: Wolters Kluwer, 2008); Symeon Symeonides, "The American Choice-of-Law Revolution in the Courts: Today and Tomorrow" (2002) 298 Recueil des Cours 1.

[2] For an account on how the current approach of American courts on conflict of laws matters is both influenced by but also departs from previous theories see Lea Brilmayer, "The Problem of Provenance: The Proper Place of Ethical Reasoning in the Selection of Applicable Law" in Donald Earl Childress, ed, *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012).

II. Beale's Vested Rights Theory

Beale's "vested rights theory" represents the first more thoroughly articulated theory of conflict of laws in the United States since Story's writings and the theoretical foundation of the First Restatement.[3] Beale's later critics, who started the realist "revolution" in the 1930s, portrayed him as a formalist, overly concerned with dogmatics and positing unexplained axioms (Part III).[4] For the counter-revolutionaries[5] the Bealean theory could serve as a point of reference in tempering what they perceived to be the chaotic and overly state-centric premises underlying the realist school.[6] At first glance, PrIL theory in the United States seems to have developed from the individual-centered theory of Beale to the state-centric theory of Currie and then to a less successful attempt to temper the state-centric development with certain rights-based arguments (partly inspired by Beale's theory). Thus portrayed, Beale's theory is thought to provide – possibly stripped of its formalist foundation – a germ of the individual-centered ideology that should find *some* place in PrIL theory and methodology.

In this chapter I provide a different historical narrative and a different reading of Beale's theory. I argue that while Beale's theory is called "vested rights," it should not be thought of as primarily individual-centered. When placed in relationship to the European state-centric theories described in the first chapter – which Beale cited and relied upon – Beale's vested rights theory could be interpreted as an extension of the state-centric theory describing PrIL as a division of sovereignty among states. Furthermore, I argue that the realist school, while a *shift* from Beale's theory, is not entirely dissimilar from the relational internationalist perspective. In part four I recover the rich spectrum of

---

[3] See e.g. Ernest Lorenzen & Raymond Heilman, "The Restatement of the Conflict of Laws" (1935) 83:5 U Pa L Rev 555.

[4] See e.g. Walter Wheeler Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924) 33 Yale LJ 457 [Cook, "The Bases"]; Walter Wheeler Cook, "The Jurisdiction of Sovereign States and the Conflict of Laws" (1931) 31:3 Colum L Rev 368 [Cook, "The Jurisdiction"]; Ernest Lorenzen, "Territoriality, Public Policy and the Conflict of Laws" (1924) 33 Yale LJ 736; David Cavers, "Review of Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws" & "A Critique of the Choice-of-Law Problem" in David Cavers, *Selected Essays 1933-1983* (Durham: Duke Univ Press, 1985).

[5] The term is taken from Albert Ehrenzweig, "A Counter-Revolution in Conflicts Law? From Beale to Cavers" (1966) 80 Harv L Rev 377.

[6] See e.g. Perry Dane, "Vested Rights, "Vestedness," and Choice of Law" (1987) 96:6 Yale LJ 1191; Terry S. Kogan, "Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity" (1987) 62:4 NYUL Rev 651; Lea Brilmayer, "Rights, Fairness, and Choice of Law" (1988) 98 Yale LJ 1277.

individual-centered, yet not individualistic arguments that realists introduced into the debate about the proper theory and methodology of PrIL.[7]

In order to construct this alternative narrative, I start by providing an analysis of Beale's theory and link it to the arguments of the state-centric theories described in the first chapter. I argue that Beale's theory is almost indistinguishable from Zitelmann's, and that the term "vested right" has brought no significant individual-centered elements, at least not in the sense of the relational internationalist theories described in the first chapter.

In the next chapter, I will provide a richer discussion of his "vested rights theory," by comparing it to the other authors' rights based theories, especially Story's and Savigny's. I will show that the term "vested rights," which can be found throughout PrIL theories of the 19th century, in fact hides a wide range of ideological differences and should certainly not be perceived as a sign of a uniform individual-centered perspective. In this chapter I am less interested in focusing on Beale's account of rights, and more on the way in which he connects his theory to that of the state-centric internationalist authors in continental Europe.[8] To underscore that connection I first offer a broad description of his account of law and rights (1) and then show how this account leads him to connect PrIL with PublIL through the concept of legislative jurisdiction (2).

1. Law and Rights

In order to understand the particularity of Beale's PrIL theory one must first understand the meaning that he attributes to law and legal rights and then appreciate the way in which those concepts become interrelated and linked to legislative jurisdiction and PublIL. For Beale law emanates from and becomes almost synonymous with the state. "Law is at once the source and the expression of sovereignty. Law creates the state and the state creates law by a common and mutual impulse; the two are born at an instant, are

[7] For an account of how the legal realist perspectives in PrIL can be understood as compatible with a rights-based perspective see Michael Green, "Legal Realism, Lex Fori, and the Choice-of-Law Revolution" (1995) 104 Yale LJ 968.

[8] Because he offers a more detailed analysis of the continental authors he found inspiration from in his "first essay" which later provided the basis for his conflict of laws treaties, I focus my reading primarily on the earlier, 1916 work. See Henry Joseph Beale, *A Treatise on the Conflict of Laws or Private International Law*, vol 1, part 1 (Cambridge: Harvard University Press, 1916).

inseparable through life, and must die together."[9] Law is the command, indeed the "function" of a sovereign,[10] which means that any degree of individual autonomy (even in the choice of law regarding contracts) is impermissible. "To allow the parties to choose the rule [that governs a transnational legal matter] is to grant them legislative functions."[11]

Law for Beale has its internal logic and coherence "absolutely distinct from any rule of conduct based on a moral ground no matter how strong."[12] This leads him to argue that "courts are sworn to enforce the law, not to make it."[13] In fact a "really learned judge" internalizes law "as a part of himself." "Such a man solving a legal problem presented to him does not say, such and such a solution seems reasonable or reaches a practical result, he says it is the law."[14] It is no wonder then that Beale finds Jitta "striking" in arguing that one should be less obsessed with choosing between laws because "positive law (loi) is not the source, but the product of legal principles (droit)."[15] Beale overall offers an idyllic, if not a naïve view of the law when arguing that "truth in law, like beauty in architecture, is simple, clear, restful.'[16] Continuity and predictability become fundamental attributes of law.

At the same time, law and a legal system are to Beale "a succession of right upon right,"[17] which leads him to argue that "if law be regarded as a right-producing principle, then every act must in accordance with the law change or not change existing rights."[18] Beale cites Dicey and Westlake and relies on Westlake's description of the way in which rights are created. Allegedly, "law's method of creating a right is to provide that upon the happening of a certain event a right shall accrue. Law annexes to the event a certain

---

[9] *Ibid* at 115.
[10] *Ibid* at 6.
[11] *Ibid* at 80. Note that the possibility of choosing the applicable law is disavowed even in those areas generally viewed as underlying private autonomy, such as certain aspects of contract law. In his review of Dicey, Beale agreed with Dicey's account of vested rights, but objected to the possibility of the parties' actual choice of law in contract law matters. See J.H. Beale, "Dicey's Conflict of Laws" (1896) 10 Harv L Rev 168.
[12] Beale, *supra* note 8 at 153.
[13] *Ibid* at 135 ("and though it is strenuously contended that they do in fact make the law, it must be admitted at least that they make it before they enforce it").
[14] *Ibid* at 136.
[15] *Ibid* at 65.
[16] *Ibid* at 85.
[17] *Ibid* at 185.
[18] *Ibid* at 154.

consequence, namely, the creation of a legal right. The creation of a right is therefore conditioned upon the happening of an event."[19] Depending on the particular classification of rights – and Beale admits that "legal rights might be analyzed in almost as many ways as there are analysts"[20] – different "events" will determine where and when different rights were "created."[21]

2. Legislative Jurisdiction and the Move to PublIL

Through a series of analytical steps, Beale goes on to connect law and rights to the issue of legislative jurisdiction and PrIL to PublIL. First, given that law is viewed as a sequence of rights and is almost synonymous with the state, Beale argues that the state itself has "an interest in the continued existence of rights."[22] Second, if law and rights "cannot exist without the will or at least the acquiescence of a political sovereign […] there is no law, then, without a sovereign; and the fundamental inquiry in any study of the application of law must be, what sovereign created the law [and implicitly the right] in question."[23] "As law-giving is a function of sovereignty, this amounts to fixing the limits of jurisdiction"[24] and in his view, as in Zitelmann's and Pillet's, the "whole great subject of jurisdiction is purely international"[25] pertaining to the "right of nations."[26] Beale describes the relationship between PrIL and PublIL in the following way:

> The legal bounds of a nation's power are fixed by the accepted law of nations. If they are so fixed, no nation claiming to belong to the family of civilized states can by any means extend or alter the legal exercise of its own powers to the prejudice of other states. While therefore the question of legal jurisdiction is a question to be determined by the law treated as a whole, it cannot properly be settled either by legislation or by decision, but

[19] *Ibid* at 106-107.
[20] *Ibid* at 115.
[21] *Ibid* at 169,183,185.
[22] *Ibid* at 166.
[23] *Ibid* at 115.
[24] *Ibid* at 6.
[25] *Ibid* at 8.
[26] *Ibid* at 53.

must be left for settlement to the body of doctrine which the particular state in question has accepted in accepting the general principles of international law.[27]

It becomes clear that "sovereign power could be subjected to no restraining force except that of another political association *more powerful than itself*."[28] Beale is unclear whether power or law is what constrains states' legislative jurisdiction amongst each other and seems to settle for a mix: "It will be noticed that personal jurisdiction is based only on law, while territorial jurisdiction is based upon power and upon law. The latter is the stronger, and personal jurisdiction must always yield to it."[29] Since "the object of international law is to avoid conflict between sovereigns" international law creates a presupposition in favor of territoriality over personal law.[30]

The entire framework of division of legislative jurisdiction under PublIL continues to support PrIL because "the desire of a sovereign to find himself included in the number of civilized nations is so great as to constrain his acceptance of the principles of international law, and among them, the rules governing international jurisdiction."[31]

What is more, the concept of vested rights itself becomes the mark of civilization symbolizing and uniting *civilized* states: "If the national law is a civilized law this [recognizing vested rights] will of course be done; and if it is not, the principles of a supposed private international law would not constrain its actions. The binding force for the dictates of justice is not created, and cannot be created, by extra-national constraint. No civilized law, national or international, could be oblivious to the just requirements of recognizing the legally accomplished fact. All civilized countries have the common ideal of justice."[32] In other words, recognizing "vested rights" is what unites and defines civilized states. While no body of external law can impose the recognition of vested rights, one could easily infer from Beale's observation that states aspire to be included in the family of civilized states under international law, and that the concept of "vested rights" operates as a standard of civilization and inclusion.

---

[27] *Ibid* at 146.
[28] *Ibid* at 117.
[29] *Ibid* at 120.
[30] *Ibid* at 120.
[31] *Ibid* at 117.
[32] *Ibid* at 112.

Many of the quotes extracted from Beale's writing will have reminded the reader of Zitelmann and Pillet. Indeed Beale cites Zitelmann, Pillet and Bustamante extensively. He considers Pillet's theory "a remarkable original theory,"[33] "ingenious, interesting and specious."[34] He is only concerned that it might be too "uncertain in its application" and that to make it operable one would need to add – as he does in his own theory – that "true continuity in law, namely that which is necessary to prevent the failure or forfeiture of acquired rights – demands territoriality, in order that this continuity may be enforced."[35] Indeed, as I will explain in the next chapter, Beale's theory is distinguishable from Pillet's only in concretizing the concept of continuity through the concept of vested rights.

Beale also considers Zitelmann "the most advanced author of the internationalist school"[36] and reproduces a 5-page detailed description of Zitelmann's theory by Eugen Ehrlich.[37] When reading Ehrlich's description of Zitelmann's theory one might mistake it for Beale's. The following passage cited by Beale from Ehrlich's description is particularly telling:

> That Zitelmann sees in a state the source of the objective law is a very natural thing in a modern Internationalist. For him, as for all of them, conflicts between laws of different states are the only ones with which private international law occupies itself. But Zitelmann draws from this idea the most extreme conclusions. He sees in the state the source of every subjective right. When a person has a right, he always gets it in the last analysis by reason of a concession of the state or of a recognition of this right by the state.[38] […] These principles constitute an integral part of the law of nations, and therefore individuals cannot evoke them any more than any other rule of the law of nations; for the law of nations confers rights only on states and imposes obligations only on states.[39]

[33] *Ibid* at 80.
[34] *Ibid* at 85.
[35] *Ibid* at 85.
[36] *Ibid* at 91.
[37] *Ibid* at 91-95.
[38] *Ibid* at 93.
[39] *Ibid* at 91.

Beale continues this state-centric line of thought himself when arguing that "within the boundaries of states there are roving tribes who form no part of the nation within whose territory they exist and have no standing among the sovereign states of international law. Such are tribes of Indians in the United States and Canada."[40] Clearly their views are excluded from the ambit of PrIL by now fully connected to the state-centric ideology of PublIL.

Lastly, Beale points to Bustamante's theory as "one of the most interesting theories based on the doctrine of vested rights."[41] Again, the passage he quotes from Bustamante could stand as a description of Beale's own theory:

> The simultaneous existence of sovereignties, makes it necessary to fix limits in space for their respective legislative jurisdiction. There can exist on the face of the earth no juridical relations without some law, jurisprudence, custom, precedent or principle applicable to it. Since humanity is divided into nations and they are fundamentally equal in the exercise of legislative power, there must exist some principle, precedent, custom, jurisprudence of law, of universal and absolute application to all things and persons. To assert the coexistence of nations is to assert the coexistence of law, and to suppose coexistent laws is to suppose them limited in application. That the power of the world may not be wasted in strife, science must assign to each its sphere of action; and it is fighting with reality to deny the name international to a law which proposes to keep the peace between the laws of different states.[42]

III. The realist school – Cook and Lorenzen

Beale's theory came under serious attack by the realist school of thought in PrIL starting in the 1930s. Its first protagonists were Walter Wheeler Cook[43] and Ernest Lorenzen.[44] The move from what was perceived to be undue formalism to a more pragmatic approach of conflict of laws was made by attacking Beale's understanding of law and rights, and his deductive methodology, and also what was perceived to be a focus

[40] *Ibid* at 118.
[41] *Ibid* at 109.
[42] *Ibid* at 110.
[43] For a description of Cook's "realist" initiatives in Conflict of Laws and in law generally see David Cavers, "Review of Walter Wheeler Cook", *supra* note 4 at 41. See Cook, *supra* note 4.
[44] See Lorenzen, *supra* note 4.

on sovereignty and territoriality inherited from Story.[45] The fact that the relationship between these two sets of critiques has not been fully appreciated led later 20th century authors to argue that the realist movement inevitably brought more parochialism and an overly state-centric perspective into conflict of laws.[46] In particular, because the principle of territoriality had informed some internationalist theories of conflicts (including Beale's), Cook's and Lorenzen's attack on territoriality was implicitly perceived as an absolute attack on internationalism.[47] Similarly, what became known as Cook's local law theory was interpreted as an endorsement of the forum's policy over other states' policies.[48]

In contrast, I suggest that a careful reading of Cook's article attacking the principle of territoriality and sovereignty underlying his reading of Story mirrored Jitta's attack of the state-centric internationalist theories and opened up the space for pragmatic and just results for individuals within and beyond the legal relationship in dispute. Similarly, by uncovering Lorenzen's extremely positive review of Jitta's work, I suggest that at least certain elements of the American realist school of thought could be seen or re-conceptualized as a continuation of the relational internationalist perspective in Jitta's theory.

1.The Critique of Beale's Theory

Cook's critique of Beale's theory emanated from the broader realist view that any claims about law and legal rights cannot be more than claims and predictions of judicial behavior: " 'Right', 'duty' and other names for legal relations are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question, but merely terms by means of which we describe to each other what prophecies

[45] Brainerd Currie referred to "hypnotic power of the ideas of territoriality and vested rights […] We need not pause to inquire *why* courts behave in such strange ways. The history of conflict-of-laws theory makes that plain enough." See Brainerd Currie, "Married Women's Contracts: A Study in Conflict-of-Laws Method" (1958) 25 U Chicago L Rev 227 at 245, 246.
[46] See Lea Brilmayer and Perry Dane, *supra* note 6.
[47] *Ibid.*
[48] See Dane, *supra* note 6; Brilmayer, *supra* note 6. For a different understanding of Cook's local law theory see Green, *supra* note 7.

we make as to the probable occurrence of a certain sequence of events – the behavior of the officials."[49]

Rights, in other words, cannot be considered some "inherent or immutable principle limiting the "jurisdiction of a state" because under the realist framework "a right is entirely non-normative until brought to life by the judge's own ethical views."[50] That means than nothing other than "purely pragmatic" considerations "as to what, all things considered, it is desirable to do"[51] can inform the decision of the judge in a PrIL dispute. It is not that any pre-existing vested rights constrain the decision of the judge, but rather that "social desirability" informs whatever content the judge ultimately gives to rights or entitlements in the dispute.[52] This line of reasoning becomes most clear in Cook's insistence that there is a constant confusion in PrIL writing, between the creation and the enforcement of rights. In his view we must be speaking figuratively when saying "that the plaintiff owns *something* and we give *it* to him."[53] "The figurative language may or may not be a convenient way of stating a result; it cannot be the reason for the result."[54] "Better social results" is the reason for "predicting" that a right will be given effect in the forum.[55]

This ambiguity goes together with what Cook perceived as another "ambiguity in the word "law" involved in the question as usually asked: Shall Q apply X' "law," or Y's "law," or Z's "law"?"[56] Since it is a judge's decision in the realist framework, which should be understood as law (rather than a pre-existing principle or right) it appears aberrational to say that a forum's judge applies foreign law. A judge belonging to the forum inevitably applies (creates[57]) the forum's law. Whatever comes from another state

---

[49] Cook, *supra* note 4 at 417.
[50] Green, *supra* note 7 at 983.
[51] Cook, *supra* note 4 at 464.
[52] *Ibid* at 466. See also Green, *supra* note 7 at 981 ("Because he accepted that the law amounts to what the courts decide, he concluded that the application of the laws has no intrinsically legal limitations of the sort that the vested rights theorists hoped to discover").
[53] Cook, *supra* note 4 at 481.
[54] *Ibid* at 481.
[55] *Ibid* at 481, 483.
[56] *Ibid* at 468.
[57] According to Cook, a judge "must legislate, whether he will or no." Walter Wheeler Cook, "The Scientific Method and the Law" (1927), 13 ABA J 303 at 308. See also Cook, *supra* note 4 at 487 for his discussion of precedent ("In doing this, the rule or principle as it existed has not been applied; it has been extended to take in the new situation").

(a law, a judgment, a right) is fact[58] and will inform the decision of the forum's court (or not) in its own (forum) decision. It is this line of reasoning that informs Cook's statement that "the forum *enforces* not a foreign right but a right *created* by *its own law*."[59]

Perry Dane interpreted Cook's insistence that a forum enforces a domestic right, rather than a foreign one, as a sign of parochialism.[60] Yet I agree with Green that this statement is explained by the realist ideology of the concept of law and the role of the judge.[61] Indeed, as Green observed: "Cook thought that all use of foreign law is grounded in the policies of a forum, but that does not mean that he thought it must be grounded in the policies behind domestic legislation and precedent. Rather, he believed that all law, foreign and domestic, has its source in the policies of the adjudicator, which will often, but not always, be equivalent to the policies behind domestic legislation and precedent."[62]

Cook's rather obscure way of describing the role of "rights" in conflict of laws adjudication[63] not only qualified him as parochial, but also made it possible for his later critics to argue that Cook does not take into consideration any legitimate expectations or considerations of fairness regarding what the parties might have expected would govern their relations.[64] Yet this is in no way implicit in his views of "rights". By arguing that there are no "rights" (foreign or domestic for that matter[65]) which a priori constrain the judgment of courts, Cook meant to suggest that there are no entitlements that are "closed off" or barred from assessment, balancing or re-evaluation in light of the circumstances

---

[58] Cook, *supra* note 4 at 470.
[59] *Ibid* at 469 (emphasis added) & 477 ("As we are prophesying what Massachussets officials are going to do, the meaning we have given to "right" compels us to say that a Massachussets right exists, identical in scope with the Maine right, and that the Massachussets court is going to "enforce" this Massachussets right").
[60] Dane, *supra* note 6.
[61] Green, *supra* note 7.
[62] *Ibid* at 983.
[63] See Elliot E. Cheatam, "Review of The Logical and Legal Bases of the Conflict of Laws" (1944) 93:1 U Pa L Rev 112 at 113 ("The local law theory here given is only one possible analytical explanation of how it happens that in deciding a case the court of one state may employ the law of another state. The theory is free from the particular rigidity of the vested rights doctrine. Yet it would substitute for the territoriality of the place of occurrence a conceptually necessary territoriality of the state of the forum").
[64] See Brilmayer, *supra* note 6; Dane, *supra* note 6.
[65] Cook, "The Bases", *supra* note 4 at 486 ("But I may be asked, if the answer to conflict of laws cases cannot be deduced from certain pre-existing principles relating to "jurisdiction," how are they to be decided? The only answer that can be given, by the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc.").

of the case.[66] But that does not mean that individuals' expectations regarding the applicable law are irrelevant or should not enter the choice of law analysis.[67]

2. Critique against Sovereignty, Territoriality and Story

Once Cook established that "rights" are not transcendental "entities" that constrain PrIL decisions,[68] he went on to dispel what he viewed as yet another "fiction," namely territoriality and the alleged limitations that international law places on legislative "jurisdiction."[69] Ernest Lorenzen joined in the same endeavor.[70]

Cook made clear that "law is not a material phenomenon, which spreads out like a light wave until it reaches the territorial boundary and then stops. Whatever be the legal limitations upon the power of a state or country to affect the legal relations of persons anywhere in the world, they must be found in positive law of some kind – be the same international law or constitutional law, and do not inhere in the constitution of the legal universe."[71]

Both Cook and Lorenzen argue that the Anglo-American world had been induced to derive PrIL from a fictitious concept of the territoriality of law and sovereignty due to Story's treatise.[72] I have argued in the first chapter, in line with Blaine Baker's interpretation, that while Story focused on sovereignty, comity and territoriality in the

---

[66] Cook, "The Bases", *supra* note 4 at 480 ("The decision thus appears not as an inevitable outcome from fixed premises (that the forum is enforcing an *obligation* created by foreign law, and *must* inevitably take it or leave it, just as it is), but for what it is, and for what Mr. Justice Holmes undoubtedly knew it was – a practical result based upon the reasons of policy established in prior cases").

[67] The following passage from Cook's assessment of Milliken v. Pratt, cited in Green, *supra* note 7 at 986 is particularly telling ("The wife did no acts in Maine; all her acts were done in Massachussets. If one rather than the other state has "jurisdiction," it would seem to be Massachussets, not Maine…It is pertinent to inquire 1) Why should the offerees expect her to be bound by the "law" of their own state rather than by that in force where she is living and acting? 2) Why should her own state be expected to recognize that she can escape the limitations of its law merely by sending a communication ("offer") to the partners in another state? The partners must know that if they ever have to sue her, it will in all probability be in the state where she lives. Why ought the offerees, the partners, expect the courts there to apply their law rather than hers to her acts done in her own state?"). See Walter Wheeler Cook, *Selected Essays on the Conflict of Laws, Reprinted from the Harvard Law Review* (Cambridge, Mass.: Harvard Law Review Association, 1940) at 435-436.

[68] Cook, "The Bases," *supra* note 4 at 476.

[69] Cook, "The Jurisdiction," *supra* note 4.

[70] Lorenzen, *supra* note 4.

[71] Cook, "The Bases," *supra* note 4 at 484.

[72] Cook, "The Jurisdiction," *supra* note 4 esp. at 368.

first few pages of the treatise, these considerations did not seem to inform his analysis of the field as much as one would assume. Cook recognizes this as well and finds it somewhat puzzling that Story has an initial theoretical treatment of sovereignty and comity at the beginning of the treatise, while later into the treatise he seems to adopt views similar to his own.[73] Yet regardless of whether or not sovereignty, territoriality, and comity really did motivate Story's treatment of the field, Cook's and Lorenzen's critique of these concepts is telling of what these authors viewed themselves as reacting against.

Both Cook and Lorenzen agreed with Story's postulate that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory," but "only if properly interpreted," namely in the sense that there is nothing that a priori constrains the policy judgment of the court.[74] On the face of it, this assessment could be open to interpretation and considered to move PrIL in an overly parochial direction. Yet again I do not think this would be an appropriate assessment.

Cook's critique of territoriality is clearly not a critique of internationalism. Rather, he is reacting against the formalism of the a priori deductions that were made from the concept of territoriality.[75] In particular, he argues, as did Jitta,[76] that the distinction between territorial and personal jurisdiction is unsound and is not based on any practical policy consideration.[77] More important for present purposes, his critique of sovereignty and territoriality, like Jitta's, is grounded in an attempt to focus more pragmatically on the regulatory needs of the individuals implicated in or affected by the relationship in dispute, as well as broader policy considerations, rather than create conclusions that enable PrIL to become more disconnected from those regulatory needs. The following passage is particularly telling:

---

[73] Cook, "The Bases," *supra* note 4 at 483, n 70.
[74] Cook, "The Jurisdiction," *supra* note 4 at 370. See also Lorenzen, *supra* note 4.
[75] Cook, "The Jurisdiction," *supra* note 4 at 370-373.
[76] See Chapter 1.
[77] Cook, "The Jurisdiction," *supra* note 4 at 380-385, esp. at 380 ("Whenever jurisdiction is exercised, i.e., whenever a state "creates rights," these rights affect persons even though they relate to "things," and that therefore the postulates in question contain inherently contradictory assertions, and so can never furnish a satisfactory basis for a sound doctrine in the field of the conflict of laws").

> If we look at the rules for the solution of problems in the conflict of laws as intended to regulate human conduct so as to bring about desirable and convenient results, we shall doubtless all agree that since a piece of lawn is as such "immovable," and only the officials of the state in which it is physically situated can – consistently with the existing territorial organization of modern political society – rightfully deal with its physical possession, it will be convenient for other states to apply to deeds of land the rules which the state of physical situs would apply to them. It is therefore useful to group together the cases involving rights relating to such "immovable" objects and deal with the as a unit. However, we must not from this grouping on practical grounds draw conclusions, which will not stand analysis. For example, it would seem to be no infringement of the existing territorial organization of modern society, if a sovereign state, say England, should decide not to follow the land of the situs in dealing with the validity and effects of deeds to foreign land.[78]

Like Cook, Lorenzen also insists throughout his article that "each sovereign state can determine the rules of the conflict of laws in accordance with its own notions of what is just and proper,"[79] but he is quick to acknowledge that "under modern conditions such an administration of justice often demands that a state shall take into consideration the rules of other states. Whether it will do so in a particular situation or not will depend upon the conclusion it reaches as to what is right and proper."[80] This, in other words, is not to encourage parochialism, but is simply a realistic acknowledgement, which Story and Jitta stated as well, that "as justice can be administered only in accordance with the sense of what is right existing in the community in which the court sits, the feelings of the local community cannot be disregarded altogether. The general problem is therefore always the same: What are the demands of justice in the particular situation; what is the controlling policy?"[81]

I believe this reading of Lorenzen is also confirmed by his extremely positive review he makes of Jitta's "The Renovation of International Law" published in 1920 in the Yale Law Journal.[82] Regardless of whether Jitta might have inspired Lorenzen's own

[78] *Ibid* at 382.
[79] *Ibid* at 748.
[80] *Ibid* at 748.
[81] *Ibid* at 748.
[82] Ernest Lorenzen, "Review of The Renovation of International Law by Josephus Jitta" (1920) 29:6 Yale LJ 700.

work, it is worth noting that the review was published before any of the main realist theories had been developed. Lorenzen believed "The Renovation of International Law" to be "a most remarkable book"[83] that "will help us all to lay aside our own prejudices and to become more earnestly desirous of participating in any movement that will bring mankind nearer to this goal."[84] The following passage is particularly telling of the way in which Lorenzen read Jitta's internationalist theory:

> To persons accustomed to the Austinian theory of sovereignty, the views expressed by Professor Jitta may be those of a visionary; yet no assumption could be further from the truth. There is probably no living writer who is more fully cognizant of the realities of life than is Professor Jitta, or who understands better the actual requirements of international intercourse. His mind rebels, however, against the mechanical application of rules of law. Law to him is not a collection of abstract rules, but a vital force arising directly from the social conditions under which men live. So far as the intercourse among men has become cosmopolitan, and it is becoming more and more so every day, it is necessary, therefore, that a cosmopolitan law, a *jus gentium* as it were, be created.[85]

I believe this reception of Jitta's work not only by Lorenzen, but also by Roscoe Pound[86] and David Cavers[87] should make one realize that at least in its inception the American realist school was fully compatible with both an individual-centered, yet not individualistic, perspective and an internationalist perspective in PrIL.

IV. Brainerd Currie

Although Cook's theory was perceived as "a dramatic triumph over the "territorial" and "vested rights" theories," it was triumphant mostly in analytical terms.[88] The first restatement reflected entirely Beale's views and theories, rather than Cook's.

---

[83] *Ibid* at 700.
[84] *Ibid* at 702.
[85] *Ibid* at 701.
[86] Roscoe Pound, "Uniformity of Commercial Law on the American Continent" (1909) 8:2 Michigan LRev 91.
[87] David Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47 Harv L Rev 173 at 193, n 35 (calling Jitta "a vigorough critic of mechanical rules for choice of law").
[88] See Cavers, "Review of Cook", *supra* note 4 esp. at 41-42.

Furthermore, Cook "did not offer a substitute order. His approach would lead to a far narrower role for precedent and to a wider role for social and economic considerations,"[89] but offered little guidance as to how PrIL might or should develop further in this direction. It was Brainerd Currie who, being a disciple of Cook and embracing his jurisprudence,[90] sought to provide a concrete and workable theory of conflict of laws.

Currie's main claim was that conflict of laws rules had to consider the purposes or policies underlying the particular laws potentially applicable in the dispute,[91] as well as their intended range of application.[92] He identified a 'presumption' that for the most part states would have an interest in having their policies implemented when they benefited their domiciliaries.[93]

Because of the particular "configuration of parties to the dispute relative to the configuration of state interests represented by various rules of decision invoked by those parties"[94] – only one state (false conflict)[95] or several states (real conflict) would have an interest in having their laws applied.[96] In the latter case:

> The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law…simply because a court should never apply any other law except when there is a good reason for doing so.[97]

---

[89] *Ibid* at 42 ("Professor Cook has defended his work against the charge that his criticism is "merely destructive" by replying that "the removal of the weeds [in the intellectual garden] is… as constructive in effect as the planting and cultivation of the useful vegetables." This is true, but it assumes that we have vegetables to plant and planters to plant them").
[90] See Dane, *supra* note 6 at 1201. See also Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham, N.C.: Duke University Press, 1963) at 6 ("Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another") [Currie, *Selected Essays*].
[91] *Ibid* esp. at 117-118, 143-146.
[92] *Ibid* at 144-145.
[93] *Ibid* at 85, 143-146, 719. But cf. id. at 186 (recognizing the possibility of "rational altruism").
[94] Dane, *supra* note 6 at 1202.
[95] Currie, *Selected Essays*, *supra* note 90 at 107, 163, 189, 726.
[96] *Ibid* at 119.
[97] *Ibid* at 119.

While Currie's work went a step forward in the more concrete elaboration of the realists' principles, the more critical reception of Currie's theory has been aptly described by Perry Dane:

> Much of Currie's work has been severly criticized. His analysis of state interests, for example, is often arbitrary, dogmatic, narrow, and vaguely unrealistic. Indeed, Currie's dimiciliary-centered scheme of choice of law is in many ways as rigid and unconvincing as the territorial catch-phrases of Beale and Dicey.[98] Moreover, a number of commentators have suggested that Currie's analysis of true conflicts slighted both the importance of values such as comity, reciprocity, and uniformity,[99] and the fact that courts often balance competing policies and interests and might be expected to manage the task as well in their efforts at choice of law.[100]

For the purpose of this chapter I am interested in the claim that Currie's thesis represented a moment when American choice of law moved in both a parochial and a state-centric direction.[101] The claim is that Currie's theory implied a reaction against both an individual-centered, and against an internationalist perspective in choice of law. I believe, with Cavers, that Currie's theory was bound to and could be legitimately interpreted as such.[102] In the next section I describe three types of individual-centered arguments made by various scholars in an attempt to temper the state-centric premises of Currie's theory which I think mirror those made by the individual-centered internationalists described in the first chapter and should be captured in attempts to rethink the regulatory goals of PrIL today.

In the remaining of this section, however, I offer some insights from the correspondence between David Cavers and Brainerd Currie in order to suggest two points: first, regardless of how his theory was later interpreted, Currie did not mean to inject a complete shift from an individual-centered to an extreme state-centric perspective

---

[98] Dane, *supra* note 4 at note 53.
[99] *Ibid* at 54.
[100] *Ibid* at n 44.
[101] See Dane, *supra* note 4; Brilmayer, *supra* note 4.
[102] David F Cavers, *The Choice-of-Law Process* (Ann Arbor: The University of Michigan Press, 1966) at 72 ("I predict that, for years to come, he (Currie) will be held by many to insist that the law of the forum must always be applied in a case in which the court can find any reasonable basis to apply the forum's law").

and second, his preference for the application of forum law, as well as his general state-centric arguments were linked to his broader aim to provide a workable theory that would diminish judicial discretion. I believe this reading of Currie's theory in light of this exchange with Cavers shows that the development of Currie's "state interest" theory should not be seen as a particular moment in the history of PrIL in which individual-centered internationalist perspectives were analytically refuted.

In order to provide some context for the academic debates between Brainerd Currie and David Cavers, it is necessary to first understand how David Cavers's theory, itself grounded in the realist school, differed from Currie's.

1. Excurs: David Cavers

David Cavers was a legal realist who came after Cook and Lorenzen. While embracing the pragmatic approach of his predecessors, his 'Critique of the Choice of Law Problem'[103] "assailed state-selecting rules for the fact that, given their disregard of the content of the laws whose application they dictated, they could not assure justice in the individual case."[104] Cavers thus continued Jitta's critique that PrIL has become obsessed with choosing between states and drafting rules of jurisdiction, rather than rules that achieve a proper regulatory goal:

> Again, so long as the court was in search of a "foreign-created right," it would seek an appropriate jurisdiction, not an appropriate substantive rule, for metaphorical consistency demands that the creation or non-creation of rights be attributed only to states and not to their legal rules. […] With the reaction against the restrictions of theory, there has come a recognition that considerations of justice and social expediency should be, and in many cases have been, the dominant determinants of problems in this field. Yet these

[103] David Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47 Harv L Rev 173 [Cavers, "A Critique"].
[104] David Cavers, "Contemporary Conflicts Law in American Perspective" (1970) 131 Recueil des Cours 85 at 152 [Cavers, "Contemporary Conflicts"]. But see David Cavers, *The Choice of Law Process*, *supra* note 102 at 76 ("I am not the champion of justice in the individual case that I have been made to seem. I never have been." Here he alludes to the fact that after his initial article he became the avid proponent of principles of preferences, which were meant both to guide and constrain judicial activity in the field of conflict of laws).

> considerations are still harnessed to the old task of devising (or justifying) rules for selecting the appropriate jurisdiction whose law should govern a given case.[105]

Cavers pled for an alternative appreciation of conflict of laws cases that comes remarkably close to that of Jitta. Cavers argued that any conflict of laws determination "requires an equally complete depiction of the facts, but to determine what their effect upon the choice of the competing laws should be, would necessitate their careful appraisal with this end in view."[106] In order to ensure a proper regulation of cross-border legal matters, one would need to focus on the acts of the individuals and provide a thorough analysis of their relevance in relationship to the policies of the potentially applicable law. A substantive analysis of the rules is necessary because

> it is difficult to see how the facts so selected could be properly appraised except in relation to the provisions of the laws whose application is at issue. The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect the controversy?[107]

In his 'Critique,' Cavers adopts the following hypothetical to illustrate his proposed methodology:

> A salesman induces a married lady, not yet 21, in state A to order several feet of belles lettres. Her order is received and accepted by the publishers at their office in state B, and they express the books to her residence in state A. After reading through two inches and paying for six, the customer repents of her bargain. The publishers sue in state A. The lady pleads want of capacity to contract.[108]

Cavers argued that a proper determination of the dispute implies a thorough analysis of the facts and their relevance in relationship to the substantive provisions of the two national laws. Furthermore, he argued that the weight or assessment of the facts will

[105] Cavers, "A Critique", *supra* note 103 at 178.
[106] *Ibid* at 188.
[107] *Ibid* at 189.
[108] *Ibid* at 180.

differ depending on which country has the policy enforcing such contracts.[109] He argues that a factual analysis of the case might proceed as follows:

> The fact that the publisher's agent went to the defendant's home would be material. Had she first "clipped the coupon" that fact might be accorded some weight. It might also be material that his sale was part of a sales campaign waged in that state and not an isolated transaction. Certainly such a case presents quite a distinct picture from one where the bargain is struck by mail, either solely as a consequence of correspondence or as a result of preliminary negotiations in the seller's state. The fact that the transaction comprises a sale of books might lead to it being viewed in a different light than if its subject were, on the one hand, shares of stock whose edges alone were gilt, or, on the other hand, some article, a vacuum cleaner perhaps, which barely lay beyond the concept of the "necessary".[110]

Furthermore, he argues, again like Jitta, that "in the course of this evaluation, the court's opinion as to the desirability of limitations upon the contractual capacity of infants and married women will inevitably enter. Any effort to exclude it would operate only to distort the intellectual processes of adjudication."[111]

Whereas this earlier essay was meant to open up the space for pragmatic interest balancing and case-by-case determination, Cavers's later work focused on devising principles of preference, which were meant to provide some predictability and consistency to the choice of law process, while still being committed to the substantive evaluation and determination of choice of law problems.[112]

While both Cavers and Currie were writing in roughly[113] the same school of thought, Cavers believed two aspects distinguished their choice of law writings. First,

---

[109] *Ibid* at 190 ("Of what real importance is it now that state A's law should have been applied had its provisions been exactly the reverse of what they are? The fact that now the application of state A's law will defeat the contract confers a radically different aspect upon the problem. The degree to which sustaining this bargain would impair the protection which state A insists is due its infant matrons must be measured against the degree to which its avoidance will frustrate the reasonable expectations of business men from without the state").

[110] *Ibid* at 189.

[111] *Ibid* at 190.

[112] For a development of these principles see Cavers, *supra* note 105.

[113] Dane argues that Currie was not really a realist. See Dane, *supra* note 4. Both Cavers and Currie however were Cook's disciples. As will become apparent from their exchange of letters discussed below, the main difference between Currie and Cavers ideologically was their attitude to judicial discretion.

while Cavers was keen to broaden the space for interest analysis (state and individual) and then construct presumptive decisions in the form of principles of preference, Currie believed that the ordinary process of construction and interpretation would ultimately resolve choice of law problems.[114] Second, and more important for present purposes, Cavers felt that Currie's "terminology may create difficulties in the application of those processes [of construction and interpretation] by tending to exaggerate the interest of a state in the application of its own law and to undervalue the importance of factors that are not reflected in the doctrine and policies of the respective laws between which a choice is to be made."[115] These included both multistate policies[116] and individual-centered considerations.[117] It was these two points of disagreement on which Cavers pressed Currie in an exchange of letters between 1957 and 1958.

This correspondence sheds a new light on Currie's interest analysis theory. It shows that both the state-centric and the parochial connotations of his theory were motivated mostly by pragmatic, rather than fundamental normative and ideological, rationales.

2. Cavers- Currie Correspondence

The correspondence between Cavers and Currie was motivated by Currie's articles on two conflict of laws cases, Miliken v. Pratt[118] concerning the choice of law governing a married woman's capacity to contract, and Grant v. McAuliffe[119] involving survival of actions. Because Currie believed that each state has an interest in applying its policy favorable to its respective domiciliaries, he argued that when the creditors and debtors come from different states neither of the two states "should yield the policy

[114] Cavers, "Contemporary Conflicts", *supra* note 104 at 74.
[115] *Ibid*.
[116] For a broader discussion of the multistate policies see Arthur Taylor Von Mehren & Donald Theodore Trautman, *The Law of Multistate Problems; Cases and Materials on Conflict of Laws*. (Boston: Little, Brown, 1965) esp. at 237ff; Cavers, "Contemporary Conflicts," *supra* note 104 at 99.
[117] Cavers, "Contemporary Conflicts," *supra* note 104 at 99.
[118] Miliken v. Pratt, 125 Mass. 374 (1878). See Brainerd Currie, "Married Women's Contracts: A Study in Conflict-of-Laws Method" (1958) 25 U Chicago L Rev 227.
[119] Grant v. McAuliffe, 41 Cal.2d 859 (1953).

embodied in its own law to that of the other state."[120] Massachussets law granting immunity to married women could not apply to women domiciled outside the state, just as the California law allowing for the survival of the tort action following the death of the tortfeasor could not apply if the plaintiff was domiciled outside the state.

Cavers challenged Currie on this line of reasoning and Currie's implicit "unreadiness to admit that the individual parties may have interests, distinct from the states' interest, that should be taken into account in a conflicts case."[121] He argued that while "residence is almost certain to be a significant, though not necessarily controlling contact in a married woman's capacity case, while dropping a letter in a box probably won't be, there are other elements in the conduct of the parties that might be important in a decision whether to deny or grant the protection each party claims: planning a transaction to by-pass a known law, for example."[122]

Cavers charged Currie for refusing "to consider the claims of human beings to justice unless he can fit them into his conception of state interests."[123] In line with his own conflict of laws theory, Cavers argued that there is no reason to assume – absent a very detailed analysis of the state policies[124] - that states do not have an interest in applying their policies for the benefit of non-domiciliaries.[125] Similarly, one could conclude that the application of the protective policy to the benefit of the domiciliary is unwarranted, for example, when the domiciliary had an upper hand in relationship to the

---

[120] David Cavers, "A Correspondence with Brainerd Currie, 1957-1958" (1982) 34 Mercer L Rev 471 at 475.
[121] *Ibid* at 477.
[122] *Ibid.*
[123] *Ibid* at 485.
[124] *Ibid* at 484 (Cavers charged Currie for being overly concerned with a " demonstration of exercise in methodology" by forcing a finding of an interest of the state to protect its domiciliaries). & 486 (Cavers thought rather than forcing a finding of a state interest, it would be more important to engage in a thorough and more objective thinking "toward the identification of state interest").
[125] *Ibid* at 480. As to Currie's view that Massachussets must have meant to protect only its domiciliary women, Cavers stated

> it may be that the legislators' objectives were more inclusive. They started with the view that wives are likely to be unduly influenced by husbands who, being in financial straits, seek their guaranties. They didn't like this type of transaction and wanted to discourage it. If a Maine wife were to go up to Boston with her husband and be talked into giving surety for him on a note to a Boston wholesaler, I'm not at all sure that the legislators would expect her to have to pay. Maybe she would on a note drawn in Maine but we here in Massachussets have our own standards. At any rate it's a view that ought not to be brushed aside.

non-domiciliary.[126] Cavers argued that judges should be able to make such "justice determinations" without being overly constrained by the "procrustean bed" of the "state interest analysis."[127]

Currie replied to these charges by trying to clarify his intentions behind the adoption of the state interest methodology. He concedes that he "has had a feeling of inadequacy" about the fact that a focus on state interests might ignore important individual interest but that he is "far from sure how the problem should be handled."[128] The way in which he clarifies his normative position is worth quoting at large:

> Of course I shall not admit that I am unwilling to consider the claims of human beings to justice unless I can fit them into the conception of state interests. I am just a little less sure what constitutes justice in a conflict of laws case, and I am very much concerned about a method that will be found operational by the courts. I have, to repeat, found it useful to compare the results reached by traditional methods with those which would be reached if the selfish interests of the states involved were alone consulted. No doubt the "justice" of the result would in many cases be improved if we assumed a benevolent and far-reaching purpose instead of a selfish one; but I am certain that this is not so in all cases. […] Similarly, I have never felt that either missionary zeal or altruism should justify American courts in awarding damages to German citizens against German employers who discharged them under the odious Nuremburg decrees.[129]

Throughout the letters Currie explains that he is concerned with "a method of general utility"[130] which springs from his pressing "concern about judicial discretion."[131] This general stance explained his view on what Cavers had called the "differentiating

---

[126] *Ibid* at 476.
[127] *Ibid* at 476, 479.
[128] *Ibid* at 481.
[129] *Ibid* at 488, citing Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2n 798 (1938).
[130] *Ibid* at 487.
[131] *Ibid* at 490 & 491:

> I have never been entirely comfortable with the idea that conflicts problems should be resolved through the exercise of a freedom which the court does not enjoy in a domestic case, however; and I have reached the conclusion that as far as I am concerned I have to get along without that idea. […] I have tried to dissociate myself from the course of judicial discretion. […] I am afraid that somehow I have to dissociate myself from the Cavers thesis, which is rather widely identified with the course of judicial discretion, since otherwise my position is so nearly identical with yours that it will be assumed to be the same and will arouse the old fears. It has already been so interpreted by a few.

facts" of the cases which Cavers argued should inspire one to a more flexible approach with an eye to the interests and claims to justice of the parties. Currie explains:

> Over the years, however, this conception [of the differentiating facts] has come to have two meanings for me. The first has embraced such circumstances as whether the transaction was part of a sales campaign and the others […] These have gradually lost significance for me, largely because I have never been able to make them very meaningful, much less to conceive of standards for their evaluation. The other meaning has been that the one strongly though implicitly suggested by the reverse-hypothesis discussion, where, without reference to who clipped the first coupon, the significant change is that the posture is such that the state policies, or interests, are presented in an entirely different light. Thus the significant differentiating facts have come, for me, to be identical with those, which relate to the incidence of state policy.[132]

In other words, as Green argued in his interpretation of Currie's theory, "it is not that traditional rights-based jurisprudence has been rejected in favor of other forms of reasoning."[133] Rather, Currie's theory was based on a twofold evaluation of the general context in which conflict of laws matters arise. First, the large variety of factual circumstances, if evaluated with an eye to achieving justice and taking account of the various arguments and appeals of the parties and their connection to the applicable law, might make the conflict of laws method inoperable. Second, the balancing act that would be required when embracing the variety of "significant facts" might lead to unrestrained judicial discretion. The move from individual interests to state interests was therefore not normatively inevitable, but rather pragmatically necessary. Similarly, the forum bias was not an absolute policy preference for particularism over internationalism, but also part of the methodological arsenal of restraining judicial discretion.

Within this different image of Currie's theory lies an insight into the extent to which the respective view of the role of the judges may shape the direction of development of PrIL, including on the individual-centered/state-centric spectrum. For realists prior to Currie, especially for Cook and Cavers, the judge's "ethical principles stand above and assess" the policies underlying the forum's law. "Thus, paradoxically in

[132] *Ibid* at 490.
[133] Green, *supra* note 7 at 994.

claiming that all adjudication is the expression of the judge's ethical principles, the local law theory [of Cavers] explains how a judge can *avoid* applying local law."[134]

In other words, allowing for some level of judicial discretion meant that "the gap between state policy and court policy allows for a critical space in which state policy may be weighed – and perhaps rejected – in cases of true conflicts."[135] If one disavows judicial discretion, as well as the elaboration of statutory and international rules, as Currie did, the policy space inevitably narrows, not only on the individual-centered/state-centered, but also on the particularist/internationalist spectrum.

V. Individual-Centered Arguments Against Currie

Regardless of what policy direction Currie meant to provide for PrIL, his theory was justifiably understood as being overly state-centric. Three perspectives were offered to temper this direction. Each of them provides a useful element that illustrates the way in which PrIL's regulatory function may be impacted by individual-centered perspectives.

1. Fairness Over Comity

The recurring critique against Currie's theory is very well captured in the title of an article by Terry Kogan: "fairness over comity."[136] The underlying concern was that while Currie provided a methodology aimed at discerning when states should exercise comity and therefore compromise on their own policy for the benefit of another state, the reasonable expectations of individuals were largely left out. In other words, legitimacy should not be considered in relationship to states. "Fairness concerns focus on the litigants' affiliating contacts, contacts that in political theory justify a person's obligation to a governmental entity."[137]

---

[134] *Ibid* at 984.
[135] *Ibid.*
[136] Terry S. Kogan, "Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity" (1987) 62:4 NYUL Rev 651.
[137] *Ibid* at 656.

Lea Brilmayer explains that the "fairness" perspective, while borrowing the rights-based approach from Beale, is different from it in several respects. Most important, the rights implicated in jurisprudential considerations of fairness "are primarily negative rights rather than positive rights; not swords, but shields. By and large they are rights to be left alone. Their source is also different from the sources that Beale relied upon. They are founded on principles of political fairness that specify preconditions for the exercise of legitimate state coercion."[138]

Stated in these terms, the fairness perspective makes the application of a particular law dependent on the political relationship between the state whose law ends up being applied and the parties.[139] Several different perspectives were offered in order to discern the circumstances that would make coercion by law legitimate in a transnational setting.[140] For example, Kogan argued that in order for a particular state's law to apply, there must be a correlation between one party having taken the benefits of its law in a manner related to a dispute, with the other party having contributed to the state in some way related to the dispute.[141] Lea Brilmayer argued that a state could only legitimately impose a burden or duty on its own domiciliaries.[142] This was the reverse of Currie's view that a state would apply its law only to the benefit of its domiciliaries, regardless of whom it might implicitly burden.

Nevertheless these theories share a premise of individual autonomy and liberty rights. In this way, they are no longer helpful as a means of determining choice of law

---

[138] Brilmayer, *supra* note 6 at 1280. See also at 1279 ("Rights analysis only establishes what Robert Nozick has called "side constraints," namely principles or limits, based on fairness, on what the state may do").

[139] For Kogan the relationship should be determined for both parties, whereas for Lea Brilmayer the analysis concerns mostly the defendant since the obligation (coercion) is exercised only in relationship to her.

[140] For a discussion in the federal context of the US see Kogan, *supra* note 138 with further references at no 3; Elliot E. Cheatham & Willis L.M. Reese, "Choice of the Applicable Law" (1952) 52 Colum L Rev 959, 970-972 (calling "protection of justified expectations" one of nine relevant policies in choice of law); Harold Korn, "The Choice-of-Law Revolution: A Critique" (1983) 83 Colum L Rev 772; Amos Shapira, "Protection of Private Interests in the Choice of Law Process: The Principle of Rational Connection Between Parties and Laws" (1970) 24 Sw L J 574.

[141] Kogan, *supra* note 136 at 706 ("1. In order for a litigant to be subjected to the burden of a state's law, it must be shown that the litigant previously took advantage of the benefits of that law in a manner related to the dispute. 2. In order for a litigant to invoke the benefit of a state's law, that litigant must demonstrate that she previously made a contribution to the state, in some way related to the dispute, that justifies her enjoying of that benefit").

[142] See Brilmayer, *supra* note 6.

matters,[143] and/or in my view inaccurate as to the contours of the concept of autonomy and legitimacy in a transnational setting.[144]

On the one hand, because the rights Lea Brilmayer was concerned with are "mostly negative rights instead of positive rights and they are vertical rights that the individual possesses against the state directly, rather than horizontal rights against the other party to the litigation,"[145] they are less concerned, if at all, with the substance of the rules in conflict and the consequences of choosing one over the othe.[146] Indeed, the approach disavows consequentialism entirely.[147] By determining legitimate authority without considering the substance of the laws in conflict, Lea Brilmayer's approach presupposes that individuals never operate in the transnational sphere in full awareness of the substance of the rules in conflict, sometimes constructing their legal relationship in such a way as to avoid the imposition of a particular law while taking full advantage of "negative rights."

In Chapter 6 I will provide an analysis of the different ways in which legitimate authority has been conceptualized in PrIL theories and distinguish what I will term the "individualistic legitimacy" notion underlying theories of "fairness," such as Brilmayer's, from what I describe as Cavers's and Jitta' "social legitimacy" theories, premised on a view of relational autonomy and rights. Here I merely want to draw the attention to the fact that Brilmayer's individual-centered argument against Currie's theory is different from both Cavers's and Jitta's, and less helpful for an attempt to rethink PrIL's global regulatory function. While I agree with Brilmayer's "strongly held moral intuition that human beings are not just means to an end, but must be treated as ends in themselves,"[148] I believe an individualistic notion of autonomy ends up allowing some people to treat other people as means under the protection of the law, while what I will describe as a social legitimacy theory is premised on achieving *just* results precisely as a corollary to

[143] For such an argument see Green, *supra* note 7.
[144] I will ground this argument further in Chapter 6.
[145] Brilmayer, *supra* note 6 at 1295 & n 59 & 60.
[146] See also Kogan, *supra* note 136 at 679 ("Fairness contacts are unrelated to state interests or regulatory policies").
[147] Brilmayer, *supra* note 6 at 1292 ("There is an alternative conception of rights that does not require prior identification of the applicable substantive law").
[148] *Ibid* at 1291.

the notion of relational autonomy.[149] Therefore, a territorial individualistic assumption that only the state of domicile can impose duties on its defendants runs counter to the myriad of elements informing a transnational legal relations and the expectations of the individuals. Focusing on the actions of the individuals should not only lead to a view attempting to minimize state intrusion or coercion, but rather to make individuals responsible for their actions in the transnational field.

On the other hand, because the rights identified by Brilmayer represent merely "side-constraints" to the process of determining the applicable law, they do not provide a solution or a prescription for what law should be chosen, but rather which one 'cannot' be chosen.[150] Perry Dane argues the stronger thesis that one needs to apply the norms to which the litigants were expected to conform at the time of the events being adjudicated.[151] "Dane does not flesh out what choice-of-law principles follow from his theory. He does argue, however, that because adjudication must recognize and enforce forum-independent rights, any choice-of-law principle should be nonrelativist, that is, any forum applying the same principle to the same set of facts should come to the same choice of law."[152]

Here Dane might appear to come close to the clasical understanding of Savigny's theory as arguing that an analysis of the nature of a legal relationship focused on the law which individuals would have assumed guides their relationship will generally lead to only one possible answer to the choice of law question. But in adopting this view, Dane leaves out Jitta's critique to Savigny's theory, as well as some of the American realists' insight. First, as Jitta argued, the nature of a legal relationship is itself a fluid concept, which will inevitably depend on the views of the judge deciding the matter. Second, the parties might have and often do have, or at least assert, different expectations regarding the applicable law. This means, as Cavers made clear, that what is ultimately involved is an assessment of whether or not each of the party deserves the application of the law he/she is claiming. At this stage of the assessment the judge should be constrained by ethical considerations, such as avoiding prejudice and even a lex-fori bias, and should

[149] See Chapter 6.
[150] Green, *supra* note 7 at 971 ("such negative rights do not determine but merely constrain choice of law").
[151] Dane, *supra* note 6 at 1218-1223.
[152] Green, *supra* note 7 at 972.

focus more on the actions and communications of the parties. But a wide variety of factors might play a role, including the intentions of the parties, the expectations that they generated in one another and in the communities affected by their actions, the power relations between the parties etc. This means that, contrary to Dane's intuition, the process of discerning the norms to which the parties were supposed to conform is much more fluid and inevitably influenced by the views of the adjudicating forum. Indeed, Brilmayer admits that "it may turn out that in numerous instances there are several different states whose law might apply without violating the parties' rights. In such cases, policy analysis could properly come into play."[153]

It is in this context that one should appreciate Green's intuition that "with ease of movement, the ethical certainty of what law the litigants had a duty to obey has, in many cases, disappeared. Without this certainty, the rights that norm-based jurisprudence claims the courts must recognize and enforce also disappear. This leaves the courts with literally nothing to do in such cases unless they are willing to experiment with innovative reasons for applying law."[154]

2. Equity

One might be convinced by Green's assessment that it "is not that traditional rights-based jurisprudence has been rejected in favor of other forms of reasoning, but that traditional rights-based jurisprudence has become irrelevant and other forms of reasoning are all that is left to fill the gap."[155] But the fact that the complex patterns of inter-human transnational relations make *traditional* rights-based jurisprudence, and some would now argue, even governmental interest analysis[156] unhelpful, does not mean that one should immediately either go back to "good old fashioned choice of law rules,"[157] or abandon any arguments focusing on individuals' and communities rights and interests.[158] Arguing

[153] Brilmayer, *supra* note 6 at 1279.
[154] Green, *supra* note 7 at 994.
[155] *Ibid*.
[156] John Hart Ely, "Choice of Law and the State's Interest in Protecting its Own" (1981) 23:2 Wm & Mary L Rev 173.
[157] *Ibid.*
[158] As became apparent from his correspondence with David Cavers, Currie implied that the complexity of such analysis is too great.

that there is no a priori rule that determines individuals' rights and expectations in broad categories of cases doesn't mean that one should abandon any individual-based perspectives as Currie could be understood to have implied.

Cavers argued that neither an obsessive procrustean bed in the form of "state interest analysis," nor the illusion of "conflicts justice" should distract one from thinking about what a just, equitable solution to the legal matter might look like. While in the correspondence with Currie he showed that state interest analysis might make it less likely for a state to apply its policy altruistically,[159] elsewhere he argued that a proper understanding of reasonable expectations of individuals would reveal that it is entirely justified for a state's policy to apply in order to hold responsible its domiciliaries for conduct abroad.[160]

In an article entitled 'Cipolla and Conflicts Justice,' Cavers reflects on different "true conflicts" scenarios in the area of tort law. In particular, he argues that in cases in which the parties are domiciled in different countries, "it does not follow that, because the domiciliary contacts conflict, their significance is equal. Rather, the court has to evaluate the position of the two parties with reference to the two states' conflicting rules since the forum must prefer one state's rule to that of the other."[161] Thus, in a case involving a plaintiff "who lives in the accident state with the lower standards and the defendant who comes from the other state with the higher standards" he asks "whether it would be unjust to the out-of-state defendant to hold him to the higher standards of liability or financial protection existing in his own state, thereby benefiting the plaintiff who, of course, would have been restricted by his own state's rule to a lower recovery if the tortfeasor had been a fellow-citizen."[162]

He argues that even from a state centric perspective, one might argue for the interest of the defendant's domicile state to "hold to the full measure of damages or the

[159] See Ely, *supra* note 156 (showing that Currie's proposition that a state would only protect its own domiciliaries has actually become the credo of the state interest analysis methodology.) See also David Cavers, "Cipolla and Conflicts Justice" (1970) 9 Duq L Rev 360 at 363 ("The idea that a state has an interest in protecting the claims of its citizens to the benefits of their own law when they are itinerant plaintiffs but not to the protection of their own law when they are stay-at-home defendants has begun to manifest itself among courts venturing upon governmental interest analyses").
[160] Cavers, "Cipolla and Conflicts Justice," *supra* note 159.
[161] *Ibid* at 362.
[162] *Ibid* at 368.

standard of care which that state's law provides for."[163] He then goes on to argue that a proper understanding of the expectations of individuals shows that it is entirely equitable for a state's law offering higher compensation to regulate a domiciliary abroad for the benefit of non-domiciliaries. Indeed, anything else would amount to invidious comparisons.[164] As Cavers put it: "a defendant may complain of the harshness of his own state's rules when he is subjected to them in a case involving extraterritorial conduct or consequences. However, he can seldom complain that he was thereby been denied conflicts justice."[165]

In other words, one would get a sense that traditional views of "conflicts justice" or of "state interest analysis" are neither always helpful nor instructive for the choice of law decision. But instead of concluding that one should therefore revert to "good old fashioned" choice of law rules such as lex loci delicti, the result should be based on an analysis of "the position of the two parties with reference to the two states' conflicting rules," not in territorial terms, but in terms of social equity.

Applying either the law of the tort or the law of the tortfeasor's domicile might be considered "fair" from a conflicts justice perspective.[166] But whether or not one should apply a law to hold domiciliaries accountable for conduct abroad will depend on an assessment of equity between domiciliaries and non-domiciliaries and a view of social justice for transnational matters. All this means going back to Jitta's insight that one needs to understand what social function one attributes to a transnational legal relationship (such as transnational torts of multinational corporation) and apply the law that allows it to perform such function.

---

[163] *Ibid* at 369.
[164] For a similar perspective see Arthur von Mehren, "Recent Trends in Choice-of-Law Methodology (1974) 60 Cornell L Rev 927; Arthur von Mehren, "Choice of Law and the Problem of Justice" (1977) 41:2 Law & Contemp Probs 27.
[165] Cavers, "Cipolla and Conflicts Justice," *supra* note 159 at 372.
[166] Note that Kogan would have argued that regardless of whether it is fair to apply the law against the defendant, it is not fair for the plaintiff to evoke it, because in order for the law to apply, each one of the parties (not just the defendant) must have a relationship to the law invoked.

3. Disaggregating State Interests

So far I have shown that the American realist school has placed the focus on surfacing and analyzing the policies underlying the respective laws in conflict. Occasionally and especially because of the conventional understanding of Currie's theory, this perspective has made analysts oblivious to the consideration of individual interests. I have showed furthermore that those interests are not to be understood exclusively as negative interests, that is, interests in being left alone by the state. I have focused on Cavers' writing because he attempted to show that the determination of the application of the policies of the laws should not be disjoined from, but rather informed by, the actions, beliefs, expectations, prior relationships etc. between the parties.

But while Cavers, in contrast to Brilmayer and Dane, continuously suggested that a focus on individuals and their interests and expectations goes hand in hand with a focus on the substance and the policies of the laws, he was less clear about why that should be the case and how this relationship might be conceptualized.

A 1959 article by Robert Kramer seems to offer some valuable insight into this question.[167] Kramer wanted to connect Currie's theory focusing on state interests with the sociological jurisprudence of Thomas Cowan and Roscoe Pound to suggest that a conflict of laws analysis should disaggregate state interests.[168] He started from the premise that the realist school had rightfully brought attention to the substantive values underlying the laws in conflict. Like many critics of Currie, he argued that the theory might have adopted an overly state-centric approach. Yet for him, this realization should not distract one from the substantive analysis of the policies underlying the laws. Rather, he argued

[167] Robert Kramer, "Interests and Policy Clashes in Conflict of Laws" (1959) 13 Rutgers L Rev 523. Interestingly, Kramer himself does not appear clear on the novelty of his thesis of disaggregating state interests. While he suggests that focusing on state interests is misleading and obscures the individual, group and social interests underlying it, at 531, he also states that other authors had argued for a "frank recognition that the social, economic, political reasons behind the policy or law of a state must and should be ascertained", at 533-534. But in this evaluation, I believe he fails to appreciate the extent to which underscoring these interests amounts to simply suggesting that there might be policies underlying state interests beyond those initially recognized by Currie, as opposed to proposing an inquiry into how individuals, groups and communities would be impacted by one decision or aother.

[168] *Ibid* at 532 ("If that policy is, as I believe, the outgrowth of clashes of individual, group, and social interests, if it is a legislative, judicial or administrative attempt to compromise, adjust, or prevent these clashes of interests, then the better we can identify these interests, their real nature, their conflicts, the better we can grasp the legitimate reasons and governmental interests behind the policy in question").

that the policy in question needs to be analyzed by first "identifying and separating from each other the various interests – individual, group, social" and the way in which the respective law is trying to reconcile "conflicts among or between the identified interests.[169]" He presents the challenge of such an analysis in a purely domestic context in the following way:[170]

> A just, decent, and orderly adjustment of these clashes of interests demands that each interest- individual, group, social – be adequately represented and have a chance to present its case before a decision is made. Yet courts have rarely, if ever, devised adequate methods for handling such multi-party clashes, and legislative and administrative hearings frequently are so dominated and overwhelmed by the clamors of powerful groups that social or individual interests may be overlooked or neglected. Markets may cease to function in a representative manner if dominated by powerful groups, and groups may callously disregard individual and social rights and interests.[171]

When moved to the transnational setting the challenge is even greater:

> Here we have clashes of interests between individuals, groups, and communities located, not all in one sovereign state, but in two or more states. In a sense we move from the three-dimensional universe of individual, group and social interests, into a multidimensional universe. We have not simply conflicts of interests – individual, group, and social – among themselves and with each other; we have a clash between the policy of one state – how it adjusts the clashing interests – and the policy of another state – the different solution that state has for a similar clash of like interests. And, of course, more than two states may be involved; we may have policy conflicts here of several states.[172]

This disaggregation of interests means that whenever a court decides on the validity of guarantees offered by married women when one of the laws in conflict does not allow

[169] *Ibid* at 526.
[170] Note that in addition to underlining the complex web of interests that need to be evaluated in any judicial decision (and especially in transnational ones) Kramer also underscores that a difficult question is also "who in our society – legislature, administrative agency, court, executive official – is to decide the conflicts, to make compromises and adjustments, to assign priorities, to determine the values of the competing interests and which shall prevail to what extent. The problems of valuation alone present perplexing questions – the interdependency of ends and means, the relative importance of both reason and feeling or intuition, the need for acute semantic analysis". *Ibid* at 526.
[171] *Ibid* at 527.
[172] *Ibid* at 527.

for such guarantees, for example, it must consider "the individual, group and social interests involved."[173] Kramer's analysis of the interests that might underlie such a decision is worth quoting at large:

> Perhaps A cared not at all about married women but, responding to the wishes of a special group of creditors – professional sureties – enacted this statute to prevent the all-too-frequent substitution of a wife for a professional surety as a guarantor for a husband's credit. Thus A's policy is one to regulate creditors here, not debtors. Or perhaps state A felt its courts were too often thrust into family affairs when wives were sureties for husbands, that such transactions were too productive of perjury and fraudulent transactions, so that the courts of A should not be forced to try such actions. Or such suretyship transactions may be too prone to lead to husbands and wives having title to property really owned by them either held by others on secret or oral trusts for them or placed in the names of their children. Similar conjectures may be made about the reasons and interests behind the policy of B. Perhaps the policy of B was really meant to aid married women, to encourage them to take a more active part in business affairs, to add to their financial knowledge about their husbands' businesses in cases of early widowhood, to enable them to enter the business of suretyship. Or perhaps B felt that a contrary policy encouraged fraud and perjury in its courts, led to husbands placing all property in the names of their wives. Or perhaps the policy was an attempt to aid and foster small family businesses which could not otherwise obtain needed credits.[174]

In other words a disaggregation of state interests implies a much wider policy space and policy consideration. It was this particular broadening of the interests that Currie meant to avoid for various pragmatic reasons.[175] However, by showing how broad-ranging the considerations and interests are, Kramer showed how much is at stake for the individuals, groups and communities who are affected by the application of these policies.

The exposure of individual, group, and social interests behind the policies means that ultimately the application of one law over the other, or of a combination of the

[173] *Ibid* at 530.
[174] *Ibid* at 540.
[175] Kramer agrees with Currie that policy balancing is not a task meant for the judges.

laws,[176] implies a projection in the transnational space of a particular kind of re-balancing of these relevant interests. I believe this is what we should understand by Jitta's claim that PrIL is ultimately concerned with applying the law that allows a legal relationship to fulfill its social purpose in the transnational space. This means that whenever a determination of the applicable law is made, one is in essence engaged in determining the social scope of this relationship in the transnational space and this entails a certain preference for certain individual, group, and social interests over others.[177] Kramer explains that "if we recognize and appreciate fully the fact that we are often dealing with policies here which, under the mask or guise of a broad public social interest, actually reflect and represent comparatively narrow selfish group interests, we may, as judges, be strongly inclined to reject a local policy, benefiting a small, powerful group at public expense, in favor of another state's policy which curbs this group interest for the benefit of the interest of a far larger group or of the public as a whole."[178] In the end it is telling that in a recent article Lea Brilmayer seems more inclined to accept this broadening of the substantive analysis (rather than avoiding it) as a natural development of PrIL from an individual-centered perspective.[179]

VI. Conclusions

The conventional picture of American PrIL theory as developing from a rights - based, to a state-interest based perspective and then back to (somewhat diluted) rights-based arguments as a means of tempering the state-centric perspective is not particularly illuminating. I have argued in this chapter that even when detached from its formalist underpinnings Beale's theory is not properly understood as individual-centered; rather, it

[176] Note that Jitta envisioned the possibility of applying a substantive norm that results from the combination of the different national laws relevant to the dispute. Arthur von Mehren argues for the same possibility. See Arthur von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1974) 88 Harv L Rev 347.
[177] Much of this complex analysis revealed by Kramer's disaggregation of interests is well captured and illustrated by Joseph Singer in two articles published in 1989 and 1900. See Joseph Singer, "Real Conflicts" (1989) 69 BU L Rev 3 at 35; Joseph Singer, "A Pragmatic Guide to Conflicts" (1990) 70 BU L Rev 731.
[178] Kramer, *supra* note 167 at 547.
[179] Brilmayer, "The Problem of Provenance," *supra* note 2.

represents a continuation of the state-centric internationalist theories described in the first chapter. Similarly, in line with Green's assessment, I argued that the realist school of thought is not only compatible with a relational internationalist perspectives, but in many ways conducive to such an approach. I offered a different reading of Currie's theory, found in his correspondence with David Cavers, to suggest that the state-centric and parochial elements that Currie's theory injected into American PrIL theories were based on pragmatic, rather than absolute normative considerations.

Shedding new light on the American realist school of PrIL enabled me to capture the variety of individual-centered internationalist arguments that realist scholars offered to counter Currie's state-centric premises. From outside the realist school Currie was criticized for ignoring "fairness" concerns, understood as rights limiting the coercive power of states in a transnational setting. Yet from within the realist school the individual-centered arguments were much richer and more nuanced. Cavers argued that courts should discern the legitimacy of applying a particular law by evaluating the acts of the individuals in relationship to the state and the policy underlying its laws. Kramer argued that state interests must be "disaggregated" in order to capture the variety of individual, group and social interests, which are balanced and captured under a legal policy. He argued that choice of law rules must inevitably capture and appreciate the right balance of those interests given the transnational context of PrIL matters.

Overall, I have argued that much as Beale's theory could be seen as a continuation of Pillet's and Zitelmann's state-centric internationalist theories, there are many overlooked arguments underlying the realist theories that represent a continuation of the relational-centered internationalist perspective, especially Jitta's.

To deepen our appreciation of the difference that the state-centered/individual-centered distinction makes for the development of PrIL, the next three chapters will pick up respectively on three themes already apparent in the historical analysis developed in this and the previous chapters: rights and reasonable expectations (Chapter 5), legitimacy and autonomy (Chapter 6) and the cosmopolitan dimensions of PrIL (Chapter 7). Describing the different ways in which these issues were analyzed from an individual-centered and a state-centered perspective will reveal in greater detail the impact for the

development of PrIL theory and methodology of choosing the state or the individual, in relational terms, as the analytical point of departure.

Chapter 5 - Recognition, Rights and Reasonable Expectations

I. Introduction

Following an overview of the ideological and analytical contours of the state-centered and individual-centered perspectives in chapter 1, chapters 2-4 traced the rise and fall of these perspectives in Europe and the United States (chapters 2, 3, 4). In the next three chapters I distill from this historical material the implications of the perspectives for understandings of rights and reasonable expectations (current chapter), legitimacy and autonomy (chapter 6), and the cosmopolitan dimensions of PrIL (chapter 7).

The goal of these chapters is to reveal the ways in which the conceptualization of some of PrIL's analytical categories depended on whether a given PrIL scholar took the state or the individual as the point of reference and on what image they had of the individual in her international existence. In particular, I wish to explore individual-based perspectives that have been marginalized to date and that offer alternatives to overly liberal or libertarian individualistic theories, as well as to exclusively state-centric theories of PrIL. These marginalized perspectives focus on the recognition, as well as the responsibilization of individuals in the transnational context; relational, rather than individualistic notions of autonomy; and substantive, socially informed, rather than libertarian conceptualizations of legitimate authority.

When PrIL theory and methodology are constructed in state-centric terms, it excludes an important space for private versus private contestation, as Robert Wai calls it,[1] where parties' arguments for justice, fairness, rights, and reasonable expectations can be made. As shown in chapters 1 and 2, the state-centric internationalist perspective,

[1] Robert Wai, "Private v. Private: Transnational Private Law and Contestation in Global Economic Governance" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015).

which developed at the end of the 19th century, imagines individuals as by-standers to an inter-state affair based on a neutral division of sovereign authority. Similarly, as I alluded to in chapter 4, the American interest-analysis theory may often be interpreted to suggest that individual interests and appeals to justice are comfortably reflected and subsumed under "state interests."

Furthermore, as Joseph Singer points out, while interest-analysis theory allows utilitarian or regulatory policies designed to maximize the general welfare to enter into the analysis, it ignores rights-based or moral principles designed to promote social justice by defining moral obligations within social relationships.[2] Indeed Singer argues that "the decision to ignore moral policies" that provide for different ways of understanding individuals' responsibilities and moral conduct in relationship to each other in a transnational context "is crucial to modern conflicts theories."[3]

At the same time, while I wish to recover these "rights-based or moral principles designed to promote social justice,"[4] I do not inevitably adopt the neutral, libertarian position. As I show in the next chapter, in reacting against the utilitarian model, Lea Brilmayer developed an individual-centered theory based on individual liberty and political neutrality. This theory imagines individuals as isolated and exclusively autonomous agents who should be "protected" from what is uncritically understood as intrusive state authority.[5]

In contrast, I wish to recover a different position by resurfacing the image of a relational individual whose existence in the international realm is determined by overlapping relationships with various individuals and communities. Focusing on these relationships inevitably means focusing on the rights, duties, legal and moral responsibilities individuals have in relationship to each other. It means focusing on the way in which they impact and alter each other's opportunities, rights, autonomy, etc. In this chapter I argue that several rights perspectives found in the theories of Joseph Story, Carl von Savigny, and Josephus Jitta, as well as Ferdinand Lassalle, offer an initial step in developing this alternative relational internationalist perspective in PrIL. This picture

[2] Joseph Singer, "Real Conflicts" (1989) 69 BU L Rev 3 at 35.
[3] *Ibid*.
[4] *Ibid*.
[5] Lea Brilmayer, "Rights, Fairness, and Choice of Law" (1989) 98 Yale L J 1277.

will be further completed in the next two chapters with a discussion of legitimate authority and PrIL's cosmopolitan dimensions.

II. Breaking The Alleged Unity of the Vested Rights Theories to Make Space for Recognition

In the recent collection *Private International Law as Global Governance*, which she edited with Diego Fernández Arroyo, Horatia Muir Watt considered possible "Future Directions" for the development of PrIL.[6] Muir Watt suggests that current Private and Public International Law might both currently undergo significant transformations through the incorporation of recognition as a proxy for emphasizing individual identity and dignity as well as creating a decent international society.[7] "In a nutshell, the idea is that personal relationships created elsewhere, under a foreign law (and according to a potentially different understanding of their meaning and content), should be given a place (within the society and under the law of the forum) as such, respecting their specific, initial characteristics."[8]

Muir Watt notes that in the case of PrIL "the potential implications of recognition may well be less immediately perceptible than in the discipline's public international counterpart. Indeed, the vocabulary of recognition has always been central to the conflict of laws – encompassing vested rights, judgments, public acts, personal status, and now under the influence of European Union law, mutual recognition."[9] However, the vocabulary of recognition, at least as it is commonly understood, is fundamentally different from the one she is trying to recover by reference to feminist writings and human rights norms, among others.

---

[6] Horatia Muir Watt, "Future Directions?" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015) 343 [Muir Watt, "Future Directions"?].

[7] As regards Public International Law Muir Watt cites Emmanuelle Jouannet for the propostion that "recognition could be the most promising candidate for a re-foundation of the discipline, as geared to the establishment of a fair and decent international society." *Ibid* at 366 citing Emanuelle Tourme- Jouannet, *Qu'est-ce qu'une société international juste? Le droit international entre développement et reconnaissance?* (Paris: Pédone, 2012). See also Emanuelle Tourme-Jouannet, "The International Law of Recognition" (2013) 24:2 EJIL 667.

[8] *Ibid* at 367.

[9] *Ibid* at 368.

With this cautionary remark, Muir Watt therefore introduces certain ambivalences that she sees as underlying PrIL as a field. First, PrIL's methodological tools and techniques might signal a propensity for recognition, but in PrIL recognition may be part of an acontextual and dogmatic ideology. By focusing on recognition, Muir Watt has in mind neither a return to Mancini's recognition of personal status according to the law of citizenship,[10] nor a blind reference to vested rights.[11] Second, recognition may be confused with an overly liberal, possibly individualistic concept. Transported to the wide variety of private law relationships with which PrIL deals, it could simultaneously achieve the recognition of identity and dignity, on the one hand, and of individualistic property and contract claims, on the other. In other words, Muir Watt does not have in mind a revival of individual liberty underlying English justice theories in PrIL, which would lead indistriminately to self-determination and identity and also strong property and contract claims. Recognition, therefore, should be limited to "personhood and family relationships."[12]

Given these ambivalences, it is unsurprising then that "for the moment, recognition in PrIL is perceived largely as a competing, and opposing, methodological approach to individual trans-border relationships, for which traditional tools have had to make room, owing to the direct vertical and horizontal effects of hard-core human rights instruments."[13] Indeed it seems that in the EU context, for example, a "human rights-based perspective" is necessary in order to achieve the "cross-border continuity of a parent-child relationship on the dignitarian ground of the right to a normal family life"[14]

---

[10] *Ibid* at 378: "a different epistemological frame is proposed by human rights law in this context, substituting a concrete, individualized approach for the more abstract concern for continuity and permanence of status whatever the circumstances."

[11] *Ibid* at 367, n 100 (expressed disagreement with prof. Ralf Michael's thesis of associating the mutual recognition principle underlying EU law with the PrIL vested rights theory: "the thesis according to which "mutual recognition" under European Union has anything to do with "vested rights" is not really convincing; or at least, no more so than any attempt to correlate mutual recognition and the recognition debate considered above") citing Ralf Michaels, "EU Law as Private International Law? Re-Conceptualizing the Country-of-Origin Principle as Vested Rights Theory" (2006) ZERP Diskussionspapier 5/2006, online: http://scholarship.law.duke.edu/faculty_scholarship/1573.

[12] *Ibid* at 367, n 102: "The scope of recognition cannot be defined dogmatically, in the way in which traditional methodological tools determine their purview, for the epistemological reasons that will be explained later. Recognition responds, rather, to a need stemming from the denial of identity, which will tend to circumscribe its use to personhood and family relationships […] A tort or criminal case may ALSO involve issues of recognition, if only through procedural issues of standing, for example."

[13] *Ibid* at 369.

[14] *Ibid*.

or the recognition of a family name across borders as the corollary of the necessary "coherence of individual status of mobile citizens within the internal market."[15] The paradigm of recognition that Muir Watt seeks to introduce into PrIL focuses on "social reality,"[16] rather than dogmatic and abstract notions of law and rights; on fluid notions of reasonable expectations, rather than methodological play;[17] on "open-textured and deliberative normative modes, sensitive to life experiences with which it interacts" rather than "formal rationality of the law,"[18] and on "a method of care, respect for alterity, protection of dignity and identity, which are to a large extent excluded by the abstraction of private international law methodology."[19]

The tension between the formalistic dogmatic image of PrIL Muir Watt presents and the framework of recognition focused on individual dignity, identity, and inter-personal care posits two alternative positions as "future developments" for PrIL. One position would welcome the overcoming of PrIL's dogmatism by the contextual and fluid human rights methodology, as well as insights from feminist writings, sociology, philosophy and so on, even to the point that PrIL might no longer constitute an independent legal discipline.[20] Alternatvely, the enterprise might be to connect Muir Watt's framework of recognition to PrIL's own underlying philosophy:

> The scope of recognition cannot be defined dogmatically, in the way in which traditional methodological tools determine their purview. This is because recognition responds, rather, to needs stemming from the denial of identities in real life. However, these are salient in the field which, in the vocabulary of the conflict of laws, belong to "personal status," and involve the impact of cross-border mobility on personhood and family relationships. Does this mean that, in this field, the tools and methods of this discipline are disqualified? The question, now, is the extent to which recognition could be seen to represent the excavation of an alternative axiological project which has always been contained implicitly within the conflict of laws.[21]

---

[15] *Ibid:* "If concerns for individual and collective dignity and identity, associated in other disciplinary fields with the recognition paradigm, have made a recent entrance into private international law, it has been through the transnational effects of fundamental rights."
[16] *Ibid* at 372.
[17] *Ibid* at 373.
[18] *Ibid* at 375.
[19] *Ibid* at 378.
[20] Horatia Muir Watt portrays this as "a methodological enquiry: the end of choice of law?" *Ibid* at 363.
[21] *Ibid* at 378.

In this chapter I attempt precisely such an "excavation of an alternative axiological project" underlying the relational internationalist perspective which, I argue, connects in many respects to the paradigm of recognition described by Muir Watt. In engaging in this excavation, I reveal precisely the ambivalence in PrIL, ranging from the utter misrecognition of individuals' pleas for identity, justice and dignity to an overly liberal individualistic recognition. I associate the liberal individualistic paradigm with early 19th century theories of vested rights, such as Tittman's, which described the application of foreign law as an attribute of personal autonomy and liberty. On the other side of the spectrum, regardless of whether Horatia Muir Watt is right that Private and Public International Law could now reconnect via the recognition paradigm, I suggest that historically the misrecognition of individuals and their pleas for justice was in fact a corollary to the state-centric internationalist position under the PrIL-PublIL association.

In contrast, I argue that a much more nuanced and contextual framework of recognition can be "excavated" from the premises of the relational internationalist perspective, especially as it culminated in Jitta's theory. First, the relational internationalist perspective emphasized precisely the spectrum from liberty and self-determination to social responsibility, based on the differentiation of the various types of private law relationships in the transnational realm. Implicitly the recognition of individual reasonable expectations and appeals to justice and of larger socio-political considerations is involved to a different degree, depending on the kind of relationship at issue. Second, the relational internationalist perspective engages in an analysis of the nature of the relationship by incorporating both extra-legal social expectations of the individuals involved and the relevant legal policies. Furthermore, as I will show below, Story refers to a notion of 'naturally vesting rights' precisely to emphasize the recognition of expectations and relationships that have manifested themselves in the lives of individuals, rather than being formally granted through law. As it culminated in Jitta's account, this perspective focused explicitly on achieving the coherence of individuals' existence in the transnational realm, emphasized a needed loosening of PrIL's methodology and pled for a purposeful and contextual analysis of international social life. Furthermore, as I show in chapter 7, Jitta emphasized the complexity of individual

identity by underscoring the myriad of affiliations and relationships in which the individual is embedded as she navigates the transnational realm.

Throughout her account, Horatia Muir Watt repeatedly cites vested rights theories in PrIL as the element - at least conceptually - most closely related to recognition, yet she seeks to dissociate the methodological and policy justifications that separate the two notions.[22] Indeed it is through the lens of rights theories that one can appreciate the level of recognition granted to individuals and their relationships. This chapter therefore takes rights theories as the terrain on which to distinguish between perspectives highly focused on individual liberty, state-centric perspectives that eliminate the voice of individuals and relational internationalist perspectives that construct a relational, social image of the individual.

To appreciate the diverse ways in which the identity and regulatory needs of individuals are portrayed in PrIL, one must first break the perceived unity of vested rights theories. In 1908 Albert Dicey argued that PrIL is almost universally unified by the concept of vested rights.[23] He claimed there was a natural convergence,[24] "a community of the aim" that flows from the universal goal to "secure the extra-territorial effect of rights."[25] Westlake in England,[26] Ernst Zitelmann in Germany,[27] Vareilles-Sommières in France,[28] and Joseph Beale in the US[29] all made the same claim in the last few decades of the 19th and the first few decades of the 20th century.[30]

---

[22] *Ibid* at 367, n 100 & 368 ("Indeed the vocabulary of recognition has always been central to the conflict of laws – encompassing vested rights, judgments, public acts, personal status, and, now under the influence of European Union law, "mutual recognition;" moreover, traditional concern for the understanding of the "foreign" has always existed, at least in the discourse of the discipline, so that under cover of a common signifier, there is a tendency to assume substantive similarity between the conventional goals of private international law as "management of pluralism" with more recent, collectively identitarian or individually dignitarian, forms of recognition").

[23] Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens, 1908).

[24] *Ibid* ("The selection of one or more of these laws is not a matter of caprice, but depends upon more or less definite reasons which are likely to influence all Courts and legislators", at 11).

[25] *Ibid* at 12.

[26] John Westlake, "Relations Between Public and Private International Law" in Lassa Oppenheim ed, *The Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914) 285 at 305.

[27] Ernst Zitelmann, *Internationales Privatrecht* (Leipzig: Duncker & Humblot, 1897).

[28] Gabriel Vareilles-Sommières, *La synthèse du droit international privé* (Paris: Pichon, 1897). For a synthesis *see* Marquis de Vareilles-Sommières, "La synthese du droit international privé" (1900) 27 Journal de droit international privé et de la jurisprudence comparée 5 & (1900) 27 Journal de droit international privé et de la jurisprudence comparée 158.

At first sight, this overwhelming consensus between PrIL scholars in different countries suggests a uniform rights-based understanding of the regulatory goals of PrIL all through the first few decades of the 20th century. But of course, not only does this tell us little about the consequences of adopting a rights-based perspective in PrIL. It also tells us little about how these and other scholars in PrIL conceptualized rights in a transnational context. Behind this façade of doctrinal uniformity hide different underlying assumptions about the contours of rights, which have a strong impact on the regulatory function of PrIL.[31] In particular, I argue that our perspective on the content and function of rights tends to change depending on whether we take the individual or the state as the analytical point of reference in PrIL theory and methodology and whether we portray an atomistic or a relational image of the individual in her international existence. We inject different assumptions, biases, and analytics into our view of rights depending on whether we think of PrIL as a space for promoting individual liberty, determining "conflicts of sovereignty among states," or for contesting and constructing "the requirements for the reasonable social intercourse of individuals in the transnational sphere."[32]

I reveal these different contours of rights by focusing on what I perceive to be three main different perspectives. In the first section I pursue the common intuition that rights theories are overly individualistic and premised on unrestrained individual autonomy. I offer several theories in the history of PrIL that seem to fit this model. In the following section I outline the formalist state-centric internationalist perspective of Pillet, Zitelmann, and Beale. I argue that from this perspective, individuals' pleas for justice and recognition are almost entirely excluded from the determination of the applicable law. I offer this perspective as a cautious tale. While righst perspectives are targeted as overly

---

[29] Joseph Henry Beale, *A Treatise on the Conflict of Laws: Or, Private International Law*, vol 1, part 1 (Harvard University Press, 1916). (Beale relied heavily on the European authors referencing the vested rights doctrine, including Pillet, Zitelmann, Westlake and Vareilles Sommieres. He described Vareilles Sommieres's theory, for example, as "a singular original, well-reasoned and careful work, which will repay careful study. He holds the theory of vested rights, and his work is therefore one of special interest to an American scholar").

[30] For an overview and critique of the different vested rights theories see Pierre Arminjon, "La notion de droit acquis en droit international privé" (1933) 44 Recueil des Cours 1.

[31] For an account of the different vested rights theories in PrIL and their relationship to the "country of origin" principle underlying EU law see Ralf Michaels, "EU Law as Private International Law? Re-conceptualizing the Country-of-Origin Principle as Vested Rights" (2006) TheoryZERP Diskussionspapier 5/2006, online: http://scholarship.law.duke.edu/faculty_scholarship/1573 [Michaels, "EU Law as Private International Law?"].

[32] For a general description of these various theoretical perspectives in PrIL see Chapter 1.

liberal or libertarian, it is important to acknowledge that "vested rights perspectives" in PrIL can also stand for state-centric, rather than individual-centered theories. These perspectives make it possible to exclude individuals entirely, to argue that their reasonable expectations are "fictitious concepts,"[33] and that their role is that of bystanders to the inter-state affair of distributing rights and authority amongst each other.

Although the first section of the chapter reveals highly liberal theories of rights that treat the application of a particular law as an attribute of individual autonomy and liberty, I suggest that we should not be too quick to classify all rights theories under this category, or at least not discard all such theories simply because they appear to focus on autonomy. In the third section I argue that Savigny's theory has been wrongly associated with the extreme individualistic perspective. I show that Savigny in fact reacted against the overly individualistic perspective and that his theory is much closer to Story's empirical method of analyzing legal relationships. To provide further support for this reading of Savigny, I show how the German socialist Josephus Lassalles used Savigny's conceptualization of the relationship between rights, autonomy, and the people (Volk) to counter the individualistic theory of vested rights and to provide an impetus for social justice in PrIL. Furthermore, I show how Jitta elaborated both on Savigny's concept of the legal relationship and on his view of autonomy and voluntary submission.

III. Individualistic Vested Rights Theories

For the intuitive case that "vested rights" theories foster an overly individualistic perspective, I focus primarily on the writings of 19th century scholars Friedrich Wilhelm Tittman, Karl Friedrich Eichhorn, and Georg Friedrich Puchta. These authors offer the clearest justifications for a theory of "vested rights" grounded in an individualistic philosophy and correlated with a certain theory of individual freedom and autonomy. These particular vested rights theories were indeed among the earliest articulations of PrIL, even though both Waechter and Savigny would later refute them.

[33] For the way in which this argument features in the state-centric internationalist theory of the Supreme Court of Canada in Tolofson v. Jensen, see Roxana Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013) 31 Windsor YB Access Just 197.

It is in these theories that one finds a clear "tension between the individual and the state,"[34] and an overemphasis on individual freedom and autonomy. Under this ideology the individual is self-sufficient, independent, and autonomous and must be protected from state intrusion. Similarly, the role of the state is merely to respect, recognize, and foster individual freedom. Transposed to the PrIL context, individual freedom translates into a freedom to choose the law or deviate from the applicable law, rights and freedom are natural pre-legal expressions of individuality, and the application of the lex fori is viewed as a "falsification of individual will."[35]

1. Friedrich Tittmann

In his 1822 dissertation, the German scholar Friedrich Tittman focused on a question he perceived as overlooked in the theory of PrIL, namely why a court would apply foreign law to begin with.[36] Viewed from this angle he believed the fundamental question PrIL must answer is the extent to which laws that vest private rights must apply extraterritorially. The fact that "vested rights" must in fact be recognized is posited as an axiom deduced from individual autonomy.[37] The task was merely to connect rights and individual autonomy to the choice of law problem. This makes him argue that "a vested right is not recognized because a foreign law which vested it is recognized, but rather, the law is recognized as a "fact" proving that a right vested."[38] An individual right is the object of recognition, while the law is just the medium through which the right finds recognition in another state.

More important, law is not the source of rights. Rights are understood by Tittmann, given his natural law ideology, as pre-legal. "A right is created when the fact required by natural law, in particular a form-free contract exists. The positive law simply

[34] Horst Müller, *Der Grundsatz des wohlerworbenen Rechts im internationalen Privatrecht* (Hamburg: Friederichsen, de Gruyter, 1935) at 185.
[35] *Ibid.*
[36] Friedrich Wilhelm Tittmann, *De competentia legum externarum et domesticarum in defiendis potissimum iuribus coniugum* (Halle: Gebauer, 1822). Tittman's dissertation was written in Latin. The discussion of his writing in this thesis relies on Müller's review of his theory. See Müller, supra note 34 at 180-187.
[37] Müller, *supra* note 34 at 181.
[38] *Ibid* at 183.

concretizes the content of this right further."[39] This means that the existence of a right is determined not by "submission under a law, but is a direct consequence of autonomy. Foreign law is applied therefore simply because this is what the parties want."[40] Whether a right is vested therefore "does not depend on a particular legal order, but on natural law and autonomy."[41]

This inevitably creates "a tension between the individual and the state," where the relationship rests in the individual's right, based on a social contract, to claim from the state "protection of its personhood and its legal features."[42] The stakes of PrIL are described accordingly: "if a court applies forum law over the law desired by the individuals, it offends not foreign law and the foreign state, but the individual and her rights vested in accordance with party autonomy. It would falsify her will."[43]

In his 1935 review of Titmann's vested rights doctrine, Müller notes that Tittmann's theory was acknowledged, but had no followers.[44] However, he argued that "one should not downplay its historical relevance. Titmann was still the first writer who purposely and because of its underlying premises inevitably introduced the concept that vested rights must be recognized in PrIL. Thereby he certainly exposed the issue fully. The critique of Wächter then illuminated the problems. Ever since, the idea keeps reoccurring in PrIL."[45]

2. Friedrich Eichhorn

Tittmann's views were later picked up by the well-known germanist Friedrich Eichhorn (1781-1854).[46] In 1935 Müller noted that Eichhorn's fame "might be the reason

[39] *Ibid* at 184.
[40] *Ibid* at 184. The distinction between deriving the application of a law from voluntary submission to that law and deriving it directly from individual autonomy matters because it reflects the way in which individual rights and entitlements are considered pre-legal (Tittmann) or derived from law (see the discussion of Savigny below).
[41] *Ibid* at 185.
[42] *Ibid* at 185.
[43] *Ibid.*
[44] *Ibid* at 186.
[45] *Ibid* at 187.
[46] Karl Friedrich Eichhorn, *Einleitung in das deutsche Privatrecht: Mit Einschluss des Lehenrechts* (Goettingen: Vandenhoeck und Ruprecht, 1836) at §34,37 & 97-99 & 108-111.

why Tittman's dissertation was not completely forgotten."[47] Eichhorn, like Tittmann, argued that party autonomy determines the law under which particular rights vest and that this autonomy can only be limited through the absolute laws of the domicile (not the forum).[48] For torts for example, he argued that the law of the place where the tortious act occurred should apply "because the tortfeasor [through his tortious act] submitted to this law."[49] Because the application of a law must be the consequence of individual freedom, presumably the tortfeasor has a "vested right" in the application of this law.

Overall Eichhorn believed that the law of domicile should govern, most likely because this is the law to which individuals presumably submit.[50] Yet for Eichhorn even derogations from the law of domicile can be made freely by the parties. Any application of the law ultimately rests on party autonomy, of which individuals dispose freely, subject to restrictions in the law of domicile.[51] In this spirit Eichhorn argued that while the law of the place where immovable property is located should govern rights related to this property, the principle "autonomy brakes state law"[52] should make it possible for individuals to "subscribe to rights with a different content" subject to the absolute laws of the lex rei sitae.[53] Müller noted that this line of reasoning makes it possible to "determine applicable, by virtue of party autonomy, another law than the one generally considered applicable."[54]

In Eichhorn's theory, as in Tittmann's, the state is merely meant to protect and mostly leave individuals alone to pursue their autonomy.[55] But by abandoning the natural law tradition, himself being part of the historical school, Eichhorn had great difficulty in explaining how states' alleged obligation to respect vested rights and autonomy should be explained theoretically.[56]

---

[47] Müller, *supra* note 34 at 187.
[48] Eichhorn, *supra* note 46 at §36 & 104-108; Müller, *supra* note 34 at 188.
[49] Müller, *supra* note 34 at 188.
[50] As I will show in the next chapter, it is at this point that an individualistic "vested rights" theory connects with Lea Brilmayer's "negative rights" theory. See Müller, *supra* note 34 at 190 (discussing that Eichhorn imagined the main role of the state as protecting the individual and her freedom).
[51] Eichhorn, *supra* note 46 at 108, §37.
[52] *Ibid* at 88, §27.
[53] *Ibid* at 104, §36.1.
[54] Müller, *supra* note 34 at 188, 189; Eichhorn, *supra* note 46 at 104, §36.1.
[55] Müller, *supra* note 34 at 190.
[56] *Ibid* at 191.

3. Georg Friedrich Puchta

In an attempt precisely to provide the philosophical ground for the concept of recognition of vested rights, the German scholar Georg Friedrich Puchta (1798-1846) later equated recognition of vested rights with the recognition of the person.[57] Allegedly, the application of foreign law must be considered exceptional only "if it is not based on the principle that a state, by recognizing an individual as a legal subject, must also recognize her vested rights (unless the state does not recognize such rights at all in its legal system); in other words, that a state cannot date the existence of a person from the time when the individual and her rights come in contact with the legal institutions from which he seeks protection."[58]

For Puchta the individual has an inherent freedom and her legal relationships are simply the consequences of such inherent freedom. This "will power and freedom" is given to individuals naturally, qua individuals, not by law.[59] Freedom is the fundament of law and all legal relationships emanate from it. In other words, legal relationships are the expression of freedom and the application of a law must ultimately have its source in individual freedom.[60]

IV. The State-centric Internationalist Perspective

The individualistic connotations of the foregoing vested rights theories indicate why PrIL is commonly criticized for being overly liberal and failing to curb private power in the transnational realm. Yet it is important to recognize that PrIL moves quite easily between the overly liberal mode and the state-centric mode and can be equally criticized for completely failing to focus on what Jitta called "the reasonable social life in

[57] Georg Friedrich Puchta, *Pandekten*, 10th ed (Leipzig: Johann Ambrosius Barth, 1866) at 172-175. § 113.
[58] *Ibid* at 173.
[59] *Ibid.*
[60] Georg Friedrich Puchta, *Vorlesungen über das heutige römische Recht*, 5th ed (Leipzig: Bernhard Tauchnitz, 1862) at 55-57, §22.

the transnational space."[61] The state-centric variation is now simply less acknowledged in the social justice debates.

Although the term "vested rights" suggests an individual-centered analysis focused on individuals' entitlements to a particular outcome or the application of a particular law, in the following section I argue that many rights-based perspectives in PrIL actually leave no space for individuals to contest or voice any of their assumptions with respect to the applicable law.

In what follows, I argue that in order to understand how such apparently "recognition-focused" concepts such as vested rights, manage to completely obscure and exclude individuals' interests and reasonable expectations, we must acknowledge the "state-centric ethic"[62] under which the main vested rights theories were created. I argue that there are six elements that characterize such state-centric vested rights theories, such as those developed primarily by Beale, Zitelmann, and Pillet in the late 19th- early 20th century and that these elements make it possible to exclude the reasonable expectations of the individuals from the determination of the applicable law.

1. Rights of States

As discussed above, Horatia Muir Watt observes that many of PrIL's methodological tools and concepts fail to account for individuals' claims for recognition and justice. The "traditional tools" appear not to incorporate human rights perspectives and to fail to appreciate the interests of the individuals claiming recognition of their legal relationships. Muir Watt attributed this lack of engagement with the complexity of individuals' existence in the transnational realm to the field's seemingly dogmatic and technical nature. However, I argue that the lack of engagement is due in part to the state-centric ideology under which many "vested rights" theories in PrIL developed. According to this ideology, the question is not the rights and duties of individuals to one another or the rights and duties of states to individuals. Rather, the question is what rights one state

[61] For an account of Jitta's general theory see Chapter 1.
[62] For the proposition that PrIL should move past the state-centric ethics borrowed from Private International Law see H. Patrick Glenn, "The Ethic of International Law" in Donald Earl Childress, ed, *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012).

has to another. In Pillet's words, "the principle of respect of vested rights presents itself as an obligation of states in relationship to each other."[63]

The underlying question becomes, for example, whether the state of citizenship (or domicile) *should recognize the authority of the state* where the individual acted to regulate her conduct.[64] In other words, does territorial sovereignty trump personal sovereignty or the other way around?[65]

As to why these categories apply, state-centric internationalist authors would argue that they are PublIL categories, and since PublIL and PrIL both have the function of "settling conflicts of sovereignty," PrIL must inevitably import the categories from PublIL.[66] If there is a connection between sovereignty, territory (or citizenship), and jurisdiction under PublIL, PrIL will incorporate it as well, along with all assumptions and limitations that it carries.[67]

Either way, the relevant rights from the state-centric internationalist perspective are the rights of states (determined a priori and neutrally) to regulate large sets of transnational legal matters. Rather than asking, as Cavers did, whether a balance of various interests entitles individuals to the application of the law they claim, the question becomes whether a state is entitled to regulate a particular legal matter in accordance with PublIL principles.[68]

---

[63] A Pillet, *Principes de droit international prive* (Paris: Pedone, 1903) at 503 [Pillet, *Principes*].
[64] Zitelmann, Pillet and Beale all structure their theories in this way. See Chapter 1.
[65] Zitelmann, *supra* note 27 ("a consensus amongst states that the state, which has territorial sovereignty must give way to the one with personal sovereignty", at 107); Beale, *supra* note 29 ("It will be noticed that personal jurisdiction is based only on law, while territorial jurisdiction is based upon power and upon law. The latter is the stronger, and personal jurisdiction must always yield to it", at 120).
[66] Antoine Pillet, *Recherches sur les droits fondamentaux des États dans l'ordre des rapports internationaux et sur la solution des conflits qu'ils font naître* (Paris: Pedone, 1899) at 26 (Pillet argues that these categories should be imported from PublIL, but also that a further principle is needed to help choose between them) [Pillet, *Droits Fondamentaux*]. For a contemporary recasting of the personal/territorial sovereignty as a corollary to the PrIL-PublIL association *see* Alex Mills, *The confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (New York: Cambridge University Press, 2009).
[67] See the Helsinki Summer Seminar 2015 discussing how "in PublIL the concepts of sovereignty, territory and jurisdiction are often seen as inextricably linked", online: http://blogs.helsinki.fi/helsinkisummerseminar/; Zitelmann, *supra* note 27 ("once one understands the dependence of Private International Law on Public International Law, the attainable can be easily distinguished from the unattainable. If Public International Law does not provide for clear principles of division of legal authority among states, no uniform principles of Private International Law can be found. If uniformity in Private International Law is missing it is entirely attributable to the state of play of Public International Law", at 78).
[68] On Cavers's theory and its relationship to the European relational internationalist theories see Chapter 4.

As Zitelmann put it, the assumption is that "private rights can be created with a well-founded claim to international recognition by that state only which possesses the general governmental control, recognized by the principles of international law, over the subject with respect to which the subjective private law confers authority, and that state alone can revoke such private rights again."[69] PrIL is thereby in search for the state with the right to "vest" rights in accordance with PublIL principles.

This right of the state to vest private rights is "the patrimony of all nations."[70] At its strongest, it would appear that an individual state cannot derogate from the "right" to regulate a legal matter because such right was determined by reference to the entire "community of states."[71] Thus in the Bhopal case, a US court allegedly respected India's "right" to regulate torts occurring in its territory, despite the fact that India itself had sought the application of American law.[72] Only the entire community of states (however defined and however exclusive) would be able to 'revoke' the application of the law of the place of tort. In other words, "vested rights" are rights of states understood "collectively." Individuals, as well as individual states appear to have no standing in "contesting" the application of a law.

2. Empty rights?

For the state centric conceptualization what matters is less an analysis of the substantive interest underlying a particular right or the context in which this interest was given legal recognition. Rather, there is a presumption that states have an interest in the *permanence* of rights or denial of rights (whatever their content and context).[73]

---

[69] Zitelmann, *supra* note 27 at 68.
[70] Antoine Pillet, "Essai d'un système general de solution des conflicts de lois" (1894) 21 Journal de droit international privé et de la jurisprudence comparée 417 at 423 [Pillet, "Essai"].
[71] *Ibid.*
[72] In re Union Carbide, 634 F. Supp. at 867. For a thorough analysis of the case and its implication see Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case* (Bombay: TM Tripathi, 1986); Upendra Baxi & Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: TM Tripathi, 1986).
[73] See for example Beale, *supra* note 29 (the characteristic of rights are "the quality of permanence, the relation of third parties to it, and the interest of the state in its existence", at 166).

This becomes merely a replay of the personality/territoriality and territoriality/extraterritoriality distinctions.[74] Pillet for example tried to devise a theory that would determine a priori the cases in which states had the right to the extraterritorial application of their laws, which they could claim vis-à-vis other states.[75] To make an a priori division possible, he argued we must operate with a highly reified concept of "law"[76] that serves no particular interests of individual states or of the parties. Rather, the law that legitimately applied would be determined by abstracting from a very broad and general social interest for various private law categories.[77]

Alternatively, Beale opted for territoriality over personality, arguing the "true continuity of law – that which is necessary to prevent the failure or forfeiture of acquired rights – demands territoriality in order that this continuity may be enforced."[78] In other words, for Beale territoriality determined legislative jurisdiction under principles of PublIL by recognizing the interest of the territorial state in the continuance of the rights it created.[79] Such rights are recognized as an expression of the principle, which Pillet embraced as well,[80] that "the state itself is interested in the continued existence of all static rights which it does not choose to terminate […]."[81] Beale thought for example that "rights of property, also, are of interest to the state."[82] Not recognizing a property right is therefore tantamount to an infringement of a state interest and of its sovereignty (in creating the right). Conversely, recognizing a property right means recognizing the

---

[74] *Ibid* (citing Pillet: "We shall declare to be territorial all laws the object of which could not be attained if in each country they did not apply as well to foreigners as to citizens; extraterritorial, all laws the object of which requires that they should follow everywhere the person who comes under the force of their provisions." "Laws for individual protection should be extraterritorial while laws of which only the entire community can require the protection of must be territorial", at 81-85).
[75] See Pillet, "Essai", *supra* note 70 at 724.
[76] *Ibid* ("One must use law in its most general sense, which eliminates any contingent and accidental factors that would make it impossible to deliver a truly general theory of PrIL, but would instead lead to a relative and limited reality," at 422; "I look at the law anew, the law as sovereign order over its subjects, without any specifications as to its content or object," at 423).
[77] *Ibid* (Pillet is allegedly interested in the social scope of law, at 715. Yet this notion of law and implicitly the social scope must be "common to all", at 724. Therefore "the only nature of law that interests us is the law as seen from the point of view that is most abstract, independent of its form, independent of the people to whom it applies, even independent of the modalities that the 'caprice' of the legislator gives it", at 724).
[78] Beale, *supra* note 29 at 85.
[79] *Ibid* at 120-121 (The objective of international law is to avoid conflict between sovereigns which is why it creates a presupposition in favor of territoriality).
[80] Pillet, *Principes*, *supra* note 63 at 515.
[81] Beale, *supra* note 29 at 166.
[82] *Ibid*.

sovereignty of the state, not the value of the interest underlying a property right. A state has the right to the permanence of the rights it created, regardless of what other states or affected individuals and communities might think of its merits (subject to the public policy exception).

This abstraction away from any substantive consideration allegedly achieves "a perfect agreement, far from raising a conflict."[83] It is only in this sense that "vested rights" become a "pillar of PrIL"[84] for state-centric internationalist authors.

3. Ethics, Morality and Law

The abstraction from any substantive considerations is also made possible by a clear delimitation between law, morality and ethics. To ensure neutrality in the distribution of authority among (equal) states, PrIL must be in the business of recognizing legal rights. A state can only have a duty to enforce a right created by another state if it is easily recognizable in a positivistic sense.

This means first that rights created under non-state norms are excluded.[85] Muir Watt, for example, notes that academic debates in Europe now focus on "whether a purely "factual relationship" (such as a common law marriage or a de facto partnership), should be subjected to the same methodology [of recognition under human rights norms of the ECHR]"[86] because it is unclear "whether the object of recognition in such circumstances is the factual situation, the law under which it grew up, or the relationship as thus formed."[87] Under the state-centric internationalist perspectives only rights "created" by positive law can be recognized.

---

[83] Pillet, Principes, *supra* note 63 at 515.
[84] *Ibid.*
[85] Beale, *supra* note 29 ("law is at once the source and the expression of sovereignty. Law creates the state and the state creates law by a common and mutual impulse; the two are born at an instant, are inseparable through life, and must die together," at 115). On Zitelmann's account of the state being the source of any objective law and rights see Beale, *supra* note 29 at 93.
[86] Muir Watt, "Future Directions", *supra* note 6 at 372 ("it is difficult to see why not, to the extent that it is effective. If effective, it must be recognized under art. 8 of the ECHR," at 372, n 137).
[87] *Ibid* at 372 and n 138 citing S. Bollée, "L'extension du domaine de la method de la reconnaisaince unilatérale" 2007 Rev crit dr int privé 307.

It also means, second, that rights are not recognized "on a balance of equities."[88] If a particular right is recognized, it is because the authority of a state to "vest" such a right is recognized. A shift to "open-textured and deliberative normative modes sensitive to the life experiences with which it interacts," such as Muir Watt pleads for,[89] appears incompatible with the state-centric internationalist framework because individuals' transnational life experience cannot be integrated into a framework focused on a neutral, formalist and uniform distribution of state authority. PrIL is perceived as a "grand law of respect" where respect is granted to an empty notion of sovereign authority, rather than life experience.[90]

For the same reason, no flexibility or proportionality is allowed in the PrIL realm under the state-centric internationalist framework. Because recognizing and enforcing legal rights represents the recognition of state authority and sovereignty, any "tweaking" or balancing of rights implicitly means a misrecognition or an infringement of the state sovereignty granted authority to "vest" it. The adage "PrIL recognizes already vested rights, it does not create new ones" had become a credo of PrIL precisely to ensure that no derogation from the authority of a state to "vest" a right would be permissible.[91]

4. National vs. Transnational Context; Recognition vs. Misrecognition

Consequently, any analysis of the relevance of the transnational context under which rights are constructed, exercised, misused and so on is precluded. Rights are necessarily "national" because nation states recognize one another and therefore also what each of them, in isolation, has created. As Beale put it, "law (and legal rights) is at once the source and the expression of sovereignty. Law creates the state and the state creates law by a common and mutual impulse; the two are born at an instant, are

[88] Beale, *supra* note 29 ("the learned lawyer solving a legal problem presented to him does not say, such and such a solution seems reasonable or reaches a practical result, he says it is the law," at 136; "If law be regarded as a command, then every act done must either be permitted or forbidden. If law be regarded as a right-producing principle, then every act must in accordance with the law change or not change existing rights," at 154).
[89] Muir Watt, *supra* note 6 at 375.
[90] Pillet, *Principes*, *supra* note 63 at 515.
[91] Dicey, *supra* note 23 ("the object of a legal decision or judgment is to enforce existing rights, or give compensation for the breach thereof, and it is not the object of a legal decision or judgment to create new rights, except in so far as such creation may be necessary for the enforcement or protection of rights already in existence", at 9).

inseparable through life, and must die together."[92] Under the state-centric internationalist framework, rights are created in the territorial state and then recognized as such, their content unaltered, in another state.[93] Nothing is either lost or added as a result of the transnational context in which the rights are exercised.

The way in which the national element features in the transnational context, in fact, sets the stage for the recognition or misrecognition of individual rights and expectations. State-centric internationalists seemed to envision mainly what Jitta called "relatively international cases," meaning cases in which most elements of the legal relationship are connected to one jurisdiction, a case that Jitta believed was extremely rare.[94]

The reversed and much more complicated scenario in which a relationship is simultaneously connected to multiple jurisdictions is hard to classify as a case of "recognition of a vested right," or rather it becomes a case of misrecognition by default. Pillet explains that when a case is connected to more jurisdictions from its inception (e.g. citizenship of the adoptive parent different from place of adoption) the legal relationship was

> from inception international. Here there is a conflict. For the right created in such relationship to be recognized, the conflict must have been determined according to the rules of Private International Law, in other words that the competent law was applied. We easily perceive the great difficulty, which this causes. The rules of Private International Law might differ between the two states. The law determined competent by one state is not the same as the one determined competent by the forum, which will determine that the legal relationship should have been judged by another law. To which body of law should the forum court look in determining this question? Here we have an issue of an international character, which is implicitly part of the international

[92] Beale, *supra* note 29 at 115.
[93] See David Kennedy, "Law and the Political Economy of the World" (2013) 26:01 Leiden J Int'l L 7 (for a very useful account of the tension between the 'free movement' of rights compared to the territorial limitation of politics, esp. at 13).
[94] Daniel Josephus Jitta, *La Méthode du droit international privé* (The Hague: Belinfante, 1890) at 206-211. (distinguishing between national (connected exclusively to the forum), relatively international (connected exclusively to another jurisdiction) and absolutely international relationships (connected to multiple jurisdictions) at 200-216) [Jitta, *La Méthode*].

> patrimony. Each state has, as to the solution of conflict of laws, equal rights and we cannot impose on one judge the solution of another. The issue must be resolved by the law of the forum. It follows that a right considered acquired in one legal system will be denied in another. As bad as these consequences might seem, they result evidently from the independence of states in determining their obligations towards other states.[95]

The result can be summarized as follows: Once a state is thought to have authority under principles of PublIL, then its authority and the rights that it created would have been recognized by other states because Pillet assumes that no actual "conflict of laws" arises in such a case. But when a legal matter is connected to more jurisdictions, then a conflict of laws exists. And here, Pillet acknowledged that even though conflict of laws are determined according to PublIL, different states might define their conflict rules differently depending on how they understand/incorporate PublIL.[96] In such a case, the misrecognition of a legal relationship is inevitable. Since Pillet was always clear that no individual interests/rights/legitimate expectations can enter the analysis of conflict of laws understood as conflict of sovereignties, there is no alternative framework of contestation to enable the recognition of legal relationships.

5. Civilized/Non-Civilized States

Under the state-centric internationalist framework the recognition of "already vested rights" (unaltered) is considered a sign of respect for state sovereignty and ultimately as a mark of civilization.[97] It was posited that "no civilized law, national or international, could be oblivious to the just requirements of recognizing the legally accomplished fact. All civilized countries have the common ideal of justice [understood as the recognition of vested rights]."[98] Beale argued that "if the national law is a civilized law this [recognizing vested rights] will of course be done; and if it is not, the principles

[95] Pillet, *Principes, supra* note 63 at 536.
[96] *Ibid* at 81-83.
[97] Beale, *supra* note 29 at 112.
[98] *Ibid.*

of a supposed PrIL would not constrain its actions. The binding force of the dictates of justice is not created, and cannot be created, by extra-territorial constraint."[99] However, "the desire of a sovereign to find himself included in the number of civilized nations is so great as to constrain his acceptance of the principles of international law, and among them, the rules governing international jurisdiction."[100]

The analogy between PrIL and PublIL under which the state-centric internationalist theory of rights is created thus "constrains" states to recognize vested rights as the mark of civilization. But "civilized" states are by no means constrained in failing to recognize the rights of individuals belonging to "less civilized states." A condition of the framework of recognition of rights as an inter-state affair is that states perceive each other as equals.[101] Pillet argued that "a state's degree of civilization is the measure of its rights" as much in the PrIL context, as in the PublIL one.[102]

It is by virtue of this state-centric framework of analysis that the recognition of rights and legal relationships translates into an uneasy conflict of sovereignty, rather than a contextual analysis of the life experience and expectations of individuals in their transnational relations.

V. The Relational Internationalist Theories

The gist of the individualistic theories is usually attributed to or at least associated with Savigny. In the previous chapter I showed that until the end of the 19th century many state-centric internationalist theories were developed based on what was perceived to be Savigny's key theoretical element, namely the international community of states. Yet after the first few decades of the 20th century, his theory was described and criticized as

[99] *Ibid* at 110.
[100] *Ibid* at 117.
[101] Zitelmann, *supra* note 27 at 6. Zitelmann would later comment on the "imperfections of public international law" in Ernst Zitelmann, *Die Unvollkommenheit des Völkerrechts* (Muenchen: Duncker & Humblot, 1919). See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, UK & New York: Cambridge University Press, 2004) at 230.
[102] Antoine Pillet, "Le droit international public, ses éléments constitutifs, son domaine, son objet" (1894) 1 RGDIP 1 at 24, 27; Pillet, *Droit fundamentaux, supra* note 66 ("il n'existe égalitè de droit entre les États civilizes et les États non civilises ou moin civilizes" (there is no legal equality between civilized and non-civilized or less civilized states) at 6.

liberal, Kantian, and overly individualistic.[103] While in the previous chapters I wanted to show that Savigny did not construct a state-centric internationalist theory from his concept of the international community of states, in this chapter I wish to show the ways in which Savigny avoided an overly individualistic perspective at the same time.

In what follows, I focus on how Savigny countered the overly individualistic notion of vested rights and distinguished his theory of "voluntary submission" from the concept of autonomy used by the individualistic authors discussed above. I then show how the German socialist Ferdinand Lassalle (1825-1864) in fact used Savigny's main relational insights precisely to counter the vested rights theory and to plead for social justice as a guiding principle of PrIL. Last, I describe the way in which Jitta further developed and clarified Savigny's theory in order to counter any extreme individualistic connotations of the vested rights theories, while at the same time keeping his individual-centered premises.

Because Savigny's individual-centered theory can be better understood by comparison to his predecessor, Joseph Story,[104] I beging by introducing three elements of Story's theory that are particularly relevant. First, the way in which Story refers interchangeably to rights and reasonable expectations mirrors the way in which Savigny shifts from the concept of absolute rights to "claims and expectations." Second, the way in which Story moves back and forth between individual rights and broader social interests and his argument that the recognition of a right is itself a policy choice can both be found in Savigny's discussion of ethical consideration with respect to vested rights. Third, the way in which Story connects rights/reasonable expectations with life

[103] See e.g. Christian Joerges, *Zum Funktionswandel Des Kollisionsrechts: Die Governmental Interest Analysis Und Die Krise Des Internationalen Privatrechts* (Berlin: Mohr Siebeck, 1971) at 4-16; Müller, *supra* note 34 (Although Müller does not attribute the vested rights doctrine to Savigny, at 175, he argues that the vested rights doctrine represents simply a "reconstruction" of the individualistic, liberal ideology found in Savigny's theory, at 177); Jessurun D'Oliveira, "La pollution du Rhin et le droit international privé" in R Hueting, *Rhine pollution: legal, economic and technical aspects = La pollution du Rhin : aspects juridiques, économiques et techniques* (Zwolle: Tjeenk Willink, 1978) at 91; Sagi Peari, "Savigny's theory of choice-of-law as a principle of 'voluntary submission'" (2014) 64:1 UTLJ 106 (for a Kantian reading of Savigny's PrIL theory).

[104] Gerhard Kegel, "Story and Savigny" (1989) 37:1 Am J Comp Law 39 (for a general account of the relationship between the theories of the two scholars).

experience, in addition to law, mirrors Behrend's description of Savigny's theory as "sociological-empirical."[105]

1. Joseph Story

As argued in the first chapter, while Story relied on the concept of sovereignty, he did not imagine PrIL as a body of rules neutrally distributing legislative sovereignty. Story described PrIL relations as instances of "mixed rights." For him PrIL rules were meant to prevent the "confusion of rights" and of "the personal and conjugal relations," and overall to prevent the "pernicious consequences" for individuals that could result from the diversity of laws.[106] His theory is based on the observation, framed most explicitly in his discussion of marriages, that "infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, succession, and other rights, if the respective laws of different countries were not to be observed, as to marriages contracted by the subjects of those countries abroad."[107]

Thus, applying foreign law is acknowledged as necessary to achieve a coherent existence for individuals across borders, as Jitta would later describe it. Comity is consequently used as a catch-phrase and a useful symbol to illustrate, for example, as to the validity of marriages, "that all nations have consented, or are presumed to consent, for the common benefit and advantages that such marriages shall be good or not, according to the laws of the country where they are celebrated."[108] This is necessary, not in order to prevent an infringement of state sovereignty, but rather because "by observing this rule, few, if any, inconveniences can arise. By disregarding it, infinite mischief must ensue."[109] In other words, it is necessary for purely pragmatic considerations, which are deduced from empirical observation of individuals' existence in the transnational space.

---

[105] Okko Behrends, "Geschichte, Politik und Jurisprudenz in Savignys System des heutigen roemischen Rechts" in Okko Behrends, Wulf Eckart Voss & Malte Diesselhorst, *Römisches Recht in der Europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker* (Ebelsbach: R. Gremer, 1985).
[106] Joseph Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*, 1st ed (Boston: Hilliard, Gray & Co., 1834) at 113.
[107] *Ibid* at 112.
[108] *Ibid.*
[109] *Ibid.*

These pragmatic considerations are often described by Story in terms of infringement and confusion of rights. Story talks about the "sanctity of contracts" and property. But the conceptualization of rights in Story's theory is different both from that of the individualistic and from the state-centric internationalist authors.

Unlike the individualistic authors, Story is clear that individuals do not have a right to the application of a particular law as an extension of individual autonomy. In the area of contract law, he argues,

> the ground of this doctrine, as commonly stated, is, that every person, contracting in a place, is understood to submit himself to the law of the place, and silently to assent to its action upon his contract. […] It would be more correct to say, that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its own territory.[110]

In other words, the law of the place where the contract was made may legitimately apply to such contracts, independent of the will or choice of the parties. And if this law is applied by other states, it is neither because they recognize a right generated by the individual will/choice/autonomy of the individuals, nor due to an inter-state respect for sovereignty, but rather because

> nothing can be more just than this principle. For when a merchant of France, Holland, or England, enters into a contract in his own country, he must be presumed to be conusant of the laws of the place, where he is, and to expect, that his contract is to be judged and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has in some other way excepted his particular contract from the laws of the country, where he is.[111]

This is described as a reasonable expectation, not a right. Should the parties not have reasonably known or inferred that this law would apply the analysis might change. But the analysis might also easily change if some other interest is at stake. Story for

[110] *Ibid* at 217-218.
[111] *Ibid* at 232.

example refered to a case, decided by the Supreme Court of Luisiana, in which "a transfer of a part of a ship was made in Virginia, the ship, at the time of the sale, being locally at New Orleans; and, before any delivery, she was attached by the creditors of the vendor."[112] Story tellingly describes this as "a conflict between the creditor and the purchaser."[113] The Supreme Court of Louisiana, while acknowledging the consensus among "civilized countries" that the law of the domicile of the property owner should apply to this kind of contract, reasoned that the application of such law can cause "serious inconvenience to the citizens of this country." The reasoning is worth quoting at large:

> This distinction appears to us founded on the soundest reasons. The municipal laws of a country have no force beyond its territorial limits; and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken, that no injury is inflicted on her own citizens; otherwise justice would be sacrificed to courtesy. Nor can the foreigner or stranger complain of this. If he sends his property within a jurisdiction, different from that, where he resides, he impliedly submits it to the rules and regulations in force in the country, where he places it.[…] We proceed to examine, whether, giving effect to the law of Virginia, on the contract now set up, would be working an injury to this state, or its citizens. In doing this, we must look to the general doctrine, and the effect it would have on our ordinary transactions, as well as its operation in this particular case. This valuable provision [delivery necessary for property transfer], by which all our citizens are bound in their dealings, protects them from the frauds, to which they would be daily subjects, were they liable to be affected by the previous contracts, not followed by the giving of possession. The exemption contended for here, would deprive them of that protection, wherever their rights, as purchasers, came in contact with strangers; a protection, which, it may be remarked, it is of the utmost importance, owing to our peculiar position, that we should carefully maintain. This city is becoming a vast storehouse for merchandise sent from abroad, owned by non-residents, and deposited here for sale; and our most important commercial transactions are in relation to property so situated. If the

[112] *Ibid* at 319.
[113] *Ibid*.

> purchasers of it should be affected by all the previous contracts made at the owners' domicile, although unaccompanied by delivery, it is easy to see, to what impositions such a doctrine would lead; to what inconvenience it would expose us; and how severely it would check and embarrass our dealings.[114]

Story believed that "no one can seriously doubt, that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or selfish policy."[115] On the other hand, it is not easy to say "to what extent [a court] may be pressed in subversion to the general rule [that the law of domicile of the owner applies] since every country has so many minute regulations in regard to the transfers of personal property incorporated into its municipal code, each of which may be properly deemed beneficial to its own government, or to the interests of its citizens."[116]

This particular case affords the best understanding of the way in which Story identifies the reasonable expectations of individuals as an important interest- albeit not the only relevant interest - to be considered in the PrIL analysis. The individual's expectation, here those of the owner and the purchaser, may conflict with a state policy in the creditor's home jurisdiction. There is no doubt in Story's theory that such policy should be identified and factored into the analysis. At the same time, the expectation of the individuals cannot be taken lightly and one should acknowledge that a contrary policy could always be found in some law of the forum that will invalidate any possible individual entitlement. Story, as Savigny, therefore invited "moderation" in the balancing between reasonable expectations and broader social interests. In this line of reasoning, Story appears to be anticipating both the rise of the state interest theory and its subsequent critique by scholars like Cavers.

Hence, for Story, as I will later show for Savigny, any question of enforcing a reasonable expectation in light of contravening policies is itself a policy choice. For example, Story argued that it is very possible that "the principle that moveables follow

[114] *Ibid* at 320-322.
[115] *Ibid* at 324.
[116] *Ibid* at 324.

the person […] had not its origin in any distinction as to real or personal laws, or in any fictitious annexation of them to the person of the owner, or their incapacity to have a fixed situs: but in an enlarged policy growing out of their transitory nature and the general convenience of nations. If the law rei sitae were generally to prevail in regard to movables, it would be utterly impossible for the owner, in many cases, to know, in what manner to dispose of them during his life, or to distribute them at his death; not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing with minute accuracy the law of transfers inter vivos, or of testamentary dispositions and successions in the different countries, in which they might happen to be."[117]

Similarly,

> the English doctrine in relation to Scotch marriages, by parties domiciled in England, and going to Scotland to marry, though a plain violation of the English marriage act, has been upheld unquestionably upon a like policy. It is the least of two evils, in a political, a civil, and a moral sense. We have already seen that the positive code of France has promulgated an opposite doctrine, with unrelenting severity.[118]

Story also stated: "it is admitted, that the doctrine is repugnant to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country, where the parties have their domicile, would not be protected. But the exception in favor of marriages is maintained upon principles of public policy, with a view to prevent the disastrous consequences to the issue of such a marriage, which would result from the loose state, in which persons so situated would live.[119] Story's vested rights have little in common, then, with the individualistic perspective outlined above.

But Story's vested rights theory is also far from the state-centric internationalist theory. As Blaine Baker noted, unlike state-centric internationalists, "Story was not constrained by analytically-rigorous, regional descriptions of positive legal rights."[120] Instead, he "used vested rights in a non-positivistic, unofficial, almost common-sensical

---

[117] *Ibid* at 311.
[118] *Ibid* at 117.
[119] *Ibid* at 116.
[120] Blaine Baker, "Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay On *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws*" (1993) 35 McGill LJ 454 at 504.

way to describe popular appreciations of natural entitlement and promissory expectations. His vested rights had more to do with the realistic presumptions of parties to a transaction, and with the policies perceived to underlie fields of private law about which he wrote, than with analytically-rigorous rights created by sovereigns, foreign or domestic."[121]

Because Story did not describe PrIL as a conflict of rights, nor sovereignties, he could afford to be quite eclectic about the "sources" from which he derived the rights qua reasonable expectations. Unlike the state-centric internationalist authors, those rights/reasonable expectations did not need to have a positive source in the laws of one particular country and certainly not in the country a priori assigned 'legislative jurisdiction.' The current European debate about whether factual relationships could be recognized as much as legal relationships might find fruitful arguments in Story's theory. According to Blaine Baker, because Story thought of rights in the transnational context as substantiated by common-sensical expectations and the values he perceived to underlie categories of private law, "Story was much less interested than Dicey or Beale in the decrees of a national sovereign technically necessary to vest positive rights."[122]

Story's notion of "rights," then, is much more fluid, more pragmatic, and empirically grounded in the experience of individuals in their transnational existence. For example, Story "justified his rule that contracts for interests in land were governed by the law of the place where the land was situated on the basis that parties to American real estate transactions had long relied upon the interplay of local requirements of writing and county-by-county systems of title registration, and that they distinguished investments in land from moveable or intangible property dealings on the basis of land's stationary character."[123] Similarly, the application of the law of the place where a bill of landing was drawn was promoted based on the "confidence, which the commercial world have hitherto reposed in the universal validity of the title acquired under a bill of landing."[124] The application of the law of the place where the property is situated was also based on the observation that "in the ordinary course of trade with foreign countries, no one thinks

[121] *Ibid* at 503.
[122] *Ibid* at 504.
[123] Baker, *supra* note 120 at 504; Story, *supra* note 106 at 358.
[124] Story, *supra* note 106 at 327.

of transferring personal property according to the forms of his own domicile; but it is transferrable according to the forms prescribed by the law of the place where the sale takes place."[125] Story's very pragmatic, fluid sense of rights in a transnational context, qua reasonable expectations, had many, often underappreciated, implications for his theory.

First, the fact that he focused on individuals' entitlements and expectations made it possible to expand his analysis into questions of ethics and morals. For example, in his treatise he argued that "unfortunately, from a very questionable subservience to mere commercial gains, it had become an established formulary of the jurisprudence of the common law, that no nation will regard or enforce the revenue laws of any other country; and that the contracts of its own subjects, to evade or defraud the just rights of other nations, will be enforced in its own tribunals. Sound morals would seem to point to a very different conclusion."[126] Similarly, in La Jeune Eugenie, he decided that the property to a vessel of a French national could be seized by a US Marshall on suspicion of slave trade in Africa based on "the general principles of sound sense and general policy, and above all, of moral justice."[127] This "universal law of society" makes it possible to compel even the subjects of other nations to comply with "a general sense of justice, for the inconvenience of mankind."[128] This universal law allegedly restricts private rights everywhere. Indeed it informs the reasonableness of the expectations individuals may have in their transnational dealings.[129]

Second, because Story described PrIL as questions of mixed rights, rather than questions of sovereignty, where rights are open ended estimations of reasonable expectations, he is able to enlarge the freedom and analytical space for a flexible analysis

---

[125] Story, *supra* note 106 at 18; Baker, *supra* note 120 at 505.
[126] Story, *supra* note 106 at 205.
[127] United States v. La Jeune Eugenie, 26 F. Cas. 832 (1822) at 847.
[128] *Ibid* at 842.
[129] *Ibid* ("Now the law of nations may be deduced, first, from the general principles of rights and justice, applied to the concerns of individuals, and hence to the relations and duties of nations; or secondly, in things indifferent or questionable, from the customary observance and recognition of civilized nations, or lastly, from the conventional and positive law, that regulates the intercourse between states. […] It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting what may be called the Christian states of Europe", at 846).

of the court. In La Jeune Eugenie for example he argued that a court "cannot seek shelter under the wings of executive authority, or bind up its judgment under considerations of mere convenience or comity, or a blind obedience to the wishes of any sovereign."[130] If this is a question of mixed rights, between the right to property and the right to life and freedom, the court feels constrained by "the general justice and humanity,"[131] "the great principles of Christian morality, mercy and humanity,"[132] "a fundamental distinction between right and wrong,"[133] "the obligation of good faith and morality and the eternal maxims of social justice."[134]

Describing this matter as a case of "mixed rights" also enabled Story to ignore the suggestion of the French and US governments in La Jeune Eugenie to have the matter remitted to French courts, since the parties did not agree to this transfer of jurisdiction. "Under such circumstances, this court must follow the duty prescribed to it by law, independently of our government or of France" and rule on the balance of rights and equities.[135]

2. Savigny

Contrary to the usual reading of Joseph Story's theory as state-centric or even an early expression of the state interest analysis methodology,[136] I have adopted Blaine Bakers' alternative reading of Story's theory as individual-centered and rights-based. At the same time, I noted Story's emphasis on individuals' reasonable expectations, as avoiding the overly individualistic theories.

Unlike the general reading of Story, Savigny's theory is currently perceived as an overly liberal and individualistic account of PrIL. In contrast, in what follows I underscore the way in which Savigny criticized both the overly individualistic account of

[130] Story, *supra* note 106 at 840.
[131] *Ibid* at 840.
[132] *Ibid* at 845.
[133] *Ibid* at 846.
[134] *Ibid* at 846.
[135] *Ibid.*
[136] Donald Earl Childress III, "Comity as Conflict: Resituating International Comity as Conflict of Laws" (2010) 44 UC Davis L Rev 11.

vested rights and that of individual autonomy and I argue that the resulting account of PrIL mirrors Story's in many respects.

In contrast to the individualistic authors, Savigny explicitly rejected the vested rights theory as a way of finding solutions to choice of law problems and adopted Waechter's critique that the vested rights theory is premised on an illogical assumption and a vicious circle: to know whether a right has vested, you must determine under which law it vested.[137] This critique should not be perceived as a mere technicality. Rejecting the vested rights theory based on this reasoning implicitly brings to light a certain view about the relationship between rights and state authority (A) and about individual autonomy and social life (B). I believe that only by understanding Savigny's views on these matters it is possible to understand how Savigny managed to avoid an overly individualistic premise in his PrIL theory.

A. Rejection of the Vested Rights Doctrine

Savigny's thoughts about "equitable considerations" with respect to rights are espoused in the often ignored last five pages of his eighth volume. These reflections have most likely been ignored because they appear in the sections of the book dealing with "conflicts of laws in time," as opposed to "conflicts of laws in space." In Savigny's view vested rights are only relevant to questions of retroactivity (conflicts between earlier and later laws of the same state) and not helpful for conflicts of different national laws. Accordingly, his discussion of vested rights is integrated into the topic of conflicts in time. Yet these pages are useful to understanding why Savigny did not adopt the vested rights theory into PrIL and how he managed to avoid the overly individualistic theory of his predecessors.

Savigny begins his analysis of "equitable considerations" with regard to vested rights (in the purely national context) by noting the prevailing assumption that "every violation of an acquired right, without the assent of the person interested, is simply impossible from the standpoint of moral rights, and this impossibility is regarded as a

[137] Friedrich Karl von Savigny, *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time*, vol. 8, 2nd ed, translated by William Guthrie (Edinburgh: T. & T. Clark, 1880) at 147 [Savigny, *Private International Law*].

supreme and absolute principle."[138] Savigny argued that this "assumption cannot be admitted" for two reasons. These reasons are illuminating for the way in which he develops his theory of PrIL and I will therefore quote several quite striking passages at length.

> In the first place [this assumption cannot be admitted] because it is incompatible with the general nature and origin of law. Law has its root in the common consciousness of the nation. This is, on the one hand, entirely different from the easily and quickly changing, the accidental and momentary consciousness of the individual man; but, on the other hand, it is subject to the law of progressive development, and cannot therefore be conceived as fixed and immovable.[139]

The "contemplation of the nation in whose sense of rights the law itself has its roots"[140] is contrasted with the idea that law has its roots in individual will, which Eichhorn often described as a legal source.[141] Savigny relied on the integration of individual autonomy within the 'Volk' (People) in order to explain how laws abolishing slavery cannot be thought of as infringing upon a vested right, but simply as laws reflecting the way in which "this status [slavery] is regarded as totally impossible, and utterly contrary to all sense of right."[142]

The idea that law has its origin in the people is thus used precisely to explain that laws restricting individual will are not per se illegitimate. Therefore, Savigny rejects the common view of "those who assert the absolute inviolability of acquired rights by new laws, merely protest[ing] against the compulsion involved in such violations, and allow the fairness and justice of the change as soon as the assent of the party interested is given

---

[138] *Ibid* at 428.
[139] *Ibid* at 428.
[140] *Ibid* at 430.
[141] See above for the discussion of Eichhorn.
[142] Savigny, "*Private International Law,*" *supra* note 137 at 429 (The note he adds to this passage is also telling: "Many writers have sought to obscure or to weaken this contrast by comparing the status connected with those severe punishments of modern times which consist of deprivation of freedom, with the mild and often friendly condition of the slaves of antiquity. But the true relations of things are thus unaltered. In order to keep the contrast before our eyes in all its clearness, two things must be remembered: First, the origin of slavery by birth; secondly, the legal position of the slave in the same line with domestic animals, as a kind of merchandise (Ulpian, XIX.1.). Modern slavery in the East, as well as the totally different slavery of America, are not here taken into account," at 429, n c).

to the abolition or modification of his acquired right."[143] If the individual is part of the "people" and the will and values of the "people" are the source of law, it cannot be that the legitimacy of a law restricting vested rights depends on the consent of the individual.

To support the legitimacy of laws restricting vested rights, Savigny adds "a second argument" relating to "the individual man as the possessor of acquired rights."[144] Savigny believes one must "examine the character of those who are the possessors of acquired rights. Such a right appears as an extension of the power of an individual man, and is always of a more or less accidental nature."[145] Furthermore, "the individual man has a limited and transient existence."[146]

In other words the individual cannot be the only focus in an analysis of rights. Rather, he is portrayed as part of the people, his existence is "limited and transient," and his power is "arbitrary" while the law must regulate for the continual existence of "the people." This is why Savigny, like Story, ends up describing individual entitlements as "claims and expectations"[147] which must be carefully balanced against the principles and values of the people. Therefore, Savigny concludes in an almost forgotten passage that "the whole question [of balancing individual rights against broader social interests] should rather be withdrawn from the province of absolute right, and transferred to that of legislative policy, which is its true place, and where many ruinous errors may be avoided by caution, prudence, and moderation."[148]

B. Voluntary Submission

Unlike in Tittmann's account, rights in Savigny's account are not pre-legal entitlements of individuals, but rather entirely dependent on and linked to a people and a state. Ralf Michaels points out that Savigny has been misunderstood as a proponent of non-state law and lex mercatoria.[149] On the contrary, Savigny is explicit that state law

[143] *Ibid* at 430.
[144] *Ibid*.
[145] *Ibid*.
[146] *Ibid*.
[147] *Ibid* at 431.
[148] *Ibid*.
[149] Ralf Michaels, "Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization" in Adrienne Windhoff-Héritier, Michael Stolleis & Fritz

pre-dates individual rights, and as has been seen in the passages quoted above, that individual rights are granted by and integrated within the law emanating from the "people" crystallized in a state.[150]

Yet Savigny constructs a principle of "voluntary submission" as a guide to the determination of the applicable law. Individualistic authors, in particular Puchta and Eichhorn, also referred to the concept of voluntary submission and they seemed to base this principle on unrestrained individual autonomy, describing it as a reflection of the respect for "personhood" and the ability of individuals to "give themselves a law."[151] It is this description of the principle of "voluntary submission" that makes it possible for these authors to then describe the application of a law as a "vested right" which must be respected and recognized by the state. Applying forum law is therefore portrayed as an infringement of autonomy, of personhood and of vested rights.

But Savigny reacts precisely against Eichhorn and Puchta and their understanding of autonomy, alleging that their theories might exacerbate both the content and the consequences of autonomy in PrIL:

> Although great unanimity prevails as to the influence which voluntary submission to a particular local law actually exercises, I must yet object to a mode of expression which has lately come into use. Modern writers are accustomed to designate this very general effect of the free will as autonomy [citing Eichhorn and Mittermaier among others] – a technical expression which has been applied, from an early time, as indicating a very peculiar relation in the development of the German law; namely, the competence of the nobility and of many corporations independently to regulate their own relations by a kind of internal legislation [citing Eichhorn and Puchta]. In this sense the expression is indispensable; and its usefulness in the proper meaning is impaired by its superfluous application to the entirely dissimilar relations of the subject with which we are here engaged, which gains nothing by it in clearness and distinctness. If this phrase be justified by asserting that the parties subject themselves to a law (already subsisting) and in that sense assign a law to themselves, the same is true in a still higher degree of the free choice of domicile; and yet no one thinks of describing that as the result of autonomy.

Wilhelm Scharpf, eds, *European and International Regulation After the Nation State: Different Scopes and Multiple Levels* (Baden-Baden: Nomos, 2004).

[150] See Friedrich Karl von Savigny, *System des heutigen Römischen Rechts,* vol. 1 (Berlin: Bei Deit & Comp., 1840) [Savigny, *System* 1]. See also Chapter 1.

[151] See the above discussion of individualistic theories.

> Accordingly it seems advisable, in regard to voluntary subjection to any local law, the choice of domicile, and the countless other voluntary actions from which legal consequences flow, to avoid the word autonomy.[152]

Savigny therefore thought that the freedom underlying the principle of voluntary subjection is very different (as will become apparent in Jitta's writing as well) from the principle of autonomy and self-regulation that seems to underlie individualistic theories of PrIL. In line with Behrend's reading of Savigny's System generally, I consider the freedom underlying Savigny's notion of voluntary submission and domicile to have a rather empirical function.[153] Much like the notion of rights in Story's theory, Savigny's voluntary submission is an acknowledgment of people's actual freedom to establish their domicile in different places, to travel to a different country to purchase property there, and to engage in potentially tortious activity in different jurisdictions. To the extent the law does not prevent them from doing so, people are free to travel, to buy foreign property, to enter into marriages with other nationals and so on. But in doing so they do not also legislate for themselves. Savigny was very critical of authors who managed to confuse "acts which originate legal relations" with "law sources."[154] Here again he argues that only the "loose use of the concept of autonomy has made it possible to place entering into a contract and the law validating such a contract on the same level as legal sources."[155]

The reason why the law of domicile, or the law of the situs applies is not because individuals consented to or incorporated their legal provisions voluntarily. Rather, one merely "deduces" from what can be understood as "empirical elements of freedom"[156] "the subordination of the individual to a particular local law, and consequently the relation of the person to a particular territory."[157] Therefore, Savigny should not be understood to argue that individuals can freely choose the applicable law.[158]

---

[152] Savigny, *Private International Law, supra* note 137 at 136.
[153] For an account of how the element of freedom plays out in Savigny's System generally see Behrends, *supra* note 105.
[154] Savigny, *Private International Law, supra* note 137 at 136.
[155] Savigny, *System 1, supra* note 150 at 12.
[156] See Behrends, *supra* note 105 at 285.
[157] Savigny, *Private International Law, supra* note 137 at 132.
[158] For a reading of Savigny's theory as a free choice of law theory see Peari, *supra* note 103. Discussing the historical roots of the principle of party autonomy in PrIL See Ralf Michaels, "Party Autonomy in

Instead, Savigny argued that because the individual extends himself into a wide network of relationships with various individuals, he inevitably "comes under the authority of the most various laws"[159] and one needs to look for a decisive factor which will connect a legal relationship to a territory.[160] Therefore, it is the freedom of individuals to enter into legal relationships across borders that is taken for granted, not the ability to choose the law. As Savigny was clear that the element giving rise to a legal relationship should not be confused with a legal source, so this element should not be confused with the ability to choose the law.

Furthermore, his empirical notion of freedom, "the empirical human will" as Behrends called it,[161] extends into a quasi-empirical analysis of legal relationships.[162] Here again, it is the eclectic analysis of the nature of a legal relationship that leads him to their localization, rather than any particular a priori element of autonomy. Savigny therefore pleads for a very thorough investigation of the wide variety of legal relationships because "only by the complete solution of this problem will it be possible to make a safe and exhaustive application to actual life of any principles that shall be established."[163]

Savigny rejected any overarching principle that attempts to "reduce under a common absolute rule as to their seat" all legal relationships because "the various legal relations are of such diverse nature."[164] He therefore not only rejected the idea that the law of domicile should apply to all legal relationships,[165] but also the principle that "every legal relation should be judged according to the local law of that territory within which it has come into existence."[166] Savigny stated:

Private International Law – A New Paradigm Without a Foundation?" (2014) [forthcoming in 58 Japanese Yearbook of International Law], online: http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf .

[159] Savigny, *Private International Law, supra* note 137 at 133.

[160] *Ibid.*

[161] Behrends, *supra* note 105 at 285.

[162] Unlike Behrends, Rückert argued that "it is a misunderstanding of Savigny when one interprets references to "life" and so on as sociological-empirical requirements." Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach: R. Gremer, 1984) at 347.

[163] Savigny, *Private International Law, supra* note 137 at 133.

[164] *Ibid* at 141.

[165] *Ibid* at 143: "The law that governs the person as such is not necessarily the law that governs the particular legal relation in which that person may be concerned, and through which he may come under the authority of the most different laws."

[166] *Ibid* at 147.

> This principle is not only arbitrary, because the place of origin in itself, and irrespective of the circumstances in which the legal relation may have been brought into existence, cannot determine the local law to be applied; but it has only the appearance of a substantive principle, while it is in reality of a merely formal nature. For the place where each legal relation comes into existence, in the juridical sense, can only be known by more minute examination of its specific nature; and in this a predominant and capital regard paid to the place of origin will only obstruct us.[167]

Savigny therefore provided a detailed, and as Gutzwiller points out, very eclectic analysis determining the "nature of the legal relationship."[168] When he discussed the law applicable to transfers of property, he engaged in a comparative analysis of different laws that determine alienation based on delivery of the thing or based on the contract.[169] When he discussed prescription he noted that "possession is a relation of facts."[170] As to obligations he referred to "well-founded expectations"[171] as well as the role of "visible facts" in determining the fulfillment of the obligation, distinguishing between those "accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy."[172] For different kinds of obligations he examined the "relation in which the nature and length of the residence stand to the substance of the obligation."[173] And even once Savigny determined an applicable law for obligations, he was careful to point out that:

> Although the seat of the obligation, and, at the same time, the local law that governs it, may upon the whole be determined with certainty by the rules here laid down, yet it must not be asserted that all possible questions of law occasioned by an obligation must be determined only by this local law. A more thorough investigation of such questions of law, in their whole connection, is required to settle this point.[174]

---

[167] *Ibid* at 147.
[168] Max Charles Gutzwiller, *Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts* (Freiburg: Gschwend, Tschopp, 1923) at 85.
[169] Savigny, *Private International Law, supra* note 137 at 184.
[170] *Ibid* at 186.
[171] *Ibid* at 196.
[172] *Ibid* at 198.
[173] *Ibid* at 207.
[174] *Ibid* at 224.

This brief synopsis of the variety of factors that Savigny emphasized in his analysis of the "nature of the legal relationship" is meant merely to dispel the common assumption that Savigny is overly formalist and adopts a principle of unrestrained autonomy. Furthermore, it is meant to show that Savigny was well aware of the variety of interests that underlie different relationships. In many of the legal relationships he analyzed, he discussed the way in which individuals act within the legal relationships and the variety of expectations they raise for each other (more on this in the next chapter).[175] Furthermore, while often completely left out of accounts of Savigny's theory, he classified the area of tort law as "quasi-penal"[176]and "coercitive, strictly positive,"[177] and involving such a wide variety of interests[178] that it should be regulated by the lex fori.

In his own words, "voluntary subjection to a local law is manifested in various kinds and degrees."[179] This will depend on the different kinds of legal relations individuals enter into and the various interests and expectations that underlie such relations. Therefore, the application of a particular law is not a "vested right" from which there is no derogation. Rather, I believe, with Gutzwiller, that the applicable law is determined based on the way in which Savigny determined the nature of the legal relationship, which in turn depends on a very wide and very eclectic set of factors and interests.[180] After all, Pillet confessed that the "true reason" why he could not accept Savigny's theory was because it offered an eclectic pool of elements from which to

[175] *Ibid* ("the important fact, that the larger number of legal relations concern not a single person, but several," at 143; "The circumstances, therefore, under which an obligation arises may often excite in others a definite and well-founded expectation, and in such a case this expectation is not to be disappointed," at 196; "If that debtor capriciously changes his domicile, or if he dies, his previous forum domicilii has, as such, entirely ceased. But in the quality here established, as the special forum of the obligation, it still continues: it follows the emigrant in his new domicile; it binds the heir in case of death, although he should have a different domicile. The reason of this peculiar rule is, that the debtor, by undertaking the obligation here, creates an expectation that he will also submit to its consequences at the same place", at 205; "This doctrine is not only correct in principle, but it is also recommended by a certain equity, since every capricious exercise of free will by one party to the detriment of the opponent, is excluded by the clear settlement of the period of prescription that results from it", at 250; "Precisely in order to exclude this unjustifiable one-sided power of the husband over the rights of the wife, was the existence of a tacit contract presumed by the defenders of the first opinion," at 294).
[176] Savigny, *Private International Law, supra* note 137 at 255.
[177] *Ibid* at 253.
[178] *Ibid* at 253-255.
[179] *Ibid* at 134.
[180] Gutzwiller, *supra* note 168 at 85.

deduce the nature of the legal relationship. The theory was not stable, not precise and abstract enough.[181]

Like Gutzwiller, I believe that while PrIL theory has adopted Savigny's choice of law rules and even his description of several private law relations as dogmas, we would have been better off adopting the underlying rationale of searching for an eclectic and wide-ranging set of factors and interests in determining by which law a legal relationship should be governed.[182]

3. Exkurs: Ferdinand Lasalle

I have argued above, in line with Behrend's general reading of Savigny's System that Savigny's concept of the legal relationship, as well as of freedom, have an "empirical sociological"[183] dimension. Rights and freedom are embedded in a social context, the individual is both self-responsible and socially constructed, and legal categories and legal relationships are not constructed a priori, but follow an empirical analysis of social life. These elements not only provide a different reading of Savigny's PrIL theory, as Behrend's account provided a different reading of Savigny's System generally. They also provide useful perspectives on how to incorporate an individual-centered perspective that is also relational, into PrIL.

In 1880 the German socialist Lassalle picked up precisely on Savigny's interplay between individual rights, autonomy, and a people in order to "capture, indeed undermine the principle which prevents any socialist (not all political) reform, namely the principle of vested rights."[184] Lassalle wrote two volumes titled "the principle of vested rights" in which he started from the premise that "rights, which are acquired through individual acts, cannot be altered by subsequent legislation"[185] and described private law as "the

[181] Pillet, "Essai", *supra* note 70 at 422-423.
[182] *Ibid.*
[183] Behrends, *supra* note 105 at 284, 287.
[184] Müller, *supra* note 34 at 195.
[185] Sibylle Hofer, *Freiheit Ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert* (Tübingen: Mohr Siebeck, 2001) at 102.

realization of individual freedom."[186] Lassalle argued that "the individual is free in the society. Whenever laws attach consequences to free acts of the individual, these consequences arise because the individual wished them. The individual has the choice to undertake a particular action or not."[187] This description appears to rehearse Savigny's view that the individual actions are not "sources of law," but they simply constitute acts to which laws attach certain consequences.

Lassalle therefore clarified that "the individual can acquire rights for himself or others, through individual or consensual actions, only insofar as laws allow him this."[188] He adopts Hegel's and Savigny's postulate that the ultimate legal source is the "consciousness of the people."[189] This led him to argue, as Savigny did in his account of vested rights, that enforcing a vested right to the detriment of a contrary legislative policy means breaking the relationship between the individual and the consciousness of the people.[190] If a legal right is granted through law and law emanates from the people, it would be impossible for an individual to claim a vested right – and thereby claim his relationship with the community - and at the same time refuse his relationship to the community by failing to recognize the contrary policy.[191]

Lassalle relied on Savigny's description of the relationship between the individual and the people to argue that individual freedom and law might be perceived as competing only on the surface, while at a deeper analysis one would need to conclude that each one contains and relies on the other.[192] Lassalle developed these thoughts for the relationship of laws both in time (retroactivity) and in space.[193] This led him to argue that when the judge would need to apply the new law in the domestic context, he should apply lex fori in the transnational context. In circumstances in which he would need to apply the old law in the domestic context, he should apply the law of the domicile for issues of legal capacity; for issues of formal validity, the law of the place where the act were incurred;

---

[186] Ferdinand Lassalle, *Das System der erworbenen Rechte, Eine Versöhnung des positiven Rechts und der Rechtsphilosophie* (Leipzig: Brochhaus, 1880), vol. 1 at 164, 170, 224, 300 [Lassalle, *Erworbene Rechte*].
[187] Müller, *supra* note 34 at 195.
[188] Lassalle, *Erworbene Rechte, supra* note 186 at 164.
[189] Müller, *supra* note 34 at 197; Lassalle, *Erworbene Rechte, supra* note 186 at 302.
[190] *Ibid*.
[191] *Ibid*.
[192] Müller, *supra* note 34 at 197; Lassalle, *Erworbene Rechte, supra* note 186 at 360.
[193] Lassalle, *Erworbene Rechte, supra* note 186 at 303-305.

and for legal validity, the law that was determined by the parties, implicitly, if not explicitly.[194]

Lassalle offered virtually no explanation about why these particular laws would have to regulate those different categories of legal issues, and therefore his theory was mostly disregarded in the development of PrIL.[195] But Lassalle was less interested in enquiring under which law a right should vest in each category of cases. His interest was rather to explain why it cannot be viewed as an affront to autonomy or individual freedom to depart from vested rights. If vested rights are an expression of autonomy (or individual will expressed in a particular act which leads to the acquision of a right), a relational view of autonomy was needed in order to explain that departing from vested rights is not an affront to autonomy but rather an expression of the social context of autonomy. In other words his "true goal" and "the highest principle" for him was "the unity between individual freedom [individuelle Willensfreiheit] and community freedom [Willensgemeinschaft]."[196]

Lassalle thought an emphasis on, and reconstruction of Hegel's and Savigny's ideas about the relationship between the individual and the people, would serve as fruitful intellectual ground to justify and push for socialist reform, both in the national and the transnational realm. He thought that by emphasizing the relational nature of autonomy one would be able to move from the protection of "individual freedom" to that of "the freedom of humanity."[197] Therefore, the goal of the state should not be to protect individual freedom and property,[198] but rather through the unity of the individual with the people, the state must "place the individual in a position to achieve such goals and such a level of development that they could not reach as isolated individuals; to enable them to achieve a level of education, power and freedom which they could not achieve as isolated individuals."[199]

---

[194] Müller, *supra* note 34 at 198.
[195] *Ibid.*
[196] Adolph Wagner, *Briefe von Ferdinand Lassalle an Carl Rodbertus* (Berlin: Puttkammer & Muehlbrecht, 1878) at 30 [Lassalle, *Letters*].
[197] Lassalle, *Erworbene Rechte, supra* note 186 at 167.
[198] Ferdinand Lassalle, "Arbeiterprogramm" in Eduard Bernstein, ed., *Ferdinand Lassalle's Reden und Schriften*, vol 2 (Berlin: Vorwärts, 1891) at 45.
[199] *Ibid.*

Freedom and autonomy in a social context translate for Lassalle into the "progressive overcoming of powerlessness, that is of misery, ignorance and poverty of the working class."[200] Certainly Lassalle's political project, including the elimination of land and capital property[201] cannot be found in Savigny's theory. What is particularly interesting, however, is Lassalle's proposition that the integration of the individual will into the consciousness of the people which Savigny advocated, as well as Savigny's dual individual/community reference point throughout his System[202] can be used as a theoretical construct to further the social justice agenda, both nationally and internationally.[203] It is precisely the linking of the political project with a theoretical model aimed at reconstructing autonomy in relational terms that made Müller suggest that "Lassalles' thought might be recast sometime in the future" in order to pursue social justice in PrIL.[204]

4. Jitta

I have argued thus far that Savigny's theory should not be understood in overly individualistic terms. The fact that Savigny took the individual and the legal relationship as an analytical point of departure did not mean that he abandoned the dual individual/community analysis that Behrends believed characterized all eight volumes of Savigny's System. Lassalle's recasting of Savigny's conceptualization of the relationship between the individual and the Volk and the notion of relational autonomy, which emerged from this conceptualization, allows for a different understanding of Savigny's theory.

Recognizing the fact that Savigny was reacting against the overly individualistic use of the concept of autonomy by Eichhorn and Puchta and that he incorporated Story's empirical dimensions provides much support for Okko Behrends' reading of Savigny's

[200] *Ibid* at 45-46.
[201] Lassalle, *Letters, supra* note 196 at 46.
[202] For this duality and how it features in Savigny's System generally see Behrends, *supra* note 105 at 277.
[203] Lassalle conceived of his work on the vested rights doctrine as "the reconciliation of vested rights with philosophy" (see the title of the book).
[204] Müller, *supra* note 34 at 198.

theory as "empirical-sociological."[205] However, his theory was not interpreted as such in the development of PrIL.[206]

Both the empirical and the sociological elements become much clearer in Jitta's writings and in particular in two elements of Savigny's theory that Jitta develops further. First, Jitta adopted Savigny's focus on the "legal relationship" which he believed was "the dawn of the modern evolution of PrIL."[207] Jitta was particularly keen to emphasize the relational social element of this analytical category, focused on the substantive, rather than structural analysis, and argued for a solid comparative analysis. This made Jitta distinguish this category firmly from vested rights (1).

Second, Jitta further clarified the distinction to which Savigny alluded between the freedom of individuals to "immerse themselves in the social life of a particular local community" and the application of a particular law. While the former is perceived as natural, part of human nature, the latter is derived from the "requirements of reasonable international social life" and deduced by reference to a much wider pool of interests of affected individuals and community[208] (2). For example, Jitta argued that "he, who has acquired, in normal intercourse and in good faith, a right to a movable good, according to the law in force in the place where the good is de facto lying, must be considered as being entitled to the said right everywhere."[209] But "exceptions to this rule may be admitted when a social interest, stronger than the interest of the maintenance of a regular intercourse in good faith, is concerned with the matter."[210]

---

[205] Behrends, *supra* note 105 at 284.
[206] Savigny was generally perceived as formalist and dogmatic. For many references to this reading of Savigny and a countering of this reading, see Behrends, *supra* note 105 at 279: " it always leads to serious mistakes, when one ignores the fact that the systematical expositions of legal terms is not meant to be classificatory, but rather follows from an empirical approach and is determined by the observed phenomena."
[207] Jitta, *La Méthode, supra* note 55 at 90.
[208] See D Josephus Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind, Systematically Developed* (The Hague: M. Nijhoff, 1919) ("Social life necessitates a reasonable order, and this necessity is the basis of reasonable principles of international social life," at 3; "The only conclusion I deduce from the foregoing considerations is that reasonable principles are not to be found by philosophical abstraction, but by observation of life's phenomena," at 3) [Jitta, *The Renovation*].
[209] *Ibid* at 127.
[210] *Ibid* at 127-128.

1. Rethinking the Juridical Relation

Jitta celebrated Savigny's "golden rule" that "for each juridical relation we ought to seek the juridical domain to which it belongs according to its peculiar nature and the civil law to which it is subjected in consequence."[211] He celebrated this rule because it made possible a focus on individuals, their relationships and their international existence, and because it could be used as a platform for a much more nuanced analysis of the applicable law.[212]

However, Jitta was careful to distinguish Savigny's "golden rule" from two other doctrines of the time that also focused on individuals. He noted that unlike Savigny's principle

> this doctrine based on the respect of regularly acquired rights supposes that it is possible to determine, before applying the fundamental rule, when a right derived from a juridical relation is a regularly acquired right. Mutatis mutandis, we find the same basis for the theory of the personal autonomy as a theory granting to the persons the faculty of freely choosing the law to which a juridical relation between them is to be subjected.[213]

In other words, he saw Savigny and himself as using the juridical relation and focusing on the individual differently than the individualistic authors focusing on vested rights and individual autonomy. But he also thought it necessary to explain how one could focus on the individual and the legal relationship while departing from the vested rights and autonomy theories.

Savigny had already made it clear that because the individual is embedded in a people, her legal relationships will also be embedded in a people and a state. He therefore searched for the link that would localize both the individual and her legal relationships within a state. He rejected localization according to an a priori formal principle, and

---

[211] *Ibid* at 90.
[212] *Ibid* ("The juridical relation is a link between two persons or juridical subjects, a link formed and maintained by the social public power, the link being at one end a duty, and at the other end a claim corresponding to the duty," at 89).
[213] *Ibid* at 90.

pleaded instead for a thorough analysis of the "nature" of each class of private law relationships. Savigny seemed to localize legal relationships based on a dual structural/substantive analysis of relationships that includes mostly private interests (for example contracts), mostly social interests (torts) or a combination of those two kinds of interests (family law, property law). Here again his analysis resembles that of Story.

Jitta departed from Savigny's analysis of the localization of legal relationships in various respects.[214] First, Jitta began from the premise that every juridical relation has "a social cause."[215] Every juridical relation is embedded in a social reality, and it is "society [that] attaches a duty connected with a claim" to particular "juridical facts" which are "modifications of the state of things in social life [for example a prejudicial act or tort unjustly performed by an accountable subject]."[216] Furthermore, he believed that this social aim differs between the various relationships within a private law class (e.g. contracts). [217]

Last, he argued that it is not only the legal relationship itself that has a social dimension but also its localization in a particular state. One must determine the "preponderant social element of a legal relationship" and determine as well whether this element caused the legal relationship to "penetrate within a particular local sphere of social life."[218] To "localize" a legal relationship what is needed is an "analysis of the link that may exist, *in a social sense*, between the fact and a local sphere of social life."[219] As a corollary to their different aims, different legal relationships, even within a single private law category, may be linked to different social communities. Furthermore:

> Not every obligation has a seat in a definite local sphere of social life. It may be an obligation belonging to international social life. In this case the obligation is governed by

[214] Jitta, *La Methode, supra* note 94 at 26, §18 (discussing how his understanding of "the nature of the legal relationship" differs from Savigny's).
[215] Jitta, *The Renovation, supra* note 208 at 136; Jitta, *La Methode, supra* note 94 at 217.
[216] Jitta, *The Renovation, supra* note 208 at 97.
[217] See e.g. D Josephus Jitta, *La substance des obligations dans le droit international privé*, 2 vols. (The Hague: Belinfante Frères, 1906 &1907) [Jitta, *Obligations*]. See also Jitta, *La Methode, supra* note 94 (criticizing Savigny for having been too general about the nature of the legal relationship and for having focused on very broad categories of legal relationships). See also Jitta, *The Renovation*, *supra* note 208 at 137 (The classification of obligations for example is "based on the social aim of a contract." He also referred to "contracts based on the social value of goods", at 137, or contracts based on the social value of change," at 139).
[218] Jitta, *Obligations*, vol. 2*, supra* note 217 at 498.
[219] Jitta, *The Renovation, supra* note 208 at 97.

> the international-common juridical rules, if they exist, and if they do not exist, by the reasonable principles of social life, which the judge will apply for the sake of reason. I confess that the localization-principle is not as easy in its application as a mechanical rule solving the Gordian knot of a conflict by referring to one definite law, but I beg to remind the reader that international social life is knotty, and that it is better to untie a knot patiently than to cut it through with a sharp knife. [220]

Jitta's explanation of the social dimension of localization is worth quoting at length:

> If such a link, strong in a social sense, is to be ascertained, the positive law, in force in the said local sphere, must be applied to the qualifications of the fact and to its juridical effects. If localization is impossible, because reasonably there is no link or no strong link between a local sphere and the fact, as the latter really belongs to international or rather the universal social life, the judge, acting as the agent of an isolated State, will have to apply the rules of the international-common law to the act, or, by default, the reasonable principles of international social life. Only the collectivity of the States is able to go further. The principle of localization mentioned above, is not the solution of a conflict of laws, in the classical sense, it is a guiding thought, as extensible in its application, as social life itself.[221]

Given the social dimensions of legal relationships and their localization it is no surprise that Jitta did not describe a particular "localization" as being the right of the parties or even as emanating from their reasonable expectations for all legal relationships.[222] If a state applies a particular foreign law, it thereby recognizes the social link that exists between a particular relationship and that "local sphere of social life."[223] Its obligation to apply that law and to recognize that legal relationship is consequently also "social," and owed towards the entire "international juridical community of mankind."[224] Depending on the legal relationship in question, it may be a demand of "the

---

[220] *Ibid* at 136-137.
[221] Jitta, *The Renovation, supra* note 208 at 97-98.
[222] Jitta, *La Méthode, supra* note 94 at 207 (arguing that the law of a forign jurisdiction applies only to relationships that are entirely connected to that jurisdiction, because individuals would have known only to guide their behavior by that law).
[223] Jitta, *Obligations, supra* note 217, vol 1 at 26.
[224] *Ibid.*

reasonable order of international social life," not of any individuals in particular.[225] "The parties are not placed above the laws and laws are not subordinated to them."[226]

Consequently, Jitta's view of private law categories is often instrumental. For example, he argued that "obligations are recognized and enforced because the reasonable order of the society demands it," not because of any right of the promisee.[227] Therefore, the "nature" or the "source" of obligations rests in the "social duties of person to person interaction."[228] The entire analysis of obligations is relational, focused on the expectations that one party created in the other and in the social community in which he acted (more on this particular point in the next chapter).[229] Itself, this "substantive nature" or "purpose" is to be determined by a serious comparative analysis of the various rules in conflict.[230] For example, choice of law rules for contract law have the goal of "considering obligations from the point of view of the demands of the juridical community of mankind"[231] and to establish "harmony between law and life."[232]

2. Different Kinds of Freedom

Once Jitta established that a juridical relation has a social scope, it was relatively easy to argue that one would localize such relationship by emphasizing its social relations for particular spheres of social life. This also made it possible to explain why the parties

---

[225] *Ibid.*
[226] *Ibid* at 27.
[227] *Ibid* at 3.
[228] *Ibid* at 35.
[229] *Ibid* at 34, 35. For bills of exchange, Jitta argued that

> each of the signatures [on the bills of exchange, of the drawer, the acceptor and one or more endorsers] ought to be brought in connection with the law of a definite sphere of social life, and the said sphere can only be that in which the bill of exchange, when being inspected by a serious man, indicates that the signature has been written. Not the place where the signature has been written in reality, but the "fiduciary" place, the place to be taken into consideration by a serious man who inspects the bill, is decisive. The result is that the obligations, deriving from the various signatures, do not only differ but that they may depend on various national laws. I do not pretend that this is a satisfactory result. On the contrary, it is a bad one. But the remedy, in the silence of the laws, is not a fiction, according to which all the signatures, posterior to that of the drawer, should have inspired a confidence to be determined by the law of the place where the bill may have been signed by the drawer, at 143.

[230] *Ibid* at 40,41.
[231] *Ibid* at 5.
[232] *Ibid* at 20.

do not have an absolute right to the application of a particular law. However, this line of reasoning was also connected to the distinction alluded to by Savigny between the freedom to submit oneself to a law and the application of this law to the PrIL relationship. Jitta clarified that the former represents the natural freedom/ability of individuals to "immerse themselves in the life of a local sphere of social life." Consequently, the application of this law to the parties is made in proportion to such penetration.[233] In other words, the application of a law is the responsibilization of individuals towards the community, which they affected through their actions. It is the consequence of an exercise of freedom, not a right derived from that exercise.

Jitta explained the distinction between the freedom to immerse oneself in a social community and the application of this community's law in the following terms: "All people have the right to take part in the universal life, by submitting themselves to the laws of different social groups which form part of humanity and they will be regulated in proportion to their penetration within the social life of these groups."[234] Thus, the application of the law is not a consequence of autonomy, understood as the freedom to choose a law, it is the consequence of the penetration of individuals in the social life of a community. Thus, "individuals are autonomous only to the extent they are granted such autonomy by the laws that regulate their legal relationships."[235] "Both local public policy and the public policy of the universal society will be applied with full force; instead of incorporating exceptions to the principle of autonomy, they will limit it, which is their true nature."[236]

It is in this sense that Jitta argues, for example, that the principle of submitting all torts to the law of the place where the tort occurred is too general.[237] It might seem intuitive if it is linked to the freedom of the tortfeasor to act in a particular place. But for Jitta what matters is that this freedom (to immerse oneself in the social life of a community) produces social consequences, and the applicable law must trace the social consequences of the freedom to enter the social life of various local communities. Therefore, he argued that it is not immediately apparent that the social consequences arise

[233] Jitta, *Obligations*, *supra* note 217, vol 2 at 505.
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid* at 515.
[237] Jitta, *Obligations, supra* note 217, vol 1 at 27.

only at the place of the tortious act,[238] or that reparation for these social consequences are best determined by the law of the place of tort.[239] Jitta "reclaims my freedom and the judge's" to evaluate the different acts and elements that determine the social value and consequences of a transnational tort.[240] Following an evaluation of the "disturbance of the reasonable social order" at the place of the tort and elsewhere, the "judge will freely apply and construct the international-common rule."[241]

VI. Conclusions

When Joseph Beale wrote his PrIL treatise based on the vested rights doctrine, he noted that "while [the theory of vested rights] has become the accepted theory in countries governed by the common law, it has been given scant attention on the European continent."[242] This impression is correct, given that despite the recurring references to "vested rights," the state-centric theories of Pillet and Zitelmann refer to rights only as a corollary to their discussion of state sovereignty and inter-state duties.[243] Yet, as I showed in chapters 2 and 4, Beale, along with Dicey and Westlake, also end up connecting the apparently individual-centered concept of "vested rights" to the universal inter-state framework of distributing state authority to vest private rights.

I have showed above that this way of framing "vested rights" in fact excludes any avenue of contestation by the individuals and communities affected by this 'distribution of sovereign rights to vest private rights.'

---

[238] Jitta argued that the localization of a legal relationship requires the relationship to have a preponderant element and that this element have caused the legal relationship to penetrate in the local sphere of social life. See Jitta, *Obligations, supra* note 217, vol 2 ("The truth is that only where there is such a preponderant element and when this element caused the penetration of the legal relationship in a particular social sphere the applicable law would be that of the social sphere. It is only when these two conditions are simultaneously present that the reasonable order of universal social life would generally indicate the law of a particular state," at 498). See also Jitta, *The Renovation, supra* note 208 at 97-98 ("The local sphere to which a fact belongs reasonably, is not always the sphere in which a material modification of the state of things took place").
[239] Jitta, *Obligations*, *supra* note 217 at 27.
[240] *Ibid.*
[241] *Ibid.*
[242] Beale, *supra* note 29 at 108.
[243] Michaels, "EU Law as Private International Law?" *supra* note 31 at 24.

At the same time, I argued that re-surfacing the individual-centered dimensions of rights perspectives in PrIL does not automatically mean pleading for unrestrained individual autonomy and choice of law. Rather, I aimed to show that the history of PrIL yields various ways of reconciling the recognition of individuals' expectations and appeals to justice with their social responsibilization. Rather than establishing a tension between individuals and states, and between private rights and larger, public concerns, Josephus Jitta created a relationship between the ability of individuals to immerse themselves in the social life of various communities and their responsibilities for the 'social disturbances' they create for various social groups.

In turn, Jitta's emphasis on the social dimensions of rights and reasonable expectations represented a reconstruction of Savigny's emphasis on the legal relationship and his concept of localization. Through a comparison with Story's fluid analysis of individuals' expectations in a social context, I argued that Savigny had paved the way for this reconstruction by adopting a relational image of the individual, as well as a more eclectic analysis of legal relationships than is usually acknowledged.

Chapter 6 - Legitimacy and Autonomy

I. Introduction

Writing on American PrIL scholarship in 1989, Lea Brilmayer criticized the American realist school of thought for failing to provide a proper theory of legitimate authority recognizing that individuals "cannot be treated as a means to an end."[1] She argued persuasively that the application of a particular law must be justified in relationship to the relevant individuals, rather than to the forum state or foreign states. In Brilmayer's view, this observation inevitably leads to the conclusion that the only elements that "define the situation, in which state coercion is proper" are "standards of political legitimacy" that underlie the relationship between a particular individual and a political community.[2] She argued that "negative rights," "rights to be left alone," should determine the legitimacy of the imposition of a state's law and that this is "the best" that an individual-centered "rights-based theory might have to offer."[3] Brilmayer's effective critique underscored many important limitations of the state interest analysis and reopened an analysis of state interest analysis on both jurisprudential and methodological grounds.

My goal in this chapter is to show how the relational internationalist authors envisioned different dimensions of legitimacy from those underscored by Brilmayer's account, by focusing on an inter-human relationship, as opposed to an isolated individual, and on private law, as opposed to constitutional or public law generally. In part, this particular relational, private law-centered perspective on legitimacy embraces Singer's appeal to "shift our focus from viewing individuals as abstract citizens whose relationships to each other are governed by rights enforced by the state to viewing them as active participants in shaping their relations in daily life."[4] Viewed in this light, the

[1] Lea Brilmayer, "Rights, Fairness, and Choice of Law" (1988) 98 Yale LJ 1277.
[2] *Ibid* at 1294.
[3] *Ibid* at 1279.
[4] Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1 at 65.

legitimacy question in PrIL begins with the particular legal relationship that is subject to dispute. The legitimacy of imposing one law over another is justified on different possible grounds, including a) by reference to the particular actions of the parties, the expectations they induced in each other, and the advantages and disadvantages that define their correlative duties; b) the values underlying private law relationships and c) the embeddedness of a legal relationship within one or several communities.

I present the particularities of this theory, which I uncover in different segments of Savigny's and Jitta's writings, by contrasting it to both the formalist state-centric internationalist perspective (Part I) and Brilmayer's account of negative rights (Part II). I focus in large part on aspects of Savigny's general theory on law, the individual, and the legal relationship. Much of this background analysis of his theory is generally ignored in studies of PrIL. And while it might be true, as Rückert suggested of Savigny's System generally, that many elements of his general theory were not always fruitfully employed by him in his analysis of the different areas of law,[5] I believe that uncovering these elements offers a new perspective on how his PrIL theory could be interpreted or reconstructed for today's reality.

Yet the account of Savigny I offer here by reference, among others, to Joachim Rückert's[6] and Okko Behrend's[7] studies on Savigny's scholarship might surprise. Joachim Rückert described Savigny's theory as "objective idealist," leading Savigny to construct a series of distinctions and then to unite these different elements into a larger "whole" and within broader principles.[8] It is through this lense that Rückert explains how Savigny distinguishes between individual freedom and the social context, private and public, law and morality, and then reunites these elements within larger concepts such as the "Volk," Christianity, equal moral worth of individuals etc.[9] Rückert then argues that

---

[5] Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach: R. Gremer, 1984) at 347-348, 360.
[6] *Ibid*.
[7] Okko Behrends, "Geschichte, Politik und Jurisprudenz in Savignys System des heutigen römischen Rechts" in Okko Behrends, Wulf Eckart Voss & Malte Diesselhorst, *Römisches Recht in der europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker* (Ebelsbach: R. Gremer, 1985) at 291 [Behrends, "Geschichte"].
[8] Rückert, *supra* note 5 at 232-237 & 374 (noting the elasticity and "anchoring in the higher," as well as the constant back and forth between concepts).
[9] *Ibid* at 364-373 (on freedom and law and morality), 358-360 (on the private/public distinction), 312-328 (on the state and the "Volk").

the distinctions Savigny makes are constantly fluctuating, are unstable, and can always be reconsidered.[10] It is precisely this flux between separating private from public and the individual from the social and then constantly attempting to reunite them under a larger "whole" which is, I argue, a useful lense through which to understand Savigny's PrIL theory, as well as the way in which he avoids both state-centric, as well as individualistic premises. Furthermore, it is important to note that this reading of Savignys's theory as unstable, operating with constantly fluctuating analytical elements maps onto the 19th century state-centric internationalists' reading of Savigny. While it is quite common for PrIL scholars to now think of Savigny as unequivocally libertarian or Kantian, 19th century internationalists and many contemporary legal historians underscore precisely the way in which Savigny navigates in between and ultimately connects many of the elements within classical liberal dichotomies.

Emphasizing Savigny's idealist philosophy might expose his theory to the same critique offered by 19th century state-centric internationalists who viewed Savigny's theory as imprecise and unstable. To a modern reader Savigny's theory might even seem contradictory. Joachim Rückert argued that one should not confuse the variability of substantive results with variability of method, since Savigny's theory is remarkably consistent within the objective idealist philosophy.[11] My point is not to prove or disprove that Savigny's theory is indeed clear or consistent, but rather to underscore that the understanding and critique of Savigny's theory as unstable and fluctuating in between divergent concepts (individual/state; liberty/social responsibility; private/public) is different and exposes an entirely different reading of Savigny than the typical critique of his theory as Kantian or libertarian. In this chapter I aim to recover precisely the way in which Savigny moves back and forth in between the elements of classical liberal dichotomies and attempts to construct a cross-reference between the individual and the social, the private and the public, liberty and social responsibility.

To outline the contrast between state-centric and relational internationalist perspective on legitimacy, I start by outlining the state-centric internationalist perspective

[10] *Ibid* e.g. at 359 (arguing that the private/public distinction is flexible, unstable and fluctuating). See also Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law" (2006) 11 Juridica International 56 at 67 (arguing that the private/public distinction was never very clear or stable and therefore "was too open for the enlightened project of modernity").
[11] Rückert, *supra* note 5 at 375.

with reference to an essay by Pillet in which he sought to provide a justification for PrIL's "universal legitimacy." I show how Pillet overtly pleaded for ignoring individual-centered perspectives, including any reliance on private law relationships, in favour of value-neutrality, a high level of abstractness, and a strict separation of law and equity as the inevitable requirements for establishing the universal legitimacy of PrIL "amongst independent states."[12]

I then outline Brilmayer's proposal for a theory of legitimacy that takes the individual as the frame of reference. While Brilmayer rightfully suggests that the imposition of state authority must be justified in relationship to the relevant individuals, rather than states, she adopts a series of dichotomies and distinctions that result in a focus on the political relationships between an isolated individual and a state. She employs an atomistic image of the individual and embraces a strong distinction between positive and negative rights, and between corrective and distributive justice.

In contrast, the relational internationalist perspective I aim to recover starts from the premise that the individual is inherently social, and constantly embedded in a wide range of relationships, which she shapes and is shaped by. This relational image of the individual and of freedom make these authors center their analysis in PrIL on her private law relationships, rather than the relationship of an isolated individual to the state. At the same time, relational internationalists manage to ground, each to a different degree, a connection between politics and private law relations, between private and public law and between freedom and social responsibility. I suggest that these analytical moves enabled by the relational analysis of the individual and liberty would make it possible to frame the legitimacy question in Cavers's terms of whether or not the individual deserves the protection of the law she claims in light of the variety of social factors, which provide the background for parties' entitlements to each other, as well as the complex elements of the parties' interactions with each other.[13] This perspective, which could be called "social legitimacy" (by distinction to the negative rights-political legitimacy outlined by

[12] Antoine Pillet, "Essai d'un système general de solution des conflicts de lois" (1984) 21 Journal de droit international privé et de la jurisprudence comparée 417 & 21 Journal de droit international privé et de la jurisprudence comparée 711 at 418, n 1 [Pillet, "Essai"].
[13] For an initial account of this perspective in Cavers's theory see Chapter 4.

Brilmayer) manages to link the individual to the other party(ies) of the relationship, as well as to the communities their relationships are embedded in.[14]

II. Legitimate Authority – An Inter-State Framework of Justification

Much of Pillet's general philosophy of PrIL has already been outlined in the first chapter of the thesis. Here I am mainly interested in Pillet's proposition that PrIL must develop a theory and methodology in which the application of a particular law is justified in an inter-state relationship.[15] Pillet saw himself as putting forth "first order principles" or "first order truths"[16] that could ground PrIL's legitimacy universally within a framework of "independent states."[17] This way of framing his theory and the goal of PrIL pushes him in two directions, one state-centric and the other internationalist, which produces a real tension.

The state-centric element made Pillet believe the entire analysis of PrIL must be focused on the law. This makes him argue that the principle "least admissible" in PrIL is the one granting any scope to "the will" or "the intentions " of the parties.[18] It is significant that the only theory he identifies, and refutes, as being grounded in the will or the intentions of the parties is the theory "allowing individuals to choose the law which governs them [which] is to allow them to place themselves above the law, and to infringe the law and destroy its effect."[19] This is contrary to Pillet's own "idea of law," which is to "command or protect, depending on the case, in brief to impose itself upon the will of individuals because of a social interest."[20] Private laws, according to Pillet, represent "sacrifices which the state representing the society asks of individuals, in the interest of

[14] For such an account see Rawi Abdelal & John Ruggie, "Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism" in David Moss & John Cistermino, eds, *New Perspectives on Regulation* (Cambridge: Tobin Project, 2009) 151. For an overview of the different notions of legitimacy, including a notion of social legitimacy, in international law see C.A. Thomas, "The Concept of Legitimacy in Internatioal Law" online: (2013) LSE, Society and Economy Working Papers 12/2013 https://www.lse.ac.uk/collections/law/wps/WPS2013-12_Thomas.pdf
[15] See Pillet, *supra* note 12.
[16] *Ibid* at 417.
[17] *Ibid* at 418, n 1.
[18] Pillet, *supra* note 12 at 717, incl. n 2.
[19] *Ibid* at 718.
[20] *Ibid* at 717.

the community."[21] "It is inadmissible, impossible to conceive that once we established them [the individual sacrifices in the name of the society] we allow individuals to derogate from them."[22]

It is important to note that Pillet did not associate Savigny with the theory of "free choice." Rather, his understanding of Savigny's theory, as well as the passages in which he tries to distinguish his theory from that of Savigny, are particularly illuminating for what he sees the state-centric perspective as reacting against. Pillet criticized Savigny primarily for the flexibility of his theory, for not being abstract and universal enough, and not grounded in any single underlying principle.[23]

In reference to Savigny's methodology, Pillet noted "attempting to search for conflict of laws solutions in the nature of things is a just idea, but too imprecise to serve as the principle for a doctrine."[24] Pillet therefore identified the very flexible and eclectic analysis of "the nature of …" methodology, not his focus on "the juridical relationship," as the trademark of Savigny's theory. Interestingly, while Savigny's reviewer Gutzwiller charged many PrIL scholars with misunderstanding Savigny's methodology of centering a legal relationship based on its nature as being abstract and dogmatic,[25] Pillet fully understood its non-dogmatic character and refuted it precisely for its flexibility.

In this light, Pillet believed that he had managed to incorporate two elements of Savigny's methodology, while avoiding its inherent flexibility. He thought that he was finally able to provide a solid analytical background for Savigny's postulate of the "juridical community of nations" by focusing on universal principles of inter-state relationships, and that he had adopted Savigny's "nature of…" methodology, while changing its object and its looseness.

Therefore, Pillet argued that "the only nature of things that one must consider is the nature of the law (la loi) itself."[26] To search for the nature of law means to maintain the state-centric focus[27] because Pillet insisted repeatedly that law is "an instrument of

---

[21] *Ibid* at 718.
[22] *Ibid*.
[23] *Ibid* at 419, 422-423 & n 1.
[24] *Ibid.*
[25] See Chapter 2.
[26] See Pillet, *supra* note 12 at 727.
[27] *Ibid* at 419, p. 422-423 & n 1: "This fault [of not focusing of the highest level of generality and abstractness] is precisely the reason why it is impossible for us to accept the system proposed by Savigny.

authority" of a particular sovereign over its subjects.[28] At the same time, Pillet believed that PrIL must legitimize itself by a universal theory and methodology. Therefore, the search for the "nature" of law was to be made in a very particular way, in order to incorporate both a state-centric and a universalist perspective.

Allegedly, the need for universal legitimacy implies that "it is of sound method to think of the notion of law in its highest generality, by eliminating all contingent and accidental elements, where observation can only lead to a relative and limited truth, and which are therefore incapable of offering a truly general theory for the solution of conflict of laws."[29] In other words, one must think of the "nature of law" at its most abstract, as the order of "a sovereign over its subjects, with no specificity to its content or object."[30] When Pillet contrasted his theory with Savigny's, he argued that his own "nature of…" methodology is able to ensure precise results because law is imagined

> in its most abstract sense, independent of its form, the persons to whom it applies and even independent of the modalities that the caprice of the legislator might give it. I only see in the law the instrument used by the legislator to exercise its authority over the people, and thus we have reached a notion of the law that is common to all societies, all states, a truly international notion of law.[31]

In order to ensure universal legitimacy for PrIL, Pillet believed it necessary to refer to the "indispensable character," the universal "nature, essence of law."[32] The only two such universally indispensable elements of an abstract notion of law understood as "an instrument of authority" are for Pillet, "continuity and generality."[33] The former allegedly implies extraterritoriality, and the latter, territoriality.[34]

Attempting to search for a conflict of laws solution in the nature of things is a just idea, but too imprecise, in order to serve as the principle for a doctrine. Furthermore, we notice that in Savigny's analysis to determine the seat of different legal relationships, Savigny himself extracts from the most diverse areas his reasons for the decision of the seat, from the intention of the parties, to the location of an object, or this or other circumstance to which he ascribes arbitrarily a preponderant influence."

[28] *Ibid* at 423.
[29] *Ibid* at 422.
[30] *Ibid* at 423.
[31] *Ibid* at 724.
[32] *Ibid* at 423.
[33] *Ibid* at 423.
[34] *Ibid* at 426. Unlike the statutists, Pillet argues that all laws, according to the essence of public power exercised over the subjects, are both territorial and extraterritorial, at 427. But PrIL is an "imperfect

One must therefore search for a general principle that determines under which circumstances one or the other element must be sacrificed in order to reach uniform application of laws among states.[35] This determination cannot depend on "the will or the fantasy of the one determining the resolution of the conflict" or on "comity among states."[36] Rather, the principle is extracted, again, from the "universal" goal of law, as Pillet saw it: "the law is always the means employed by the legislator to achieve a well determined social goal. This is the same everywhere. Whether it regards public or private law, civil or criminal law, one of the fundamental laws of the state or a law of procedure, it is still true that the law is simply an instrument established in order to achieve a social goal."[37] This realization however does not inject much nuance because "all laws everywhere have the same social goals."[38] Pillet prided himself that through this "analogy" or universality of social goals, he was able to "achieve the community of law amongst nations, as Savigny postulated it."[39]

The simplicity of the "social purpose" analysis, which is meant to be abstract and universal, becomes obvious when Pillet concludes that there are only two such legal purposes in the law: to protect individual interests and community, or social interests.[40] Laws protecting individual interests must be extraterritorial, while those protecting social interests must be territorial.[41] In Pillet's theory, an a priori, allegedly common sensical analysis, as opposed to a thorough comparative or normative analysis would elucidate which category of laws serves to protect individual or community interests.[42]

At this culmination of his theory, Pillet felt the need to situate one last time his own theory within the rest of PrIL scholarship. In a quite telling passage, Pillet argued that "if in our studies we have used a method so close to Savigny's [the nature of… method], in the result, we have reached conclusions very similar to the Italian school

---

science," at 434; a "science of sacrifice," at 712, which makes it impossible for both characters to be maintained. Therefore, states must "sacrifice a certain element of laws' effectiveness in order to maintain … international recognition which only such sacrifice can guarantee," at 712.

[35] *Ibid* at 712.

[36] *Ibid* at 713. At note 1, Pillet associated the comity doctrine with the nationalist perspective.

[37] *Ibid* at 725.

[38] *Ibid* at 713.

[39] *Ibid* at 728 & n 1.

[40] *Ibid* at 739.

[41] *Ibid*.

[42] *Ibid* at 740 (Pillet argued such an analysis is possible, even if he acknowledged that the distinction is quite loose).

instead. Like Mancini and his disciples we have separated two classes of laws, those that serve individual interests, and those that serve social interests."[43] In other words, Pillet quite accurately did not attribute the strict individual/social analytical duality to Savigny, but rather to the Italian school, and it was very likely the PublIL association of the Italian school that made him feel flattered at the thought of the possible analogies, since he also saw himself as part of the PublIL school of thought.[44] Even in this context, however, he was careful to point out that while he adopted the individual/community analytical duality, he did not accept any of the individual-centered connotations of the Italian school.

First, "if I [Pillet] accord the laws concerning individual interests an international effect, it is not because of an otherwise justifiable respect for the right of human personality[…] It is from the law itself, the nature and its scope that we extract, necessarily its extraterritoriality."[45] Secondly, "Mancini takes as a point of departure nationality understood as a purely natural fact and pretends to derive from this purely philosophical notion practical consequences for PrIL, which is inadmissible. We take as a point of departure the state as it is in fact, its sovereignty, its duties…."[46] Lastly, "my laws of social guarantee do not coincide with the laws of public policy of the Italian school, they go beyond them."[47]

Here Pillet came full circle. While he grounded his repetitive dismissal of any individual-centered premises and his state-centric ideology on the "social purposes" of law, his quest for universal and abstract premises made him construct a formalist duality between the individual and her social environment. This search pushed Pillet to overtly dismiss any quest for "equity."[48] By separating laws into those fostering the interests of the individuals and those fostering the interests of a social group, he dismissed an important overlap and cross-referencing between the two, which makes him less attuned to the distributive background informing private law rules. Rather than fostering and enabling a social analysis and implications of PrIL rules as he initially suggested, Pillet

[43] *Ibid* at 745.
[44] *Ibid* at 745.
[45] *Ibid* at 745.
[46] *Ibid* at 746.
[47] *Ibid* at 746.
[48] *Ibid* at 714.

managed to obscure it. Furthermore, while his theory at first sight aims at avoiding the understanding of the individual as an atomistic unity dissociated from the social context, his theory ends up creating precisely that separation of the individual from the social context. Lastly, by explicitly denying any voice to the litigating parties to express, contest, and balance each other's expectations, Pillet's state-centric theory also depletes the potential of the adversarial system and excludes any virtue in a pragmatic and policy oriented judgment of the judiciary.

The particular state-centric and the universal dimensions of Pillet's theory converge in the proposition that PrIL legitimizes itself relative to states as understood collectively, precisely through its alleged neutrality, abstractness and policy-free substratum. This way of justifying the legitimacy of PrIL rules makes it possible to obscure any form of inter-individual justice that is not incorporated in the abstract notion of the law identified by Pillet. Through Pillet's imagery that "the litigating parties disappear for a while"[49] it is possible both to exclude their voice and to avoid any responsibilization of individuals in their transnational legal relationships.

III. Brilmayer's "Negative Rights" Theory as a Reaction to the Interest Analysis Methodology

Pillet himself described his theory as a rather formalist and very abstract state-centric internationalist perspective. The formalist aspects were a result of the particular way in which Pillet framed both the internationalist and the state-centric dimensions. In a different combination, a state-centric theory could look fundamentally different. Indeed, in the American Realist school, and in particular in Brainerd Currie's theory, the state-centric dimension may present similarities to,[50] but also depart fundamentally from Pillet's. Like Pillet, Currie also centered the analysis on what he described as the social function of law, wether private or public.[51] Similar to Pillet, he argued that any method of

[49] Antoine Pillet, "Droit international privé consideré dans ses rapports avec le droit international public," Annales de l'enseignement superior de Grenoble (Grenoble: F Allier Phre & Fils, 1892) at 335.
[50] Ralf Michaels, "Economics of Law as Choice of Law" (2008) 71 Law and Contemporary Problems 73 at 84, n 64.
[51] For an initial outline of Currie's theory see Chapter 3.

determining the applicable law should be centered on an analysis of the social scope of law. Some of Currie's critics, including his fellow realist Cavers, rightly note that his analysis of the social scope is not much more sophisticated than Pillet's. The few nuances that Currie added to the analysis, result primarily from his focus on the social scope of individual legal provisions, rather than whole categories of private law, and from the fact that Currie openly disavowed any a priori quest for uniformity. I have argued in the previous chapter, primarily through unearthing his correspondence with David Cavers, that Currie's apparent dismissal of universalist and individual-centered considerations was based mostly on pragmatic, rather than normative, considerations. I have conceded, however, as did Cavers, that Currie's theory was bound to be and was interpreted as primarily state-centric. It was this interpretation of his theory that generated much of the criticism I discussed in the previous chapter.

In the context of this chapter, one critique made by Lea Brilmayer in 1989 is of particular importance. In *Rights, Fairness and Choice of Law* Brilmayer charges state-centric theories, in particular Currie's theory, for framing the question of legitimate authority as an inter-state matter.[52] She argues that the legitimacy of imposing a particular law should be referable to the state-individual relationship.[53] She further argues that PrIL theory had, up to that point, been oblivious to "what the best possible rights-based theory might have to offer," namely, a framework of "negative rights" or "side constraints" of state authority vis-à-vis individuals.[54] Thus, Brilmayer distinguishes this "model of political rights in the inter-state setting" both from Beale's and from the realists or what she calls the "policy theorists."[55]

To Brilmayer, the vested rights theory discussed at greater length in the previous chapter dealt with "positive rights because the state has an affirmative obligation to act so as to help people realize their value,"[56] while her theory deals with rights "to be left alone" by the state, "not swords, but shields" "founded on principles of political fairness

[52] See Brilmayer, *supra* note 1.
[53] Even though she charges primarily Currie's theory because of its utilitarian foundation (as opposed to individual-rights based), she also rightly identifies Beale's theory as partly state-centric, as I have described it in the previous chapter. See Brilmayer, *supra* note 1 at 1292.
[54] *Ibid* at 1279.
[55] *Ibid* at 1280.
[56] *Ibid* at 1280, n 11.

that specify the preconditions for the exercise of legitimate state coercion."[57] The distinction between her theory and Currie's or Cook's appears even stronger once Brilmayer argues that those theorists had completely lost sight of individuals and their "pre-existing rights,"[58] and focused exclusively on overall social utility.[59] Brilmayer is careful to add that Currie's utilitarian model is not only problematic for its focus on social values and not individuals rights – although that was certainly an important aspect that Brilmayer was reacting against – but also because of its perceived particularistic, rather than universalist, focus. "Under a universalistic consequentialist theory, a state might adopt that substantive policy which it thinks is best for the world at large. This is not, however, what the modern choice of law theorists had in mind."[60]

Brilmayer criticized the state-centric theories on several grounds, four of which bring to light important considerations illuminating both her own theory and that of the individual-centered internationalist authors I will describe in the next section. First, Brilmayer criticizes utilitarian theory for focusing on "the general social good, rather than the claims of the instant parties to fair treatment."[61] Second, she criticizes what "is fairly standard in interest analysis opinions and literature to allude to the needs of local nonparties whose economic interests will be affected by the decision."[62] Third, she argues that interest analysis "demonstrates a lack of concern with what the parties might deserve as a result of their past action."[63] Lastly, she decries interest analysis's indifference to "actuarial balance"[64] or "corrective justice,"[65] since in her view "choice of law seems an unpromising area of law in which to effect wealth redistribution."[66] In light of these

[57] *Ibid* at 1280.
[58] *Ibid* at 1284.
[59] *Ibid* at 1283-1285.
[60] *Ibid* at 1288.
[61] *Ibid* at 1287.
[62] *Ibid* at 1289.
[63] *Ibid* at 1289.
[64] *Ibid* at 1311. See also 1311-1312: "to implement the notion of actuarial fairness, one might want to follow a general principle of mutuality. Mutuality would require that the substantive rule not be applied to an individual's detriment unless the individual would be eligible to receive the benefits if the tables were turned."
[65] *Ibid* at 1310.
[66] *Ibid* at 1311: "In the interstate arena, a state's authority is at its most tenuous. However, if choice of law rules are to have redistributive consequences, at least they are better directed against insiders than outsiders. This is the effect of the domiciliary principles, because the state is granted the right to coerce its own people or business entities by imposing burdens upon them. Ideally, a choice of law rule would be actuarially balanced; however, a state's choice to redistribute wealth away from its own people is not

considerations, she believes the interest analysis perspective allows the state to treat the individual "merely as a means to an end."[67]

In contrast, an individual-centered theory, in Brilmayer's view, should be centered on "the political relationship between the state and the individual,"[68] namely, "on one's right to resist the imposition of a personal burden for the common good."[69] Based on this political relationship between the individual and the state, it appears wrong that "the claims of one of the parties are being sacrificed to further the general good of a community of which he or she may not even be a part."[70] Because the rights that Brilmayer is referencing are "negative rights instead of positive rights, and they are vertical rights that the individual possesses against the state directly, rather than horizontal rights against the other party to the litigation," the concern is with "political legitimacy" or "political rights,"[71] which underscores the fact that "persons have the right to be left alone" by the state.[72]

Brilmayer therefore concludes that "in a political rights analysis domiciliary connecting factors are of front-line importance, not secondary to territorial connecting factors. More important, under the political rights model, domiciliary factors function solely as a justification for the imposition of burdens; it is the party who is burdened who must have a local domicile."[73]

---

automatically illegitimate. Such a law is unnecessarily generous, but so long as the burdens are self-imposed, the state may legitimately choose to do so. The decision-maker imposing such a rule should be certain, however, that the costs are considered and found to be acceptable[….] Such a choice of law regime is not ideal. Adoption of such a regime should be a carefully considered choice, even if only local persons are disadvantaged."

[67] *Ibid* at 1291.

[68] *Ibid* at 1292.

[69] *Ibid* at 1292.

[70] *Ibid* at 1293. See also 1294: "one must show that the individual is properly subject to the state's authority before he or she can be called upon to contribute to the state's social good."

[71] *Ibid* at 1295. See also 1296: "one's choice of law rights, are, like personal jurisdiction rights, held against the state directly. They are not rights against the other party to the lawsuit (although, of course, they will affect one's legal claims).

[72] *Ibid* at 1296.

[73] *Ibid* at 1299.

IV. The Relational Internationalist Perspective

Lea Brilmayer's reaction to the state-centric analysis in PrIL is highly suggestive because her framing of the critique brings to light a series of assumptions at work in her own rights theory of legitimacy. Brilmayer pleads for PrIL theory and methodology to focus on individuals. She further assumes that PrIL must offer a framework of justification of the applicable law, and that this justification is owed to individuals. She argues rightfully that "the claims of the instant parties to fair treatment" matter.[74] Yet for Brilmayer this translates inevitably into equating "fair treatment" with "negative rights," and embracing a strong "philosophical distinction between deontological and consequentialist reasoning."[75]

Brilmayer's assumptions and distinctions lead her to frame her theory as one of "political legitimacy," as a "negative rights approach" set within a relationship between the individual and the state. First, while she refers to "the instant parties" she does not focus on their private law relationship but rather develops her own theory by reference to an isolated individual who has a "right to be left alone" by the state. The individual is separated from the collectivity and from the other party to the legal relationship and exists in tension with state authority. Second, and consequently, she finds it plausible to distinguish between negative and positive rights, or to imply that a theory of legitimate authority can reference only negative rights. The state's "affirmative obligation to act so as to help people realize their value" is contrasted to, and separated from, the state's duty to "leave individuals alone." This, finally, creates a tension between corrective and distributive justice. Allegedly, the ideal choice of law rules would be "actuarially balanced" and centered on corrective justice.[76] "Actuarial balance is desirable, because

[74] *Ibid* at 1287.
[75] *Ibid* at 1285.
[76] *Ibid* at 1277.

choice of law seems an unpromising area of law in which to effect wealth redistribution. In the interstate arena, a state's authority is at its most tenuous."[77]

Brilmayer's theory of legitimacy is centered on the state-individual relationship in more ways than meets the eye. The relationship is important not only in the sense that the relevant inquiry is the legitimacy of imposing state authority (through its law) on individuals. The legitimacy theory is cast as a state-individual relationship also by suggesting that individuals' entitlements, benefits, burdens, and expectations can be thought of only by reference to a political relationship between the individual and the state. The following passage is particularly suggestive of how Brilmayer seeks to capture any benefits and entitlements within the state-individual relationship alone:

> In the usual domestic context, an individual would expect to experience both the benefits and the costs of a rule over the long run. Substantive rules, in other words, are actuarially fair, because an individual is eligible, in theory, to gain as much by application of the rule as he or she would lose if the tables were turned. To make a class of individuals ineligible to receive the benefits under a rule, while allowing the rule's burdens to be imposed upon them, results in an actuarial imbalance because over the long run the rule cannot be expected to work out evenly. The point is not merely a comparison of how insiders and outsiders are treated, although these are also problems of a distributional type. Rather, the problem is that of a single individual and his or her overall expectation of benefits and burdens.[78]

In Brilmayer's theory, then, the legitimacy of applying a certain law to an individual depends on the political relationship she has with a particular state. In contrast, the relational internationalist perspective I will highlight in this section differs from Brilmayer's account of legitimacy in important ways.

First, the relational internationalist authors suggest that any kind of "connecting factor" or principle one might search for in order to determine the legitimacy of applying a particular law must focus on a legal relationship rather than an isolated individual. The individual is viewed as inherently social and private law relationships are understood as

[77] *Ibid* at 1311.
[78] *Ibid* at 1309-1310.

legal elements that serve a variety of human goals.[79] Understanding those human goals and their transnational context then becomes of paramount importance.

Second, because of the fundamentally relational account of the individual and individual freedom, the categories and dichotomies of negative/positive rights, corrective/distributive justice, and private/public are muddled and lose their a priori validity, although each scholar considers their importance to various degrees. PrIL is analyzed by analogy to and through the prism of private law (rather than PublIL or constitutional law) because the analysis is focused on the legal relationships that individuals purposefully develop with each other. As opposed to being perceived or analyzed in a vacuum of isolated freedom or liberty, these relationships are placed in a political and social context.

1. The Social Nature of the Individual and of Freedom

In the opening essay to the "Historical Legal Science Review" which he founded together with Eichhorn, Savigny wrote that according to the historical school he embraced:

> There is no complete (vollkommen) individual and isolated human existence: rather, what can be perceived as atomistic, is, viewed from another angle, part of a larger whole. Therefore, every individual is at the same time part of a family, a people, a state: each historical period of a people is the continuation and development of all previous historical periods; any other analytical perspective is therefore one-sided, and when it is followed, it is false and pernicious.[80]

A theory that imagines a tension and "a complete separation between the individual and the state," does not therefore seem right to Savigny.[81] For Savigny, "the seeds of the state are in the families and the immediate constituents of the state are the

[79] Behrends, "Geschichte", *supra* note 7.
[80] Friedrich Carl von Savigny, "Über den Zweck dieser Zeitschrift" (1815) 1 Zeitschrift für geschichtliche Rechtswissenschaft 1 at 3. See also 1-3 (Savigny contrasted the historical perspective with the ahistorical perspective under which he included both rationalistic theories and natural law theories) [Savigny, "Über den Zweck"].
[81] *Ibid* at 5.

families, not the individuals."[82] The social nature of individuals is reflected and embraced within the state and beyond. Savigny rejected the rational, individualistic notion of the law and the state in a telling paragraph:

> Many start from the term of wrong to understand what right might be. Wrong appears to them the disturbance of freedom through another one's freedom, and this disturbance is believed to prevent individual developments and therefore must be eliminated. The elimination of this evil is believed to be achieved through law. The same is achieved, according to some, through a sensible convention, according to which each sacrifices a portion of her freedom to ensure the freedom of others…The State appears to them as a mechanism of self-defense, which under conditions of a more equitable way of life, could disappear, instead of, as I believe, become even more glorious and powerful.[83]

The social nature of the individual inevitably led Savigny to emphasize the social dimensions of liberty. Allegedly, "he who mistakenly believes he is exercising free will (Willkuer), where only a higher communal freedom is possible, renounces his most noble claims."[84] For the social individual, freedom is experienced not by dissociation from the relationships with others, but by embracing and fostering them.[85] Rückert believed Savigny was thus offering "a different way of talking about freedom" which differs strongly from the Kantian.[86] Rückert showed that Savigny's separation between law and morality does not derive from the universalization "of a subjective rational-autonomous premise" and from the "postulate of freedom according to general laws."[87] Rather, both law and morality are anchored not in individual freedom but in the "Christian way of

---

[82] See Friedrich Karl von Savigny, *System des heutigen Römischen Rechts,* vol 1 (Berlin: Bei Deit & Comp., 1840) at 344 [Savigny, *System* 1]. For an illuminating account of the role of the family in the structure of the Roman society and in private law see Okko Behrends, "Das Sozialrecht. Sein Wert und seine Funktion in historischer Perspektive" in Behrends, Okko & Eva Schumann, *Gesetzgebung, Menschenbild und Sozialmodell im Familien- und Sozialrecht*, Neue Abhandlungen der Akademie der Wissenschaft zu Gottingen, Bd 3 (Berlin; New York: De Gruyter, 2008) [Behrends, "Das Sozialrecht"].
[83] Savigny, *System* 1, *supra* note 82 at 332-333. See also Rückert, *supra* note 5 at 365 (Rückert sees in this passage a glimpse of Savigny's general theory of the state, people and truth, none of which are linked to a theory of individual will. He believes these passages, among others, outline Savigny's absolute "rejection of Kant's theory"). For an account of Savigny's "positive anthropology" see Behrends, "Geschichte," *supra* note 79 at 268.
[84] Savigny, "Über den Zweck," *supra* note 80 at 4.
[85] See Rückert, *supra* note 5 at 368.
[86] *Ibid* at 368-369.
[87] *Ibid* at 365.

life."[88] Law serves morality by "recognizing the equal moral worth and freedom of individuals"[89] where the "moral determination of human nature" rests in "the Christian way of life."[90]

It was therefore wrong to assume an isolated, atomistic image of the individual. But it was equally wrong to image the individual as subsumed under the state. Savigny repeatedly warned of "despotism," the loss of "spiritual freedom" through domination and suppression.[91] Therefore, one had to avoid imagining the state as a "brotherhood," "a fraternity" or the individual as "an organic member of a larger whole,"[92] not because Savigny wanted to disallow solidarity with others (see below), but because this would allow for and indeed foster arbitrary power of the ruler over the people.[93] It was therefore not the social responsibilization of the individual that had to be avoided, but the imposition of "the individual view and arbitrary will" of the ruler over the people, in the name of 'the social body.'[94]

Savigny, as well as Story and Jitta for that matter, shared with Brilmayer the fear that the state might treat the individual merely "as a means" to an end. Certainly Pillet's proposition that the "litigating parties disappear for a while" while states determine the proper distribution of authority amongst themselves was unacceptable. But this did not

---

[88] *Ibid* at 365-366.
[89] Savigny, *System* 1, *supra* note 82 at 55.
[90] *Ibid* at 53, 54. However, for a discussion of the way in which Savigny's religious outlook was not bound to the Christian period see Behrends, "Geschichte," *supra* note 7 at 263-264. For an account of the image of the individual's social responsibility under the Christian way of life in Roman law and under the historical school of thought see Behrends, "Das Sozialrecht," *supra* note 82 esp at 34-35.
[91] Savigny, *System* 1, *supra* note 82, *Vorrede*, at XI.
[92] Behrends, "Das Sozialrecht," *supra* note 82 at 21 citing Otto Bähr, *Der Rechtsstaat: eine publizistische Skizze* (Aalen: Scientia, 1961, reprint of 1861) at 19 (" I consider it an incomplete account to find the contrast to private law in state law. In relationship to private law, that is the law, which concerns the individual as such, there is a larger legal field in which the person is an organic member of a larger whole, so that rights and obligations arise therefrom. We can call this higher term under which the individual is organically classified, and from which he acquires a legal existence, cooperatives. The most important such cooperative is the state." Behrends considered Bähr's attributing Savigny a clear separation between public and private law because he did not articulate an account of states as cooperatives "utterly unfounded," at 20. He also explains that this would have been "under the circumstances of the modern state, encouraged by the French revolution, a fatal general claim," at 21).
[93] For a wonderful discussion of the way in which Savigny's theory is compatible with the social state by preserving both duties of solidarity as well as individual self-responsibility see Behrends, "Das Sozialstaat," *supra* note 82 esp. at 19-27 & 20-21 (explaining how Bähr hastily dismissed Savigny's private law/public law duality and thereby imagined the state as "a social body" which would in turn "enable despotic power").
[94] Savigny, *System* 1, *supra* note 82 at 57.

mean that the individual in isolation would become the central figure of law in general and PrIL in particular.

The proposition that the law of domicile of one individual should apply to govern all PrIL matters was therefore equally unacceptable.[95] Savigny indeed thought, like Brilmayer, that domicile "connects a person with a particular territory."[96] But unlike Brilmayer, he was keen to observe that "legal relations concern not a single person, but several."[97] "In such cases, this principle leaves us quite helpless, since we cannot find out from it which of the persons affected by the legal relation shall fix by his domicile the local law to be applied."[98] Rather "legal relations are of such diverse nature, that they can hardly be reduced under a common absolute rule as to their seat."[99] Therefore, while domicile as a general rule might establish the relationship between an isolated individual and a territory, for inter-personal relations a thorough analysis of "the essence and requirements of each legal relationship" is necessary.[100]

2. Politics and Private Law Relations

Emphasizing the social nature of individuals and of freedom and autonomy made it possible to connect private law relations with politics. This is most obvious in Jitta's theory, but as Okko Behrends has shown, it is also true of Savigny's theory.

Savigny's PrIL theory is usually described as apolitical and, in fact, as a deliberate effort to depoliticize the field.[101] While his localization of legal relations could often be criticized, as it was by Jitta, for failing to engage with or underscore the contentious policy elements of the "nature of legal relationships,"[102] I agree with

[95] As showed in the previous chapter this was suggested by Eichhorn and Puchta taking the individual isolated. Savigny also references this in Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*, translated by William Guthrie (Edinburgh: T&T Clark, 1880) at 143, n g [Savigny, *Private International Law*].
[96] *Ibid* at 143.
[97] *Ibid.*
[98] *Ibid*.
[99] *Ibid* at 141.
[100] *Ibid* at 145.
[101] See for example Horatia Muir Watt, "Private International Law Beyond the Schism" (2011) 2 Transnat'l L Theory 347.
[102] For an account of the different ways in which Jitta employs the "legal relationship" as an analytical element, as opposed to Savigny, see Chapter 5.

Behrends's view that it is a misreading of Savigny to suggest that he meant to discourage political engagement, or that his analysis of legal relations was meant to encourage a dogmatic perspective, rather than a more pragmatic perspective grounded in real life.[103]

Indeed Savigny criticized repeatedly Kant's formalism[104] and pled on various occasions for the revival of the political engagement of the Roman Republic, including in the area of private law.[105] For example, he decried what he perceived to be the citizenry's indifference to the legal institution of property, as well as its perception as "merely technical" by the jurists of his time. He argued that these attitudes are "a sign of a public state of affairs, which lacks the political spirit of legal development; when this spirit is present these relationships [of property] appear as everything but irrelevant."[106] Here again Savigny wished to maintain political engagement by the citizenry and therefore relied on the notion of the "Volk" as the source of the "people's spirit" in order to counter contractual theories of the state as well as despotic regimes.[107]

Savigny in fact recognized and emphasized the need for political engagement required for legal reform[108] and embraced "higher political goals."[109] With respect to proposals for the legalization of consensual divorce, Savigny argued that proposals had not properly engaged with all the moral dimensions of laws with regard to marriage, and that it is based on a "false presupposition that law has no other purpose but to ensure the highest individual freedom" and that there are no policy principles involved in a marital relationship.[110] With respect to legislative proposals relating to mortgages, Savigny

---

[103] See for example Behrends, *supra* note 79 at 279: "It always leads to great mistakes, when one looses sight of the fact that Savigny's legal terms exposition is not formalistic, classificatory, which is made prior to any real experience, but rather empirically grounded and based on the observation of real life phenomena." For a very interesting account of how Savigny tried to influence the 19th century agrarian reform in Germany through legal reform and through resurfacing Roman law concepts see James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 2014).

[104] *Ibid* at 261, n 6, 267, n 17, 270, n 26, 298-299 (referencing how the "Vertrauensprinzip" is fully integrated in Savigny's theory, but is explicitly excluded in Kant's).

[105] *Ibid* at 280. See Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr & Zimmer, 1814) at 31, 32 (pleading for the revival from the Roman Republic of the "lively, vivid political spirit.") [Savigny, *Vom Beruf*].

[106] *Ibid* at 48.

[107] Behrends, *supra* note 79 at 280.

[108] Savigny, *Vom Beruf*, *supra* note 105 at 16.

[109] *Ibid*.

[110] Friedrich Carl von Savigny, "Stimmen für und wider neue Gesetzbücher" (1817) 3 Zeitschrift für geschichtliche Rechtswissenschaft 11 at 25.

argued that the proposals were "mechanical"[111] and that they were based on simplistic a priori assumptions that mortgage law can be built based on universal formal principles (such as publicity and specialty), which can easily be implemented in any country with no regard to the political context.[112] "This merely formal perspective on legislating I consider pernicious."[113]

Therefore Rückert's and Behrends's reading of Savigny's general theory as being grounded in a constant back and forth between the individual and the social, the technical and the sociological, and the abstract and the empirical, seems persuasive and very instructive for one's understanding of Savigny's PrIL theory. Behrends argues that this duality is most evident in Savigny's distinction between the legal relationship and the legal institute.[114] The latter represents the "legal elements which grant legal structure" to the legal relationship, while the former represents the empirical, sociological part of private law, reflective of life experience.[115]

In Savigny's theory, legal relationships serve human needs, desires, purposes and so on, they represent the condition for human existence and social life, and a proper determination and development through law must follow their inherent social goals.[116] Property, for example, is not determined by the formalistic and abstract notion of individual will,[117] but is derived from the observation that the individual secures the means of his existence "through the extension of his power over its natural borders."[118] Therefore, as Behrends notes, legal relationships, including property, are for Savigny "not abstract forms, but rather purposeful rules which must not be interpreted schematically, but according to life experience."[119]

It is significant then that Savigny chooses to determine choice of law rules based on an analysis of legal relationships, rather than legal institutes. Using the legal relationships as a reference point for PrIL theory by itself is potentially very useful and

---

[111] *Ibid* at 26.
[112] *Ibid* at 28.
[113] *Ibid.*
[114] Behrends, "Geschichte," *supra* note 7 at 287ff.
[115] *Ibid* at 288, 291.
[116] *Ibid* at 291.
[117] *Ibid* at 285.
[118] Savigny, *System* 1, *supra* note 82 at 344.
[119] Behrends, "Geschichte," *supra* note 7 at 291.

quite powerful imagery for focusing on a sociological, empirical observation of inter-human relationships and the purposes, goals and contexts of their development. Referring to a transnational property, tort, or family relationship between individuals linked to a variety of jurisdictions can ground the analysis of choice of law matters in the real life experiences of individuals in the transnational context.

In the historical development of PrIL, the shift of focus from the legal provision to the legal relationship as an analytical tool for solving choice of law matters, was either hardly perceived as significant or interpreted as exclusively liberal and individualistic. Jitta, on the other hand, celebrated Savigny's analytical shift to legal relationships as "the dawn of the modern development of Private International Law."[120] He believed that this enabled one to shift back and forth from social reality to legal determinations.[121] Private law relations could be explained, analyzed and possibly assigned a policy substratum (see Jitta's term "jus gentium privatum" which I will describe in the next chapter) by reference to inter-personal social reality and social needs, while at the same time being more minutely specified and contextualized within different national laws responding to different socio-political contexts.[122] In two volumes, Jitta broke down the vast area of legal obligations in categories and subcategories[123] and went back and forth between general observations about the needs of "international social order" and a comparative analysis of various legal provisions. An excerpt of his analysis of the social nature of the agency relationship provides some insight into his theory. In an initial account of the agency relationship Jitta argues that

> We can explain, by an inter-human social duty, the obligations arising from the management of another's business, without recourse to a quasi-agency. The person who, without being thus obliged conducts the business of another, could be held to continue such business for a reasonable time because by involving himself, he prevented the intervention of another, and the spontaneous interruption of the managing of affairs could cause damages to the one for whom he is managing the affairs. In turn the one whose

[120] D Josephus Jitta, *The renovation of international law on the basis of a juridical community of mankind, systematically developed* (The Hague: M. Nijhoff, 1919) at 90.
[121] *Ibid* at 94-99.
[122] Jitta applies this dual comparative legal/sociological perspective in his analysis of the area of obligations. See Josephus Jitta, *La Substance des Obligations dans le Droit International Privé,* 2 vols (Hague: Belifante Freres, 1906, 1907) [Jitta, *Substance des Obligations*].
[123] *Ibid.*

> affairs were usefully managed has a duty to reimburse the agent; this is more than a duty of recognition, the social order is interested that the agent does not sustain the damage in this case; that would discourage those who are willing to serve. In case of full success we could even say that the one for whom the affairs were managed is unjustly enriched at the expense of the agent, if he is able to save the expenses that are attached to the management of the affairs, however it is not the measure of the enrichment which serves to establish the rights of the agent. The reasonable social order also requires that we do not encourage too much an interference with someone's affairs, which could be indiscrete.[124]

This general examination of the various interests and social expectations involved in the agency relationship is then followed by a comparative analysis of various laws, which brings to the surface "a great number of very serious nuances."[125] Once the different interests and perspectives are extracted both from a quasi-sociological examination of "the reasonable order of social life" and a comparative analysis, it appears impossible to presume that the complexity of transnational relations could be reduced to an a priori choice of a national law. Rather, Jitta argued that one must "resort to the circumstances."[126] He argued that one should focus on inter-personal relations and apply to them "the international substratum of private law,"[127] when it exists. When it does not, the diversity of perspectives within the various laws should not be obscured by the mechanical choice of one law. Rather, one would need to go back and forth between the various interests and circumstances of the case and the "local sphere of social life" with which they are most closely connected in light of the policies identified in the various laws.[128]

3. Private and Public Law

The fact that relational internationalist authors took private law relationships as their analytical point of departure should not be associated with a strict division between

[124] Jitta, *Substance des Obligations*, vol 1, *supra* note 122 at 39.
[125] *Ibid* at 207.
[126] *Ibid* at 211.
[127] Thomas Baty, "A Modern Jus Gentium" (1909) 20 Jurid Rev 110 at 114.
[128] This is the methodology most thoroughly exemplified in his volumes on the law of obligations. See *supra* note 122.

private and public law. At the rather general level of centering the analysis on inter-personal relationships, relational internationalists distinguished between private and public law.[129] This meant that their analysis starts from the particular individuals involved in or affected by the legal relationship subject to the dispute.

However, substantively, relational internationalists do not advocate an absolute separation between private and public law in the way that we might expect today. While the correlative aspect of the private law relationship is maintained, the entitlements of the parties are not set in a vacuum, but rather are dependent on and determined by social considerations. This is most clear in Jitta's and Story's theories which often reference private law in instrumental terms.[130] However, even in Savigny's theory, the distinction between private and public, and between law and morality have a different outlook and different justifications than the liberal, Kantian theory and are therefore much more fluid and unstable.

Savigny, for example, while distinguishing between private and public law as two "equally important parts of the law,"[131] wrote that the state and public law are "the highest level of legal development"[132] and that they have "the most determined influence on the development of private law."[133] Both private and public law join forces to fulfill the "general purpose of law" and are anchored in "the Christian way of life."[134] Savigny was misunderstood as eliminating the pursuit of the common good from the purview of private law. Rather Savigny argues that there is no need to distinguish a "separate" principle of national economy under the name of "the public good" since "to the extent the aim is to enlarge our dominion over our external nature (resources), this can only enlarge and improve the means through which man achieves moral freedom according to his nature. But a separate goal is not therein present."[135]

---

[129] Savigny, *System* 1, *supra* note 82, § 9,15,52; Daniel Josephus Jitta, *La Méthode du droit international privé* (The Hague: Belinfante, 1890) at 68.
[130] See Chapter 5.
[131] Savigny, *System* 1, *supra* note 82 at § 9,15,52. Rückert, *supra* note 5 at 359.
[132] *Ibid* at 359.
[133] Savigny, *System* 1, *supra* note 82 at 24.
[134] Savigny, *System* 1, *supra* note 82 at 53-54: "This general scope of all law is based on the Christian way of life; since Christianity is not only recognized by us as the rule of life, but it also transformed the world, so that all our thoughts as foreign and hostile as they might seem to it, are nevertheless disciplined and permeated by it." See also Rückert, *supra* note 5 at 359.
[135] Savigny, *System* 1, *supra* note 82 at 54.

Rückert is therefore right to point out that Savigny's distinction between private and public law should not be analogized "to the natural law-liberal distinction between private and public law."[136] Rückert also tellingly points out that the difference between the natural law-liberal distinction and Savigny's is connected to Savigny's constant integration of the individual and freedom into a larger whole.[137] In Rückert's words, "in reality Savigny did not ignore the fact that any exercise of freedom requires an examination of the larger point of view, the "Christian way of life" in which law has its "ultimate truth". In this un-discharged voltage of his private law formulas, any abuse of freedom activates the "general" element."[138]

Furthermore, if law and morality are separated, it is not only for fear of a despotic moralist, but also because "law serves morality, not by doing her bidding, but by securing the free development of its strength resting in each individual will."[139] Separating the two enables the development of morality. Savigny explained this by outlining the differences between family and property relations, although the reasoning might appear questionable:

> Against the contention expressed here that property law, unlike family law, does not have a moral component, one could argue that moral law should cover every type of human action and that therefore property law should also have a moral basis. However, it does have a moral component in that the rich should only perceive his riches as a good entrusted to his administration, even if this view remains foreign to the legal order. The difference rests in the fact that the family relationship is only partly covered by law, so that a large part is left to moral precepts. In contrast property relations are covered largely by legal rules without reference to the moral or immoral use of the rights. Therefore, the rich can leave the poor without support or harsh use of rights and the help offered arose not from private, but from public law, for example in the institutions supporting the poor, to which the rich can be forced to contribute, even when their contribution cannot be noticed directly. It remains therefore true that property law as a private law institute does not have a moral component; but this contention neither runs against the unconditional reign of moral laws nor places private law in an ambiguous light.[140]

---

[136] Rückert, *supra* note 5 at 359.
[137] *Ibid*.
[138] *Ibid* at 360.
[139] Savigny, *System* 1, *supra* note 82 at 331. For the explanation of the religious connotations of the separation between law and morality see Behrends, "Das Sozialrecht", *supra* note 82 at 288-290.
[140] Savigny, *System* 1, *supra* note 82 at 370.

Savigny therefore distinguished between law in its "pure and direct" form and the instantiations of the legal element in an "indirect and mixed form."[141] The pure and direct form refers to the rules that clearly specify the conditions of individuals' rights and entitlements, whereas the "mixed" elements of law represent principles, policies, and values that need pragmatic balancing and weighing in individual cases.[142] This duality is found in Savigny's PrIL as well.[143] Savigny therefore integrated various ways of correcting and rethinking the formal private/public divide.[144] Behrends notes that in this back and forth between various values and policies, "he allowed for room for any social policy, including protection for the working class."[145] By elucidating the context of the Roman sources that Savigny relied on, Behrends argues that "Savigny's system was obviously open for social law, in principle in the same way as the current social Rechtsstaat incorporating fundamental rights."[146]

But this social law is not based on a complete integration of private law into public law, because this would allow for the state's "full disposition over education, the work force and the distribution of goods."[147] Rather, it is based on a perpetual consideration and balancing of different policies and different images of the individual within a social community. Behrends explains that in this "historically grounded balance […] the value of the individual and personal freedom of the adult capable of independence is placed at the forefront and the requirements of solidarity and serving others are implemented in both areas [of freedom and solidarity] to the protection of the first."[148] Behrends shows that the achievement of economic independence and therefore

---

[141] *Ibid* at 55ff.
[142] *Ibid* at 55 naming: 1. Moral goals (boni mores) including in the new law religious goals; 2. Observance of state interests; 3. Fatherly provisions, as well as "promotion of exchanges, protection of various classes of people, such as women and children, against particular dangers." For a discussion of the social law vision that emerges from Savigny's duality between individualistic premises and other-considering duties see Behrends, "Das Sozialrecht," *supra* note 82.
[143] In his eigth volume, Savigny cited his discussion on the various types of laws from his first volume. See Savigny, *Private International Law, supra* note 95 at 77ff.
[144] Behrends notes that "Savigny's historical legal school which recognized the pertinent motives of the French revolution but also wished to maintain the republican freedoms, came in this search for the "true", meaning the correct social model." See Behrends, "Das Sozialrecht," *supra* note 82 at 19.
[145] Behrends, "Das Sozialrecht," *supra* note 82 at 19, n 46.
[146] *Ibid* at 20.
[147] *Ibid* at 24.
[148] *Ibid* at 24.

self-reliance rests at the core of the image of the individual in the social state and in Savigny's system, and has its historical roots in the Roman society of small families aspiring to economic self-reliance:

> If one recognizes in this way the adult individual capable of self-reliance as the model of the law it becomes clear that social law takes account of an image according to which the individual within the citizenry to which he belongs or amongs which he lives requires attention and solidarity and, to employ the *jeu de mot* by mister Eberhard Echenhofer, wants to be and must be *solidaire*, not *solitaire*. It is an aspect, which belongs to the human condition. Everyone is at some point young, constantly aging and in need of help, many temporarily or long term incapable of working or unemployed; and everyone is, from the beginning until the end, in need of information.[149]

4. Freedom and Responsibility

Savignys is clear that with "great caution," any sphere of individual freedom that private law might grant can be rethought and narrowed in light of a wide range of policy considerations from outside of private law. Principles of "boni mores," "bona fides," and inter-personal trust ("Vertrauensprinzip") provide further relational context and social limits within which individual freedom can be exercised *within* private law.[150]

This sought after equilibrium between the individual and the social environment, between individual freedom and "social freedom," culminates for both Savigny and Jitta in a perpetual cross-referencing between individual freedom and social responsibility. Okko Behrends shows persuasively how, in Savigny's case this was the result of the influence of two different schools of Roman law. Behrends argued that "on the one hand Savigny's Christian-Enlightment anthropology is related to the skeptical-academic individualistic tradition. On the other hand, his legal theory, which grounds the historical truth of legal principles, reflects the general assumptions of the natural law stoic school

[149] *Ibid* at 24.
[150] Behrends, "Geschichte," *supra* note 7 at 293. For the context of the roman sources from which Savignys seeks inspiration see Behrends, "Geschichte," *supra* note 7 at 294. See also Okko Behrends, "Die *bona fides* in *mandatum*. Die vorklassischen Grundlagen des klassischen Konsensualvertrags Auftrag" in Okko Behrends, *Institut und Prinzip. Siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtsshulen. Ausgewählte Aufsätze* (Göttingen: Wallsteig, 2004) vol 1 at 806 [Behrends, "Bona fides"].

of thought and establishes therefore a true methodological parallel between Savigny's and the Stoic's legal theory."[151] This enabled Savigny to create "an equilibrium between the formal rules of individual freedom and material principles that ground other-considering duties."[152]

This equilibrium is partly reflected in Savigny's "Vertrauensprinzip" and bona fides. The general Roman law context for this principle, on which Savigny drew heavily, is well explained by Behrends:

> The self-serving ius civile, the ius civile in the narrow sense, is the area of self-resposibility and freedom of citizens and therefore of the self-centering. This separates people. The area of ius naturale or ius gentium is the area of *aequum et bonum* or *bona fides* and is dominated by principles of others-considering duties. It unites people regardless of the ius civile and aims at trustworthy cooperation and solidarity.[153]

Savigny tried to create a duality and mutual reference between two dichotomies: on the one hand individual freedom/social responsibility and on the other hand the structure/value or rule/principle dynamics of the law.[154] Behrends thought the linking element between the two extremes within each set of dichotomies is the "trust principle" (Vertrauensprinzip) of "loyalty and faith" (Treu und Glaube). [155]

On the one hand this principle was meant to counterbalance individual freedom and social responsibility and was thought of as a vehicle enabling the weighing of values and goals.[156] Savigny recognized openly that the balance might tilt in different directions depending on the case, as well as the socio-economic conditions of each period[157] and already noted "the extended importance of *bona fides.* "[158]

---

[151] Behrends, "Geschichte," *supra* note 7 at 297.
[152] *Ibid.*
[153] Behrends, "Bona fides", *supra* note 150 at 827.
[154] Okko Behrends, "Struktur und Wert. Zum institutionellen und prinzipiellen Denken im geltenden Recht" in Okko Behrends, *Institut und Prinzip. Siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtsshulen. Ausgewählte Aufsätze,* vol 1 (Göttingen: Wallsteig, 2004) 51 at 58-59. [Behrends, "Struktur und Wert"].
[155] Behrends, "Geschichte," *supra* note 7 at 294 citing, among others, Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (Berlin: Bei Veit & Comp., 1841), vol 5 at 108.
[156] Savigny, *System* 1, *supra* note 82 at 5.
[157] Behrends, "Struktur und Wert," *supra* note 154 at 59: "Savigny's model is in conformity with ancient precepts also in that the form-value dichotomy belongs to the nature of law, but the particular resulting

On the other hand, the principle was "partly extra-legal social and partly juridified."[159] This enabled him to go back and forth between "life constructed socially with no legal coercion[160]" and "life viewed from one angle only, namely the legal."[161] Extracting principles of bona fides from social custom and general reasonable expectations meant openness to referring to social life and life experiences, as well as to acknowledging the "social application of private law."[162] In the last chapter I show how this structure/value duality translates into Savigny's integration of individual liberty and public policy on the one hand, and uniformity as well as flexibility in PrIL, on the other.

Here I merely want to note that in PrIL, too, Savigny examined different legal relations precisely on the basis of this duality between liberal and social principles so as to understand which are dominant in which kinds of relationships. Whereas contract seems to reflect a higher degree of individual liberty for him, tort appears embedded in too a wide range of social considerations. This, in turn, reflected in the "different degrees of voluntary submission." Within contract law, voluntary submission translates into a more or less free choice of law; for property, the voluntary submission is merely a reflection of the empirical observation of the "necessity" of submitting to the law of the place where the property is located; torts involve too many social consequences so that no voluntary submission (embodied either in the exercise of choosing a domicile or in traveling to the place where the tort occurred) is enough to establish the application of a law.[163] And of course whatever initial degree of individual freedom might be granted (for example in contract law), a second level analysis involves the extent to which an abuse of individual freedom could "activate the general level" through the public policy exception.

It is precisely in this gradation and constant cross-reference between individual liberty and social responsibility that Behrends saw yet another striking difference

---

counterbalancing is a task that occurs in each era and which is not always best attained in each era. It is therefore no accident that Savigny rediscovered the duality between form – pure legal element – and value – mixed legal element, but was aided in this discovery also by the Christian-secular view that the individual needs to attain moral freedom, a space of formal legal freedom. For Jhering this concept is then overwhelmed by a strong cultural optimism, which considers legal structures and values the product of human culture."

[158] Savigny, *System* 1, *supra* note 82 at 5.
[159] Behrends, "Geschichte," *supra* note 7 at 293.
[160] *Ibid* at 294.
[161] Savigny, *Vom Beruf*, *supra* note 105 at 30.
[162] Behrends, "Strucktur und Wert", *supra* note 154 at 60.
[163] Savigny, *Private International Law, supra* note 137 at 184-185, 196, 253-255.

between Savigny and Kant. While Kant rejected the Roman "bona fides" as a principle determining in any way individual responsibility,[164] Savigny tried to "incorporate social reality under the political life principle of law"[165] precisely through the Roman law principle of bona fides translated into "loyalty and faith."

The same principle of social responsibility is found repeatedly in Jitta's theory under another, but very similar terminology. Much of the analysis of transnational private law relations is based for him on a principle of inter-personal, social "trust." As in Savigny's theory, the principle is partly extra-legal and socially constructed, "based on the demands of universal social life," and partly juridical.[166] This means that either the applicable national law or the rights and obligations of individuals directly can be derived from the various elements of the inter-personal relationship and its transnational context.[167]

According to Jitta, one should be attuned to the reasonable expectations that individuals create in each other and in the third parties whom their actions involve or affect.[168] One should also examine, based on this principle of "social trust," into which "sphere of social life" individual actions have penetrated and which individual and community interests they have affected.[169]

However, Jitta's theory seems to use the principle of social trust differently from Savigny's. First, for Savigny the bona fides was used as a medium to counter individualism and inject social obligations. For Jitta, the distinction between liberty and social responsibility is less clear and it is less clear overall whether there is a duality between liberty and social responsibility or whether the principle of social trust becomes the main vehicle of analysis - not alongside but sometimes instead of the concept of individual freedom. His adage "if private law is social, PrIL is doubly social" is meant, I believe, to emphasize precisely the significance of what he constantly referred to as "the social duty of person to person" underlying both private law and PrIL.[170]

---

[164] Behrends, "Geschichte," *supra* note 7 at 298.
[165] *Ibid* at 300.
[166] See for example Jitta, *Substance des Obligations*, *supra* note 122, vol 1 at 220.
[167] *Ibid* at 218.
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid* at 213.

Second, for Savigny it seemed important to recognize individual freedom and social responsibility as counterweights to one another precisely in order to provide some stability, predictability, and structure to legal reasoning, whereas Jitta might be criticized for falling in the trap of the "free law judge." He seems to have been much less concerned with judicial discretion than Savigny and even Story might have been. From that point of view, "the mixed legal element" of bona fides, which embraces and references open ended appreciations of social interactions, takes up much more analytical space in Jitta's work than in Savigny's. In part, this is explained by the particular intellectual context in which they employ the terms. Savigny took them from Roman law and its particular legal and social context. Jitta was interested in a sociological analysis and interpretation of law. This also explains why Jitta might have felt quite comfortable in taking relationality to another level of analysis. While for Savigny the individual is both a self-responsible self-referential being and a *solidaire*, Jitta seemed to think of the individual as always socially bound.

Therefore, while Jitta openly admitted that the principle of reasonable expectation, social trust, and inter-personal duty is itself controversial and subject to different interpretations and gradations in various legal systems,[171] he argued that this regrettable lack of uniformity in the interpretation or the substance of the principle of inter-personal morality should not lead PrIL back into the formalism of choosing between laws, because this would take the field away from what Muir Watt calls "the sensitivity to life experience."[172] In this way, Jitta seems to have been captured by what Behrends calls "the false alternatives" of either "formal law or free judge law," while in Behrends's view Savigny tried to navigate between them.[173] Jitta therefore argued that until a common conviction existed between national laws the judge should be able to express his reasoned "conviction" as to the reasonable way of solving the PrIL matter based on the principle of "inter-personal trust" as determined by the "demands of the international social life."[174]

---

[171] *Ibid* at 221.
[172] Horatia Muir Watt, "Future Directions?" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015) 343 at 375.
[173] For a very interesting discussion of Savigny's model versus the newer strands of judicial discretion or interest jurisprudence see Behrends, "Struktur und Wert", *supra* note 154 esp. at 60-62.
[174] Jitta, *Substance des Obligations*, *supra* note 122 at 220.

It is at this point that Jitta's theory intersects with that of the American realist David Cavers, as I have suggested in Chapter 4. As explained in that chapter, Cavers argued that the variety of "differentiating facts" of inter-personal relations should guide the choice of law analysis. In the case of "a salesman [who] induces a married lady, not yet 21, in state A to order several feet of belles lettres," many facts relating to the interpersonal relation might have a reasonable bearing on the outcome of the case. "The fact that the publisher's agent went to the defendant's home would be material," as well as whether she "first clipped the coupon," or "whether the sale was part of a sales campaign waged in that state and not an isolated transaction," or whether "the bargain was struck by mail," or whether "the transaction comprises a sale of books…or shares of stock…or, on the other hand, some article, a vacuum cleaner perhaps, which barely lay beyond the concept of the 'necessary.'"[175] Arguably all of these factors have an impact on the parties' reasonable expectations in relation to one another. All these factors would need to be considered under the analysis of principles of "inter-personal trust." According to Cavers, "the degree to which sustaining this bargain would impair the protection which state A insists is due its infant matrons must be measured against the degree to which its avoidance will frustrate the reasonable expectations of business men from without the state."[176]

Offering the woman or the businessman the protection granted by her or his state will depend on their various actions and intentions, as well as the policy evaluation of the judge.[177] Since I view both Cavers and Jitta as trying to establish fair principles of inter-personal relations in the transnational context, the relevant question is indeed, as Cavers suggested, "whether the individual is entitled the protection of the law she claims" in light of the actions of the parties and many other relevant "differentiating factors" of the dispute.[178] It should be possible to argue that the woman might not be entitled to the protection if the sale involved stocks purchased online on the assumption of the woman's much more sophisticated knowledge and purposeful purchase. It should be equally plausible to argue that the man is not entitled to the protection of his law if he engaged in

[175] David Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47 Harv L Rev 173 at 180-189.
[176] *Ibid*.
[177] *Ibid*.
[178] *Ibid*.

a campaign in the woman's state of domicile and therefore was bound to coerce the woman into the purchase in full awareness of the age limit. This kind of analysis implies a responsibilization of individuals in their transnational conduct and also emphasizes the mutual care, respect and consideration that individuals should pay to one another in their transnational dealings.

Allowing individuals to use one another as means under the cover that "they should not be treated as means" *by the state,* as Brilmayer suggested simply obscures their inter-personal obligations under their "citizenship" or "domicile" affiliation with a state. In other words, rather than justifying the legitimacy of the imposition of one law or another on the particularities of their inter-personal dealings, one searches for legitimation in the form of a particular political link with a state.

5. Social Legitimacy

In contrast to Brilmayer's "political legitimacy" theory centered on the individual-state relationship, I believe the individual-centered theory that I have attempted to recover and reconstruct in the previous sections creates what can be seen as a form of "social legitimacy." This theory embraces Singer's proposition to "shift our focus from viewing individuals as abstract citizens whose relationships to each other are governed by rights enforced by the state to viewing them as active participants in shaping their relations in daily life."[179] But in so doing, it provides for various layers of analysis of the legitimacy of applying one particular law over another. I believe that there are three different layers embedded in the theories of the relational internationalist theorists, although they inevitably bleed into each other and reference one another's analytical nuances.

First, relational internationalists cite individuals' reasonable expectations as to the applicable law and/or as to the substantive outcome of the dispute as an important consideration. This is, for example the case when Jitta argued that it seems reasonable for individuals to assume that the authority of their state of citizenship does not follow them so as to prevent them from obtaining a divorce even after they have established domicile

[179] See Singer, *supra* note 4.

elsewhere and therefore moved their legal relationship to the social context of another state.[180] It also appears as a justification for Cavers that someone who organized a sales campaign in the country where minors are prevented from entering into contracts is less justified in his expectation that his law will apply than had the minor ordered through the mail.[181]

Second, relational internationalists cite private law values, including the concepts of social trust and *bona fides* as informing a certain substratum of inter-personal morality to which individuals can be held accountable in their transnational dealings. In La Jeune Eugenie, Story felt comfortable subjecting property rights to universal values and morals, and tried to excavate the variety of values underlying private law categories in his determination of the applicable law.[182] Jitta considered a particular law applicable to legal matters relating to letters of exchange based on the confidence such letters inspired in the particular communities where they were circulated.[183] He cited the various relationships of trust emerging within the private law category of agency from both an extra-legal social and legal perspective. Savigny argued that the husband cannot change his wife's entitlements to maintenance through a simple change of domicile because this would constitute a complete disregard for her agency.[184]

Third, relational internationalists hold individuals accountable, in Jitta's words, to "the degree of their penetration in these social communities." While their methods of

---

[180] Josephus Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind* (The Hague: Martinus Nijhoff, 1919) at 120: "The State, according to my opinion, exceeds the reasonable limits of its sovereignty, by enacting a rule which forbids divorce to its subjects in such a manner, that the prohibition is absolutely indestructible. Husband and wife, especially the wife, must be at liberty to establish their home, *cum animo perpetuitatis,* in the realm of another sovereign, and to obtain a divorce there, the effect of which must be recognized everywhere. The regulation of the jurisdiction, of course, must be in accordance with the general rule."

[181] Cavers, *supra* note 175 at 190.

[182] See Chapter 5.

[183] Jitta, *Substance des Obligations*, *supra* note 122, vol 1 at 34-36.

[184] Savigny, *Private International Law, supra* note 137 at 294 (arguing that choice of law rules should not allow for "the unjustifiable one-sided power of the husband over the rights of the wife." This is because "when the marriage was about to be contracted, it was entirely in the wife's option, either to abstain from it altogether, or to add certain conditions touching patrimonial rights. She has made no such contract, but has accepted the conjugal rights as fixed by the law of the domicile, and naturally has reckoned on its perpetual continuance. The husband now changes the domicile by his own mere will, as he is undoubtedly entitled to do, and quite a different distribution of the conjugal estate is thus introduced for this marriage. If the wife is satisfied with it, our whole controversy is less important, since an alteration of her rights could have been affected by contract. The question, however, is important, if the change is detrimental to the wife, as she is not content with it").

"localization" of a legal relationship differ, as I have explained in the previous chapter, I believe none imagined private law relationships as immune from legal authority, but instead as accountable to the laws of different communities as determined by the particular "link" between a transnational private law relationship and one or various communities. Certainly one could now question Savigny's possibly essentialized analysis of the "nature" of private law relationships, as Jitta did. And, of course, one could disagree with Savigny's view of the "nature" of any one private law relationship and could downplay the element of individual liberty in relation to the element of social responsibility. But all of this would be in line with the relational internationalist perspective. Since, in my reading, these authors did not operate with nor wish to construct "false alternatives" between the individual and the state, individual liberty, and social responsibility, rearranging any of these values would not appear as an abrupt change. It is only when one argues either that the "litigating parties disappear for a while" in the PrIL division of authority among states, or that an individual can impose "side constraints" on state authority that the "recalibration" between the individual and the social, which Savigny left open, seems a drastic move in either direction.

V. Conclusions

The state-centric internationalist perspective created a framework of inter-state legitimacy whereby the application of a particular law is justified relative in relationship to a foreign sovereign, based primarily on a uniform neutral division of state authority. The same principles of neutrality, coupled with individual freedom generated theories of legitimacy based on consent, either conceived of as a free choice of law, or based on the political relationships of domicile or citizenship.

In contrast, I have shown that the relational internationalist perspective took neither extreme position. Instead, the question of legitimacy was answered in a more fluid context in which the individual is not separated from his or her private law relationships or from the state and is also not subsumed under them. Various layers of analysis were used without the sense that a particular choice between them is inevitable or that any one choice is suited for all private law relationships. Individuals' reasonable

expectations, the extra-legal social context, as well as the legal and political context, all played a role to various degrees depending on the private law relationships and to a different degree in the writings of each author. The possibility for the recalibration and the rethinking of the values underlying private law relationships and their projection in the transnational context was, in my reading, always left open.

Chapter 7 - Universalism vs. Uniformity

I. Introduction

In 1953 the German scholar Gerhard Kegel wrote a highly influential article that sought to push PrIL from "legalistic jurisprudence" (Begriffsjurisprudenz) towards "interests jurisprudence" or to achieve a proper balance between the two.[1] Unlike the American realist school, Kegel's theory was not meant to create a paradigmatic shift in PrIL. Rather, it claimed to provide the best theoretical justification for PrIL's underlying justice dimensions.[2] On the one hand, Kegel wanted to clarify that previous terms of art in PrIL, such as the center of gravity, the nature of the legal relationship, Natur de Sache and so on, should only be understood as short forms for the existence and analysis of various underlying interests.[3] On the other hand, he introduced a much debated, much contested, and some argue much misunderstood distinction between material justice and conflicts justice, suggesting that there are particular interests to which PrIL, as opposed to substantive law, caters.[4] Lastly, he used his theory of justice in PrIL to argue that PrIL deals primarily with individual and private law interests, and thereby to contest the highly political, state-centric focus of Currie's theory.[5]

---

[1] Gerhard Kegel, "Begriffs- und Interessenjurispruden im internationalen Privatrecht" in Hans Lewald et al, *Festschrift Hans Lewald: bei Vollendung des 40. Amtsjahres als ordentlicher Professor im Oktober 1953 überreicht von seinen Freunden und Kollegen mit Unterstützung der Basler Juristischen Fakultät* (Basel: Helbing & Lichtenhahn, 1953) [Kegel, "Interessenjurisprudenz"].

[2] Klaus Schurig, "Interessenjurisprudenz contra Interessenjurisprudenz im IPR: Anmerkungen zu Flessners Thesen" (1995) 59:2 RabelsZ 229 at 235 ("Currie wanted, even a limited change of paradigm. Such a thing either works or not. In contrast, interest jurisprudence aims to set the current PrIL on a rational foundation and to make judicial decision processes more transparent and therefore easier to contest, to understand and to replicate").

[3] See Kegel, *supra* note 1 at 270ff.

[4] Gerhard Kegel, "The Crisis of Conflict of Laws" (1964) in 112 Recueil des Cours 91 [Kegel, "The Crisis"]. For a list of publications by Gerhard Kegel see Alexander Lüderitz, Jochen Schröder, eds, *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende? Festschrift für Gerhard Kegel* (Frankfurt: Alfred Metzner, 1977) at 479 [*Festschrift Kegel*].

[5] See Kegel, *supra* note 1 at 287; Klaus Schurig, "Das Fundament trägt noch" in Heinz-Peter Mansel, *Internationales Privatrecht im 20. Jahrhundert: Der Einfluss von Gerhard Kegel und Alexander Lüderitz auf das Kollisionsrecht* (Tübingen: Mohr Siebeck, 2014) [Schurig, "Das Fundament"].

These different analytical moves and Kegel's general interest theory have all had a profound influence on the development of PrIL in Germany and Europe generally, even though Alex Flessner argues that the impact of Kegel's theory was not equivalent to that of Currie's theory in the U.S.[6] But according to Kegel's collaborator, Klaus Schurig, Kegel's theory represents, after Savigny's and Kahn's theories, a third stepping stone in the "fundamentals" of contemporary PrIL in Germany and possibly in many other European states.[7]

Kegel's initial articulations of interest jurisprudence in PrIL has generated intense debates and critique and has created a school of thought in its own right, at least in Germany.[8] Within this school of thought, there has been discussion of many aspects of significant importance regarding the state-centric/individual-centered analytical duality in PrIL. Scholars debated on how individual interests should be defined or discovered; what the relationship between individual and broader public interests might be; whether individual interests are only geographical or also substantive; how the interests of order and uniformity are to be evaluated from an individual-centered perspective, and what the relevance of the transnational context of individual interests might be.

All of these questions bring to light important and often underappreciated nuances regarding the articulation of individual-centered perspectives in PrIL, and I therefore begin this chapter by providing a broad overview of the main insights of interest jurisprudence on these questions. However, my interest is not only to recover these German interest jurisprudence debates as a particular variation of individual-centered perspectives developed in the second half of the 20th century. My goal is also to use these debates as an entry point to outline the way in which 19th century relational internationalists reflected on some of the same issues regarding the articulation and relevance of individual interests in the transnational realm. In this chapter in particular, I focus on the way in which relational internationalists referenced the transnational context

---

[6] Alex Flessner, *Interessenjurisprudenz im internationalen Privatrecht* (Tübingen: J.C.B. Mohr, 1990) [Flessner, *Interessenjurisprudenz*].

[7] Schurig, "Das Fundament," *supra* note 5 at 9 (arguing that after Savigny "further architects were needed to create the fundamentals of modern PrIL") & 11 (arguing that both Savigny and Kahn brought important developments to PrIL, but that the theories remained "rather intuitive and unstructured" until interest jurisprudence was developed).

[8] For a discussion of the various criticisms, which were brought against interest jurisprudence along the years see Schurig, "Das Fundament," *supra* note 5.

of individual interests and how the pursuit of order and uniformity fits within the relational internationalist perspective. This reference back to history from the 20th century articulation of interest jurisprudence to 19th century relational internationalists is not only a useful entry point to reveal yet other layers of the relational internationalist perspective. Interest jurisprudence theorists themselves engaged in a conversation with the past when articulating their views. For example, Gerhard Kegel considered the way in which his conflicts/material justice distinction differs from Jitta's and Cavers's theories,[9] while Alexander Lüderitz reflected on the way in which interest jurisprudence links to but also departs from Savigny's theory.[10] And as recently as 2014, an edited volume published in Germany inquired into the way in which 21st century PrIL might still be influenced by Kegel's and Luderitz's 20th century PrIL writings and how those, in turn, might be influenced by 19th century classical (presumably Savignian) theories.[11]

In introducing the main tenets of interest jurisprudence in the first section of the chapter, I am therefore particularly attuned to the way in which its proponents position themselves in relationship to 19th century individual-centered theories. In the second section I offer my own account of how the two constellations of theories relate and depart from each other.

II. Gerhard Kegel

In the 1950s the German PrIL scholar Gerhard Kegel began to publish a series of writings focusing on the question of "justice" in PrIL.[12] Kegel perceived himself as reacting to two different themes referenced in PrIL theory up until that time.

On the one hand, Kegel believed the 'classical' thinkers had failed to provide a true theory of justice for PrIL. He perceived Savigny's "theory of the seat", or von Bar's term "the nature of the situation," or Gierke's theory of "center of gravity" as mere "images" or metaphors that cannot explain the particularities of PrIL's justice

[9] See Kegel, *supra* note 1 at 271 & 272.
[10] Alexander Lüderitz, "Anknüpfung im Parteiinteresse" in *Festschrift Kegel*, *supra* note 4 [Lüderitz, "Parteiinteresse"].
[11] See Mansel, *supra* note 5.
[12] See Kegel, *supra* note 1.

dimensions.[13] Rather, he argued that one must identify the "interests" particular to PrIL. In other words, as later German interest theorists (and often quite different from Kegel) would argue, PrIL can only legitimate itself as a distinct field if it caters to distinct interests.[14]

On the other hand, Kegel argued that theories that explicitly or implicitly identify "state interests" as the particular 'stakes' of PrIL had to be wrong. He was thereby attacking Currie's governmental interest approach as well as the formalist state-centric European theories. Whereas the latter were allegedly wrong to assume that PrIL was governing relationships between states,[15] the former was allegedly wrong both for mixing governmental with private interests and private with public law, and for mixing questions of substantive justice with conflicts justice.[16]

According to Kegel, "the justice we are seeking in private international law demands an evaluation of interests, just as any other legal decision does. However, here we are concerned not with governmental interests, but with the interests of private persons, be it interests of individual parties or interests of undetermined persons, which might be called the interests of commerce […] For the sake of order and uniformity, this cannot be ascertained in individual cases according to fluctuating and unstable criteria. It must rather be determined with reference to the broadest possible means."[17] Furthermore

> justice, together with the interests that it regulates, cannot be divided into disconnected parts, that is, into justice and interests in the area of substantive law and justice and interests in conflicts law. The interests of conflicts law predominate as a rule, but in exceptional cases the interests of substantive law prevail. Accordingly, justice in the field of conflicts law regularly takes precedence over that of substantive law, and the rules of conflicts law govern; but as an exception, in cases where the application of foreign substantive law would violate the public policy of the forum, justice in the field of substantive law is given priority over that of conflicts law and the foreign substantive law is not applied.[18]

---

[13] See Henri Batiffol, "Les intérêts de droit international privé" in *Festschrift Kegel*, *supra* note 4 at 14 [Batiffol, "Les intérêts"].
[14] Lüderitz, "Parteiinteresse," *supra* note 10 at 53.
[15] Batiffol, "Les intérêts," *supra* note 13 at 12.
[16] See Kegel, "The Crisis," *supra* note 4, Ch XII.
[17] *Ibid* at 186.
[18] *Ibid* at 189.

It was this division between conflicts justice and substantive justice that provoked the most criticism of Kegel's theory. Recently, Klaus Schurig, Kegel's collaborator, argued that Kegel was misunderstood as pleading for the *independence,* as opposed to the *separation,* of conflicts interests from substantive interests.[19] Instead, "changes in the substantive norms and the corresponding appreciation of substantive interests spill into PrIL, since they imply different conflicts interests."[20]

This ambivalence is reflected in Kegel's attempt to position himself relative to Cavers's theory. Since for Kegel, "it is in principle wrong to make the choice of a law dependent on what is perceived as the better substantive result,"[21] Cavers, "who made the most progress in this direction" seems an appropriate intellectual opponent.[22] But Kegel was also unsure about how to read Cavers in light of the conflicts justice/substantive justice division:

> Since he [Cavers] does not touch upon the difference between substantive and conflicts justice, it is possible that what he aimed at was a refinement of conflicts justice. In that case, his contribution would lie only in proving and refining the conventional PrIL rules in light of conflicts justice. His "fresh approach" would be less provocative, but more significant.[23]

In addition to dividing substantive and conflicts justice, Kegel divided private from public law. Allegedly, in private law "the state gives its benevolent sanction to a *de facto* system of private law, rather than bringing this system into existence by legislative fiat."[24] And while he admits "this is no doubt an exaggeration [it is] a necessary one if we are to underline the essential difference between public and private law."[25] Political interests cannot in general guide the choice of law question, since they are "foreign elements to *Private* International Law," even though their relevance is recognized on a

[19] Schurig, "Das Fundament," *supra* note 5 at 12.
[20] *Ibid.*
[21] Kegel, "Interessenjurisprudenz", *supra* note 1 at 270.
[22] *Ibid* at 271.
[23] *Ibid*.
[24] Kegel, "The Crisis," *supra* note 4 at 183.
[25] *Ibid.*

case-by-case basis under public policy.[26] While Kegel remarked that private law deals with "the correct and proper ordering of relationships among private parties" this translates into the proposition that one should acknowledge the fact that "the state does not decide its own affairs, but those affairs of others."[27] The "affairs of others" stand for the affairs of "individual parties" or "of undetermined persons, which might be called interests of commerce."[28]

These interests are, in turn, defined in abstract terms based on general a priori assumptions. The following passage provides much insight into the possible arrangement of interests that Kegel anticipated, as well as the normative grounding for these interests:

> The interests of the party himself are best served by the application of the law of the state of which he is a *citizen*. For in most cases it will be this state that is also the state where he grew up, learned to acquire respect, consciously or unconsciously, for his social obligations and whose law, in the last analysis, he has come to accept and trust. In most cases the law of *domicile* stands in less intimate relationship with the individual. To choose the *lex domicilii* means to give consideration to the interests of others with whom the party is living, that is, to the interests of the local society in which the foreigner has established his domicile, in other words, the interests of commerce. These interests of *commerce* are also protected, apart from the domicile factor so suitable for personal, family and inheritance rights, by the *lex loci contractus* for the form of the contract, by the *lex rei sitae* for things (since most people come into contact with a movable or immovable thing in the place where it is located) and by the *lex loci delicti* for torts (since tortfeasor, victim and helping third party are able to follow this law with the most ease and certainty).[29]

In a rather diffuse way, the interests of individuals and/or of the repeatedly personified "commerce" lead to the pursuit of "order" playing "a vital role for the determination of [PrIL] rules."[30] It is no wonder then that interests of commerce are

[26] Kegel, "Interessenjurisprudenz", *supra* note 1 at 269.
[27] Kegel, "The Crisis," *supra* note 4 at 182.
[28] *Ibid* at 186. It is possible that these remarks can be explained less by a desire to push for a natural law like, apolitical version of PrIL but by a different understanding of the private/public divide in the European context, as opposed to the American one. For a useful perspective on the differences see Nils Jansen & Ralf Michaels, "Private Law and the State: Comparative Perceptions and Historical Observations" (2007) 71:2 RabelsZ 345.
[29] Kegel, "The Crisis," *supra* note 4 at 187.
[30] *Ibid* at 187.

equated with interests in the "facilitation" and "ease" of commerce.[31] Kegel referred repeatedly to the need for structure, order and uniformity of results. He seemed to link the pursuit of order directly with private interests or the interests of "commerce". For example, he cited passages in which Currie referred to the "rights of the litigants" and "justice to the parties" as rare instances where Currie allegedly must have acknowledged the "interests of order" in PrIL.[32] Other times, as in the passage above, the "interests of commerce" seem to be effectuated by choosing the law that is in abstract and geographical (rather than substantive) terms common to the parties.

Overall, according to Kegel, "the interests of *order* play a vital role in the determination of legal rules. In conflict of laws, moreover, there are special interests of legal order."[33] "There is a definite interest here in avoiding solutions containing gaps, overlaps and contradictions, i.e. there is an interest in *substantive uniformity* (homogeneity) of *result.*[34] Another essential interest of order is the interest in *international* (or interstate) *uniformity of result.* However, since every state has to ensure the achievement of justice on its own, these interests are, despite widespread opinion to the contrary, rather sharply delimited. No state will give in to another on important points in the absence of a comprehensive and satisfactory international or interstate agreement. Here, even if for other reasons, namely for considerations of justice rather than governmental interests, I share Currie's restraint."[35]

Kegel implied that states might deviate from uniform rules of choice of law because they have a different understanding of conflicts justice in a particular set of private law relationships. While some states might believe that the best (in geographical terms) connecting factor is that of domicile, others might believe citizenship is most appropriate. Kegel did not have in mind situations in which states choose one or the other connecting factor because they want to pursue a general, public interest or because they want to achieve a particular kind of relationship in substantive terms (i.e. ensuring an equal relationship between husband and wife by applying the law of common domicile at

[31] Kegel, "Interessenjurisprudenz", *supra* note 1 at 274.
[32] Kegel, "The Crisis," *supra* note 1 at 179.
[33] *Ibid* at 187.
[34] Kegel here was making the important point that PrIL should be interested in avoiding the creation of so-called "limping" relationships, which are valid in one jurisdiction, but not in another.
[35] *Ibid* at 188.

the time of marriage). Rather, he believes that inter-personal or public equity considerations should be outside the scope of analysis in devising connecting factors for choice of law rules as much as possible.

III. Individual-Centered Intuitions

My interest here is primarily in the writers who attempted to evaluate Kegel's theory from an individual-centered perspective. That is, I wish to reveal the skepticism, questions and intuitions raised mainly by scholars who shared Kegel's individual-centered premises, but believed that these premises do not inevitably and have not (in the classical theory) led to Kegel's particular theory of justice and its underlying dichotomies.

1. Henri Batiffol

The French PrIL scholar Henri Batiffol (1905-1989) shared with Kegel the disapproval of the European state-centric theories of Zitelmann and Pillet. Batiffol admitted that when his PrIL scholarship began "in the inter-war period, the constructions of Pillet or Zitelmann who looked within PublIL for principles and solutions to conflict of laws issues, understood as reciprocal obligations among states, seemed from another era and quite sterile."[36] But Batiffol also saw himself as an opponent of individualistic theorists, among whom he included Savigny, who, we are reminded, wrote in line with liberalism "which professes that the final scope of all juridical construction is the protection of the individual, and primarily her liberty."[37]

Since Batiffol found neither the PublIL argument nor individualistic liberalism were acceptable, he applauded the German so-called "third-school"[38] for shifting the focus in a direction he personally favored. Allegedly this school "considers national systems as positive law, against an abstract and unreal universalism, but works towards

[36] Batiffol, "Les intérêts," *supra* note 13 at 12.
[37] *Ibid* at 15.
[38] *Ibid.*

their reconciliation through comparative law."[39] He perceived himself and Kegel as pertaining to this new school of thought, which relied on private law to re-create a universalist theory.

Batiffol became famous for putting a name to this "revised" universalist theory of PrIL in the 20th century. He argued that PrIL deals with "the co-ordination of legal systems," pled for a revival of the renvoi doctrine, and generally argued that PrIL ensures the co-existence of different legal systems.[40] While this was meant to be a new private law inspired universalist theory, it remained unclear how his theory of co-ordination was any different from Pillet's and Zitelmann's.

Yet from a philosophical point of view, in a book titled *The Philosophical Foundations of PrIL* Batiffol argued quite thoroughly for focusing PrIL theory on the private law relationship, even though he did not acknowledge that the move had already been made by Savigny.[41] He also pleaded for a more substantive focus in PrIL drawn from an analysis of private law norms and ideals, as well as for emphasizing state and inter-state interests.[42] Although his philosophical work in PrIL had implicitly uncovered potential areas of reform, he did not seem able to transform those philosophical ideas into his own theory of co-ordination, which remained quite vague. In Chapter 4 I discussed how Graveson looked to the theory of co-ordination to emphasize individual liberty, and how French courts, in fact, used Batiffol's theory as a platform for overly liberal jurisprudence. Furthermore, Franceskakis and recently Bucher criticized the theory of systems co-ordination for being overly technical and for failing to illuminate whose interests are served through various forms of inter-system co-ordination.[43] This ambivalence between his disavowing of extreme liberalism, while incorporating liberal and formalist principles in his own theory may be a result of the fact that Batiffol tried to reconcile state-centric and individual-centered perspectives by bringing them all together, yet without articulating the links between them. PrIL would deal with individual liberty,

---

[39] *Ibid.*
[40] Henri Batiffol, "Réflexions sur la coordinations des systèmes nationaux" (1967) 120 Recueil des Cours 165; Henri Batiffol, *Traité élémentaire de droit international privé*, 3rd ed (Paris: Pichon & Durand-Auzias, 1959).
[41] Henri Batiffol, *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956) at 222.
[42] *Ibid* at 15-16 & 222-227.
[43] For Franceskakis's critique of Batiffol's theory see Chapter 3. See also Andreas Bucher, "La dimension sociale du droit international privé: cours general" (2009) 330 Recueil des Cours 1 at 92-94.

but also with private law relations and private law values, with public law principles, and with state, as well as inter-state interests.

Given this lack of clarity about the relationship between individual- and state-centric perspectives, it is therefore not surprising that Batiffol considers his theory of "co-ordination" quite similar to Kegel's theory of "conflicts justice" and confessed to being "struck by the fundamental convergences."[44] He found an ambivalence in Kegel's reference to "private interests." To the extent Kegel's references were to interests of individuals in relational terms, Batiffol welcomes the emphasis because this would be different from an individualistic approach. But since Kegel referred to the interests of an "average individual," Batiffol was unsure whether Kegel maintained or departed from an individualistic premise with the reference to parties' interests.[45] Similarly, he was unsure whether Kegel referred to the interests of commerce as "interests of third parties" or to more abstract sets of interests. The former would temper the liberalist tendencies Batiffol saw himself reacting against, so to the extent Kegel had those interests in mind, Batiffol was happy to subscribe.[46] Lastly, Batiffol was in agreement with focusing on the interests of order and uniformity of solutions, depending on what that might mean. If they were used as proxy for inter-state interests and "international order," he could subscribe to them too, so long as they did not lead to "undue compromises" in the name of decisional harmony.[47]

These comments by Batiffol indirectly made two important appreciations on Kegel's theory. He showed that the categories of interests identified by Kegel needed a corresponding theory of the individual's relationship to the state, a theory of law and a theory of autonomy. But at the same time, Batiffol showed that one could freely fill in these blanks. Both Batiffol's and Kegel's theories were broad and indeterminate enough to converge on the moderate account that Batiffol aimed to construct in his review, without making any specific ideological commitments.

[44] Batiffol, "Les intérêts," *supra* note 13 at 20-21.
[45] *Ibid* at 15-16.
[46] *Ibid* at 17.
[47] *Ibid* at 18.

2. Alexander Lüderitz

It was precisely the vagueness of Kegel's first account of interest jurisprudence[48] that another German interest jurisprude, Alexander Lüderitz, sought to overcome. In an article in a Festschrift dedicated to his mentor Gerhard Kegel, Lüderitz argued the element that needed most refinement was the category of "private interests." Better articulating this main category would clarify the rest of the theory as well.[49]

Lüderitz opened his review with a critique of the perpetually state-centric development of PrIL. He argues that in an initial step, Zitelmann and other European state-centric theorists had structured PrIL around PublIL, thereby failing to account for any interests and expectations of the actual individuals involved in the PrIL matters.[50]

Writing in 1977, Lüderitz thought not much had happened to temper those initial state-centric theories. He believed that "PrIL had barely found its model as private law, that it was already challenged in light of an alleged shift in function of private law generally."[51] PrIL, in other words, had never had a chance to articulate and construct its private law dimensions, which for Lüderitz, as I will show below, are of profound humanist value.[52]

Lüderitz believed that the critique of Savigny contributed to maintaining the field's state-centrism. But in his view, as in Schurig's view, this critique was the result of a misunderstanding of Savigny's premises.[53] Schurig recently argued that no theory, including the interest jurisprudence theory, should be thought of as Savignyan, but rather, if anything, as a refinement, a challenge, or a re-conceptualization of Savignyan traces.[54]

---

[48] Klaus Schurig explains though that Kegel meant the initial essay to open a conversation on the possible category of interests that might factor into the PrIL decision. See Schurig, "Das Fundament," *supra* note 5 at 12.
[49] Lüderitz, "Parteiinteresse," *supra* note 10 at 35. For an analysis of Lüderitz's theory see also Karsten Otte, "Betrachtungen zur Interessenlehre," in Heinz-Peter Mansel, *Internationales Privatrecht im 20. Jahrhundert: Der Einfluss von Gerhard Kegel und Alexander Lüderitz auf das Kollisionsrecht* (Tübingen: Mohr Siebeck, 2014) at 27.
[50] Lüderitz, "Parteiinteresse," *supra* note 10 at 33.
[51] *Ibid* at 34-35.
[52] *Ibid.*
[53] *Ibid* at 31-32.
[54] Schurig, "Das Fundament," *supra* note 5 at 5-6 & 11.

That said, insofar as even the slightest association between classical PrIL and German interest jurisprudence was regarded cautiously because Savigny's theory is commonly perceived as formalistic or overly liberal, Schurig thought that this misunderstood Savigny.[55] Schurig showed how Savigny reacted to the formalism of previous theories and in fact anticipated a much larger scope for political and public policy considerations than we now recognize in his writing.[56] "Savigny never had the blindfold he was attributed."[57]

Thus, rather than prompting a return to a problematic theory, Kegel was simply one more "architect" in a series – together with Savigny and Kahn, maybe among others – to have set the fundamentals of PrIL, in Schurig's view.[58] For Schurig, then, interest jurisprudence was a stepping-stone in a series of developments from Savigny. Lüderitz, however, thought that in some respects, it was a step backward, rather than forward, from some of Savigny's insights.

Lüderitz's general insight is that over time, scholars unduly narrowed Savigny's theory, and augmented its formalism and universal implications.[59] Lüderitz argued that Savigny's theory consisted of two steps. The first one could be translated as the thesis of equality between nationals and foreigners. It was this step that motivated Savigny to argue that, in principle, the place of litigation (determined by the unilateral choice of plaintiff) should not determine the outcome of the case. Thus, preventing forum shopping and striving for uniformity of decisions should be among the goals of PrIL because, and to the extent that, a certain kind of equality between the parties is a goal as well.[60] Lüderitz argued, as I have done in previous chapters, that we have tended to raise this initial rather formal principle of equality, to the level of formalizing the entirety of PrIL. In other words, Savigny's principle of formal equality between nationals and foreigners was increased, including by Kegel, to a point where "the entire justice substratum

[55] *Ibid* at 8.
[56] *Ibid.*
[57] *Ibid* at 9.
[58] *Ibid.*
[59] Lüderitz, "Parteiinteresse," *supra* note 10 at 32-33.
[60] *Ibid* at 31-32.

collapses into brute order […] PrIL becomes technical law and for many a senseless game."[61]

Lüderitz argued that while PrIL scholars, like Kegel, focused on and enlarged the scope of the principle of formal equality, they lost sight of the second step of Savigny's analysis, namely the principle of "free submission."[62] As I have showed in previous chapters, Lüderitz argued that this principle is sometimes concretized through various empirical elements of freedom (choice of domicile, purchase of foreign land) and sometimes through a fluid determination of reasonable expectations that individuals raise in one another in their transnational dealings.[63] Lüderitz pointed out that these expectations could either refer directly to the application of a law or to the substantive center point of a legal relationship, which in turn informs the application of a particular law.[64]

Lüderitz seemed to believe, as I have argued as well, that we have lost sight of Savigny's fluid analysis of the various elements of what Lüderitz calls the inter-personal "interaction field"[65] and have started to focus on the pursuit of order and uniformity at all cost. Lüderitz showed for example how Savigny's focus on domicile was uncritically replaced with a focus on citizenship, by ignoring the important implications for autonomy and self-determination.[66] Similarly, he argued that Zitelmann's scholarship further formalized and increased Savigny's more moderate universalist thesis.[67]

In contrast, Lüderitz argued that the pursuit of order and uniformity should translate in a pursuit of systematicity, according to which various insights of the analysis of the inter-personal "interaction field" in a transnational context could be systematized based on a set of repeating circumstances and legal issues.[68] Lüderitz therefore assumed that an individual-centered interest-based analysis would first reveal the variety of interests at stake and then systematize them into something like Cavers's principles of references. He worried that Kegel's theory would allow one to avoid the entire relational

[61] *Ibid* at 32.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid* at 32-33.
[65] *Ibid* at 37.
[66] *Ibid* at 33.
[67] *Ibid* at 33.
[68] *Ibid* at 40-41.

interest-based analysis in order to ensure unchanging, yet inevitably formalistic, order and uniformity.

Lüderitz attempted to show the variety of relational elements at stake in the choice of law determination. For example, he outlined the variety of "relations" involved in the determination of the applicable law for name changes following marriage.[69] He argued that allowing name changes according to the law of the domicile of immigrant couples enables them to integrate faster into the new country.[70] In particular, it allows a smoother integration for the children of such families into local schools.[71] At the same time, it might construct a more difficult relationship with the enlarged family left behind in the state of citizenship.[72]

Similarly, norms that apply to questions relating to the parents' rights to and methods of the education of their children have widespread implications for a variety of relationships. Applying German law as the law of domicile might provide more protection to the children of migrant workers and would offer equal rights to both parents as to the education of their child.[73] At the same time, it might create conflicts between the children who would become more integrated into the German culture and ways of thinking and the parents who might still be attached to the culture and customs of their homeland.[74]

Furthermore, Lüderitz argued that one could not make broad personal assumptions about the nature of these various relational interests. He perceived Kegel's appreciation of the "normality" of one's attachment to one's state of citizenship as highly problematic for people's autonomy and self-determination.[75] Instead, he argued that one would need to resort to empirical data and studies of family sociology, historical accounts of patterns of immigration and so on[76] before constructing a PrIL rule that has important implication for all those inter-personal relations. This also means that choice of law rules

[69] *Ibid* at 36.
[70] *Ibid* at 37.
[71] *Ibid* at 37.
[72] *Ibid.*
[73] *Ibid* at 38.
[74] *Ibid.*
[75] *Ibid* at 38.
[76] *Ibid* at 39.

might differ between temporary guest workers and long-term immigrants, or between temporary guest workers in one county over another.

Alexander Lüderitz introduced an important distinction and relationship between interests, on the one hand, and purposes and goals, on the other. To construct human interests, a solid and empirical appreciation of human purposes is needed. One had to understand patterns of migration in order to understand whether migrant workers had an interest in the application of the home or host state's law. Studies of family sociology, empirical data on the number of students of migrant workers enrolled in local schools and so on could all contribute to an appreciation of whether these workers and their children had an interest in the application of particular laws for particular relationships, including maintenance obligations, name changes and education rights.

Secondly, Lüderitz maintained but also loosened the conflicts/substantive justice divide. The human goals had a strong "substantive" component in relational terms. People aimed at particular relationships with particular individuals or communities on particular terms, which in turn pointed to an interest in the application of a particular law. Yet there was no preference for conflicts over material justice. Once one distinguished between interests in the application of a law as such, without regard to its content, and interest in the application of a particular policy under a particular law, one was in a better position to both reveal and weigh them. For example, Lüderitz showed how no interest in the application of the law as such could trump the interest of the weaker party to a contract in the application of protective norms.[77]

Third, Lüderitz shifted the normative justification for order, as well as the degree of order that Kegel had postulated for PrIL. What was needed, according to Lüderitz, was not order or decisional harmony, but the creation of categories of interests based on particular repeating circumstances and empirical data. "Complete justice in individual cases cannot be obtained in this way. Where wood is chopped, splinters must fall.[78]" The typifying of interest constellations was not meant to facilitate commerce or make it smoother. People do not have an interest in order and uniformity per se; their interests are in relating in particular ways to particular people and communities. The typifying of

[77] *Ibid* at 49, 53-54.
[78] *Ibid* at 40.

interest constellations was instead a rule of law consideration. Case-by-case determinations "would be incompatible with current notions of law, would overwhelm the courts, would completely undermine certainty (and thereby "trust") and would mean de lege ferenda to absolve the legislator of any responsibility."[79]

Fourth, Lüderitz also framed the private/public duality differently. Lüderitz was clear that he "does not plead for strict classifications – here private, there public."[80] Rather, there is a strong humanist concern about subsuming interests of particular individuals or groups of individuals under larger categories of the state or the nation.[81] The plea is for a full appreciation of all interests, rather than allow the interests of particular individuals or of larger community interests to be subsumed under one another.[82]

It was Lüderitz's particular humanist perspective that led him to describe the transnational context of PrIL relations in different terms from Kegel and Batiffol. The PrIL analysis inevitably starts from individuals, their interests, and their goals, and when it moves upwards, it constantly refers and relates to those individual interests. In other words, it is not that private interests sit alongside interests of commerce, interests of order, inter-state interests and so on, but rather that the human interests initially identified need to be constantly rethought and re-analyzed in relationship to other interests.

3. Alex Flessner

The humanist underpinnings of Lüderitz's PrIL scholarship carried through in the writings of Alex Flessner as well. In 1988, Flessner argued "it is extraordinary that in the area of private law, the human is perceived as subsumed under a state legal order, in which he is placed long term (in family or inheritance law) or from case to case (in the area of obligations and property law) through the operation of the choice of law norm.

---

[79] *Ibid.*
[80] *Ibid* at 50.
[81] *Ibid* at 30.
[82] *Ibid* at 50: "I do not plead for strict classifications – here "private," there "public". However, one should not lose sight of the fact that in many legal relationships primarily private interests would need to be reconciled and weighed; *how* this is done interests the public, but generally not in the sense that it is interested in a particular result in line with its own material appreciations. Finally public interests of different kinds also may speak in favor of party autonomy."

This repeated attempt of Private International Law to subordinate people (under a state, a nation and its law) misses the conditions that made Private International Law necessary in the first place, namely the fact that all these nations, states and legal systems, which raise the plea for application, coexist internationally, constantly compete with each other."[83] In this constant insecurity and relative chaos, the individual "does not operate under a legal system but in between legal systems – and some sensible solutions need to be drawn from this for individuals."[84]

These humanist underpinnings cause Flessner to raise the same critiques of Kegel's theory as Lüderitz: one must identify the real interest of real individuals, rather than the presumptive interests of average individuals.[85] It seems equally plausible, then, that individuals and communities might have both expectations as to which law would apply irrespective of its content and expectations as to a particular outcome or substantive norm and principle.[86] Lastly, Flessner believed the pursuit of order and uniformity is, on its own, a dubious interest within an individual-centered interest-based theory.[87] Individuals do not have an interest in the pursuit of uniformity and order, but rather an interest in having their interests acknowledged, discussed, and weighed against each other, even in relationship to other state-centric and public interests.

Flessner gave the example of a PrIL matter in the 1970s generated by a Spanish couple's divorce case brought in Germany. The couple were Spanish citizens, and Spanish law did not allow divorce due to the Catholic underpinnings of its marriage laws at the time, whereas German law did.[88] Flessner argued that it was unhelpful to suggest that the right to divorce should be denied because the law of citizenship applies and to justify the application of that law on the abstract assumption that individuals are connected to their state of citizenship.[89] Furthermore, it would be unhelpful to argue, as Kegel did, that the matter is actually "procedural" versus "substantive" or "an incidental

---

[83] See "Das "Private" und das "Internationale" des internationalen Privatrechts. Diskussionsbeiträge von Alex Flessner und Rainer Pitschas" in Erik Jayme & Heimz-Peter Mansel, *Nation und Staat im internationalen Privatrecht. Zum kollisionsrechtlichen Staatsangehörigkeitsprinzip in verfassungsrechtlicher und internationalprivatrechtlicher Sicht* (Heidelberg: C.F. Müller: 1988) 340 at 341.
[84] *Ibid* at 343.
[85] Flessner, *Interessenjurisprudenz, supra* note 6 at 57.
[86] *Ibid* at 54-56, 79-80, 91-92.
[87] *Ibid* at 66, 45
[88] *Ibid* at 26ff; BVerfGE 31,58 in (1972) 36 RabelsZ 145.
[89] *Ibid* at 28.

question,[90]" since this allows one to hide a policy choice behind a dogmatic insistence on "internal structure.[91]" Flessner argued that this mode of argument simply obscured the question whether the substantive interest that the couple claims – in divorce – should be recognized based on an analysis of the relevant individuals/communities affected and a balancing of the respective interests. Not only was this abstract justification of "conflicts justice" not addressing the particular "substantive" interest of the parties to a divorce. It also did not capture the relevance, if any, of the Spanish state's interest in preventing its citizens from divorcing when they no longer live in Spain.

Flessner in Germany, like Cavers in the United States, became the proponent of "justice in the individual case." Flessner argued it is highly problematic to plead for order "in the interest of commerce" or as "an interest of the legal system" since this only obscures the actual interest bearers and the actual interests involved in the dispute. In the case of the Spanish couple divorcing in Germany, Flessner argued that it is unhelpful to suggest, as Kegel did, that the right to divorce is declined because of the interest in preserving order, structure, and consistency within PrIL by the unvarying application of the nationality principle. Flessner repeatedly and rhetorically wondered who the addressee of uniformity was in such a context and why their interests weighed more than those of the spouses.[92]

The proposition that considerations of order and uniformity might interest the broader national or international community was always perceived with skepticism by Flessner. But occasionally this appeared as a corollary to a more general skepticism regarding broader public or community interests in the area of private law. On the one hand, Flessner seemed to assume that a properly formulated interest jurisprudence will clearly account for all kinds of interests and interest bearers.[93] On the other hand, he was skeptical that any interests other than those of the parties are implicated in the large

[90] *Ibid* at 29.
[91] *Ibid* at 28: "There remains a conflict between the interest of avoiding limping marriages and the interest of the couple in entering into a marriage or, in other words, between paternalism and respect for a legal institution, and self-determination and consensus of the spouses. For the settlement of policy conflict one would need to develop a relevant criterion from the will of the historical legislator as well as the entire value structure of the present legal order."
[92] *Ibid.*
[93] *Ibid* at 62-63.

majority of private law disputes.[94] This made him plead for granting large scope to party autonomy and free choice of law.

IV. Interest Jurisprudence and Relational Internationalism

The ambivalence that Batiffol noticed in Kegel's initial account of interest jurisprudence, between an individualistic and a relational perspective, is carried through in Flessner's theory, through his appeal for free choice of law. While interest jurisprudence pleads for the identification of all interests and interest bearers, the separation between private and public, and between the individual and the state often translates into an assumption that private interests predominate in all or most private law matters. Often the initial proposition that one should *distinguish* between private and public interests, and between material and conflicts justice turns into a preference for the private and/or conflicts justice.

I suggest that much of this is explained by the analytical starting point of interest jurisprudence. All three scholars, Kegel, Lüderitz and Flessner started with a humanist concern that the interests of people and their views about justice, freedom and security are easily marginalized within state-centric theories, if not deliberately ignored. This is a fundamental concern that they share with 19th century relational internationalists. The latter, however, shifted from a focus on the state to a focus on the private law relationship. The initial unit of analysis is the private law relationship, rather than isolated individuals. Story structured his treaties on different kinds of private law relationships, as did Savigny. Savigny explicitly rejected a focus on individuals in isolation. Jitta adopted the analysis of legal relationships as the dawn of modern PrIL theories and broke large private law categories into different types of legal relationships. Because they focused on "the nature of legal relationships," they could extract policy elements from both the extra-legal social context and legal norms and principles. Story often referred to the values he

[94] *Ibid*. See also at 86-87: Flessner arguesd that he did not question "the value prescription of the political school, but rather its veracity." In other words, Flessner argued not that political interests should not be applied when they can be ascertained, but that they should not be presupposed in all private law scenarios, when they are not ascertained. Flessner further argued that an interest jurisprudence is guided by "the legitimate expectations of the litigating parties or the general community" and pointed out that this is already foreseeable in Savigny's theory, at 86-87, n 261.

believed underlie different kinds of private law relationships. Savigny and especially Jitta referred both to inter-personal expectations and level of trust within different private law relationships, as well as the "many nuances" revealed in an analysis of the policies behind the laws. It is in this context that Cavers also argued that the policies behind the laws and the actions of the parties and the expectations they raised for each other would both factor into the analysis.

Interest jurisprudence, however, asks us to take a step back from an analysis of the nature of the legal relationship. Kegel's remark that the terms of "nature of a legal relationship," "most connected law" etc. are signposts for an analysis of the interest at stake in the dispute is an important one, although not particularly novel. As I argued in previous chapters, many authors had already argued that Savigny's notion of the "nature of a legal relationship" was a fluid, rather than a dogmatic concept. But interest jurisprudence distanced itself from the "nature of a legal relationship" analysis also because this analysis might "disproportionately favor substantive considerations."[95]

Moving away from a focus on the private law relationship therefore meant moving further away from a substantive analysis both of the way in which individuals understood their relationship and of the values that are embodied in the various national laws relating to the particular relationship. In keeping with interest jurisprudence, this allowed a re-focusing on conflicts justice considerations, that is, on the application of a law without regard to its substantive content.

It is at this junction that the two kinds of individual-centered theories diverge. Relational internationalists took the relationship as the first element of analysis, included substantive values embedded in the relationships and the laws regulating it, and then proceeded to analyze the embeddedness of the legal relationship in ever larger social circles. By distancing itself from an analysis of private law relationships, interest jurisprudence disconnected itself from an otherwise rich substantive analysis. Yet from a different angle, interest jurisprudence, especially in Alexander Lüderitz's account, brought to light a particular set of relational considerations, which while often implicit in the 19th century theories, was not as explicitly developed. Lüderitz focused on the relationships individuals have with other individuals and communities aside from the

[95] Otte, *supra* note 49 at 32 & n 27.

private law relationship, and how those relationships have a bearing on their expectations as to which law will apply to their private law relationships. As I will show below, Jitta also encouraged PrIL to take account of the each person's individuality by reference to his/her relationships to various individuals and communities apart from the private law relationship, but the insight was not as explicitly developed.

In contrast, Alexander Lüderitz argued explicitly that individuals have an interest in the application of a particular law because they have or wish to establish certain connections with certain communities. For example, he argued at least certain categories of migrant workers have an interest in being integrated in the host country community;[96] children have an interest in having the maintenance obligations of parents being adapted to the living conditions and costs of the community in which they live, in order to fully take part in the social life of that community;[97] the parent whose parental relationship to the child is in dispute has an interest in having the law of his/her domicile applied, for example, in order to comply with formal requirements that are common in her social environment and so on. [98] Once it is clear that individuals' access to, participation in and integration into particular national communities are linked to the application of particular laws, it becomes clear that the parties to the legal relationship might have different such interests. Lüderitz was clear that ultimately PrIL represents a value judgment on whose interests should prevail in which cases and here substantive considerations could provide a factor of interpretation and of choice between the relevant interests.[99]

What results from Lüderitz's analysis is a kind of sociology of the transnational realm. Human mobility in the transnational realm is taken at face value and analyzed in social, legal, and even political terms. And because of the complexity of social life understood in this way, Lüderitz pleaded for "recognizing color" rather than make black

[96] Lüderitz, "Parteiinteresse," *supra* note 10 at 41.
[97] *Ibid* at 43.
[98] *Ibid*.
[99] *Ibid* at 37,40. See also Otte, *supra* note 49 at 31 noting that Lüderitz, unlike Kegel, made a distinction between interests and aims: "For the decision of conflicts of interests Lüderitz offered premises. More important than the interests themselves are the aims of a particular conflicts decision. The aim is not the same as the interest: Interests are the empirically determined or presumed needs of the ones under law's purview. The aim establishes whose interest one should give priority to. Interests must be evaluated by weighing them against one another and therefore establishing priorities in every decision on which law to apply; the aims which are invoked in this evaluation of interests are building blocks of justice. One is therefore in search for the purposeful evaluations of all elements of a dispute."

and white appreciations.[100] Order and uniformity are important human interests and rest at the foundation of legality, but they should not be used as a slogan that prevents the recognition and weighing of human interests.[101] An individual-centered approach reveals the complexity of transnational social life, which creates a more complicated and nuanced relationship between individual interests in the transnational realm, and the need for order and uniformity.

In the next section I seek to reveal the precise way in which the relational internationalist perspective can be thought of as "internationalist," yet not be committed to a formalist pursuit of order and uniformity at all cost. Before outlining the universalist contours of Savigny's and Jitta's PrIL teories, I briefly consider the contours of their general universalist ideology. I first show how Savigny's universalist ideology can be explained by the various elements of the romanticist and historicist perspectives to which he was drawn (Section 1). I then elaborate on how those same general views on reconciling universalism with particularism, and national self-determination with natural law were picked up and elaborated by Jitta (Section 2).

1. Savigny

There are various paths to understanding Savigny. The one adopted by Okko Behrends was to trace Savigny's thinking to the Roman law sources that he cited and seemed more favorable towards.[102] Another path, adopted by Rückert, was to trace Savigny's thinking to the German romanticist tradition and subscribe to him an "objective idealist" philosophy, which although unique to Savigny, nevertheless finds its roots in early German romanticism.[103] Finally, another path, proposed by Beiser, is to follow the various steps that contributed to Savigny's thinking, from "the young romantic," to his strong critique of natural law and Kant, and to his "mature work" in the

[100] *Ibid* at 38.
[101] *Ibid* at 32.
[102] For Okko Behrends understanding of Savigny's theory see Chapter 5.
[103] For Joachim Rückert's understanding of Savigny's theory see Chapter 5.

System.[104] Interestingly, all these ways of capturing Savigny's thinking converge on one aspect, which is of particular interest for this chapter, namely the blend between natural law and positivism, between universalism and relativism, and between "the spirit of humanity" and "the spirit of the Volk."

Okko Behrends argues that Savigny incorporates universal principles of ethics and social co-operation from the stoic-natural law philosophy, while preserving a belief in particular national laws that purport to define and structure those general principles "in a particular way."[105] He argues that PrIL was an example of Savigny trying to combine the individual with the social and the particular with the universal.[106]

Rückert too identifies in Savigny a "Hoheitsdrang" (an aspiration to the higher and the universal), while maintaining his faith in national self-determination and a strong cultivation of the individuality of each "Volk."[107] Finally, Beiser tries to capture Savigny's universalist/particularist and natural law/positive law duality by situating Savigny in the context of three different influences: the romanticist school, the rejection of Kantian precepts, and the historical school. Beiser's analysis is particularly helpful in explaining Savigny's mix of universalist and relativist element and ultimately his universalist/particularist ideology within PrIL. I therefore start with a brief account of Beiser's explanation for the ideological duality in Savigny, before showing how this duality might be captured in his PrIL writings.

1.1. Savigny's Triad: Romanticism, Anti-Kantianism, Historicism

In 2011 the leading scholar of German Idealism, Fredrick Beiser, wrote a compelling and detailed account of the ideology of the various protagonists of the German Historicist Tradition, including, most important for this chapter, the philosopher

[104] Frederick C. Beiser, *The German Historicist Tradition* (Oxford; New York: Oxford University Press, 2011).
[105] Okko Behrends, "Geschichte, Politik und Jurisprudenz in Savignys System des heutigen roemischen Rechts" in Okko Behrends, Wulf Eckart Voss & Malte Diesselhorst, *Römisches Recht in der Europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker* (Ebelsbach: R. Gremer, 1985) 257 at 269.
[106] *Ibid* at 271.
[107] Joachim Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach: R. Gremer, 1984) at 238, 358.

Johann Gottfried Herder (1744-1803) and Savigny.[108] In the chapter dedicated to Savigny, Beiser traces Savigny's thinking, from his "most formative years" in Marburg under the influence of the romantic tradition, to his decisive critique of natural law and Kant and his historicist views, to his mature work in the System and the puzzling return of several "natural law-like" precepts.[109]

Beiser shows in a first step that as a "young romantic"[110] Savigny started with a strong inclination to natural law and aspired to show "how law originates from the necessary laws of our own consciousness."[111] But under the influence of the powerful intellectual movement known as the "Fruehromantik," sometime between 1800 and 1802 Savigny completely lost faith in the natural law tradition, and through his critique of Kant's moral philosophy, he lost confidence "in the power of reason to provide substantive practical principles."[112] Furthermore, Beiser notes that

> Savigny began to recognize that legal doctrines cannot be given a transcendental foundation independent of a particular society and state. He now realized that traditional natural law doctrines, which assumed that human beings have a fixed identity and nature prior to their entrance into society and the state, began with a false abstraction. Human beings are social and political animals, whose very identity is determined by the specific society and state in which they live. Thus, a natural law for all human beings seemed as plausible as the ideal of a single universal language.[113]

Fully engaged with the early historical and romantic tradition, Savigny wrote in this period about "the spirit of humanity" identified with "Christianismus" not found in any particular church but whose basic value is "the education of the human race."[114] He argued for a reintegration of the passions of love and friendship in philosophical ethics and a focus on the concrete human being, rather than the abstract entity endowed with reason, and argued for an ethic of "self-realization and individuality."[115] In line with the

[108] Beiser, *supra* note 104 at ch 3 (Herder) & 5 (Savigny).
[109] *Ibid* at ch 5.
[110] *Ibid* at 218-219.
[111] *Ibid* at 221.
[112] *Ibid.*
[113] *Ibid* at 222.
[114] *Ibid* at 222-223.
[115] *Ibid* at 223.

Frühromantik tradition, he looked back with nostalgia at the Holy Roman Empire, which had many independent sources of authority serving "as sources of local autonomy and belonging."[116]

Savigny subsequently engaged in a strong and repeated critique of Kant and natural law, which paved the way for his historicism and his theory of the Volksgeist.[117] He was critical of Kant's disregard of what Savigny viewed as the moral virtues of love and friendship,[118] and wrote against Kant's theory of punishment[119] and Kant's categorical imperative and pure reason.[120] Savigny therefore purported to establish a new theory of jurisprudence, neither Kantian, nor grounded in natural law, but rather in history. He argued that the genesis of law must be linked to the social and political context,[121] against any a priori method of finding the law and generally against formalist jurisprudence.[122] He now argued that law is not the product of reason, but that it reflects the beliefs and ways of life of an individual people. As Beiser notes, Savigny believed that "civil law is as characteristic of a nation as its language, customs and constitution; and to separate it from the culture of a nation is an artificial abstraction. The law therefore grows with a people, and it dies with them when a nation declines. The proper seat of the law lies in the common consciousness of the nation."[123] The way in which Savigny thought of his historical jurisprudence in contrast to the philosophical school was aptly summarized by Beiser:

> The problem with the philosophical school, he argues, is that it makes an artificial and arbitrary separation of the part from the whole. This part can be the individual citizen, who is separated from his family, country and state; or it can be the present generation, which is separated from history […] It is clear from Savigny's argument that the historical school represents a methodological holism. This school claims that each

[116] *Ibid* at 223: "For the early romantics, the chief evil of modern politics was centralization, the amassing of all power in a single executive and bureaucracy, which would crush all diversity and local liberty. They found such centralization not only in the absolutist regimes of the eighteenth century, but also in the revolutionary government in France."
[117] *Ibid* at 225.
[118] *Ibid* at 225.
[119] *Ibid* at 226.
[120] *Ibid* at 227.
[121] *Ibid* at 230.
[122] *Ibid* at 233.
[123] *Ibid* at 238.

> individual has to be understood from its place in a whole, whether the part/whole relationships is synchronic or diachronic, whether it is that of a citizen to the state or that of a generation to history. Hence the basic fallacy of the philosophical school is hypostasis: it separates the part from the whole and gives it a self-sufficient identity, when in reality the part is intelligible only within the whole.[124]

These initial articulations of his historical theory of jurisprudence are further developed in the System. There, Savigny adopted the organic ideology of the historical school to argue that every right "is part of a larger network of rights (legal relationship), and that its meaning and extend depends upon this network […] Savigny insisted that "the spiritual element of jurisprudential practice" consists in constantly keeping in mind these two organic factors; in other words, in treating any individual case, we have to consider the relationship of all the parts and how they changed or developed."[125] Furthermore, law exists "in the common consciousness of the people," so "positive right is also national right."[126] The historical theory is now definitively separated from the social contract theory and Beiser explains Savigny's charge towards the latter in these terms:

> He makes two basic objections against it. First, it assumes that each individual could exist apart from his society and state, that he could just as well have chosen to live in some other society and state from that in which he happens to live. But this does not agree with the fact that wherever we find human beings they exist in a community and live according to laws. Second, the theory is circular, because it assumes the powers to deliberate and make laws that people could have only through society and the state. Though a collection of distinct individuals need the law, they still do not have the power to create it.[127]

These themes were merely a continuation of Savigny's life-long focus on three elements: 1. the rejection of the theory of pure reason and philosophical a priori

[124] *Ibid* at 244.
[125] *Ibid* at 246-247. "Further, the institution of right should be understood organically, i.e. in its living interconnections and its progressive development, so that it is seen as part of a whole, the wider web of legal relationships and higher laws, which also have an organic nature."
[126] *Ibid* at 274.
[127] *Ibid* at 251.

deductions; 2. his insistence on the particularities, traditions and values of each people and 3. the relational and organic embeddedness of the individual and individual rights within a larger whole. In all these respects Savigny was well grounded in the Fruehromantik and the Historical School. But Beiser also notes "one of the most striking passages of Savigny's System" in which natural law seems to make a comeback for Savigny who now argued that the context of law can be "individual, the characteristic of a particular people; or it can be universal, i.e. that common to human nature."[128] Beiser describes Savigny's new take on natural law:

> Savigny sees these as two necessary aspects of all right, and he complains that they have become separated in contemporary jurisprudence. There are those who stress the individual aspect of right, as if general principles play no role, and there are those who emphasize the universal aspect of rights, as if general principles had their meaning independent of particular cases. Normally, Savigny criticizes the second party, the formalists who had developed the universal side of the law; but here, as if to admit that they too have their point, he insists that we should not neglect "the sense for the whole, and therefore the higher meaning of the institutes of right". The universal content of Volksrecht appears as "the moral nature of right" and it involves such concepts as "the moral worth and freedom of man". The task of the legislator, Savigny insists, is to keep in mind both these aspects of law and to fuse them into a unity, so that the universal principles take on a concrete meaning and particular cases have a general significance. […] Hence, in the second book of the System, Savigny discusses the universal concept of right, which he defines as the sphere in which a person can act freely without the influence of others. The need and existence of right is the result of our human condition, Savigny says, and it does not depend on contingent historical circumstances alone.[129]

Savigny concluded that the universal ideal is the development of "ethically/morally responsible freedom"[130] and the "ethical development of human nature" even though "it is the historical task of each Volk to develop it in its own way."[131] This was Savigny's way of avoiding both abstract formalism and absolute

[128] *Ibid.*
[129] *Ibid* at 251.
[130] *Ibid.*
[131] *Ibid.*

positivism, and to reconcile relativism with universalism.[132] This also makes it possible for Savigny, and as I will later show for Jitta as well, to distinguish jus gentium from natural law. According to Savigny, jus gentium is "first extracted from experience, empirically" and then based on its "grounding element", "namely the consciousness of human nature."[133] This, he argued, made it possible for the Romans to think of jus gentium as "jus civile, as a positive law which arose and developed historically."[134] This meant that one must exercise "extreme caution" when moving from the universal to the particular in order to not destroy the national spirit of the laws of the people, while still having in sight "the equal ethical worth and freedom of individuals."[135]

Certainly one way of understanding this recurrence of universal principles in Savigny's system is to adopt Behrend's proposition that Savigny always incorporated the human rights, ethical dimensions of social life from the stoic tradition. But I believe another useful way of understanding Savigny's incorporation of universal elements is made possible when Savigny is placed within the historical tradition in which he was writing, and in particular when his 19th century historical tradition is placed in relationship with the earlier historical tradition of the 18th century, in particular that of Herder. My concern here is not in the debate about whether or not Savigny read Herder extensively[136] or whether or not Herder is actually the main "gateway through which to understand Savigny."[137] Rather, the usefulness lies in understanding how the relationship between the relative analytical dimensions of the Volk and the universal elements of natural law featured in the earlier historical tradition of the 18th century, which helps explain, I argue, the way in which they featured in Savigny's writing.

In their analysis of the German historical tradition and in particular the relationship between the earlier 18th century and the later 19th century school, both F.M.

---

[132] Behrends, *supra* note 105 at 269.
[133] See Friedrich Karl von Savigny, *System des heutigen Römischen Rechts,* vol 1 (Berlin: Bei Deit & Comp., 1840) at 113.
[134] *Ibid*.
[135] *Ibid* at 56.
[136] See Christoph Mährlein, *Volksgeist und Recht, Hegels Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft* (Würzburg: Königshausen & Neumann, 2000), at 127 (discussing the way in which Herder's influence on Savigny has been discussed in PrIL scholarship and contesting the assumption that Savigny read much of Herder's historical philosophy).
[137] See Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed (Göttingen: Vandenhoeck & Rupert, 1996) at 393.

Barnard and Beiser find it striking that while in the 18th century Herder kept traces of universalist, natural law inspired elements, the later 19th century generation to which Savigny belonged, "self-consciously and explicitly rejected the natural law tradition."[138] Of course all 18th century historians, including Herder, were extremely critical of natural law for "illegitimately universalizing the values of 18th century Europe as if they held for all epochs and cultures."[139] But if Herder and Humboldt "still clung to the concept of natural law" it was because they were "very reluctant to surrender it for fear of relativism."[140]

To be sure, Herder was concerned with the imperialist connotations of natural law and its individualistic underpinnings, since he, like Savigny, conceived of the individual as a social being, who cannot be understood apart from her social context.[141] But Herder was equally concerned with the potential of relativism which would allow the state, especially the centralized bureaucratic states of the modern world, a free hand for despotism.[142]

Therefore, natural law was to be maintained, even though it needed to be stripped off of the individualistic connotations.[143] According to Herder, the universal element is not the isolated individual, but "humanity," which symbolizes inter-human cooperation, rather than the mere accumulation of isolated individuals.[144] Common to all states was therefore the pursuit of happiness[145] and ethical self-realization and perfection[146] even though each state achieves it differently in different times.[147]

---

[138] Beiser, *supra* note 104 at 13; F.M. Barnard, *Herder's Social and Political Thought, From Enlightenment to Nationalism* (Oxford: Clarendon Press, 1965) at 153-167. See Johann Gottfried V. Herder, *Outlines of a Philosophy of the History of Man* translated by T. Churchill (New York: Bergman Publishers, 1800).
[139] Beiser, *supra* note 104 at 13.
[140] *Ibid* at 217: "In Savigny there is no such reluctance [to abandon natural law], there is no such fear. He was indeed heartless and relentless in banishing the concept from his writing and the lecture hall. Only later in his career would he discover that the concept is not so easily abandoned."
[141] *Ibid* at 156: "Against Hobbes and Rousseau, he argues that man is naturally social, and that he cannot survive, let alone prosper, without the aid of others."
[142] *Ibid*.
[143] *Ibid*.
[144] *Ibid* at 155, 157. Barnard, *supra* note 138 at 77: "By humanization Herder chiefly meant the provision of education and social welfare under conditions of political freedom. This, Herder insisted, presupposed as the most basic requirement the absence of political censorship and the abolition of absolutist rule."
[145] Beiser, *supra* note 104 at 134.
[146] *Ibid* at 156.
[147] *Ibid* at 158.

As for Savigny, Christianity, though not associated with any particular church, would ground humanity generally because "religion, as Herder viewed it, is essentially man's consciousness of his social obligations. Christianity, in its purest form, is the expression of this consciousness in social conduct and in man's attitude to his fellow-man."[148] Furthermore, for Herder, and similarly for Savigny, the law of nature demands the realization of individuality, whether the individual is a particular person, culture or state.[149] Under humanity Herder included "everything having to do with what I said about man's noble education toward the use of reason and freedom, toward finer senses and drives, toward the finest and strongest health, toward the fulfillment and domination of the earth."[150]

Although it might seem as surprising as Savigny's universalist postulates in the System appeared, Herder too argued ultimately that "the basic norms by which we should govern our life are those that ensure, as their minimal precondition, that we can live autonomously and rationally. Hence, for Herder, the two fundamental characteristics of humanity are the use of reason and freedom."[151] Yet these are formal characteristics only, so that the content of what should count as rational and what one should choose as a free being will depend according to circumstances.[152]

Herder believed that all these elements, Christianity, education towards use of reason and freedom, the belief in the common social nature of mankind, would lead to more "humanity" which he associated with "Billigkeit," which in turn translates into reasonable, fair, just, and equitable inter-personal relations.[153]

> Increasing trade in particular would, Herder felt, create a community of interest transcending national boundaries. Though he agreed that trade did not spring from the noblest of human motives, he nevertheless regarded it as one of the most powerful 'organic' forces in that it combined two fundamental human drives, the instinct of self-preservation and the sensus humanitatis. When he was advancing, therefore, the principle of partnership as a basis of international relations, he presumably thought in terms of a

[148] *Ibid* at 139,158,156; Barnard, *supra* note 138 at 9.
[149] Beiser, *supra* note 104 at 159.
[150] *Ibid* at 156.
[151] *Ibid* at 162.
[152] *Ibid*.
[153] Barnard, *supra* note 138 at 98.

> fusion between the economic and ethical springs of human behavior, leading to an ethical code of commercial relations which could give birth to a sense of partnership between nations.[154]

The relativist view of individual "Völker" with different climates, social, political, cultural and ethnical backgrounds combined with a search for universal "humanity" and the pursuit of fair and equitable inter-personal relations, and ultimately with individual ethical self-realization and perfection. "Such was Herder's ultimate solution to the problem of the one-in-many in history, of how there could be a single rational standard amid incommensurable national ones."[155]

I do not mean to suggest that Savigny's writing was nearly as elaborate as Herder's. Nor do I aim to settle whether Savigny's reference to Christianity, to the universal pursuit of "ethically responsible freedom," or to the self-realization and perfection of the individual, be it one people or one individual in a social context, mirror similar concepts in Herder.

What I meant to suggest by creating a parallel between Herder's and Savigny's historical ideology is that in the historical tradition the blend of natural law alongside the relativist concept of the individual Volk was a way of ensuring national autonomy and self-determination, while also creating an ethical basis for law and inter-human co-operation as well as individual self-determination. For example, Barnard argued that the German political romantics who followed Herder and made use of his concepts (among whom he counts Savigny as well) had in fact brought those concepts to the nationalist front, ignoring Herder's more universalist and humanist views, such as "middle-class leadership, reform from below, co-operation, rather than subordination, and popular participation in government." [156] Barnard argues that because Romanticists over-emphasized the significance of the state and could not conceive of human existence outside the state, they increased the potential for human subordination and extreme nationalism, which were out of tune with Herder's ideology of empowering people to

---

[154] *Ibid* at 105.
[155] Beiser, *supra* note 104 at 162: "Freedom prescribes only that we choose effective means to ends, whatever those ends might be; and reason prescribes only that we find sufficient evidence for our beliefs, whatever these beliefs might be. The formality of these requirements, Herder assumes, makes the standpoint of humanity compatible with historical change and cultural diversity."
[156] Barnard, *supra* note 138 at 154.

self-realization and perfection through ethical social co-operation.[157] He therefore found it unsurprising that romanticists denied any virtue for natural law and includes Savigny in this camp.[158] He argues that contrary to the later Romanticists, Herder "upheld the notions of both Volk and Humanitaet as equally relevant value considerations.[159]"

Viewed from this angle, then, Savigny's attempt in the System to re-emphasize both the national and the universal could be understood as precisely the kind of ideological tempering and human empowering beyond and within the state that Barnard saw in Herder, but not in the Romanticists. Savigny's life-long attack on natural law and a-priori value judgments was now to be tempered by an appeal to human freedom and self-realization where the development of "ethically responsible freedom" and Christian social values were perceived as universal values beyond the state.

1.2. Back to Private International Law

To the extent this interpretation or reconstruction is plausible, it allows for different appreciation of the way in which both universalist and nationalist, both private and public elements are combined in Savigny's PrIL, confirming Behrend's own intuition that Savigny's PrIL theory could be read as simultaneously combining these elements.[160] On the one hand, Savigny's choice for domicile as the connecting factor over nationality can be understood precisely as a means of allowing individuals the personal freedom outside and beyond the state that Barnard thought 19th century historicists lost through their attack on natural law. Savigny's repeated references about how individuals inevitably extend into various jurisdictions because they enter into a variety of relationships vital to their development allude precisely to the idea of the "ethic of self-realization and freedom" within and outside the state, which Herder thought would be inevitable for human flourishing and development.[161]

This freedom would be "ethically responsible" in two ways. It was "freedom" within a relationship and therefore responsible to other individuals. Batiffol was right to

[157] *Ibid* at 156.
[158] *Ibid* at 159.
[159] *Ibid* at 166.
[160] See Chapter 5.
[161] Beiser, *supra* note 104 at 155.

suggest, at least implicitly, that Kegel's attempt to construct connecting factors based on appreciations about the international existence of isolated individuals would be different from Savigny's attempt to deduce connecting factors from appreciation of inter-personal relationships in a transnational context. Savigny argued, for example, that although in principle, the husband is "free" to change his domicile, this cannot create any legal consequences for the wife's demands on marital property, since this would not respect her own freedom.[162]

At the same time, this freedom would also be "responsible" to a larger community. After all, Savigny sought to situate a legal relationship within a larger community. He can, of course, be criticized, as he was by Jitta, in that he constructed overly broad categories of relationships and thus failed to distinguish much more particular interests and policies.[163] He can also be criticized, as Jitta did again, for not being mindful enough to incorporate both private interests of the parties and legal policies into all legal relationships. Jitta thought all relationships, including contractual ones, require an evaluation of both individual interests and legal policies through comparative analysis. In contrast, Savigny seemed to have focused more on the latter or the former, depending on the legal relationship. For example, elements of the relationships of the contractual parties dominates Savigny's analysis of the applicable law for contract, as opposed to Jitta's elaborate two-volume comparative analysis of legal policies, alongside the interests of the contractual parties.

Yet Savigny's analysis of the "responsibility" of freedom beyond the private law relationship is actually wider than might be acknowledged. Three notable examples might be useful to illustrate the point. First, when Savigny discussed the applicable law for contracts for immovable property, he argued that the lex rei sitae might generally apply because individuals extend themselves into another jurisdiction to purchase land. But beyond that, he noticed that while some national rules allow for a transmission of property at the time of entering into the contract, others only allow it at the time of actual handing over of the property. From this he deduced an interest of the state where the

[162] Carl von Savigny, *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*, translated by William Guthrie (Edinburgh: T&T Clark, 1880) at 294 [Savigny, *Private International Law*].
[163] See chapter 5 and the following sections of this chapter.

property is located and determined such law applicable.[164] Second, in the area of tort law, he argued that so many interests beyond the tortious relationship are involved that one should apply the lex fori, rather than the law of the place of tort.[165] Third, Savigny argued, as is common in PrIL, that the public policy exception would apply to alter any choice of law rule otherwise established, including those for contract. What might have been forgotten is that Savigny defined the category of "public policy" in very broad terms.[166] Ludwig von Bar criticized Savigny sharply for this and argued that if one applied such wide public policy exception it would rarely be possible to apply foreign law.[167]

Within Savigny's philosophy, however, a broad public policy exception arguably made sense, if Savigny was, as I demonstrated above, keen to plead for the universal "spirit of humanity," the universal "ethic of self-realization and individuality," the universal equal "moral worth and freedom" and the "common consciousness of a people and the "historical task of each people to develop freedom on its own." It also makes sense if Savigny wanted to construct the universal "freedom" of individuals, while also arguing for "ethical responsibility" within a relationship and within a community. In other words, if there was to be a (possibly idealized) balance, all elements had their role to play. The broad public policy and the relational perspective would temper individual liberty. Christianity and the appeal for an international juridical community would encourage universalism, but a legal relationship would still be localized in a community. Elements of the private law relationship and elements of legal policy would factor into the "localization" of a legal relationship, but to a different extent and depending on different relationships.

Lüderitz is therefore right to argue that focusing on Savigny's second step - the analysis of individuals' expectations - might make us focus on an empirical, sociological analysis of the "interaction field" among individuals, which could then be systematized

---

[164] Savigny, *Private International Law*, *supra* note 162 at 183-184.
[165] *Ibid* at 253.
[166] *Ibid* at 77-81. Savigny includes under this class laws which "rest on reasons of public interests (publica utilitas), whether these relate to politics, police or political economy."
[167] See Ludwig von Bar, *Das internationale Privat- und Strafrecht* (Hannover: Hahn'sche Hofbuchhandlung, 1862) at 109-110: "Most laws which are not logical consequences of general principles may be referred to reasons of this description (of politics, police, or political economy), and there would be really little room for the application of foreign law."

into rules and principles of PrIL, as opposed to attempting to pursue order and uniformity at all cost. Flessner's intuition that we should also try to explain who is the addresee of uniformity is also instructive, since Savigny himself argued that "we must never forget that rules of law are made for the parties, whose real interests it is to further their purpose impartially and that the interests of the parties are not to be made subservient to the uniformity or consistency of the rules of law."[168]

It seems, then, that we should not be too quick to consider Savigny as overly liberal because of the "return" of natural law in his System. That assessment would exclude his life-long attack on universal abstractions and disregard of national autonomy and self-determination. But focusing on the latter and ignoring Savigny's universal principles of Christianity and "ethically responsible freedom" loses sight of Savigny's interest in individuals' development, autonomy, and flourishing, and he acknowledged that this should be made possible both within and beyond the state. We should also be cautious about classifying the "classical" theory of Savigny as obsessed with uniformity or as having maintained, as Flessner thought of Kegel's theory, that individuals' interests are subordinated to the pursuit of order and uniformity.

2. Jitta

Many of Savigny's initial articulations of the universalist/particularist pendulum were further developed by Jitta. Like Savigny, Jitta also argued for focusing on both the autonomy and self-determination of a nation, as well as natural law and universal principles of justice. Much like Savigny, he tried to distinguish natural law from jus gentium, while at the same time reconciling natural law and jus gentium with positive law. Also in line with Savigny's intuition, Jitta argued that the blend between national and universal should be understood as a corollary to human existence. The focus on humanity as well as the state is merely an attempt at capturing both the national and the international existence of individuals.

Unlike Savigny however, Jitta believed much of this back and forth between national and universal values needs to be constructed based on comparative law. He

[168] Savigny, *Private International Law*, *supra* note 162 at 138.

believed a thorough comparative analysis will illuminate what is at stake in the regulation of legal relationships in a transnational context. First, it would reveal any pre-legal universal human rights and values. Second, it might reveal common principles of law as corollary to common goals about inter-personal morality, social justice and the like. Last, it could at least illuminate what kind of values and goals rest at the heart of differences in the law. All these insights would be crucial for the task that Jitta envisioned for PrIL, namely constructing the "reasonable principles of international social life" for particular legal relationships.

In the next section, I outline the way in which Jitta constructed the relationship between jus gentium, natural and positive law and how he attributed this relationship to a certain understanding of individuals' international existence and freedom. In the second section, I show briefly the way in which Jitta believed this kind of universalist thinking would translate into a different analysis of particular transnational marital law issues, rather than the obsessive pursuit of uniformity and order.

In outlining the shift from a fluid universalist ideology to PrIL's obsessive pursuit of internal order, structure and uniformity, I also end the circle of this chapter's analysis. I started by outlining how Gerhard Kegel's principles of order and structure and his theory of conflicts justice were perceived as "classical." But a return to the classical thinkers shows that their universalist ideology was much more moderate and more fluid. Comparing the way in which Jitta looked at marital property issues under a universalist lens with the way in which Kegel looked at them through the lens of conflicts justice, order, and structure captures the differences between the two ideologies.

1. Constructing a Universalist Thinking

As will by now have become apparent, Jitta was an outcast relative to both the universalist and the particularist theories as they were understood during his time. It was therefore not uncommon to find him included in both the universalist and particularist camps, with reference to different parts of his theory.[169] Similarly, scholars would often find it hard to engage with Jitta's theory because it could not be unequivocally included

[169] Franz Kahn, "Abhandlungen aus dem internationalen Privatrecht" (1899) 40 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 at 20, n 2 and accompanying text. See Chapter 2.

in either of the otherwise polarized camps.[170] Jitta's universalist ideology appeared unorthodox because he openly disavowed the a priori pursuit of uniformity, criticized the enactment of overly general rules of PrIL that purport to have a wide range of application, and challenged PrIL's obsession with conflict of laws. Unlike Kegel, he believed an individual-centered internationalist perspective should make us question, rather than endorse, the a priori pursuit of and association between uniformity and conflicts justice.

Jitta perceived his own theory as navigating somewhere between universalism and particularism as a corollary to what he described as the general pendulum of individuals between "the cosmopolitan spirit and the national sentiment."[171] In other words, individuals' identity is constructed through their existence both within and outside a state of citizenship, domicile, residence or other affiliation. PrIL theory must follow this very fragile balance between the cosmopolitan and the nationalist spirit, rather than exaggerate on either front.[172] It should also develop more towards one or the other side of the spectrum by constantly re-adapting to individuals' own relationship to their social context – more towards the national sentiment or towards the cosmopolitan spirit.[173]

In PrIL Jitta believed that this appreciation for both universalism and particularism could be achieved by focusing on a comparative analysis of the regulation of particular inter-personal relationships in different legal systems.

On the one hand, Jitta argued that PrIL should continue Savigny's intuition of searching for "the nature of the legal relationship."[174] On the other hand he believed that Savigny had wrongly focused both on almost pre-determining a universal nature of relationships and on analyzing overly broad categories of legal relationships.[175] Comparative law would prevent both mistakes. It would force one to understand how different legal systems perceive a legal relationship and purport to regulate it. Whatever principles of PrIL might apply to this relationship should be the result of comparative analysis, rather than established beforehand. It also forces one to go into the detail. In

[170] See Chapter 2.
[171] Josephus Jitta, *La methode du droit international privé* (The Hague: Belifante Fréres, 1890) at 27 [Jitta, *La Methode*].
[172] *Ibid* at 27-31.
[173] *Ibid.*
[174] *Ibid* at 216.
[175] *Ibid* at 198, 216.

Jitta's own work on "obligations," the category was broken into a large variety of "sub-categories" as a result of the understanding that there were different types of contractual relations and various issues pertaining to each of those relationships.[176]

Comparative law would also enable one to understand the actual complexity of the field. This is because in the transnational context "the facets of the various legal relationships are much more complex than in purely national circumstances, and human individuality is significantly modified by the various relationships with various juridical groups which exist within humanity."[177] Jitta described the transnational context of legal relationships in these terms:

> to formulate the law appropriate to the nature of a particular legal relationship within universal society, a state must take account, not only of physical, intellectual, moral and economic conditions of this enlarged and therefore much more varied social context, but also of the juridical consequences that derive from the diversity of states.[178]

The method of pre-determining the universal nature of broad legal relationships seemed wrong to Jitta because it leads to un-principled abstraction and generalizations,[179] as well as to an under-appreciation of the various ways and social contexts in which different legal systems construct the nature of legal relationships.[180]

Acknowledging the complexity of legal relationships and the transnational context in which they take place made Jitta skeptical of Savigny's method of localizing a legal relationship in all cases. To Jitta a legal relationship could only be localized when it was absolutely clear that such relationship has a preponderant element defining its nature and this element caused the legal relationship to penetrate in a local sphere of social life.[181] When this was not the case, Jitta believed the localization of a legal relationship meant a disregard for the complex transnational social context and the policies of the

---

[176] Josephus Jitta, *La substance des Obligations dans le Droit international privé*, t 1 & 2 (The Hague: Belifantes Fréres: 1906, 1907) [Jitta, *La substance*].
[177] Jitta, *La Methode, supra* note 171 at 218.
[178] *Ibid.*
[179] *Ibid* at 468.
[180] *Ibid* at 217-218.
[181] Jitta, *La Substance, supra* note 176 at 498.

laws involved.[182] Rather, he believed that one should try to construct the "reasonable principles of international social life" and this should be done not in abstract, but following a thorough comparative analysis.[183] Jitta believed that an appropriate comparative analysis might at times reveal "international-common rules of law"[184] and went to great length to explain how these common rules of law relate to the notions of "natural law" and "jus gentium". Jitta's understanding of natural law in the private law realm was explained in the following terms:

> Private law must ensure the equality of all individuals before the law, but it does not mean the identity of law for all individuals. This identity would be in contradiction with the conditions of life, which give each person *a distinct individuality,* both because of differences in morals, sex, age, education and level of culture and of social differences, which are so many that we can say that there are no two people that have identical conditions of existence. Among those conditions, which result from today's reality, we must include the intimate connection that exists between an individual and one or more states, because of race, language, place of domicile, birth or even residence. Private law must take account of all those conditions, it is not enough to ensure all individuals the same level of liberty, one must grant each person, *taking account of her individuality and the individuality of others,* the greatest level of freedom compatible with the accomplishment of the same condition for other individuals, and with the maintenance of the social order. It is in this sense that I speak of a natural private law, which is the pillar of the just and unjust.[185]

Jitta clarified that this principle of natural private law not only refutes the formalist principle of freedom, which is usually associated with natural private law, but

---

[182] *Ibid.*
[183] Jitta repeatedly pleads for the alignment of law and life, a departure from abstraction and formalism and much more nouanced and sociological analysis of relationships in this international context. See D Josephus Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind, Systematically Developed* (The Hague: M. Nijhoff, 1919) e.g. at 3: "the reasonable principles are not to be found by philosophical abstraction, but by observation of life's phenomena" [Jitta, *The Renovation*]. For Jitta's understanding of the use of comparative law in PrIL see Jitta, *La Substance,* t 1, *supra* note 176 at 40-45.
[184] Jitta, *The Renovation*, *supra* note 183 at 91.
[185] Jitta, *La Methode, supra* note 171 at 60.

also rejects the notion that natural law "is either unchangeable or constructed for an ideal humanity."[186]

> No doubt its principle is true everywhere, but since its principle takes account of human individuality generated by a large variety of conditions, law based on human individuality will vary as well. Because of this it is impossible to detach [private] law from reality, which reflects the current conditions of human individuality. […] In this way, natural and positive law can coordinate with each other; the abstract notion of just and unjust does not have a strength of its own in disregard of human consciousness, and human consciousness does not deserve the force it may exercise if it does not take account of the just and unjust. […] It is therefore the duty of our legal field to coordinate the positive private law of humanity with the natural demands of social life.[187]

The "international common law" in Jitta's theory therefore does not stand for "philosophical law, founded solely on natural reason."[188] "I do not make of philosophical law the source of a duty that a judge must sanction in the name of society […] common international law is different and composed of principles of law recognized by all nations, as the emanation of natural reason […] Philosophical law and the common international law have a common element: natural reason. But for philosophy natural reason is an ideal, whereas for the international common law it has penetrated the juridical consciousness of all nations. It is for this reason that I consider the latter positive law."[189] Jitta was rehearsing here Savigny's proposition that jus gentium is to be recovered empirically and that it is its widespread use and adherence to its norms that qualifies it as "rational."

Jitta, for example, seeks to discern how the natural law/positive law blend might operate by asking whether promissory obligations can be understood as natural and universal. He argued that neither autonomy in the realm of private law, nor promising is

---

[186] *Ibid.*
[187] *Ibid* at 60-61.
[188] Jitta, *La Substance,* t 2, *supra* note 176 at 498.
[189] *Ibid* at 499. It is precisely the fact that Jitta does not pre-determine a universally valid law, but tries to discern it from comparative analysis which made Beale, Baty, Lorenzen, and Pound appreciate Jitta's version of "just gentium." See Chapter 2 and 3 for an outline of how Jitta's theory was perceived by the US legal realist school.

concrete enough to justify including them in a set of natural principles.[190] The level of autonomy granted to individuals within a particular legal relationship inevitably depends on the law that regulates such relationships.[191] Similarly, a promise cannot be understood by reference to autonomy and cannot create a universal obligation. Instead, much like current philosophical accounts of promissory obligations suggest,[192] Jitta believed that the underlying rationale for giving any weight to a promise is the degree of confidence that one individual causes in another by virtue of her promising.[193] "The field of application of the principle of autonomy can thus obtain the scope it deserves by reference to the principle of confidence raised in others."[194] The principle that one must be mindful of the confidence that her promising created in another person might be a universal principle of inter-personal morality, but each legal system will give effect to this principle in various ways and to various degrees.

Overall, Jitta believed that "the common international law, when it exists, is a subsidiary source for the international legal relations that do not penetrate through a predominant element into a local sphere of social life."[195] Jitta recognized that in his theory, the role of the judge is extremely important in conducting a thorough analysis of the legal relationship, determining into which jurisdictions (local spheres of social life as he called them) it penetrates and why, and what the common international rules might be.[196] Jitta thought of the "judicial conscience" as an important element of law's power of justification, reflection, and debate.[197]

When and to the extent that such common rules do not exist, the judge and/or the legislator has an obligation towards individuals directly to consider and construct PrIL rules based on "reasonable principles of international social life," rather than abstractly assigning legal relationships to a particular jurisdiction with the intent of settling an abstract conflict of sovereignties.[198] Here Jitta was implying that even when the

---

[190] *Ibid* at 500.
[191] *Ibid* at 505.
[192] See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011) at 302-303; T.M. Scanlon, *What We Owe Each Other* (Cambridge: Harvard University Press, 2000).
[193] Jitta, *La Substance,* t 2, *supra* note 176 at 500.
[194] *Ibid* at 502.
[195] *Ibid* at 500.
[196] *Ibid* at 502. He notes though that he has tried not to abuse such resource.
[197] *Ibid.*
[198] Jitta, *The Renovation*, *supra* note 183 at 91.

comparative analysis does not reveal uniform rules, it allows one to appreciate what kind of goals and policies (both in terms of inter-personal morality and social justice) underlie the various rules and this 'substantive data' should be used in creating PrIL rules. While Jitta reassured his reader that "he has not abused this resource [the conscience of the judge],"[199] he was also very critical of doctrinal perspectives in PrIL that "ensure the mechanical certainty of the rule of law only by putting the judicial conscience to sleep."[200]

Jitta openly admitted that his approach might lead to different appreciations of "the reasonable principles of international social life" as between different national courts and legislators determining PrIL rules. Yet to Jitta, this disagreement when it followed an actual analysis of the requirements of international social life seemed preferable to abstract uniformity.[201] In his own words

> I must confess frankly that the international-common rules and the reasonable principles, the latter being considered as a subsidiary positive law, do not give the world great certainty as to the applicable rule, but the way out is by no means the establishment of mechanical rules for the solution of the so-called conflicts of laws, *it is the involvement of unions of States and, in the last resort, of the collectivity of the States.* The State, acting in isolation, cannot give the world the uniformity of the juridical rules, whilst the collectivity is in possession of the full power of mankind on the human species.[202]

2. "The Famossissima Quaestio"

Overall, Jitta believed adopting "the legal relationship" as the unit of analysis and committing this analysis to the transnational social context would inevitably shift the analytical process back and forth between universalist and particularist considerations.

---

[199] Jitta, *La Substance,* t 2, *supra* note 176 at 502.
[200] *Ibid* at 503.
[201] *Ibid.*
[202] Jitta, *The Renovation*, *supra* note 183 at 91. See also Jitta, *La Substance,* t 2, *supra* note 176 at 503: "Particularly for international legal relations, which can neither be localized, nor regulated by international common principles of law, there is a strong difference between my analysis and those systems which pretend to achieve the application of one particular law through all combinations possible. If those systems achieve mechanically the certainty of the applicable law, they only achieve this result by putting the consciousness of the judge to sleep."

The elements of this analytical process are, I suggest, helpfully hinted at in an article published by Jitta in 1909 on matters of inheritance to pre-marital property.[203]

In this article entitled *The 'famossissima quaestio' of 1693. A Contribution to the History of the Old Dutch School of Private International Law* Jitta wanted to emphasize a particular analytical shift that he believed characterized the Dutch theory of PrIL in the 17th century. He wished to stress, as I do methodologically in this thesis, the under-appreciation of the contours of a particular historical school of thought (the Dutch in his article) and the potential for reconstructing this theory for the development of PrIL in his own time. He believed the particular way in which the "Suprema Curia Brabantiae" in Hague dealt with the question of inheritance to pre-marital property in a transnational context in the 17th century illuminated an important and not fully appreciated analytical shift from the "statutory theory" to a relational analysis, similar to that described in Jitta's own writing.

The case involved a couple who lived their entire married life in Brussels but had no marriage contract. At the time of the marriage, the wife had various real properties located in Bergen-op-Zoom. Following her death, a will was discovered in Bergen-op-Zoom, according to which she left these properties to her sisters. The PrIL matter arose from the difference between the laws of Brussels and Bergen-op-Zoom. According to the laws in Brussels, property owned by spouses before the marriage was not included in the common marital property, whereas it was according to the laws at Bergen-op-Zoom (communion universalis). According to the law in Brussels, then, the wife could freely dispose of the property in her will, whereas according to the law at Bergen-op-Zoom, she could only dispose of half of the property. [204] Jitta interpreted the judicial opinion by one of the members of the Hague Court so as to show the type of reasoning that he believed should have paved the way for the demise of the "statutory school of thought" in PrIL.[205]

Jitta cited the way in which the court had constructed its decision from an analysis of "the nature of a marriage, from a historical, comparative, and, as one would say today,

---

[203] Josephus Jitta, "Die "famosissima quaestio" von 1693. Ein Beitrag zur Geschichte der alten niederlaendischen Schule des internationalen Privatrechts" in *Rechtswissenschaftliche Beiträge: juristische Festgabe zu Josef Kohlers 60. Geburtstag* (Stuttgart: F. Enke, 1909) [Jitta, "Famosissima Quaestio"].
[204] *Ibid* at 124.
[205] According to this school, statutes were broken into personal (dealing with people), territorial (dealing with property and territory) or mixed, in order to determine whether the territorial or personal sovereignty should prevail.

social-ethical standpoint."[206] In order to determine who is entitled to the wife's property the court sought to understand the role of the provisions of the law that allowed or prevented the wife from disposing of pre-marital property. The court went on to analyze how these provisions might be related to the way in which a legal system perceived the nature and values underlying a marital relationship.

In an initial step, the ethical step the goal was to understand whether there could be any pre-legal principles of inter-personal morality that could transcend deviations in social conventions. The court therefore asked whether it can be thought of as universally unethical to exclude pre-marital property from the marital property.[207] The court examined comparatively and historically the nature of the marriage relationship within the relevant jurisdictions and concluded that while equal division of the property acquired during the marriage might be considered a universal principle, the same could not be said of pre-marital property.[208]

Since this was therefore a conventional norm differing among jurisdictions, the court went on to inquire what kind of statute (personal or territorial being the only two options contemplated) the statute determining the right to inheritance should be construed to be. Since it was considered to be a "territorial" statute, dealing with property rather than individuals, the law at the place where the property was situated governed the dispute, granting half of the property to the husband.[209]

Jitta perceived this judgment as an important historical moment. He was extremely critical of the statutory school, which he considered unreasonably abstract and arbitrary.[210] He considered "senseless" its inquiry - which dominated PrIL for a long time and exerted a strong influences even at the time when Jitta wrote,[211] into whether a statute is personal (dealing with persons) or territorial (dealing with property and territory).[212] For Jitta the court's attempt to analyze the elements and values of a legal relationship

[206] *Ibid* at 127.
[207] *Ibid* at 129.
[208] *Ibid* 127.
[209] *Ibid* at 129.
[210] See Josephus Jitta, "The Development of Private International Law through Conventions" (1920) 29 Yale LJ 497 at 503 [Jitta, "Conventions"].
[211] Jitta, "Famosissima Quaestio," *supra* note 203 at 129-130 (mentioning that even though Savigny had introduced the focus on the legal relationship, even at the time of Jitta's writing this approach "still today fights with the remains of the old strictum jus").
[212] *Ibid* at 129.

should have been "the beginning of the demise" of the statutory school.[213] He believed several aspects of the "nature of the legal relationship" analysis were particularly important.

First, he applauded the court's inclination towards a comparative analysis. He believed thorough comparative analysis should be an extremely important dimension of PrIL. He made the important observation that while PrIL and comparative law appear to be related, comparative law has rarely ever been thoroughly used in PrIL. Comparative law in PrIL was rather understood, as "placing norms side by side."[214]

Second, Jitta appreciated the court's attempt to uncover points of commonality between the various jurisdictions on matters of matrimonial property. Understanding whether there was a common perception of the nature of a legal relationship was in Jitta's view an important dimension of appreciating how to best regulate such legal relationship in a transnational context. Whereas the court had focused primarily on the ethical dimension, Jitta seemed to appreciate all three elements of the comparative analysis (ethical, social, historical) as equally important. These elements could reveal not only any common elements of regulating marital property, but would also explain the differences between the various regulations, which could then inform the PrIL determination.[215]

For example, in another article Jitta argued that a focus on marriage equality combined with an appreciation of the different ways in which different jurisdictions regulate pre-marital property might suggest that the PrIL rule for pre-marital property should be: "when a marriage is concluded between parties belonging to various nations, no change in the fortunes will take place by the simple fact of the union."[216] If the

---

[213] *Ibid* at 126.

[214] *Ibid* at 128: "what was before simply putting norms side by side, is now under the influence of the quaestio, a true comparison. A marriage is a legal institution of all people and it binds the sons and daughter of all nations […] Through the question of the universal connubium one discussed the nature of the marriage, not only using social-ethical arguments, but also through a comparison of the morals underlying laws of various nations."

[215] *Ibid* at 129.

[216] Jitta, "Conventions," *supra* note 210 at 506. In this article Jitta was trying to construct substantive principles that might be agreeable to various countries, even though they differ on "the choice of law question". "A stipulation in a treaty, allowing the contracting States a choice between the principle of nationality and that of the domicile, in the Anglo-American sense, is to be taken into serious consideration. Such a choice would be only a small amelioration, if the nations would cling to the doctrine that the only aim of private international law is to solve conflicts between laws, but, if the aim is really to insure the

comparative analysis reveals that jurisdictions disagree on whether or not to include pre-marital property in the equal division rule because of different values and ethical or socio-economic goals, those should be respected.

Jitta, like Cavers, favored a more substantive and concrete analysis of the needs and expectations of individuals as they interact with each other in the transnational realm, without neglecting the substantive disagreements between the various jurisdictions relevant in the particular case. Their focus was not on constructing abstract principles of choice of law in an attempt to create absolute, yet technical, uniformity in the law. Rather, they believed that the method and scope of reasoning, interpretation, and analysis would be universal, even though national courts and legislators might reach different results on a matter.[217]

In light of his reflections on the need for a relational and comparative, substantive analysis of PrIL matters, Jitta was critical of the way in which the issue of marital property in a transnational context was settled in his time under the German legislation and the 1905 Hague Convention.[218] The relevant PrIL rule determined that "absent a contract the consequences of marriage both for movable and immovable property would be determined by the law of citizenship of the man at the time of entering into the marriage."[219]

Jitta believed this illustrated the point that when the emphasis is placed on choosing a law at all cost, it is hard to see what the substantive goals and principles for this particular legal relationship in a transnational context should be. Furthermore, Jitta

---

reasonable social intercourse between all the individuals, members of mankind, many rules, avoiding a general reference to a law, would be acceptable to the supporters of the principle of nationality as well as to the opposition. As to the marriage of aliens, the conditions, which every State is bound to control and entitled to impose, would be determined. With regard to the patrimonial effects of marriage, the rule could be admitted, that when a marriage is concluded between parties belonging to various nations, no change in the fortunes will take place by the simple fact of the union. As to divorce, the equal rights of husband and wife could be insured; the wife could be authorized to sue before the court of the last common domicile, if the husband is guilty of grave misconduct. […] Many things can be done in this way, even in the domain of family law and the succession of law, where the conservativism of the nations is so obstinate."

[217] Jitta thought that this divergence was inevitable, since every judicial determination is influenced by and becomes a symbol of each state's historical, political, social and judicial individuality. See Jitta, *La Methode, supra* note 171 at 75. He deplored the lack of certainty that this affords individuals in their transnational existence, at 214, but argued that this can only encourage states to co-operate in devising substantive norms to regulate transnational legal matters, rather than strive for formal rules of choice of law, at 456.

[218] Jitta, "Famosissima Quaestio," *supra* note 203 at 131.

[219] *Ibid.*

noted that the uniformity such rules purport to achieve is illusory. States differ on the definition of citizenship, others adopt the principles of domicile and would never ratify such a convention, there will be practical difficulties of determining the law of citizenship many years before the dispute and so on. Last and more important, he believed this default rule privileging the law of the husband's citizenship at the time of the marriage was a good example of adopting a universal PrIL rule that in fact petrifies unethical discrimination between a man and a woman in a marriage relationship.[220] He suggested that once such a law is adopted, it would be very hard to adapt this norm to progressive changes towards equality between men and women.

Jitta thereby anticipated the fact that over the better part of the 20th century the issue of gender equality would be left unaddressed in PrIL, despite its incorporation into various constitutions and various branches of national law. What prevented the integration of a fundamental value of inter-personal justice was precisely the obsession with systemic structure, as well as with the abstract and uniform choice of law rules that Jitta had refuted.[221] In Germany, Alex Flessner showed that Kegel's interest jurisprudence had not been able to help integrate this value, precisely because under Kegel's initial conceptualization the need for order and uniformity had been given a primordial importance.[222]

Juxtapositioning the way in which Jitta described the cosmopolitan dimension of PrIL with the way in which 20th century PrIL increasingly focused on the systemic nature of discipline PrIL and on its uniformity might confirm Lüderitz's intuition that we have progressively turned the cosmopolitan foundations of 19th century relational internationalism into "brute order." The analytical method of alternating between the Volk and humanity, between liberty and social responsibility, and between national law and universal principles of justice rested at the foundation of the relational internationalist perspective and defined the cosmopolitan nature of PrIL. Yet this method implied a higher degree of flexibility than both 19th century state-centric theorists, as well as various 20th century scholars, such as Batiffol and Kegel, could accept. Story had already

[220] *Ibid.*
[221] For an overview of these decisions and the influence of Kegel's interest jurisprudence in this context, see Flessner, *Interessenjurisprudenz, supra* note 6 at 15-26.
[222] *Ibid* at 18.

expressed a strong skepticism about uniformity and structure at all cost, Savigny had explicitly stated that individuals should not be subservient to the goal of uniformity and structure, and Jitta had taken that skepticism even further. Yet that skepticism was easily shed in light of attempts to create a universal system of PrIL from late 19th century onward. And as Kegel's theory was perceived as a restatement of classical, presumably Savignyan PrIL, it seemed that the conflicts/material and private/public divisions on which the pursuit of order and systematicity were created had always underpinned the Savignyan theory. Yet in this chapter I tried to show that the cosmopolitan foundations underlying the relational internationalist perspective were different and much more nuanced than the blind pursuit of order and uniformity that was progressively injected into PrIL, starting already with the state-centric universalist theories.

V. Conclusions

The pursuit of order and uniformity has always been an important principle of PrIL theory and methodology. Yet its normative justification, as well as its relationship to other PrIL principles is not always clear. In previous chapters, I showed that the principle rests very much at the core of the state-centric internationalist perspective, which tried to create an analogy between PrIL and PublIL.

The principle of order and uniformity, however, is generally associated with Savigny. Furthermore, the intransigent pursuit of order and uniformity is generally associated with a liberal ideology, a clear separation between private and public law, and a disregard for national politics and national self-determination.

In this chapter I argued that this understanding of the PrIL canon might have been enshrined in PrIL when Gerhard Kegel put forward his theory of "conflicts justice," in which he outlined a clear association between private interests and order and uniformity, alongside the private/public and conflicts justice/material justice dichotomies. Yet following the intuitions of various modern individual-centered perspectives, I argued that this normative justification for the pursuit of order and uniformity is certainly not inevitable and does not map onto the relational internationalist perspective.

Instead, in this chapter I aimed to show that the universalist ideology of the authors referenced throughout this thesis is, in fact, considerably more fluid and more restrained than the intransigent pursuit of order, uniformity, or the appeal to the internal structure and logic of PrIL. Both Savigny and Jitta were particularly keen on achieving a fragile balance between national autonomy and self-determination, as well as universal principles and values, including individual self-determination and social co-operation. Their reconstruction of jus gentium and natural law was placed alongside their insistence on the particularity of each "Volk" or state and the articulation of individual self-determination was placed alongside a relational perspective. In their theory, expectations regarding the application of a particular law in geographical terms informed or supplemented expectations regarding a particular substantive outcome for various legal relationships.

All of these various dimensions were then to be systematized (possibly over-systematized in Savigny's theory) into various principles of international reasonable social order and/or choice of law rules. But those were meant to be the result of an analysis, that sought to integrate, not separate, the national/universalist, geographical/substantive and private/public dimensions. This universalist "method" of the relational internationalists is different in many respects from the way in which we have come to insist on the pursuit of order, structure and uniformity by adopting the "broadest" and possibly most abstract element of analysis (for example state sovereignty, individual choice, broad appreciations of average individuals' attachments to various countries).

Conclusions

In 1949 André Bonnichon remarked: "modern scholars of PrIL commonly state that conflict of laws boils down to a conflict of sovereignties."[1] This conventional wisdom was perplexing to Bonnichon because "while PublIL scholars freely recognize that sovereignty is one of the most complex notions and some even deny its existence as such an attribute of state power, those who write in the field of PrIL pretend to be employing a clear concept and to derive rigorous consequences from it. Allegedly, the object and nature of PrIL, its characteristic place among different branches of law, the solution of general problems such as renvoi and characterization, are all to be solved by reference to state sovereignty."[2]

A year later, Bonnichon argued that it was necessary to discern the fundamental influence of this conflict of sovereignties theory on PrIL, as well as its inevitable limitations. His own conclusions about the idea of conflict of laws as conflict of sovereignties were as follows:

> A notion born relatively late in the development of a science. […] It appeared capable of becoming the core of a new thesis. […] Then this clear notion proves to be complex. We can discern the ambiguities, which make the reasoning easy and the conclusions fragile. It proves an insufficient instrument and we go back to ancient concepts, although we disguise them under the new vocabulary.[…] As so many like it, it must be put in the category of ideas that served, can still serve, but cannot play the central role that we once attributed to it. This … I believe, must be the destiny of the idea of conflict of sovereignties in PrIL. The science of conflicts that existed before the end of the 19th century was long content with the aspects that I called functional or essential, namely with principles of justice and the nature of the relationships. The new theories of public law internal and international, the Napoleonic codification, the need for synthesis and the rejection of the notion of comity constituted favorable circumstances for the rise of the

[1] André Bonnichon, "La notion de conflit de souverainetes dans la science des conflits des lois" (1949) 39 Rev crit dr int privé 615 at 615 [Bonnichon, "La notion 1949"].
[2] *Ibid* at 615.

idea that conflict of laws is nothing but conflict of sovereignty. But the mere notion of sovereignty is unclear.[3]

It is hard to determine how much has changed since Bonnichon's account. PrIL scholars have continued to be fascinated by the idea of PrIL as conflicts of sovereignty, and with the prospects of using this metaphor as a way of reconnecting PrIL with PublIL.[4] And just as at the time of Bonnichon's writing, the discussions about and perspectives on sovereignty are very much internal to PrIL. Now, as much if not more than in the mid-20th century, PublIL scholars are contesting conventional notions of state sovereignty and the abuses and injustices brought by the state-centric dimensions of PublIL.[5] Just as Bonnichon described in mid-20th century, little of the PublIL critique of statism is translated into PrIL state-centric theories. This lack of critical engagement with state-centric premises in PrIL is exacerbated by a sense that there is no alternative on which to construct an international theory that takes account of social justice and global justice generally. Even more so than in Bonnichon's time, it is hard to remember that any fruitful theories that existed before the association between PrIL-PublIL was forged in the 19th century. And to the extent those theories that Bonnichon calls "functional or essentialist, focusing on principles of justice and the nature of legal relationships" still form part of the intellectual memory of PrIL, they are attributed to a theory of PrIL dismissed as overly liberal or libertarian.

In this thesis, I have argued that both of these premises are wrong. In the first place, the 19th century PrIL-PublIL association and its focus on state sovereignty did not represent the enlightened quest for the global good that it is thought to have been.

---

[3] André Bonnichon, "La notion de conflit de souverainetes dans la science des conflits des lois" (1950) 40 Rev crit dr int privé 11 at 31-32.

[4] See more recently Alex Mills, *The confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (New York: Cambridge University Press, 2009).

[5] For a range of perspectives see James Der Derian et al., "How Should Sovereignty Be Defended?" in Christopher J. Bickerton, Philip Cunliffe & Alexander Gourevitch, eds, *Politics Without Sovereignty: A Critique of Contemporary International Relations* (London: UCL Press, 2007) 187. See also "The Transformation of Sovereignty" 88 Am Soc Int'l L Proc v (1994). For an interesting critique from a feminist perspective see Karen Knop, "Borders of the Imagination: The state in Feminist International Law" in 88 Am Soc Int'l L Proc v (1994); Karen Knop, "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 Transnat'l L & Contemp Probs 293. See also Eyal Benvenisti, "Sovereigns as Trustees for Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107:2 Am J Int'l L 295 (trying to maintain, yet reconstruct the notion of state sovereignty, as trusteeship for humanity).

Second, individual-centered, private law focused theories of the 19th century did not all plead for an overarching principle of individual liberty and did not adopt an individualistic, libertarian perspective on private law. To the contrary, they were much more nuanced and flexible than state-centric theories. Indeed, I have argued that several authors of the 19th century portrayed a relational, socially constituted image of the individual and therefore connected PrIL with a different model of private law than the libertarian account common today.

I begin these conclusions by summarizing the relational internationalist perspective as a theory that places individuals at the center of a range of concentric circles representing different dimensions of relationality. Relational internationalists placed the individual in relationship to the other party(ies) of the private law relationship, emphasized the relationships that individuals have with various communities and groups apart from their private law relationships, embedded private law relationships within various national communities, and finally integrated all these relationships into a broader notion of humanity.

In all of these respects, I have argued, the relational internationalist perspective is worth recovering and revisiting, but not necessarily transplanting with an unaltered content, into the 21st century. Just as Bonnichon thought PrIL should have been mindful of debates around the notion of sovereignty outside of the field, relational internationalism needs to be brought in conversation with, and possibly partly traded off for, newer insights on relationality within other legal fields and policy debates.

In the last section of these conclusions I wish to propose, but by no means exhaustively set, the boundaries of a conversation that might fruitfully be had between 19th century relational internationalism and contemporary relational perspectives and other academic debates that resonate with some of the elements that I have identified as defining the relational internationalist perspective. In this section I build on the recovery in this thesis of a complex and nuanced theoretical perspective within PrIL's intellectual history and suggest how this perspective can be an important bridge between PrIL and a wide range of academic debates, including: private law theory and feminist perspectives on relational justice, global justice debates, as well as debates about the role of intellectual history studies generally.

I. Concentric Circles of Relationality

The relational internationalist perspective that I have described throughout this thesis is premised on a strong humanist concern. PrIL, Jitta wrote at the end of the 19th century, "has become a species of supreme law, a law of laws, placed to such extent above the individuals, that it can disregard them."[6] The main concern of authors like Jitta was that the state-centric paradigm would subsume individuals under broader categories of states and nations, and would eliminate their voice and self-determination. They feared that the conceptualization of conflict of laws as conflict of states or state sovereignty would create the illusion that PrIL did not have the burden of justifying its methods, its principles, and its norms to individuals directly. The main target, especially for Jitta, who had witnessed the height of the state-centric perspective, was the implicit contention, which Pillet made explicit, that in this inter-state distribution of sovereignty the "litigating parties disappear for a while."[7]

Once the humanist premises of the relational internationalist perspective are fully captured, the relational underpinnings of the theory also become clearer. Relational internationalists did not aim to separate the individuals from each other or from the state, or to create a strict separation between private and public, or the market from politics. Their main goal was to bring back the voice, the interests, and the concerns of individuals as they navigated the transnational realm. It would have appeared impossible for these authors to disconnect individuals from the large framework of relationships in which they are embedded because they were interested primarily in accounting for the individual *as* a transnational agent. The relationships and connections that transformed an individual from a citizen of a state to a transnational agent were precisely the elements that rested at the core of relational internationalism.

The analysis of the relational internationalists starts from the realization that PrIL regulates relationships between individuals in the transnational realm. All relational

[6] Josephus Jitta, *La methode du droit international privé* (The Hague: Belifante Fréres, 1890) at 5 [Jitta, *La Methode*].
[7] Antoine Pillet, "Droit international privé consideré dans ses rapports avec le droit international public", Annales de l'enseignement superior de Grenoble (Grenoble: F. Allier Père & Fils, 1892) 309 at 335 [Pillet, "Rapports"].

internationalists are keen to show that PrIL must account for the interests and expectations of all parties to the dispute. Story spoke about conflicts between creditors and purchaser, Savigny explicitly denied any attempt to derive the applicable law from the geographical affiliations, interests and expectations of one party only, and Jitta adopted the focus on relationships as the dawn of the modern theory of PrIL. They insisted repeatedly that PrIL must remain attuned to the fact that it is dealing with correlative rights, obligations, and expectations, and that PrIL rules should prevent any party from a unilateral determination of such correlative interests.

Because the private law relationship is the primary unit of analysis from which their theory starts, they focused less on describing the image of the individual coming into the private law relationship. Accounts of individuals' pre-existing affiliations to different communities and groups, and the corresponding socio-economic makeup of individual identity prior to entering into a private law relationship are occasionally found in Story's theory, but not so much in Savigny's theory. I have argued in Chapter 7 that 20th century German interest jurisprudence includes, in the writings of Alexander Lüderitz, more sophisticated accounts of this level of relationality. But in the writing of Josephus Jitta, the last protagonist in my account of relational internationalism, the multi-facetted human identity that is brought into the private law relationship is clearly underscored. Jitta wrote that private law and PrIL must take account of each person's "*distinct individuality*, both because of differences in morals, sex, age, education and level of culture and because of social differences, which are so numerous that we can say that there are no two people who have identical conditions of existence."[8] These diverse conditions of existence "include the intimate connection that exist between an individual and one or more states because of race, language, place of domicile, birth or even residence."[9] For Jitta this picture of the diverse conditions of social life translates into the argument that both private law and PrIL must account for substantive, rather than formal autonomy and liberty. "Private law must take account of all those conditions, it is not enough to ensure all individuals the same level of liberty, one must grant each person, *taking account of her individuality and the individuality of others,* the greatest level of

[8] Jitta, *La Methode, supra* note 6 at 60.
[9] *Ibid.*

freedom that is compatible with the accomplishment of the same conditions for other individuals, and with the maintenance of the social order."[10]

This complex context upon which relational internationalists reflect manages to situate not just individuals, but also their inter-personal relationships in a pendulum between "the cosmopolitan spirit and the national sentiment.[11]" Therefore, every private law relationship is embedded in a social community and/or a state. All relational internationalists try to find links that place private law relationships in the realm of a community and/or a state. And by the time Jitta articulated this "localization" principle, it becomes clear that this too has a social dimension. Since "every relationship has a social purpose," every juridical relationship is embedded in a social reality.[12] To localize a private law relationship in a particular community, then, means to underscore "the link that may exist, in a social sense, between the fact and a local sphere of social life."[13]

Once the emebeddedness of a private law relationship is explained in social terms, it becomes obvious that a private law relationship could be simultaneously embedded in various communities and ultimately within humanity at large. For relational internationalists, this translates into many different analytical dimensions. On the one hand, they all reference several universal principles of inter-personal morality, inter-personal trust and solidarity. On the other hand, they all reference a certain substratum of universal law and *ius gentium*. Yet they are careful to situate this concept at the border between positive and natural law, in order to ensure enough room for national self-determination and legal particularities, while at the same time committing law to higher, universal standards.

Furthermore, the embeddedness of individuals and their relationships within humanity means that a private law relationship can have such a wide systemic social impact that "it may belong to international social life" in a much broader sense.[14] The social sphere for which one must account is much wider when one understands that a

[10] *Ibid*.
[11] *Ibid* at 27.
[12] Josephus Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind* (The Hague: Martinus Nijhoff, 1919) at 99 [Jitta, *The Renovation*].
[13] *Ibid* at 97.
[14] *Ibid* at 136-137.

private law relationship can simultaneously impact and become embedded in so many local spheres of social life.

Emphasizing all these levels of relationality made Jitta at the end of the 19th century "beg to remind the reader that international social life is knotty, and that it is better to untie the knot patiently than to cut it through with a sharp knife."[15]

II. A Conversation Between the Past and the Present

The various ways in which the relational sensibility seeks to situate the individual within various spheres of social life all point to the value of recovering the relational sensibility, which PrIL has lost from its historical memory. Recasting this 19th century "relational internationalist perspective" challenges the common assumption that PrIL has no internal resources to rethink its regulatory function in an increasingly inter-connected world. Instead, I believe this perspective resonates with strikingly contemporary and critical insights. Theoretically and methodologically, this perspective encourages a much needed contextual analysis, fosters inter-personal responsibility, mutual trust, and respect in transnational dealings and brings a much needed awareness of the wide range of elements that constitute individual identity in a transnational context.

But to make up for what would have been more than a century of development and refinement, I also believe one needs to rethink, reconstruct, and partly trade off some of the insights of the 19th century relational perspective in light of contemporary debates within feminist scholarship and private law theory, as well as to ponder on the role of further intellectual historical accounts for the current development of PrIL.

While I certainly cannot hope to treat these topics exhaustively here, I wish to sketch what a conversation between the past and the present might look like along the lines of these contemporary topics.

[15] *Ibid.*

1. Private Law and Feminist Theories of Relationality

Relational internationalists constructed much of their theory by reference to private law, and their relational insights in many ways started, though did not remain at the analytical level of the private law relationship. Interestingly, many current private law theories focus on emphasizing various layers of inter-personal solidarity and a substantive notion of equality and self-determination underlying private law relationality, in contrast to the conventional neo-Kantian notion of correlativity.[16] Furthermore, feminist theories have long criticized the classical notion of correlativity in private law, as well as the formal equality principle, and have in many ways pioneered much of the work on relationality.[17] I believe that in order to make use of a reconstruction of the 19th century relational internationalist perspective for the development of PrIL, the field should tap into and engage the rich debates occurring within these areas of law and policy, in particular along five areas of inquiry.

A. Contextual Analysis, Medium-Level Relationality vs. Ideal Relationships

Both within private law and feminist writings, there is a lively debate about whether a focus on relationships is merely a proxy for engaging in a contextual analysis, or if it represents a normative argument in favor of a particular kind of relationship and community between people. Furthermore, in both private law and feminist writings the endorsement of particular substantive relationships ranges from a medium level relationality, according to which the individual participates in relationships and

[16] See, e.g., Hanoch Dagan & Avihay Dorfman, *The Justice of Private Law,* online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527970; Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000); Eduardo M. Peñalver, "Property as Entrance" (2005) 91 Va L Rev 1889; Joseph William Singer, Democratic Estates: Property Law in a Free and Democratic Society (2009) 94 Cornell L Rev 1009; Gregory Alexander, "The Social Obligation Norm in American Property Law" 94 Cornell L Rev 1009; Anthony Townsend Kronman, Contract Law and Distributive Justice (1980) 89 Yale LJ 472.

[17] See generally Jennifer Nedelsky, *Law's Relations. A Relational Theory of Self, Autonomy and Law* (2011); Catriona Mackenzie & Natalie Stoljar, Relational Autonomy: Feminist Perspectives On Autonomy, Agency, And The Social Self (New York: Oxford University Press, 2000); Martha Minow & Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 1 Hypatia 11; Martha Minow, "Paradoxes of Rights" in Austin Rata & Thomas R. Kearns, eds, *Identities, Politics, and Rights* (Ann Arbor: University of Michigan Press, 1995); Samantha Brennan, "The Liberal Rights of Feminist Liberalism" in Amy R. Baehr, ed, *Varieties of Feminist Liberalism* (New York: Rowman & Littlefield, 2004).

community, while relying on a potential right of exist, to a thick notion of community, according to which the individual is thought of as always constituted by and socially responsible to others within a particular relationship/community.[18]

Framing the individual as an inherently social being, aiming to establish relationships with other people in the transnational realm, enabled relational internationalists to construct a much more contextual and sophisticated analysis than state-centric theories. While Robert Leckey argued that the value of relationality to push for contextual analysis is less important in areas that are already prone to contextual analysis,[19] I hope that it will have become apparent that in the case of PrIL it was precisely relationality that provided an impetus for more contextual analysis.

But while the 19th century "relational international perspective" relies on the insight of the individual's inherent social nature to push for a more contextual and nuanced analysis of PrIL matters, it is not always clear whether it also pleads for a particular level of social embeddeddness emerging from transnational inter-human relationships. I think this rests on the fact that while all relational internationalists pleaded for the integration of elements of good faith, inter-personal trust, and solidarity as analytical elements for choice of law matters, they did not provide much insight into the level of solidarity that these analytical elements push for or encourage.

As the contemporary debate between legal theorists Hanoch Dagan and Gregory Alexander suggests, our conceptualization of the level of integration within a private law relationship will dictate a different level of social responsibility. And, in turn, the level of inter-dependency one envisions within private law relationships will dictate what individuals and communities can demand of each other and between themselves.[20] These insights are extremely important for PrIL in elucidating the kind and level of responsibility and care individuals owe to each other and to the communities that their transnational relationships inevitably affect.

---

[18] *See* Robert Leckey, *Contextual Subjects, Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008) at 3-31 (discussing the various layers of relationality within the feminist scholarship).
[19] *Ibid.*
[20] See Alexander, *supra* note 16; Hanoch Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011) at ch 2 & 3.

B. Inherent versus Constitutive Relationality

Part of the debate around the level of inter-connectedness that should inform private law norms relates to a debate about the value of community and relationships for individuals. Feminist scholars have long argued that liberal private law is only able, if at all, to account for 'inherent relationality' as an attribute of human nature.[21] Feminist relational insights, on the other hand, are extremely helpful in revealing how autonomy and human flourishing are constituted, and therefore perpetually impacted by relationships with others.[22] Similarly, conceptualizing the embeddeddness of an individual as an expression of a common concern for everybody's "human flourishing" as Gregory Alexander does, or as a necessary condition for individual autonomy as Hanoch Dagan does, will generate different levels of social cohesion and self-sacrifice for others, within and beyond the private law relationship.[23]

The 19th century "relational internationalist perspective" fluctuates between a concern for inherent or constitutive relationality, and is often less attuned to the potential tensions. In Jitta's theory, the relationships with various communities and the socio-economic context are clearly constitutive of each person's "distinct individuality." But when Story and Savigny in particular plead for the recognition of individuals' expectations, they presume that this would enable and foster more equitable and smoother transnational inter-individual relationships. And while they are mindful of the correlative dimensions of expectations, they may be less attentive to the (possibly inequitable) relationships and conventions that construct those initial expectations, and what consequences their recognition would have in terms of structuring these and similar transnational relations. Feminist insights would help further illuminate the way in which various layers of relationships shape one's expectations and capabilities, and how those are further projected into transnational legal relationships.

[21] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 1 at 9, n 4.
[22] *Ibid.*
[23] See Alexander, *supra* note 16; Dagan, *supra* note 16 at ch. 3.

C. Formal versus Substantive Autonomy

A corollary to the distinction between inherent and constitutive relationality is the debate over formal versus substantive autonomy. Feminist writers generally, and Jennifer Nedelsky in particular, are keen to emphasize a thick notion of "relational autonomy," according to which autonomy is shaped by factors such as race, class, gender, as well as citizenship and others. This insight has translated into private law theories. Anthony Kronman already showed that the libertarian and even liberal notion of autonomy underestimates the impact of market power, poverty, social status and others on individual autonomy, and that it fails to account for and reverse disparities caused by those factors, through private law norms.[24] Hanoch Dagan and Avihay Dorfman have recently argued that individuals, and not just states, private law, and not just public law, must respect and accommodate individual particularities and "ground projects" such as disabilities, religion, class, gender, or ethnicity.[25]

19th century PrIL constructing the "relational internationalist perspective" were aware of the fact that private law relationships impact and construct parties' autonomy. Jitta clearly disavowed a formalist notion of equality and autonomy when arguing that it is not enough for private law and PrIL to ensure all individuals the same level of liberty, but that "one must grant each person, *taking account of her individuality and the individuality of others,* the greatest level of freedom which is compatible with the accomplishment of the same conditions for other individuals, and with the maintenance of the social order."[26] Yet it is not always clear to what extent and for what factors individuals are supposed to accommodate each other in their transnational private law dealings. Sharpening the implications of incorporating a thick, substantive notion of autonomy would be extremely valuable for PrIL. For example, it would make much less plausible the common proposition that the law of the tort applies to all transnational torts because this is the jurisdiction to which all parties are most connected to or which they implicitly agreed to. While the rule might pose fewer problems in the case of a minor car accident, it has wide-ranging implications in the case of mining operations of

[24] *See* Kronman, *supra* note 16.
[25] *See* Hanoch Dagan & Avihay Dorfman, "Just Relationships", online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537.
[26] Jitta, *La Methode, supra* note 6 at 60.

transnational corporations in developing countries. Injecting a strong awareness for disparities in market power, level of income, cultural and ethnical background, among other factors, would often challenge or at least refine the "implied consent" argument which rests at the foundation of many choice of law norms.

D. Conflicts of Rights and Interests versus Resulting Patterns of Relationships

Once autonomy is re-conceptualized as constituted by and dependent on relationships with other individuals and communities, it becomes clear that one of the most important roles of law is to structure healthy relationships that support and enable autonomy. Feminist writers have made an important contribution by analyzing rights, including private rights, as relational.[27] Rights are viewed not as reified and immutable entitlements, but instruments through which to construct particular types of relationships. Consequently, feminist writers challenge legal determinations cast in terms of conflicts of individual rights or interests. Rather, they argue for a critical analysis of the patterns of relationships that result from the institutionalization of particular rights over others.[28]

19th century relational internationalists similarly disavow a reification of rights and the vested rights doctrine, primarily because those concepts rely on the atomistic, rather than the relational image of the individual. They attempt both to maintain the empowering element connotative of rights, as well as to deny their immutability by referring to conflicts of reasonable expectations or interests. While this is already a major improvement over the vested rights theory, it is not clear that 19th century authors are particularly attuned to the overall patterns of relationships that emerge through various PrIL norms. By contrast, feminist perspectives raise a deep concern for the potential violence of and subordination within the various types of private law relationships, including familial and personal ones. Incorporating those insights within PrIL would allow one to maintain the relational sensibility that comes with private law theories, while preventing us from idealizing relational structures within private law and PrIL.

[27] See, e.g., Jennifer Nedelsky, "Reconceiving Rights as Relationships" (1993) 1 Rev Const Stud 1.
[28] *Ibid*.

Incorporating insights from the feminist debates on relational rights would make PrIL sensible to the patterns of relationships it structures through its norms and decisions. For example, determinations on the applicable law for the rights of foreign parents to the education of their children born in a country different from that of the parents' citizenship would become sensitive to the way in which these norms structure the relationship of migrant workers with their host and home country respectively. It would also make the choice of law analysis attuned to whether applying one national law over another would generate conflict between children whose rights are informed by host country standards, and the parents, whose cultural practices are informed by their home state. Similarly, PrIL would become sensitive to the kind of patterns of relationships it creates when it enables corporations to take advantage of lower standards of care, and quantum damages in developing countries when they engage in tortious activity.

E. Relational Justice versus Distributive Justice

An implicit assumption in the feminist writing might be that desirable patterns of relationships imply and foster distributive justice. But feminist perspectives have also been criticized for focusing on a particularized ethic of care, which posits care and responsibility exclusively within a relationship. Similarly, if the relational lens is meant merely to create a certain kind of "relational justice," this might inhibit reflection on distributive implications.[29] Interestingly, the same debate is now cast not only within legal and political philosophy,[30] but also within private law theories. Hanoch Dagan and Avihay Dorfman explicitly argue that relational justice is separate from, though not antithetical to distributive justice.[31] Gregory Alexander also argues that focusing on human capabilities to be fostered within relationships and communities does not have to translate into welfare maximization.[32] All these debates might simply outline a preference for ultimate values. But considering the extent to which deontological arguments, which

[29] See Robert E. Goodin, "Structures of Political Order: The Relational Feminist Alternative" in Ian Shapiro & Russel Hardin, eds, *Political Order. Nomos 38* (New York: New York University Press, 1996).
[30] See Samuel Scheffler, "The Practice of Equality" in Carina Fourie, Fabian Shuppert & Ivo Wallimann – Helmer, eds, *Social Equality: On What it Means to Be Equal* (New York: Oxford University Press, 2015).
[31] See Dagan & Dorfman, *supra* note 16.
[32] See Alexander, *supra* note 16.

might define relational justice, would inhibit awareness of values outside the relationship or the community seems important.

19th century PrIL authors embracing the relational internationalist perspective were particularly attuned to the relevant dimensions of justice within a private law relationship. The relational sensibility would often allow them to extend this analysis to third parties and to the various communities that are affected by the particular private law relationships. But they were less attuned to the relationship and potential conflict between relational and distributive justice in a transnational context. Incorporating the insights of the current debates within private law, and feminist writings into PrIL will help illuminate and sharpen those connections.

Overall, connecting PrIL with feminist scholarship and private law theories on relationality via the 19th century "relational internationalist perspective" is likely to bring contributions going in both directions. Feminist perspectives are virtually nonexistent in Private International Law[33] and among private law theories only the neo-Kantian version has been applied to the field.[34] At the same time the transnational arena of inter-human interaction poses more complicated and diverse challenges than the national context for which most of those theories were written. Applying them to PrIL will reveal the potential, as well as the limitations of incorporating relational insights in the transnational context.

[33] Notable exceptions are Annalise Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms" (1991) 29:3 Osgoode Hall LJ 419 (on dependet domicile); Ivana Isailović, "Political Recognition and Transnational Law. Gender Equality and Cultural Diversification in French Courts" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015) 318; Horatia Muir Watt, "Future Directions?" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015) 343 (recovering a framework of recognition inspired, among others, by feminist writings); Karen Knop, "Relational Nationality: On Gender and Nationality in International Law" in T.A. Aleinikoff and D. Klusmeyer, eds, *Citizenship Today: Global Perspectives and Practices* (Washington, D.C.: Carnegie Endowment for International Peace, 2001) 89; Karen Knop & Christine Chinkin, "Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law" (2001) 22:4 Mich J Int'l L 523 (on dependent nationality).

[34] See Sagi Peari, "Savigny's Theory of Choice of Law as a Principle of Voluntary Submission" (2014) 64 UTLJ 106. Hanoch Dagan & Avihay Dorfman are working on a project connecting their work on relational justice in private law with Private International Law. See Hanoch Dagan & Avihay Dorfman, "Interpersonal Human Rights and Transnational Private Law" (on file with author).

2. Global Justice Debates

Recovering and adapting private law theories from PrIL's intellectual history might at first sight appear counter-intuitive, since it is precisely the private law heritage that is presumed to hold PrIL in isolation from global justice considerations. The perception of PrIL as an impoverished field of law, both intellectually and politically, has made many critics of PrIL lose hope that PrIL might have any vocabulary and doctrinal tools of its own to align the field with global justice considerations. Therefore, a call for reform in PrIL now generally translates into a broad proposal to connect the field with global justice debates occurring elsewhere: in legal and political philosophy, public international law, human rights, environmental law, law and development, etc.[35] Some suggest that we should stop thinking of PrIL as an independent legal discipline altogether.[36] While these reformers rightfully seek to re-invigorate normative debates about PrIL's global justice dimensions by importing insights from the global justice scholarship, it is often unclear what precisely PrIL can learn from these insights and how it can change in light of them. Indeed, it is not even clear what analytical and conceptual elements of the global justice debates connect to PrIL.

But a fruitful strategy of reform might be to connect particular perspectives in the global justice literature with normative approaches excavated from PrIL's own arsenal. And here again, though possibly counter-intuitive, past private law theories map onto global justice perspectives much more than state-centric theories. In this section I want to underscore four points of interesting connections between current global justice theories and the relational internationalist perspective.

First, contemporary debates in the global justice literature suggest that states' duties of solidarity towards non-citizens should be viewed as a corollary to the various forms of duties individuals have in the "lifelong of inter-subjective relations."[37] Fair principles of inter-subjective interaction in which individuals meet either as "citizens of

[35] See the introduction for a discussion of this perspective.
[36] Horatia Muir Watt, "Future Directions?" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015).
[37] Sergio Dellavalle, "On Sovereignty, Legitimacy, and Solidarity, Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?" (2015) 16:2 Theor Inq L 367.

their respective nations" or as "citizens of the world" translate into a responsibility of states to consider and weigh the interests of all parties to these interactions.[38]

This way of constructing a framework of global solidarity, which connects to various levels and degrees of inter-human solidarity in different social contexts is very useful for PrIL which operates at the micro-level of inter-human interaction by examining cross-border private law relations. Making the legitimacy of a PrIL determination dependent on the extent to which the court hearing the PrIL matter has examined the level of consideration, respect, dignity and care individuals owe each other in their cross-border private law relations would create an important layer of global justice in PrIL. Relational internationalists have similarly argued that moral principles of inter-personal interaction should translate into the responsibilities of states towards foreign constituents who are involved in and affected by various private law relationships in a transnational context.

Second, global justice authors, such as Eyal Benvenisti, try to shift the perception of national courts, from viewing themselves only as the trustees of their executives, to increasingly acknowledging their fiduciary duties towards litigating parties, whether national or foreign.[39] Several state-centric theories encouraged courts to perceive their determinations as informed by their duties towards their executives or the legislative branch, rather than foreign nationals and foreign interests. Yet relational internationalists similarly suggested that courts in PrIL should realize or almost "pretend" that PrIL litigation is not embedded in the much more politically contentious inter-state matters of PublIL.[40] They argued that this should enable courts in PrIL to construct "a public duty

[38] *Ibid.* See also Sergio Dellavalle, "Opening the Forum to the Others: Is There an Obligation to Take Non-National-Interests Into Account Within National Political and Juridical Decision-Making Processes?" (2014) 6 Göttingen Journal of International Law 217 (2014).

[39] Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 AJIL 241; Eyal Benvenisti, "National Courts, Domestic Democracy, and the Evolution of International Law" (2009) 20 EJIL 59; Eyal Benvenisti, George W. Downs, "The Democratizing Effects of Transjudicial Coordination" (2012) 8:2 Utrecht Law Review 158; Eyal Benvenisti, "Sovereigns as Trustees for Humanity" (2013) 107 AJIL 295.

[40] See the "as if analogy" underlying PrIL methodology in Karen Knop, Ralf Michaels, Annelise Riles, "From Multiculturalism to Technique, Feminism, Culture, and the Conflict of Laws Style" (2012) 64 Stan L Rev 589. For the proposition that PrIL should dissociate itself from the contentious nature of PublIL see Robert Wai, "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001) 39 Can YB Int'l L 117; Robert Wai, "The Interlegality of Transnational Private Law" (2008) 71 L & Contemp Probs 107.

towards humanity" and towards the litigating parties, obliging them to an equitable weighing of the interests of domestic and foreign parties alike.[41]

Third, global justice scholars increasingly plead for a departure from a "statist" view of the world,[42] emphasizing the way in which groups, investors, corporations, government officials, and discrete minorities disenfranchised by globalization look to various decision fora in order to regain the democratic voice that they might have lost in their respective jurisdictions.[43] The appeal to disaggregate state interests in order to allow for the voice of various individuals and groups rested at the core of relational internationalists who wrote precisely against the dominant school of thought, which tried to conceptualize inter-human relationships in the international realm as inter-state relationships.

Finally, global justice theorists argue that both the use and distribution of sovereign authority should be linked to human rights.[44] In other words both questions of who gets to regulate a legal matter and how the legal matter is to be regulated must be linked to norms and principles of human rights.[45] Furthermore, human rights would need to be theorized, "inter alia, [as] claims for inclusion in a political society that operates on the terrain of global politics."[46] Determinations about who gets to decide upon the rights and liabilities of individuals in a transnational context are the bread and butter of PrIL. Yet connections between these determinations and Human Rights are rarely under the purview of PrIL norms.[47] Relational internationalists however not only incorporated a layer of horizontal human rights norms under the term "jus gentium," but were also

[41] See, e.g. Story's reasoning in La Jeune Eugenie, presented in Chapter 5.
[42] Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale LJ 1; Joseph Stiglitz, *Making Globalisation Work* (New York: W.W. Norton, 2007); Thomas Pogge, *Realizing Rawls*; (Ithaca: Cornell University Press, 1989); Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Martha Nussbaum, "Beyond the Social Contract: Toward Global Justice" in Grethe B. Peterson, ed, *The Tanner Lectures on Human Values*, vol. 24 (Salt Lake City: University of Utah Press, 2004) 413.
[43] Eyal Benvenisti, Exit and Voice in the Age of Globalization (1999) 98 Mich L Rev 167.
[44] Patrick Macklem, "What is International Human Rights? Three Applications of a Distributive Account" (2007) 52 McGill L J 575; Evan J. Criddle, Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009) 34 Yale J Int'l L 331.
[45] Macklem, *supra* note 44.
[46] Joshua Cohen, Charles Sabel, "Extra Republicam Nulla Justitia?" (2006) 34 Philosophy & Public Affairs 147.
[47] See Muir Watt, *supra* note 36.

aware that individuals pursue particular claims in particular courts as part of their quest for recognition and integration in various communities.[48]

Just as in the case of the parallel between the relational internationalist perspective and feminist relational perspectives, the parallel with global justice debates can bring contributions going in both directions. Overall, connecting global justice insights with the intellectual history of PrIL is likely to illuminate the current unjust dimensions of the field, but also the value of the reconstruction of PrIL's own intellectual history. It also quite clearly brings PrIL in conversation with global justice theories and identifies its own inner potential to contribute to global justice. But the relational internationalist perspective also has much to offer to global justice debates. First, it deliberately includes the private and economic dimensions of transnational life within the purview of global justice debates. Second, it situates those dimensions neither in the domain of the unfettered individual autonomy, nor in the exclusively statist framework. Thirdly and relatedly, it combines appeals to humanity with references to the virtue and autonomy of national communities; positive law and lucid comparative law analysis with references to universal inter-personal morality and ethics, and ius gentium; and navigates back and forth between inter-personal relationships and the relationships of individuals to broader communities and groups.[49] In the case of PrIL, this translates into a fluid, but

[48] See esp. Chapter 7.

[49] This maps onto a wonderful analysis provided by Robert Wai regarding the value of bringing perspectives from transnational law in conversation with debates around cosmopolitanism. See Robert Wai, "The Cosmopolitanism of Transnational Economic Law" in Cecilia M. Baillet & Katja Franko Aas, eds, *Cosmopolitan Justice and its Discontents* (New York: Routledge, 2011) 153. See e.g. at 156:

> A cosmopolitan perspective on the global economy must recognize that while the nation-state is clearly one venue for norm-generation, the forms of community are multiple and so likewise are sources of relevant norms of conduct. Normative communities are complicated and dynamic, and exist at many levels, from the local – including private or exclusive worlds like the family – through to the world public affairs of states. Consequently, a consideration of transnational economic law may in some respects offer a better model for the simultaneous consideration of both state and non-state normative orders, and their interrelationship. If the particular contribution of law comes from its synthesis of practical relevance and normative promise, then it is all the more important to consider the full range of normative practice in the global society.

structured and more technical analysis and methodology, which in turn might provide more structure and anchorage to legal and ethical analysis around cosmopolitanism.[50]

3. The Value of Intellectual Historical Analysis for Private International Law

There are potential cross-references at all the different points of conversation between the present and the past outlined above. 19th century relational internationalism recovers a relational sensibility that is part of PrIL's own intellectual history. It illuminates quite explicit dimensions of global justice and restores jus gentium as a moral point of reference for law, distilled from states' own practice.[51] It replaces a framework of recognition focused on isolated individuals with a framework of recognition of relationships and various facets of inter-personal interaction. All these themes are found in current debates on law and policy outside of PrIL, to which PrIL could and should connect. In turn, these debates would have much to contribute to sharpening and possibly correcting some of the insights of relational internationalism.

I have started this dissertation by noting the contrast between an increasing interest in rethinking the theoretical foundations of PrIL and a decreasing interest in the intellectual history of the field. I suggested that the lack of interest in the intellectual history of the field has much to do with the conventional understanding of 19th century PrIL on which the call for jurisprudential rethinking is premised. I hope by the time the reader has arrived at these conclusions, she will be persuaded that the conventional understanding is in many ways flawed and that PrIL's intellectual history holds much valuable material to be recovered and rethought.

---

[50] For a wonderful exposition of the possibilities and advantages of PrIL's techniques see Karen Knop, Ralf Michaels, Annelise Riles, "From Multiculturalism to Technique, Feminism, Culture, and the Conflict of Laws Style" (2012) 64 Stan L Rev 589.

[51] For a contemporary jurisprudential recast of ius gentium and the blend of natural and positive law that it incorporates see Jeremy Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (New Haven: Yale University Press, 2012). See also Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011); Neil Walker, *Intimations of Global Law* (Cambridge, United Kingdom: Cambridge University Press, 2014) at 198-199 (noting how certain intimations of global law under which current recasts of ius gentium could be included are premised less on natural law and universal reason, but rather "upon the idea of law as a joint construction, as a collective accomplishment"). In PrIL Horatia Muir Watt also drew attention to the loss of ius gentium as a normative dimension of PrIL and argued that "the conceptual divide between international politics and global market led to the immunity of cross-border private economic expansion from the moral and legal constraints previously carried by the *ius gentium*." See Horatia Muir Watt, "Private International Law Beyond the Schism" (2011) 2 Transnatl Leg Theory 347 at 359.

But in these concluding paragraphs I want to consider more broadly how studies of intellectual history can help in the process of rethinking PrIL's theoretical foundations.

An immediate and rather straightforward value of intellectual history in PrIL is to separate what many of the "canonical" writers of PrIL meant to say from the way in which their theories were read and altered. In a 2005 volume dedicated to Pierre Lagarde (Henri Batiffol's collaborator), Pierre Gothot argued compellingly about the need to separate Savigny from "Savignianism."[52] Gothot argues that at least in Europe, Savigny is "no longer an interesting and inventive scholar, he is above all a reference 'like no other,' often decisive, an 'authority' in the sense closest to the etymology of the word."[53] But those references are mostly to Savigny's disciples, "very different from each other, who did not retain much from Savigny other that the community of law metaphor and the analytical method."[54] This is how, in Gothot's view "Savignyanism arose, and with it we lost the interest in Savignyan thought."[55] Much the same can be said of the other 'canonical' figures of the 19th century. Intellectual history can help both restore the 'canonical' thinking on its own terms, as well as revise the canon altogether.

On the one hand, further intellectual historical work can reveal the common perceptions about the theoretical foundations of PrIL. For example, revealing the conventional association between PrIL and PublIL shows that it is not enough to reclaim the association today as a way of increasing PrIL's social justice dimensions. Instead, acknowledging the formalist underpinnings of the 19th century association makes it possible to reveal and criticize its contemporary reinvention, rather than idealizing any attempt to reconnect the fields.

On the other hand, intellectual history can reveal paths not taken in the development of the field. Re-engaging with Savignian thought generally and in PrIL in particular, might reveal insights and perspectives which were lost in the "prejudices and misunderstanding"[56] or "misleading simplifications"[57] about Savigny's theories. As

---

[52] Pierre Gothot, "Simples réflexions à propos de la saga du conflit des lois" in *Le droit international privé: esprit et methodes, Mélanges en l'honneur de Paul Lagarde* (Paris: Dalloz, 2007) 343.
[53] *Ibid* at 350.
[54] *Ibid*.
[55] *Ibid* at 354.
[56] Joachim Rückert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law" (2006) 11 Juridica International 55 at 57, referring to three main "prejudices and misunderstandings" about Savigny: "(1) the Left Hegelian and Marxist point of view, that Savigny was just a juridical reactionary; (2) the

Joachim Rückert remarked, especially in a field much influenced by Savignian thought, such as PrIL, revisiting Savigny might allow us to "not only learn history but learn from history."[58] Similarly, acknowledging an alternative to both the formalist and the state-centric late 19th century perspectives in the writings of Josephus Jitta, means breaking the spell of inevitability that very much marks PrIL as a field. It shows that different imaginaries were constructed in the intellectual history of PrIL, some of which were marginalized, misunderstood or even failed to register as possible alternatives. Bringing them back for the purpose of analysis and critique can contribute much to the jurisprudential rethinking of PrIL. As Annabel Brett notes

> in this sense, to do intellectual history just *is* to do philosophy. If philosophy has a further task, it is not to gain a better insight into reality, but analogously to poetry, to stretch our imagination and our language and thus to help create a new world for living in. We might add that doing intellectual history can itself be understood as poetic in that sense, for intellectual history does not merely unravel the structure of what we have inherited but can also unearth what we have lost.[59]

Intellectual history, therefore, should not be opposed to, but rather form part of rethinking the theoretical foundations of PrIL in a world of increasing inter-dependence and human mobility. It is my hope that this dissertation might help to open the door for further engagement with PrIL's intellectual history on its own, and as a path to rethinking the premises and aspirations of PrIL for the future.

---

opinion that he only wanted to preserve conservatively what has become obsolete already; (3) and, especially, the view that his theory of legal method had become obsolete and useless."

[57] *Ibid* at 67.

[58] *Ibid.*

[59] See Annabel Brett, "What is Intellectual History Now?" in D Cannadiene, *What is History Now?* (New York: Palgrave Macmillan, 2002) 113 at 127.

Bibliography

I. Monographs

Arminjon, Pierre, ed. *Mélanges Antoine Pillet: reproduction de diverses études et notes de jurisprudence écrites par Antoine Pillet* (Paris: Recueil Sirey, 1929).

Armitage, David. *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013).

Bachellier, Marie-Noëlle et al, eds, *Le droit international privé: esprit et methodes, Mélanges en l'honneur de Paul Lagarde* (Paris: Dalloz, 2007).

Baehr, Amy R., ed, *Varieties of Feminist Liberalism* (New York: Rowman & Littlefield, 2004).

Bähr, Otto. *Der Rechtsstaat: eine publizistische Skizze* (Aalen: Scientia, 1961).

Baillet, Cecilia M. & Katja Franko Aas, eds, *Cosmopolitan Justice and its Discontents* (New York: Routledge, 2011).

Bar, Ludwig von. *Das internationale Privat- und Strafrecht* (Hannover: Hahn'sche Hofbuchhandlung, 1862).

_____. *The Theory and Practice of Private International Law*, translated by G.R. Gillespie (Edinburgh : W. Green & Sons, 1892).

Barnard, F.M. *Herder's Social and Political Thought, From Enlightenment to Nationalism* (Oxford: Clarendon Press, 1965).

Bartin, Etienne. *Études de droit international privé* (Paris: A. Chevalier-Marescq, 1899).

_____. *Principes de droit international privé: selon la loi et la jurisprudence françaises* (Paris: Domat-Montchrestien, 1930).

Batiffol, Henri. *Traité élémentaire de droit international privé*, 2d ed (Paris: Librairie Générale de Droit et de Jurisprudence, 1955).

_____. *Aspects philosophiques du droit international privé* (Paris: Dalloz, 1956).

_____. *Traité élémentaire de droit international privé*, 3rd ed (Paris: Pichon & Durand-Auzias, 1959).

_____. *Droit international privé*, 4th ed (Paris: Librairie générale de droit et de jurisprudence, 1967).

Baxi, Upendra. *Inconvenient Forum and Convenient Catastrophe: the Bhopal Case* (Bombay: TM Tripathi, 1986).

Baxi, Upendra & Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal Case* (Bombay: TM Tripathi, 1986).

Beale, Joseph Henry. *A Treatise on the Conflict of Laws: Or, Private International Law*, vol 1, Part 1 (Cambridge: Harvard University Press, 1916).

Behrends, Okko, Wulf Eckart Voss & Malte Diesselhorst. *Römisches Recht in der europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker* (Ebelsbach: R. Gremer, 1985).

Behrends, Okko. *Institut und Prinzip: siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtsschulen ; ausgewählte Aufsätze,* 2 vols (Göttingen: Wallstein Verlag, 2004).

Behrends, Okko & Eva Schumann. *Gesetzgebung, Menschenbild und Sozialmodell im Familien- und Sozialrecht*. Neue Abhandlungen der Akademie der Wissenschaft zu Gottingen, Bd 3 (Berlin: De Gruyter, 2008).

Beiser, Frederick C. *The German Historicist Tradition* (Oxford: Oxford University Press, 2011).

Beitz, Charles. *Political Theory and International Relations* (Princeton: Princeton University Press, 1979).

Boullenois, Louis. *Traité de la personalité, et de la réalité des lois, coutumes, ou statuts, par forme d'observations* (Paris: Guillaume Desprez, 1762).

Bucher, Andreas. *Grundfragen der Anknüpfungsgerechtigkeit im internationalen Privatrecht (aus kontinentaleuropäischer Sicht)* (Basel: Helbing & Lichtenhahn, 1975).

Cannadiene, D. *What is History Now?* (New York: Palgrave Macmillan, 2002).

Cavers, David F. *The Choice-of-Law Process* (Ann Arbor: The University of Michigan Press, 1966).

Cavers, David. *Selected Essays 1933-1983* (Durham: Duke Univ Press, 1985).

Chassat, Mailhé de. *Traité de statuts (lois personelles, lois réelles), d'après le droit ancienes et le droit modern, ou du Droit International Privé* (Paris: A. Durand, 1845).

Childress, Donald Earl. *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012).

Cook, Walter Wheeler. *Selected Essays on the Conflict of Laws, Reprinted from the Harvard Law Review* (Cambridge: Harvard Law Review Association, 1940).

Cosack, Konrad. *Lehrbuch des deutschen bürgerlichen Rechts*, 1st ed (Jena: Gustav Fischer, 1910).

Crome, Carl. *System des deutschen bürgerlichen Rechts* (Tübingen : J.C.B.Mohr, 1900).

Currie, Brainerd. *Selected Essays on the Conflict of Laws*. (Durham, N.C.: Duke University Press, 1963).

Dagan, Hanoch. *Property: Values and Institutions* (Oxford: Oxford University Press, 2011).

Dicey, A V. *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens and Sons, 1908).

Domingo, Rafael. *The New Global Law* (Cambridge: Cambridge University Press, 2011).

Dworkin, Ronald. *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011).

Eichhorn, Karl Friedrich. *Einleitung in das deutsche Privatrecht: Mit Einschluss des Lehenrechts* (Goettingen: Vandenhoeck und Ruprecht, 1836).

Endemann, Friedrich. *Lehrbuch des bürgerlichen Rechts. Einführung in das Studium des Bürgerlichen Gesetzbuchs*, 9th ed (Berlin: C. Heymann, 1903).

Flessner, Alex. *Interessenjurisprudenz im internationalen Privatrecht* (Tübingen: J.C.B. Mohr, 1990).

Fourie, Carina, Fabian Shuppert & Ivo Wallimann – Helmer, eds, *Social Equality: On What it Means to Be Equal* (New York: Oxford University Press, 2015).

Francescakis, Phocion. *La pensée des autres en droit international privé: comptes rendus bibliographiques (1946-1984) réunis en hommage à leur auteur*, Annales / Université Aristote de Thessalonique, Faculté de droit 1 (Thessalonique: Université Aristote de Thessalonique, Faculté de droit, 1985).

Freund, Otto Kahn. *The Growth of Internationalism in English Private International Law* (Jerusalem: Magnus Press, 1960).

Graveson, RH. *Conflict of Laws,* 7th ed (London: Sweet & Maxwell, 1974).

Gutzwiller, Max Charles. *Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts* (Freiburg: Gschwend, Tschopp & Co., 1923).

Harrison, Frederic & A H F Lefroy. *On Jurisprudence and the Conflict of Laws* (Oxford: Clarendon Press, 1919).

Herder, Johann Gottfried V. *Outlines of a Philosophy of the History of Man,* translated by T. Churchill (New York: Bergman Publishers, 1800).

Hofer, Sibylle. *Freiheit Ohne Grenzen? Privatrechtstheoretische Diskussionen im 19. Jahrhundert* (Tübingen: Mohr Siebeck, 2001).

Holland, Thomas Erskine. *The Elements of Jurisprudence* (Oxford: Clarendon Press, 1880).

Huber, Ulrich. *Praelectionum Iuris civilis tomi tres* (Naples: Expensis Iosephi et Ioannis Roland fratrum: 1788).

Hueting, R. *Rhine Pollution: Legal, Economic and Technical Aspects = La pollution du Rhin : aspects juridiques, économiques et techniques* (Zwolle: Tjeenk Willink, 1978).

Jayme, Erik & Heinz-Peter Mansel, ed, *Nation und Staat im internationalen Privatrecht. Zum kollisionsrechtlichen Staatsangehörigkeitsprinzip in verfassungsrechtlicher und internationalprivatrechtlicher Sicht* (Heidelberg: C.F. Müller, 1988).

Jayme, Erik. *Internationales Privatrecht: Ideengeschichte von Mancini und Ehrenzweig zum Europäischen Kollisionsrecht* (Heidelberg: C.F. Müller, 2009).

Jitta, Daniel Josephus. *La Méthode du droit international privé* (The Hague: Belinfante, 1890).

_____. *La substance des obligations dans le droit international privé*, 2 vols (La Haye: Belinfante Frères, 1906 & 1907).

_____. *The Renovation of International Law on the Basis of a Juridical Community of Mankind, Systematically Developed* (The Hague: M. Nijhoff, 1919).

Joerges, Christian. *Zum Funktionswandel des Kollisionsrechts: Die Governmental Interest Analysis und die Krise des internationalen Privatrechts* (Berlin: Mohr Siebeck, 1971).

Jouannet, Emanuelle Tourme. *Qu'est-ce qu'une société international juste? Le droit international entre développement et reconnaissance?* (Paris: Pédone, 2012).

Juenger, Friedrich K. *Choice of Law and Multistate Justice* (Boston: M. Nijhoff, 1993).

Kahn, Franz. *Über Inhalt, Natur und Methode des internationalen Privatrechts* (Jena: G. Fischer, 1899).

Kalenský, Pavel. *Trends of Private International Law* (Prague: Czechoslovak Academy of Sciences, 1971).

Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, UK & New York: Cambridge University Press, 2004).

Lassalle, Ferdinand. *Das System der erworbenen Rechte, Eine Versöhnung des positiven Rechts und der Rechtsphilosophie* (Leipzig: Brochhaus, 1880).

Lassalle, Ferdinand & Eduard Bernstein. *Ferdinard Lassalle's Reden und Schriften.* (Berlin: Vorwärts, 1891).

Leckey, Robert. *Contextual Subjects, Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008).

Lewald, Hans. *Règles générales des conflits de lois; contributions à la technique du droit international privé* (Basel: Helbing & Lichtenhahn, 1941).

_____. *Festschrift Hans Lewald: [bei Vollendung d. 40. Amtsjahres als Ordentl. Prof. im Oktober 1953]* (Basel: Helbing & Lichtenhahn, 1953).

Lorenz, Egon. *Zur Struktur des internationalen Privatrechts. Ein Beitrag zur Reformdiskussion* (Berlin: Dunkler & Humblot, 1977).

Lüderitz, Alexander & Jochen Schröder, eds, *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende? Festschrift für Gerhard Kegel* (Frankfurt: Alfred Metzner, 1977).

Mackenzie, Catriona & Natalie Stoljar, Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self (New York: Oxford University Press, 2000).

Mancini, P.S. *Diriti Internazionale, Prelezioni* 1 (Napoli: Giuseppe Marghieri, 1873).

_____. *Della nazionalitá come fondamento del diritto delle genti* (Napoli : Instituto Suor Orsola Benincasa, 1988).

Mansel, Heinz-Peter. *Internationales Privatrecht im 20. Jahrhundert: Der Einfluss von Gerhard Kegel und Alexander Lüderitz auf das Kollisionsrecht* (Tübingen: Mohr Siebeck, 2014).

Mährlein, Christoph. *Volksgeist und Recht. Hegels Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft* (Würzburg: Königshausen & Neumann, 2000).

Mills, Alex. *The confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (New York: Cambridge University Press, 2009).

Moss, David & John Cistermino, eds, *New Perspectives on Regulation* (Cambridge: Tobin Project, 2009)

Müller, Horst. *Der Gundsatz des wohlerworbenen Rechts im internationalen Privatrecht* (Hamburg: Friederichsen, de Gruyter, 1935).

Nedelsky, Jennifer. *Law's Relations. A Relational Theory of Self, Autonomy and Law* (2011).

Niboyet, Jean Paulin. *Cours de droit international privé: à l'usage des étudiants de licence et de doctorat* (Paris: Recueil Sirey, 1946).

_____ *Traité de droit international privé français* (Paris: Recueil Sirey, 1938).

Niemeyer, Theodor. *Zur Methodik des internationalen Privatrechtes* (Leipzig: Duncker & Humblot, 1894).

_____. *Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts* (Leipzig: Duncker & Humblot, 1895).

Nussbaum, Arthur. *Principles of Private International Law* (Oxford: Oxford University Press, 1943).

Oppenheim, Lassa. *The Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914).

Pillet, Antoine. *Recherches sur les droits fondamentaux des États dans l'ordre des rapports internationaux et sur la solution des conflits qu'ils font naître* (Paris: Pedone, 1899).

_____. *Principes de droit international prive* (Grenoble: Allier Frères, 1903).

Pogge, Thomas. *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

Puchta, Georg Friedrich. *Pandekten*, 10th ed (Leipzig: Johann Ambrosius Barth, 1866).

Reppy, A. *Law, a Century of Progress, 1835-1935: Contributions in Celebration of the 100th Anniversary of the Founding of the School of Law of New York University.* (New York: New York University Press, 1937).

Rückert, Joachim. *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach: R. Gremer, 1984).

Savigny, Friedrich Carl von. *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: Mohr & Zimmer, 1814).

_____. *The History of the Roman Law During the Middle Ages*, translated by E. Cathcart (Edinburgh: Adam Black, 1829).

_____. *System des heutigen Römischen Rechts,* vol 1 (Berlin: Bei Deit und Comp., 1840).

_____. *System des heutigen römischen Rechts,* vol 5 (Berlin: Bei Veit & Comp., 1841).

_____. *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time*, translated by William Guthrie (T. & T. Clark, 1869).

Scanlon, T.M. *What We Owe Each Other* (Cambridge: Harvard University Press, 2000).

Schäffner, Wilhelm. *Entwicklung des internationalen Privatrechts* (Frankfurt: JD Sauerländer, 1841).

Singer, Joseph William. *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000).

Story, Joseph. *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*, 1st ed (Boston: Hilliard, Gray, 1834).

_____. *Commentaries on the Conflict of Laws, Foreign and Domestic in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Successions, and Judgments,* 3rd ed (Boston: Charles C. Little & James Brown, 1846).

Story, Wm.W., ed, *Life and Letters of Joseph Story*, vol 2 (London: John Chapman, 1851).

Symeonides, Symeon. *American Private International Law* (Austin, TX: Wolters Kluwer, 2008).

Tittmann, Friedrich Wilhelm. *De competentia legum externarum et domesticarum in defiendis potissimum iuribus coniugum* (Halle: Gebauer, 1822).

T.M.C. Asser Instituut. *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C Asser Instituut, 1995).

Vareilles-Sommières, Gabriel. *La synthèse du droit international privé* (Paris: Pichon, 1897).

Von Mehren, Arthur Taylor & Donald Theodore Trautman. *The Law of Multistate Problems; Cases and Materials on Conflict of Laws.* (Boston: Little, Brown, 1965).

Wagner, Adolph. *Briefe von Ferdinand Lassalle an Carl Rodbertus* (Berlin: Puttkammer & Muehlbrecht, 1878).

Waldron, Jeremy. *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (New Haven: Yale University Press, 2012).

Walker, Neil. *Intimations of Global Law* (Cambridge: Cambridge University Press, 2014).

Watson, Alan. *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (Athens, GA: University of Georgia Press, 1992).

Watt, Horatia Muir & Diego P Fernández Arroyo. *Private International Law and Global Governance* (Oxford University Press, 2015).

Wieacker, Franz. *Privatrechtsgeschichte des Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed (Göttingen: Vandenhoeck & Rupert, 1996).

Windhoff-Héritier, Adrienne, Michael Stolleis & Fritz Wilhelm Scharpf. *European and International Regulation After the Nation State: Different Scopes and Multiple Levels* (Baden-Baden: Nomos, 2004).

Zitelmann, Ernst. *Internationales Privatrecht* (Leipzig: Duncker & Humblot, 1897).

_____. *Die Unvollkommenheit des Völkerrechts* (Muenchen: Duncker & Humblot, 1919).

II. Articles

Abdelal, Rawi & John Ruggie, "Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism" in David Moss & John Cistermino, eds, *New Perspectives on Regulation* (Cambridge: Tobin Project, 2009) 151.

Annalise Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms" (1991) 29:3 Osgoode Hall LJ 419.

Alexander, Gregory. "The Social Obligation Norm in American Property Law" 94 Cornell L Rev 1009.

Arminjon, Pierre. "La notion de droit acquis en Droit international privé" (1933) 44 Recueil des Cours 1.

Baker, Blaine. "Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay on Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws" (1993) 35 McGill L J 454.

Bar, Ludwig von. “Neue Prinzipien und Methoden des internationalen Privatrechts” (1899) 14 AOR 1.

Bartin, Etienne. “La doctrine des qualifications et ses rapports avec le caractere national du conflit des lois” (1930) 31 Recueil des Cours 561.

Batiffol, Henri. ”Les tendences doctrinales actuelles en droit international privé” (1948) 72 Recueil des Cours 1.

_____. “Principes de Droit International Privé” (1959) 97 Recueil des Cours 431.

_____. “Réflexions sur la coordination des systèmes nationaux” (1967) 120 Recueil des Cours 165.

_____. “Les intérêts du droit international privé” in Alexander Lüderitz & Jochen Schröder, *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende?* (Frankfurt: Alfred Metzner, 1977) 11.

Baty, Thomas. “A Modern Jus Gentium” (1909) 20 Jurid Rev 109 at 109.

Beale, J.H. “Dicey’s Conflict of Laws” (1896) 10 Harv L Rev 168.

Behrends, Okko. “Geschichte, Politik und Jurisprudenz in Savignys System des heutigen römischen Rechts” in Okko Behrends, Wulf Eckart Voss & Malte Diesselhorst, *Römisches Recht in der Europäischen Tradition: Symposion aus Anlass des 75. Geburtstages von Franz Wieacker* (Ebelsbach: R. Gremer, 1985).

_____. “Die *bona fides* in *mandatum*. Die vorklassischen Grundlagen des klassischen Konsensualvertrags Auftrag” in Okko Behrends, *Institut und Prinzip. Siedlungsgeschichtliche Grundlagen, philosophische Einflüsse und das Fortwirken der beiden republikanischen Konzeptionen in den kaiserzeitlichen Rechtsshulen. Ausgewählte Aufsätze,* vol 1 (Göttingen: Wallsteig, 2004).

_____. “Das Sozialrecht. Sein Wert und seine Funktion in historischer Perspektive” in Behrends, Okko & Eva Schumann, *Gesetzgebung, Menschenbild und Sozialmodell im Familien- und Sozialrecht*, Neue Abhandlungen der Akademie der Wissenschaft zu Gottingen, Bd 3 (Berlin: De Gruyter, 2008).

Benvenisti, Eyal. Exit and Voice in the Age of Globalization (1999) 98 Mich L Rev 167.

_____. “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts” (2008) 102 AJIL 241.

_____. “National Courts, Domestic Democracy, and the Evolution of International Law” (2009) 20 EJIL 59.

Benvenisti, Eyal & George W. Downs, "The Democratizing Effects of Transjudicial Coordination" (2012) 8:2 Utrecht L Rev 158.

Benvenisti, Eyal. "Sovereigns as Trustees for Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107:2 Am J Int'l L 295.

Bernard, Maurice. "Review of Antoine Pillet, Principes de Droit International Privé" (1904) 31 Journal de droit international privé et de la jurisprudence comparée 769.

Bollée, S. "L'extension du domaine de la methode de la reconnaisance unilatérale" (2007) 96 Rev crit dr int privé 307.

Bomhoff, Jacco. "The Constitution of the Conflict of Laws" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford University Press, 2015) 262.

Bonnichon, André. "La notion de conflit de souverainetes dans la science des conflits de lois" (1949) 39 Rev crit dr int privé 615 & "La notion de conflit de souverainetes dans la science des conflits de lois" (1950) 40 Rev crit dr int privé 11.

Brennan, Samantha. "The Liberal Rights of Feminist Liberalism" in Amy R. Baehr, ed, *Varieties of Feminist Liberalism* (New York: Rowman & Littlefield, 2004).

Brett, Annabel. "What is Intellectual History Now?" in D Cannadiene, *What is History Now?* (New York: Palgrave Macmillan, 2002) 113 .

Brilmayer, Lea. "Rights, Fairness, and Choice of Law" (1989) 98 Yale LJ 1277.

_____. "The Problem of Provenance: The Proper Place of Ethical Reasoning in the Selection of Applicable Law" in Donald Earl Childress, ed, *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012).

Bucher, Andreas. "La dimension sociale du droit international privé: cours general" (2009) 330 Recueil des Cours 1.

Cavers, David. "A Critique of the Choice-of-Law Problem" (1933) 47 Harv L Rev 173.

_____. "Contemporary Conflicts Law in American Perspective" (1970) 131 Recueil des Cours 85.

_____. "Cipolla and Conflicts Justice" (1970) 9 Duq L Rev 360.

_____. "A Correspondence with Brainerd Currie, 1957-1958" (1982) 34 Mercer L Rev 471.

Cheatam, Elliot E. "Review of The Logical and Legal Bases of the Conflict of Laws" (1944) 93:1 U Pa L Rev 112.

Cheatham, Elliot E. & Willis L.M. Reese. "Choice of the Applicable Law" (1952) 52 Colum L Rev 959.

Childress III, Donald Earl. "Comity as Conflict: Resituating International Comity as Conflict of Laws" (2010) 44 UC Davis L Rev 11.

Cohen, Joshua & Charles Sabel, "Extra Republicam Nulla Justitia?" (2006) 34 Philosphy & Public Affairs 147.

Cook, Walter Wheeler. "The Logical and Legal Bases of the Conflict of Laws" (1924) 33 Yale LJ 457.

_____. "The Scientific Method and the Law" (1927) 13 ABA J 30.

_____. "The Jurisdiction of Sovereign States and the Conflict of Laws" (1931) 31:3 Colum L Rev 368.

Criddle, Evan J. & Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009) 34 Yale J Int'l L 331.

Currie, Brainerd. "Married Women's Contracts: A Study in Conflict-of-Laws Method" (1958) 25 U Chicago L Rev 227.

Dane, Perry. "Vested Rights, "Vestedness," and Choice of Law" (1987) 96:6 Yale LJ 1191.

De Nova, Rodolfo. "The First American Book on Conflict of Laws" (1964) 8 Am J Leg Hist 136.

_____. "Historical and Comparative Introduction to the Conflict of Laws" (1966) 116 Recueil des Cours 437.

Dellavalle, Sergio. "Opening the Forum to the Others: Is There an Obligation to Take Non-National-Interests Into Account Within National Political and Juridical Decision-Making Processes?" (2014) 6 Göttingen Journal of International Law 217.

Dellavalle, Sergio. "On Sovereignty, Legitimacy, and Solidarity, Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?" (2015) 16:2 Theor Inq L 367.

Der Derian, James et al., "How Should Sovereignty Be Defended?" in Christopher J. Bickerton, Philip Cunliffe & Alexander Gourevitch, eds, *Politics Without Sovereignty: A Critique of Contemporary International Relations* (London: UCL Press, 2007).

D'Oliveira, Hans Ulrich Jessurun. "Die Freiheit des Niederländischen Richters bei der Entwicklung des internationalen Privatrechts: Zur antizipierenden Anwendung des Benelux-Einheitsgesetzes über das Internationale Privatrecht – ein Requiem" (1975) 39:2 RabelZ 224.

_____. "La Pollution du Rhin et le droit international privé" in *Rhine Pollution: Legal, Economic and Technical Aspects. La pollution du Rhin: aspects juridiques, économiques et techniques* (Zwolle: Tjeenk Willink, 1978).

Ehrenzweig, Albert. "A Counter-Revolution in Conflicts Law? From Beale to Cavers" (1966) 80 Harv L Rev 377.

Ehrlich, Eugen. "Les tendances actuelles du droit international privé" (1908) 4 Rev dr int privé 902.

Ely, John Hart. "Choice of Law and the State's Interest in Protecting its Own" (1981) 23:2 Wm & Mary L Rev 173.

Franceskakis, Phocion. Review of "Begriffs- und Interessenjurisprudenz im internationalen Privatrecht" by Gerhard Kegel (1954) 43 Rev crit dr int privé 238.

_____. "Perspectives du Droit international privé actuel a propos de la deuxième édition du Traité de M. Henri Batiffol" Book Review of *Traité élémentaire de droit international privé*, 2d ed, by Henri Batiffol (1955) 7:2 RIDC 349.

_____. "De conflictu legum, Mélanges offerts à R.D. Kollewijn et J. Offerhaus à l'occasion de leur soixante-dixième anniversaire," review of M. von Overbeck, "Les règles de droit international privé materiel" (1963) 53 Rev crit dr int privé 866.

_____. Review of Jessurun D'Oliveira, "La Pollution du Rhin et le droit international privé" (1979) 59 Rev crit dr int privé 266.

_____. *De coflictu legum, Melanges offerts a R.D. Kollewijn et J. Offerhaus a l'occasion de leur soixante-dixieme anniversaire*, review of "Théorie des statuts à la lumière générale de l'évolution de la société" by M. Blagojeviç in Phocion Francescakis, *La pensée des autres en droit international privé: comptes rendus bibliographiques (1946-1984) réunis en hommage à leur auteur* (Thessalonique: Université Aristote de Thessalonique, Faculté de droit, 1985) 211.

Gaudemet, Eugène. "La thèorie des conflits des lois dans l'ouvre d'Antoine Pillet et de la doctrine de Savigny" in Arminjon, Pierre, ed, *Mélanges Antoine Pillet: reproduction de diverses études et notes de jurisprudence écrites par Antoine Pillet* (Paris: Recueil Sirey, 1929).

Gidel, Gilbert. "Droits et devoirs des nations, théorie classique des droit fondamentaux des États" (1925) 10 Recueil des Cours 537 at 559.

Glenn, H. Patrick. "The Ethic of International Law" in Donald Earl Childress, ed, *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012).

Goodin, Robert E. “Structures of Political Order: The Relational Feminist Alternative” in Ian Shapiro & Russel Hardin, eds, *Political Order. Nomos 38* (New York: New York University Press, 1996).

Gothot, Pierre. “Le renouveau de la tendance unilatéraliste en droit international privé” (1971) 60 Rev crit dr int privé 1, 209 & 417.

_____. “Simples réflexions à propos de la saga du conflit des lois” in *Le droit international privé: esprit et methodes, Mélanges en l’honneur de Paul Lagarde* (Paris: Dalloz, 2007).

Graveson, Ronald H. “The Doctrine of Evasion of the Law in England and America” (1937) 19:1 Journal of Comparative Legislation and International Law 21.

_____. “The Comparative Evolution of Principles of the Conflict of Laws in England and the United States” (1960) 99 Recueil des Cours 21.

_____. “Aspects Philosophiques du Droit International Privé Anglais” (1962) 51 Rev crit dr int privé 397.

_____. “Comparative Aspects of the General Principles of Private International Law” (1963) 109 Recueil des Cours 1.

Green, Michael. “Legal Realism, Lex Fori, and the Choice-of-Law Revolution” (1995) 104 Yale LJ 968.

Gutzwiller, Max. “Zitlemann’s völkerrechtliche Theorie des Internationalprivatrechts” (1923) 16 Archiv für Rechts- und Wirtschaftsphilosophie 468

_____. “Le développement Historique du Droit International Privé” (1929) 29 Recueil des Cours 237.

Isailović, Ivana. “Political Recognition and Transnational Law. Gender Equality and Cultural Diversification in French Courts” in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015) 318.

Jansen, Nils & Ralf Michaels, “Private Law and the State: Comparative Perceptions and Historical Observations” (2007) 71:2 RabelsZ 345.

Jayme, Erik. “Die kulturelle Dimension des Rechts – ihre Beudeutung für das internationale Privatrecht und die Rechtsvergleichung” (2003) 67:2 RabelsZ 211.

_____. “Menschenrechte und Theorie des internationalen Privatrechts” in Erik Jayme, ed, *Internationales Privatrecht und Völkerrecht* (Heidelberg: CF Müller, 2003).

_____. "Völkerrecht und internationales Privatrecht – eine entwicklungsgeschichtliche Betrachtung" in S Leibe & M Ruffert eds, *Völkerrecht und IPR* (Jena: Jenaer Wissenschaftliche Verlagsgesellschaft, 2006).

Jitta, Josephus. "Das Wesen des internationalen Privatrechts" (1899) 14 AOR 301.

_____. "Alte und neue Methoden des internationalen Privatrechts" (1900) 15 AOR 564.

_____. "Le Droit commun international comme source du droit international privé" (1908) 4 Revue de Droit International Privé et de Droit Pénal International 553 & (1909) 5 Revue de Droit International Privé et de Droit Pénal International 485.

_____. "Die 'famosissima quaestio' von 1693. Ein Beitrag zur Geschichte der alten niederlaendischen Schule des internationalen Privatrechts" in *Rechtswissenschaftliche Beiträge: juristische Festgabe zu Josef Kohlers 60. Geburtstag* (Stuttgart: F. Enke, 1909).

_____. "The Development of Private International Law through Conventions" (1920) 29:5 Yale LJ 497.

Jouannet, Emanuelle Tourme. "The International Law of Recognition" (2013) 24:2 EJIL 667.

Juenger, Friedrich K. "The Lex Mercatoria and Private International Law" (2000) 60 La L Rev 1134.

Kahn, Franz. "Gesetzeskollisionen, Ein Beitrag zur Lehre des Internationalen Privatrechts" (1890) 30 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 & (1898) 39 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1 & (1899) 40 Jherings Jahrbücher für die Dogmatik des Bürgerlichen Rechts 1.

Kegel, Gerhard. "Story and Savigny" (1989) 37:1 Am J Comp L 39.

Kennedy, David. "International Law and the Nineteenth Century: History of an Illusion" (1998) 17 Quinnipiac L Rev 99.

_____. "Law and the Political Economy of the World" (2013) 26:1 Leiden J Int'l L 7.

Knop, Karen. "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 Transnat'l L & Contemp Probs 293.

_____. "Relational Nationality: On Gender and Nationality in International Law" in T.A. Aleinikoff and D. Klusmeyer, eds, *Citizenship Today: Global Perspectives and Practices* (Washington, D.C.: Carnegie Endowment for International Peace, 2001) 89.

Knop, Karen & Christine Chinkin, "Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law" (2001) 22:4 Mich J Int'l L 523.

Knop, Karen. "Citizenship Private and Public" (2008) 71 Law & Contemp Probs 309.

Knop, Karen, Ralf Michaels & Annelise Riles, "From Multiculturalism to Technique, Feminism, Culture, and the Conflict of Laws Style" (2012) 64 Stan L Rev 589.

Karen Knop, "Private Citizens of the World: Subjects in Lorimer's the Institutes of the Law of Nations" [upcoming in 2016 in the EJIL].

Kegel, Gerhard. "Begriffs- und Interessenjurisprudenz im internationalen Privatrecht" in Hans Lewald et al, eds, *Festschrift Hans Lewald: bei Vollendung des 40.Amtsjahres als ordentlicher Professor im Oktober 1953 überreicht von seinen Freunden und Kollegen mit Unterstützung der Basler Juristischen Fakultät* (Basel: Helbing & Lichtenhahn, 1953).

_____. "The Crisis of Conflict of Laws" (1964) 112 Recueil des Cours 91.

Kochenov, Dimitry. "European Citizenship and the Difficult Relationship Between Status and Rights" (2009) 15 Colum J Eur L 169.

Kogan, Terry S. "Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity" (1987) 62:4 NYUL Rev 651.

Kollewijn, R D. "Conflicts of Western and Non-Western Law" (1951) 4:3 International Law Quarterly 307.

_____. "Quelques considerations a propos de la doctrine de Savigny" (1968) 15:3 Neth Int'l L Rev 237.

Korn, Harold. "The Choice-of-Law Revolution: A Critique" (1983) 83 Colum L Rev 772.

Kramer, Robert. "Interests and Policy Clashes in Conflict of Laws" (1959) 13 Rutgers L Rev 523.

Kraus, Hans-Christof. "Begriff und Verständnis des 'Bürgers' bei Savigny" (1993) 110:1 Zeitschrift der Savigny Stiftung für Rechtsgeschichte Romanistische Abteilung 552.

Kronman, Anthony Townsend. Contract Law and Distributive Justice (1980) 89 Yale LJ 472.

Lacapra, Dominick. "Rethinking Intellectual History and Reading Texts" (1980) 19:3 History and Theory 245.

Logemann, JHA. "Biography of Roeland Duco Kollewijn" (1962) 9:4 Neth Int'l L Rev 17.

Lorenzen, Ernest G. “Huber’s de Conflictu Legum” (1919) 13 Ill L Rev 375.

_____. “Review of The Renovation of International Law by D. Josephus Jitta” (1920) 29 Yale LJ 700.

_____. “Territoriality, Public Policy and the Conflict of Laws” (1924) 33 Yale LJ 736.

_____. “Story’s Commentaries of the Conflict of Laws – One Hundred Years After” (1934) 48 Harv L Rev 15

Lorenzen, Ernest & Raymond Heilman. “The Restatement of the Conflict of Laws” (1935) 83:5 U Pa L Rev 555.

Lüderitz, Alexander. “Anknüpfung im Parteiinteresse” in Alexander Lüderitz & Jochen Schröder, *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende?* (Frankfurt: Alfred Metzner, 1977) 31.

Macklem, Patrick. “What is International Human Rights Law? Three Applications of a Distributive Account” (2007) 52 McGill L J 575.

Mancini, P.S. “De l’utilité de rendre obligatoires pour tous les Etats, sous la forme d’un ou de plusieurs traités internationaux, un certain nombre de régles generales du droit international privé pour assurer la decision uniforme des conflits entre les différentes legislations civiles et criminelles” (1874) 1 Journal de droit international privé et de la jurisprudence comparée 221 & 286.

Meijers, Maurits. “L’histoire des principes fondamentaux du droit international privé a partir du moyen age, spécialment dans l’Europe occidentale” (1934) 49 Recueil des Cours 547.

Mehren, Arthur Taylor von. “Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology” (1974) 88:2 Harv L Rev 347.

_____. “Recent Trends in Choice-of-Law Methodology (1974) 60 Cornell L Rev 927.

_____. “Choice of Law and the Problem of Justice” (1977) 41:2 Law & Contemp Probs 27.

Michaels, Ralf. “Globalizing Savigny? The State in Savigny’s Private International Law and the Challenge of Europeanization and Globalization” in Adrienne Windhoff-Héritier, Michael Stolleis & Fritz Wilhelm Scharpf, eds, *European and International Regulation After the Nation State: Different Scopes and Multiple Levels* (Baden-Baden: Nomos, 2004).

_____. "Public and Private International Law: German Views on Global Issues" (2008) 4 J P Int'l L 121.

_____. "Economics of Law as Choice of Law" (2008) 71 Law & Contemp Probs 73.

_____. "Party Autonomy in Private International Law – A New Paradigm Without a Foundation?" [forthcoming in 2014 in 58 Japanese Yearbook of International Law] online: http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf .

_____. "Story, Joseph" in J. Basedow et al, eds, *European Encyclopedia ofPrivate International Law* [forthcoming in 2016].

_____ . "Waechter, Carl Georg" in J. Basedow et al, eds, *European Encyclopedia of Private International Law* [forthcoming in 2016].

Minow, Martha. "Paradoxes of Rights" in Austin Rata & Thomas R. Kearns, eds, *Identities, Politics, and Rights* (Ann Arbor: University of Michigan Press, 1995).

Minow, Martha & Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law" (1996) 1 Hypatia 11.

Nadelmann, Kurt. "Wächter's Essay on the Collision of Private Laws of Different States" (1964) 13 Am J Comp L 414.

_____. "Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws" (1980) 28:1 Am J Comp L 67.

Nedelsky, Jennifer. "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 1.

_____. "Reconceiving Rights as Relationships" (1993) 1 Rev Const Stud 1.

Neuhaus, Paul Heinrich. "Savigny und die Rechtsfindung aus der Natur der Sache" (1949) 15:3 RabelsZ 364.

Nova, Rodolfo de. "The First American Book on Conflict of Laws" (1964) 8:2 Am J Legal Hist 136.

Nussbaum, Arthur. "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws" (1942) 42:2 Colum L Rev 189.

Nussbaum, Martha. "Beyond the Social Contract: Toward Global Justice" in Grethe B. Peterson, ed, *The Tanner Lectures on Human Values*, vol 24 (Salt Lake City, University of Utah Press, 2004).

Offerhaus, Comp. J. "L'Université d'Amsterdam et le Droit international privé" in *Ius et Lex – Festgabe zum 70. Geburtstag Max Gutzwiller* (Basel: Helbing & Lichtenhahn, 1959).

Paul, Joel R. "The Isolation of Private International Law" (1988) 7 Wis Int'l L J 149.

Peari, Sagi. "Savigny's Theory of Choice-of-Law as a Principle of 'Voluntary Submission'" (2014) 64:1 UTLJ 106.

Peñalver, Eduardo M. "Property as Entrance" (2005) 91 Va L Rev 1889.

Pillet, Antoine. "Droit international privé consideré dans ses rapports avec le droit international public" in Annales de l'enseignement superior de Grenoble (Grenoble: F. Allier Père & Fils, 1892) 309.

_____. "Le droit international public, ses elements constitutifs, son domaine, son objet" (1894) 1 RGDIP 1.

_____. "Essai d'un système general de solution des conflicts de lois" (1894) 21 Journal de droit international privé et de la jurisprudence comparée 417.

Pound, Roscoe. "Uniformity of Commercial Law on the American Continent" (1909) 8:2 Michigan LRev 91.

Rückert, Joachim. "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law" (2006) 11 Juridica International 56.

Sack, Alexander N. "Conflicts of Laws in the History of the English Law" in A Reppy ed, *Law, a Century of Progress, 1835-1935: Contributions in Celebration of the 100th Anniversary of the Founding of the School of Law of New York University*. (New York: New York University Press, 1937).

Salcedo, Juan Antonio Carillo. Le Renouveau du Particularisme en Droit International Privé (1978) 160 Recueil des Cours 181.

Savigny, Friedrich Carl von. "Über den Zweck dieser Zeitschrift" (1815) 1 Zeitschrift für geschichtliche Rechtswissenschaft 1.

_____. "Stimmen für und wider neue Gesetzbücher" (1817) 3 Zeitschrift für geschichtliche Rechtswissenschaft 11.

Scheffler, Samuel. "The Practice of Equality" in Carina Fourie, Fabian Shuppert & Ivo Wallimann – Helmer, eds, *Social Equality: On What it Means to Be Equal* (New York: Oxford University Press, 2015).

Schurig, Klaus. "Interessenjurisprudenz contra Interessenjurisprudenz im IPR: Anmerkungen zu Flessners Thesen" (1995) 59:2 RabelsZ 229.

_____. "Das Fundament trägt noch" in Heinz-Peter Mansel, ed, *Internationales Privatrecht im 20. Jahrhundert, Der Einfluss von Gerhard Kegel und Alexander Lüderitz auf das Kollisionsrecht* (Tübingen: Mohr Siebeck, 2014) 9.

Shapira, Amos. "Protection of Private Interests in the Choice of Law Process: The Principle of Rational Connection Between Parties and Laws" (1970) 24 Sw L J 574.

Singer, Joseph. "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1.

_____. "Real Conflicts" (1989) 69 BUL Rev 3.

_____. "A Pragmatic Guide to Conflicts" (1990) 70 BUL Rev 731.

_____. Democratic Estates: Property Law in a Free and Democratic Society (2009) 94 Cornell L Rev 1009.

Skinner, Quentin. "Meaning and Understanding in the History of Ideas" (1969) 8:1 History and Theory 3.

Sommières, Marquis de Vareilles. "La synthese du droit international privé" (1900) 27 J dr int privé 5 & (1900) 27 J dr int privé 158.

Steenhoff, G.J. "Daniël Josephus Jitta" (1854-1925) in *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C Asser Instituut, 1995) 237.

_____. "Roeland Duco Kollewijn – 1892-1972" in *The Moulding of International Law: Ten Dutch Proponents* (The Hague: T.M.C Asser Instituut, 1995) 382.

Symeonides, Symeon. "The American Choice-of-Law Revolution in the Courts: Today and Tomorrow" (2002) 298 Recueil des Cours 1.

"The Transformation of Sovereignty" 88 Am Soc Int'l L Proc v (1994).

Treggiari, Ferdinando. "Nationales Recht und Recht der Nationalität – Mancini" in Jayme, Erik & Heinz-Peter Mansel, ed, *Nation und Staat im internationalen Privatrecht. Zum kollisionsrechtlichen Staatsangehörigkeitsprinzip in verfassungsrechtlicher und internationalprivatrechtlicher Sicht* (Heidelberg: C.F. Müller, 1988).

Voskuil, C.C.A. "A Survey of Dutch Scholarly Practice Concerning Private International Law From 1938 till Present" (1970) 17 Nethl Int'l L Rev 11.

Vrellis, Spyridon. "Conflit ou coordination de valeurs en droit international privé a la recherché de la justice" (2007) 328 Recueil des Cours 189.

Wai, Robert. "In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law" (2001) 39 Can YB Int'l L 117.

_____. "The Interlegality of Transnational Private Law" (2008) 71 L & Contemp Probs 107.

_____. "The Cosmopolitanism of Transnational Economic Law" in Cecilia M. Baillet & Katja Franko Aas, eds, *Cosmopolitan Justice and its Discontents* (New York: Routledge, 2011) 153.

_____. "Private v. Private: Transnational Private Law and Contestation in Global Economic Governance" in Horatia Muir Watt & Diego P Fernández Arroyo, eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015).

Watt, Horatia Muir. "European Federalism and the New Unilateralism" (2008) 82 Tulane L Rev 1983.

_____. "Private International Law Beyond the Schism" (2011) 2 Transnatl Leg Theory 347.

_____. "Future Directions" in Muir Watt, Horatia & Diego P Fernández Arroyo. *Private International Law and Global Governance* (Oxford University Press, 2015).

Wächter, Karl Georg von. "Über die Collision der Privatrechtsgesetze verschiedener Staaten" (1841) 241 AcP 230 & (1842) 251 AcP 1 & 161 & 361.

Wortley, B A. "The Concept of Man in English Private International Law" (1947) 33 Trans Grotius Soc 147.

_____. "The Interaction of Private and Public International Law Today" (1954) 85 Recueil des Cours 239 at 255.

III. Unpublished Manuscripts and Electronic Sources

Butler, Martha & Cynthia Kirkby. "Same-Sex Marriage, Divorce and Families: Selected Recent Developments" (2013), online: Library of Parliament Research Publications http://www.lop.parl.gc.ca/content/lop/ResearchPublications/2013-74-e.htm.

Dagan, Hanoch & Avihay Dorfman, *The Justice of Private Law* (2015), online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527970.

Dagan, Hanoch & Avihay Dorfman, "Just Relationships" (2016), online: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537.

Dagan, Hanoch & Avihay Dorfman, "Interpersonal Human Rights and Transnational Private Law" (2016, on file with author).

Decker, Thomas. *Das kollisionsrechtliche Werk Ernst Zittelmanns (1852-1923)* (doctorate in law, Osnabrück University, 2004) [unpublished].

Hatzimihail, Nicholas. *Pre-classical Conflicts of Laws*, forthcoming.

Lehning, Percy B. "European Citizenship. Towards a European Identity," online: (1999) 2:1 Working Paper Series in European Studies http://aei.pitt.edu/8995/1/lehning.pdf

Michaels, Ralf. "EU Law as Private International Law? Re-Conceptualizing the Country-of-Origin Principle as Vested Rights Theory" (2006) ZERP Diskussionspapier 5/2006, online: http://scholarship.law.duke.edu/faculty_scholarship/1573.

Thomas, C.A. "The Concept of Legitimacy in Internatioal Law" online: (2013) LSE, Society and Economy Working Papers 12/2013 https://www.lse.ac.uk/collections/law/wps/WPS2013-12_Thomas.pdf