

From the Law of Nations to the Private Law of Mankind

Roxana Banu†

Introduction	101
I. Historical Parallels	102
II. Jus Gentium Privatum	104
A. Natural Law/Positive Law	105
B. Universal Law/Comparative Law	107
C. Floor/Ceiling.....	107
D. Colonial Context/Human Empowerment.....	109
III. “Distinct Individuality”	109
Conclusion	111

Introduction

Professors Hanoch Dagan and Avihay Dorfman’s article *Interpersonal Human Rights*¹ is a timely and critical contribution to our thinking about the degree of and normative justification for personal responsibility for transnational wrongs. Their contribution is rooted in a remarkable jurisprudential reconstruction of the moral fundamentals of private law, which they initially developed in a jointly-authored prior article entitled *Just Relationships*.² *Interpersonal Human Rights*, along with their other co-authored work,³ is therefore meant to address the transnational implications of their relational theory of private law justice. This jurisprudential extension brings their scholarship in conversation with many different legal fields, including human rights law, public international law writ large, and private international law. Scholars from these fields should consider the extent to which *Interpersonal Human Rights* connects to but also enhances the conceptual and normative arsenal we currently have available to address problems of inter-personal justice in the transnational realm.

This Response develops precisely this type of interdisciplinary dialogue from the perspective of private international law (also known as Conflict of Laws). Part I identifies the theoretical framework within private international law that Dagan and Dorfman’s article is likely to connect to and those it would discount as unhelpful. I draw a parallel between the way in which Dagan and Dorfman structure the state-centric/individual-centric distinction and the way in which private international law historically drew that distinction. I suggest that *Interpersonal Human Rights* connects to a

† Assistant Professor, Western University Law School. I am very grateful to Joanna Langille for very helpful comments on an earlier draft.

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

2. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

3. Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 THEORETICAL INQUIRIES L. 391 (2017).

51 CORNELL INT’L L.J. ONLINE 101 (2018)

nineteenth century private international law perspective that I describe and refer to elsewhere as “relational internationalist.”⁴ Part II brings the main analytical insights offered by Dagan and Dorfman into conversation with this “relational internationalist” perspective. While nineteenth century relational internationalists made many of Dagan and Dorfman’s conceptual and analytical moves, they approached them with a high degree of humility because of a strong appreciation for legal pluralism and cultural diversity. This humility, as I explain below, highlights some of the challenges one faces when constructing a framework of interpersonal human rights.

Part III returns to Dagan and Dorfman’s state-centric/individual-centric distinction to suggest a possible nuance. Dagan and Dorfman rightly argue that individuals may legitimately assert claims of justice directly in relationship to the individuals they interact with, rather than to the state or via the state. But a key insight of what are called “conflicts justice” theorists in private international law is that the claims individuals make to one another are informed by their respective relationship to one or several states and their familiarity with a certain culture, law, and social practice. As I discuss, private international law foresees the ability of individuals to make claims of justice to each other, but in large part insists that those claims are informed by individuals’ social, if not political, affiliations. This makes it hard to give much content to a quasi pre-political notion of universal human rights even within an individual-centered analytical framework.

I. Historical Parallels

Dagan and Dorfman frame their article as an improvement on the conceptual and analytical framework available in both private and public international law for holding individuals and corporations accountable for transnational wrongs. They rightly note that because of its traditional state-centered focus, public international law may lack the resources to provide “a justification for imposing a burden on a private actor in the name of a right that was originally conceived in vertical terms.”⁵

By contrast, interpersonal interactions across borders are the bread and butter of private international law. Yet Dagan and Dorfman argue that this field of law also fails to provide a justification for holding individuals and corporations directly accountable for transnational wrongs. The typical analysis in private international law seems to move in a different direction than what Dagan and Dorfman are arguing for. In the context of private legal matters connected to multiple jurisdictions, the main question in private international law is which law—usually a single state’s law—determines the rights and liabilities of the parties. In other words, the liability of a particular individual or corporation can only be derived “indirectly” from the national law determined applicable by the choice of law rules of the forum, rather than by appeal to a universal framework of inter-personal justice. In turn,

4. See generally ROXANA BANU, NINETEENTH-CENTURY PERSPECTIVES ON PRIVATE INTERNATIONAL LAW 70—91 (2018).

5. See Dagan & Dorfman, *supra* note 1, at 363.

historically these choice-of-law rules were based on a determination of which state should have the authority to regulate a particular matter based on its connection with that particular jurisdiction. By contrast, Dagan and Dorfman argue that the traditional choice-of-law question can and should only complement a fundamental, more direct question of relational justice, namely whether the defendant individual or corporation adequately respected the other party's claim for self-determination (as opposed to independence) and substantive equality.

This makes it possible for Dagan and Dorfman to argue that liability for the “unspeakable” wrong in the *Pfizer* case can be derived directly from *jus gentium privatum*, part of customary international law, “irrespective of the content of the applicable law.”⁶ In light of Dagan and Dorfman's account, the traditional choice of law question in private international law seems mistaken or at least insufficient. It is mistaken because it is ultimately premised on determining the state, which has the authority to regulate a particular inter-personal interaction in the transnational realm, rather than to directly determine the degree of mutual respect for self-determination and substantive autonomy. Consequently, it is premised on the assumption that one must always appeal to a particular—often national—law from which to derive one's rights and obligations in the transnational realm. It appears inevitable for Dagan and Dorfman to suggest that the only fine-tuning private international law might attempt, but ultimately fail to offer, is in its “exceptional” devices, such as public policy (as opposed to its overarching theory and methodology).⁷

In my own work I have sought to show that private international law's nineteenth century intellectual history includes a “relational internationalist” strand of thought, which joins Dagan and Dorfman in their critique of both state-centrism and liberal individualism and which mirrors many of Dagan and Dorfman's arguments.⁸ A rather extreme liberal individualist strand of nineteenth century private international law argued that choice of law rules must recognize vested rights, which are discerned by reference to individual autonomy and choice, rather than any national law.⁹ By contrast, a state-centric strand argued that choice of law rules merely reflect a particular kind of distribution of regulatory authority among states. On this perspective, when legislators and adjudicators determine the contours of this distribution of legislative authority, “the litigating parties simply disappear for a while.”¹⁰

Between these two extremes, relational internationalists argued, much

6. *Id.* at 386–87.

7. *See id.* at 369–72. In recent work, Joanna Langille argues, following an analysis of over 400 private international law cases from various common law jurisdictions, that the public policy exception is invoked by courts precisely to maintain this floor of inter-personal justice that Dagan and Dorfman argue for. *See* Joanna Langille, *The Limits of Legality: The Rule of Law Principles Governing the Common Law Public Policy Exception in Private International Law* (unpublished manuscript) (on file with author).

8. *See generally* BANU, *supra* note 4.

9. For an overview of this perspective see *id.* at 173–76.

10. Antoine Pillet, *Droit international privé considéré dans ses rapports avec le droit international public* [Private international law considered in its relations with public international law], in *ANNALES DE L'ENSEIGNEMENT SUPERIOR DE GRENOBLE* 335 (1829).

like Dagan and Dorfman, that private international law bears a justificatory burden towards individuals directly, rather than towards states within an international community;¹¹ that a substratum of private law and private international law governs our relationships as people rather than citizens of a state;¹² and that, relatedly, our responsibilities to each other are partly derived from a universal core of inter-personal respect, dignity and care, while also being partly informed by the political and economic background of national private law norms.¹³ Most importantly, relational internationalists relied on the notion of *jus gentium privatum* that is also the focus of Dagan and Dorfman's article and similarly struggled to position this notion in between positive and natural law and in between abstract philosophy and comparative law.¹⁴

Dagan and Dorfman's article provides a much-welcomed opportunity to revisit and analyze private international law's own analytical framework of relational justice, especially its underlying premise of *jus gentium privatum*. But as I explain in the next section, the extent to which it may help update and improve private international law's relational internationalist strand depends in part on its engagement with relational internationalism's self-recognized limitations.

II. *Jus Gentium Privatum*

In pursuing an account of interpersonal human rights grounded in private law, Dagan and Dorfman appear to firmly reject both a state-centric perspective in either public or private international law as well as a natural law, pre-political version of private law.¹⁵ However, inevitably, the nuanced middle ground they construct has elements of both. While Dagan and Dorfman “do not deny the contingency of some subsets of private law” they insist that “some underlying normative foundations of these private law domains nonetheless transcend the contingency of their positive instantiations.”¹⁶ Similarly, they argue that there is a universal core of interpersonal solidarity¹⁷ from which no national legislation can derogate and which informs our duties to each other as “private citizens of the world,”¹⁸ rather than co-citizens of a state. At the same time, following Waldron's philosophical reconstruction of *jus gentium*, Dagan and Dorfman seem to conceive of this core of private law as the result of a “reflective equilibrium”

11. See JOSEPHUS JITTA, *LA METHODE DE DROIT INTERNATIONAL PRIVÉ* 5 (1890) [hereafter JITTA, *LA METHODE*]. See also BANU, *supra* note 4, at 60.

12. See JITTA, *LA METHODE*, *supra* note 11, at 43–44, 119. See also BANU, *supra* note 4, at 61, 64.

13. See BANU, *supra* note 4, at 265–90.

14. See *id.*

15. See Dagan & Dorfman, *supra* note 1, at 382 (“Private law's core prescriptions—our interpersonal human rights—are neither part of a natural law nor do they depend on the state for their legitimate existence.”)

16. *Id.* at 379.

17. See *id.* at 381–82.

18. I take this term from Karen Knop's wonderful reconstruction of James Lorimer's conceptualization of the private citizens of the world. See Karen Knop, *Lorimer's Private Citizens of the World*, 27 *EUR. J. INT'L L.* 447 (2016).

between natural law and positive law.¹⁹ It is ultimately “grounded in a moral reading of the basic elements of private laws of domestic systems.”²⁰ Dagan and Dorfman insist that this universal floor of interpersonal morality from which to draw can usefully be developed through a “gradual process of respectful dialogue among national courts,” such that comparative law, rather than philosophical abstraction, may become the building block of “universal norms of interpersonal human rights.”²¹ Finally, Dagan and Dorfman acknowledge the “(post-colonial) worry” about generating any kind of floor of inter-personal morality from “Anglo-Christian parochialism” but ultimately conclude that this “seems to be *less*, rather than more, pertinent to our exercise of extracting the minimal core of private law than to the parallel exercise regarding constitutional law or (vertical) human rights law.”²²

In my reading, Dagan and Dorfman construct and then reconcile four dichotomies within their private law theory for the transnational realm: between natural and positive law; between an apolitical floor of private morality and a political ceiling of inter-personal rights and obligations; between a priori universal norms and their “discovery” through comparative law and judicial cooperation; and between raising and lowering a post-colonial red flag. In the interpretation I offer elsewhere, these were the analytical moves that also characterized nineteenth century relational internationalist scholars in private international law, especially the scholarship of the Dutch scholar Josephus Jitta (1854-1925).²³ These were also the moves that relational internationalists made with much trepidation and humility, which may have caused this particular strand to not take much hold in the field (and thus to be part of the ‘forgotten history’ of private international law). In what follows I want to offer a sense of that trepidation and humility to show the questions that need to be raised and discussed in applying a framework of interpersonal human rights to private international law matters.

A. Natural Law/Positive Law

At the end of the nineteenth century, the Dutch scholar Josephus Jitta argued that it was wrong to suggest that private international law theory and methodology had “attained its objective when it had chosen from among the laws that touch upon a legal relation.”²⁴ He believed that private international law was not “the science of laws or lawgivers but the science of the jural relations between people in a community larger than a state.”²⁵ “The decisive element” in private international law had to be securing a “reasonable social intercourse among people” in the transnational realm.²⁶

19. See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 136 (2005).

20. Dagan & Dorfman, *supra* note 1, at 385.

21. *Id.* at 388.

22. *Id.* at 383.

23. See generally BANU, *supra* note 4, at 59–68.

24. JITTA, *LA METHODE*, *supra* note 11, at 44.

25. *Id.* at 119.

26. JOSEPHUS JITTA, *THE RENOVATION OF INTERNATIONAL LAW ON THE BASIS OF A*

To attain this objective, the judge would have to appeal to the law of a particular state when a legal relation was fundamentally embedded in a particular state, to common principles of law when a legal relation was embedded in a variety of states or humanity more broadly, and to judicial conscience and responsibility when little answer could be drawn from either national or international customary law.²⁷ In the first case, “international public policy,” which would presumably cover the interpersonal human rights referenced by Dagan and Dorfman, would function as a corrective to the applicable law.²⁸ In the second case, one would appeal to international common law directly. Much like Dagan and Dorfman, and following Carl von Savigny, Jitta positioned “international common law” somewhere in between natural and positive law.²⁹ And again like Dagan and Dorfman, Jitta seemed to premise the universal substratum of private law, “the pillar of the just and unjust,” on self-determination and substantive equality.³⁰ Thus, Jitta concludes that 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.”³¹ But since this version of private law “takes account of human individuality generated by a large variety of conditions,” it implicitly acknowledges that “law based on human individuality will vary as well. . . . [T]he abstract notion of the 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.”³² International common law is “positive law” because it has “penetrated the juridical consciousness of all nations” even if ultimately based on “natural reason.”³³

This also meant that there may always be a difference between international common law and “ideal law.”³⁴ This, in Jitta’s view, was the real struggle for private international law. Even if one agreed, as Jitta argued, that recognizing a legally created company across borders, or allowing for the possibility of divorce, conforms to the ideal private law premised on self-determination and substantive equality, these issues were hardly part of the international common law of his time.³⁵ And slavery was entirely in contradiction to the ideal private law, yet very much part of international

JURIDICAL COMMUNITY OF MANKIND 125 (1919) [hereafter JITTA, THE RENOVATION].

27. For an overview of this layered thinking about the choice of law question in private international Law, see BANU, *supra* note 4, at 282–88.

28. See Josephus Jitta, *Le Droit Commun International comme Source du Droit International Privé*, 4 REVUE DE DROIT INTERNATIONAL PRIVÉ ET DE DROIT PÉNAL INTERNATIONAL 553, 561 (1908) [hereafter Jitta, *Droit Commun*].

29. *See id.* at 553–56.

30. *See* JITTA, LA METHODE, *supra* note 11, at 60.

31. *Id.*

32. *Id.* at 60–61.

33. *See* JOSEPHUS JITTA, LA SUBSTANCE DES OBLIGATIONS DANS LE DROIT INTERNATIONAL PRIVÉ, vol. 2, at 498 (1907) [hereafter JITTA, OBLIGATIONS].

34. *See* Jitta, *Droit Commun*, *supra* note 28, at 554.

35. *See id.* at 564.

common law for a significant period of time.³⁶ Jitta doubted, therefore, whether explaining *jus gentium privatum* as a reflective equilibrium between positive and natural law really helped answer the thorny questions of private international law. In cases of conflict, his answer was to invite the judge to move towards ideal law and beyond international common law, even when its own national law was far from it.³⁷ Yet Jitta recognized that this too, as I show below, was a tenuous proposition.

B. Universal Law/Comparative Law

If *jus gentium privatum* was to be in some sense “positive law, not a philosophical abstraction”³⁸ it would have to be “recovered” via comparative law. Jitta’s theory very much anticipated Dagan and Dorfman’s “gradual process of respectful dialogue among national courts seeking to distill the universal core of interpersonal human rights from their diverse, but not chaotic, sets of domestic private law.”³⁹ But just as Jitta was prepared to embrace the reflective equilibrium between “multicultural dialogue” and “parochialism”⁴⁰ he again pointed to its limitations:

The nature of legal relations, examined from the individual point of view, does not allow for abstractions, derived from the philosophical law, but must take the society such as it is. An individual state cannot flatter itself to transform the legal conditions of a universal society, but must take them as they are.⁴¹

If one agrees that *jus gentium privatum* can only be distilled from a solid comparative analysis, one cannot make up a common conviction from “philosophical abstraction.” One cannot have one’s cake and eat it too. A judge cannot declare polygamous marriages, adultery, alienation of affections, surrogacy, and so on illegal without acknowledging and thoroughly engaging with the fact that, in a part of the world related to the dispute, all these are perfectly legal. To Jitta, it seemed difficult to reconcile a strong sense of resistance—shared by Dagan and Dorfman—to pre-political natural law with the need to establish a floor of inter-personal morality, even if he too, like Dagan and Dorfman, thought private law theory and *jus gentium privatum* were the answer.

C. Floor/Ceiling

At this point Dagan and Dorfman might blame Jitta’s impasse on the danger of collapsing the ceiling of politics to the floor of inter-personal morality within private law. Because of the dense social and political

36. *See id.* at 554.

37. *See id.* at 564.

38. *Id.* at 554.

39. Dagan & Dorfman, *supra* note 1, at 388. For Jitta’s perspective, see Jitta, *Droit Commun*, *supra* note 28. For Jitta’s account of the use of comparative law to derive the universal substratum of private law, see Josephus Jitta, *Le Droit Commun comme Source de Droit International Privé*, 4 REVUE DE DROIT INTERNATIONAL PRIVÉ ET DE DROIT PÉNAL INTERNATIONAL 553 (1908) & 5 REVUE DE DROIT INTERNATIONAL PRIVÉ ET DE DROIT PÉNAL INTERNATIONAL 485 (1909).

40. *See* Dagan & Dorfman, *supra* note 1, at 388.

41. JITTA, OBLIGATIONS, *supra* note 33, at 218.

background of family law, determining the legality of polygamous marriages or surrogacy, while current topics in the long portfolio of private international legal matters, may not be part of Dagan and Dorfman's floor of private law relational justice. But when Jitta looks at the topics reviewed by Dagan and Dorfman—torts,⁴² property,⁴³ employment contracts⁴⁴—the results are not strikingly different from his results on family law issues.

For example, Jitta argues that in the case of “personal, imputable and unlawful or rather antisocial” acts, “the disturbance of the reasonable order of social life is so obvious, that a duty of indemnification may be considered as founded on an international common-rule.”⁴⁵ Liability in the *Pfizer* case would flow, for Jitta as for Dagan and Dorfman, from *jus gentium privatum*. But the crux of the matter, the issues most heavily litigated in many private international law cases are often the extent of liability and the possibility of awarding punitive damages. These issues, according to Jitta, fall outside the core of *jus gentium privatum*.⁴⁶ Even more importantly, Jitta suggests that depending on how the “core” is defined, granting punitive damages may be considered as violating *jus gentium privatum*.⁴⁷ Would Dagan and Dorfman push this argument further or in a different direction? Would their theory help us discern whether a multinational corporation headquartered in the US, like Chevron, would need to pay punitive damages to Ecuadorian plaintiffs for torts committed in Ecuador even if Ecuador does not recognize punitive damages at all or to a lesser extent?⁴⁸ Would the notion of substantive equality or self-determination from Dagan and Dorfman's private law theory help unpack this issue any further? Similarly, even if, as Dagan and Dorfman suggest,⁴⁹ and despite the recent United States Supreme Court decision,⁵⁰ corporate liability for human rights violations were part of the core of *jus gentium privatum*, could we find any prescriptions within the “core” of private law about the *boundaries* of the “link of privity,”⁵¹ as Dagan and Dorfman call it, within a corporate value chain?⁵²

42. See JITTA, THE RENOVATION, *supra* note 26, at 144–46.

43. See *id.* at 124–33.

44. See JITTA, OBLIGATIONS, *supra* note 33, at 183–99.

45. JITTA, THE RENOVATION, *supra* note 26, at 144.

46. See *id.* 144–45.

47. See *id.*

48. For a brief overview of the issue of granting punitive damages in the context of the Chevron saga, see *Chevron Corp. v. Yaiguaje*, 3 SCR 69 [2015], at para 6.

49. See Dagan & Dorfman, *supra* note 1, at 386, n.114.

50. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

51. See Dagan & Dorfman, *supra* note 1, at 372.

52. This is now being analyzed by Canadian and English courts, as they rethink the traditional Anns test. See *Okpabi and Others v. Royal Dutch Shell Plc and Dutch Petroleum Development Company of Nigeria Ltd.*, 2017 EWHC 89 (TCC); *Choc v. Highbay Minerals Inc.*, 2013 ONSC 1414. A review of these cases shows that in some contexts courts are struggling not with acknowledging the “missing link of privity” as Dagan and Dorfman call it, but with defining its contours. Dagan & Dorfman, *supra* note 1, at 361.

D. Colonial Context/Human Empowerment

The questions raised above point to the current hot topics of private international law and inevitably push Dagan and Dorfman to further elaborate on just how “admittedly minimal”⁵³ the core of private law may be in the transnational realm to be truly transformative. But they also shed light on the postcolonial worry they might set aside too easily. If a private law relational justice theory cannot explain why a corporation headquartered in the US should pay the same amount in damages for human rights violations and environmental degradation occurring abroad (often in least developed countries) as for those occurring in the state of the multinational corporation’s headquarters, then a framework of global distributive justice with a strong postcolonial lens is the only answer. Similarly, if a private law relational justice theory cannot pierce deeper into the layers of transnational corporate organization to increase liability across the corporate chain for violations occurring in developing countries, that raises a red flag from a postcolonial perspective. Depending on its exact contours, a framework of *Interpersonal Human Rights* may simply tolerate or even increase inequality because it is too “thin.”

Furthermore, it may seem at first sight, as Dagan and Dorfman suggest, that a framework of *Interpersonal Human Rights* is less affected by a colonial critique because it applies to all individuals and inter-personal interactions beyond the circle of “civilized” states.⁵⁴ This is precisely the argument that relational internationalists made as well.⁵⁵ But private international law’s intellectual history—largely unexplored thus far—shows just how hard, how contested, and how consequential defining a private right—such as property—as a human right can be.

For example, in the context of expropriations in between and after the two World Wars, when the British scholar B.A. Wortley attempted to describe the “core” human right to private property he shifted from arguing that *jus gentium* protects “property as inherent in human nature” or “as much property as is necessary to support life” or that it simply prohibits deprivations that would leave one “unable to satisfy [his] obligations that he has assumed under various municipal laws either to his own creditors, to his family or, in the case of an ecclesiastic, to his superiors under Canon Law.”⁵⁶ Who gets empowered and who gets excluded is highly impacted by this definition of the modicum of the human right to property.

III. “Distinct Individuality”

I have argued thus far that the depth of *jus gentium privatum* is profoundly influenced by the way in which a theory of private law, including that developed by Dagan and Dorfman, navigates the four dichotomies

53. Dagan & Dorfman, *supra* note 1, at 364–65.

54. *Cf. id.* at 383.

55. See Josephus Jitta, *Alte und neue Methoden des internationalen Privatrechts*, 15 AOR 564 (1900).

56. For an analysis for Wortley’s different definitions of the human right to property see Banu, *supra* note 4, at 114–24.

described above. Most importantly, it is significantly influenced by the way in which such a private law theory conceptualizes the individual navigating the transnational social space. Dagan and Dorfman rightly suggest that because their private law theory is premised on substantive as opposed to formal equality, and on self-determination, as opposed to independence, their version of *jus gentium privatum* can be considerably more robust and more transformative.⁵⁷ But the examples they review—most prominently battery and lack of consent—are not only already recognized in private international law as the universal core of interpersonal responsibility (as Langille’s study on the public policy exception shows)⁵⁸, but they would surely be part of a notion of *jus gentium privatum* premised on a Kantian private law theory, as opposed to the more robust private law theory Dagan and Dorfman aim to construct. Here again, if *jus gentium privatum* remains quite thin, it may mirror the natural law account. If it gains in strength, in part because of the premise of substantive equality, it may end up being highly contested. But either way, it seems a choice must be made.

How exactly could the social, economic and political transnational context impact the notion of substantive equality and therefore the content of *jus gentium privatum*? Here again, should the Ecuadorian indigenous population claim to be compensated the same way (and in the same amount) as Chevron would compensate US victims? Could this be a claim of substantive equality or a claim to be treated with the same level of respect as victims in highly developed states? Could this be translated in any way within Dagan and Dorfman’s notion of the “ground projects”⁵⁹ that individuals can ask others to respect and accommodate?

Once Dagan and Dorfman’s private law theory is transplanted to the transnational context it becomes necessary to clarify how the “ground projects” underlying substantive autonomy may be impacted by the transnational context. It would also become necessary to explain, how, despite the fact that the core of private law covers our relationships as people, rather than co-citizens, our familiarity with a culture, a state, a social practice impacts our demands on one another. A key insight of relational internationalists and of what are known as “conflicts justice” theorists in private international law is that individuals’ claims of justice to one another are influenced by their relationship and familiarity with a state, a culture and a law. In Jitta’s account the proposition that private law must take account of each person’s “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” extends to the realization that “among those conditions . . . 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.”⁶⁰ For example, as the German “conflicts

57. See Dagan & Dorfman, *supra* note 1, at 375.

58. See generally Banu *supra* note 4.

59. See Dagan & Dorfman, *supra* note 1, at 375.

60. JITTA, LA METHODE, *supra* note 11, at 60.

justice” theorist Alexander Lüderitz notes, private international law rules may be called on to determine whether, in the case of recent immigrants, once should apply the foreign law allowing for more authoritarian parenting styles, or the law of the host country premised on equal parenting rights and a particular view of the child’s physical and mental well-being.⁶¹ Is the answer premised on a universal view of the child’s and the parents’ substantive equality and self-determination or, as Lüderitz notes, on a more pragmatic balancing between the interests of the child in adapting to the new society and culture and the parents’ sense of belonging and familiarity with a different social practice and culture?⁶²

Conclusion

Depending on one’s own perspective of private international law the arguments made by Dagan and Dorfman may seem indigenous or foreign to the field. But to the extent they map onto nineteenth century relational internationalism, they certainly resonate with private international law’s intellectual history. Bringing *Interpersonal Human Rights* in conversation with that intellectual tradition is helpful, I argued, both to highlight how this framework has been traditionally applied in the context of private international law, but also to ponder on the extent to which new analytical resources could be brought from Dagan and Dorfman’s remarkably nuanced and exciting new private law theory. The extent to which Dagan and Dorfman’s theory may continue and improve private international law’s own relational internationalist framework will depend on just how thin the universal modicum of private law ends up being. That, in turn, I believe depends on how much of the economic, political, and social context of the transnational social realm Dagan and Dorfman’s notion of substantive equality may absorb.

61. See Alexander Lüderitz, *Anknüpfung im Parteiinteresse*, in ALEXANDER LÜDERITZ & JOCHEN SCHRÖDER, *INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS: BEWAHRUNG ODER WENDE. FESTSCHRIFT FÜR GERHARD KEGEL* 45–47 (1977).

62. See *id.*