Introduction to *Theories of Legal Relations*: a comparative analysis

1.- The concept of legal relationships is fundamental and generic (it is used to define other concepts) so it would probably be prudent not to attempt to explore it further. However, it appears in most modern Civil Codes and is used by common law judges. It is a concept that has become as universal as a contract or a right. Although it may be defined and theorised differently, it seems that all legal systems may have the same idea. Distinct from the human relationship, it is at the same time very close to it. Indeed, there is no lasting human bond that is not legal except friendship (but this exception can be explained). As neotenic (born prematurely), humans need to reinvent everything: walking, swimming, and even living in society. Legal relationships have been invented by humans to be able to live in society.

In a period of disruption caused by the circulation of viruses, climate change, wars, and digital globalisation, it is important to re-examine human relationships. The responses to these many risks are, at least in part, legal: it is important to maintain the balance between people tending towards autonomy in their legal ties within the planetary space.

Exploring the notion of legal relationships also aims to place law in a general academic movement that consider all relationships. Is there a relational turning point, just as linguistic, emotional or even animal turns have appeared? There is a risk that this notion of ‘turn’ ends up corresponding only to a fashionable phenomenon. Nevertheless, I think it is possible to argue that parallel relational approaches are developing in several areas. For example, in physics, philosophy, and biology, a relational theory is a framework for understanding reality so that the positions of objects are only relevant if they are related to other objects. In a relational space-time theory, space does not exist independently of related objects and vice versa. One synthesis of the relational theory, called

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1 See paragraph 6.
The R-theory,\(^3\) defines fundamental relationships in nature as information transfers among natural systems. Information relationships (encoding and decoding) between entities involve organisations. In social sciences, the social network theory has been applied to politics and sociology for several decades. The relational-processual philosophy developed by Whitehead has led scientists to reflect on how our conception of the world has been transformed. Thus, physics is increasingly a science that studies infinitesimal chains rather than particles. Relational approaches in ethics,\(^4\) art,\(^5\) and management are similar to interactionist approaches in sociology and psychology. These movements are undoubtedly linked to neuroscience discoveries, particularly the theory of mirror neurons (even if this theory is now discussed). Humans are not isolated from each other; they are connected and can feel the suffering of others. In anthropology, several authors are now discussing rituals as a means of creating, strengthening and transforming kinship relationships and more broadly social relationships.\(^6\)

Human relationships are not mere factual connections where language and symbols are secondary and purely formal. Human relationships have been symbolically constituted for a certain period through rituals, gestures, images, and words; otherwise, they are mere contacts.

Some recent authors have developed a relational approach to law: notably Nedelsky,\(^7\) Somek,\(^8\) Pavlakos,\(^9\) and Falcon y Tella.\(^{10}\) However, among these authors, positions are contrasted in various aspects, particularly the place to be given to emotions. The American journalist Goleman has written books on relational intelligence and emotional intelligence. According to this author, the notions of emotion and relationship are linked. Nedelsky has an empirical common law approach that takes affects into account. However, Somek in Austria and Pavlakos in Greece (and the United Kingdom) have a Kantian and Fichtean approach that does not include emotions in their theory based

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\(^4\) See paragraph 148.
on a free and reasonable agent. Falcon y Tella (in Spain), who uses the three-dimensional theories of law of Goldschmidt and Reale based on the triptych fact, value, and norm, distinguishes three possible perspectives in law: the theory of the norm, the theory of the legal order, and the theory of the legal relationship. However, the approach to the legal relationship is here rather classical and comes from Savigny, who was himself influenced by Kant. The notion of will (*Willkur*) is not psychological and affective but abstract and *a priori* (it pre-exists contacts with phenomena).

There are many theories of legal relationships among the different traditions (German-speaking, English-speaking, Russian-speaking, Chinese-speaking, Roman-speaking ones, etc.). Subjectivist, objectivist, psychological, logical, empirical, idealist, complex, State-based, etc., approaches may be distinguished. The solutions to the various risks of disruption are global: it is a question of remedying the practical consequences of climate change, which lead to the destruction of our relationships with nature and other people (mainly through the so-called climate wars); of taking into account the risks of isolation due to the digitalisation of society; of drawing lessons from the implementation of social distancing due to the fight against viruses (masks, containment, quarantine); and even of reflecting from a legal point of view on the effects of financial globalisation, which is likely to dilute responsibilities and generate social crises. In all these cases, it is not only factual relations that are at stake but also legal. Private law scholars and legal theorists may have something to say about this, alongside specialists from other disciplines. Therefore, it is important to look for a common denominator based on an analytical study of legal relationships, *i.e.* a study of the terms used in different languages and actual legal solutions without seeking a divine or a more widely transcendent explanation. It can already be noted, by way of illustration, that the structuring concept of the new Chinese Civil Code, which came into force in 2021, is the notion of legal relationships (*minshi guanxi*). Its origins can be traced back to Russian, German, and Anglo-American doctrines, while at the same time being rooted in the culture of Confucianism. On a regional scale, the European

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Union (EU) struggles to build a common core of civil law composed of fundamental notions beyond its heavy regulations. It seems that the attempt to forge a body of standard solutions in contract law has instead failed. It is somewhat compensated by more successful attempts in civil or criminal procedures. Thus, the ELI-UNIDROIT model law on European civil procedure refers to procedural relationships.\(^{12}\)

To be honest, studying all legal relationships approaches is an important, not to say gigantic, task of synthesis to which I would like to contribute, although I am aware a single author cannot achieve this. I would at least like to be able to provoke a debate on this fundamental notion, which is often left in the shade, perhaps because of its elusive character but undoubtedly also because of the theoretical difficulties it raises (in particular concerning the notion of relationships in philosophy).

In an analytical approach, I observe that in all legal systems some relationships are qualified as juridical between entities, called legal subjects; they may involve prerogatives (in a broad sense: rights, duties, powers, privileges, etc.) and norms. Observing several legal systems does not lead me to reduce legal relationships to pure conjunctions of norms or prerogatives. Indeed, it appears that legal relationships are autonomous legal concepts with consequences of their own (in criminal matters, for example, the existence of a relationship of authority between the perpetrator of an offence and the victim is likely to lead to an even stronger conviction in case of personal injury). The analytical approach does not, however, avoid questions of legal theory, such as, among other things, the is-ought problem (when a claim is made about what ought to be, based solely on statements about what they are) since the transition from one to the other is made precisely by taking into account legal relationships.

2.- A few words about my background may be helpful to understand the question I am raising. After studying law in France, I spent a year in London for my Master of Law (LL.M.) in 1992–1993, where I took the Legal Theory course at University College, London (UCL) – which gave me the opportunity to attend seminars led by Dworkin and Teubner. I also chose a course on Security Law taught by two lawyers. During the entire academic year they examined only one House of Lords’ case: *National Westminster Bank Plc v Morgan*, the so-called *Natwest* case.\(^ {13}\) This case dealt with whether a loan agreement made through a bank could be avoided in the event of undue influence. In this case, an agent of a bank had visited a couple of borrowers to have them accept

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a guarantee on their house (the ‘charge’). After the husband’s death, the bank initiated proceedings to seize the house and thus obtain repayment of the loan. The question was whether the banker had committed undue influence with regard to the widow. The doctrine of undue influence, developed in case law as nullity in case of violence, which presupposed threats, could not cover all situations. Various judgements had previously established the existence of an irrebuttable presumption of influence in pre-existing legal relationships (parent and child, doctor and patient, lawyer and client, trustee and beneficiary) but not between spouses, nor between employers and their employees, nor even between a banker and a client. In the Natwest case, the issue was not undue influence in a relationship provided for in a pre-established list but undue influence in a commercial contract between a banker and his clients. As there was no presumption of influence, the question arose as to whether the contract should be annulled if there was a clear disadvantage that could be presumed to be an abuse of weakness. The House of Lords indeed held that a party had to have gained an advantage to be said to have committed undue influence. However, Lord Scarman noted (p. 10) that undue influence could not be inferred systematically from a clear disadvantage: ‘Even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power’. However, most of judges decided that a significant disadvantage was a condition for undue influence in legal relationships in which there was no irrebuttable presumption. We had to wait for other cases to answer the multiple questions raised by the Natwest landmark case. Under the rule of precedent, the decision was never overruled, but a later decision imposed the presence of an independent lawyer in such transactions.\(^{14}\) In the Natwest v Morgan case the couple had actually received no independent legal advice.

The doctrine of undue influence was all about characterising the different relationships involved and the possibility of triangulation (with the independent lawyer). However, I realised that under common law, one could hardly know anything other than the solution of the judgement and consequently could not anticipate other decisions: everything would depend on the facts at stake in ulterior cases. As in France or Germany, one could not conduct theoretical reasoning to determine the scope of an uncertain judgement. I thought at that time that a theoretical and dogmatic approach (in the sense of a set of legal concepts organising all the knowledge of the law) had its merits. If the facts that give rise to the first precedent-setting judgement are confused, and

\(^{14}\) Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44 (11 October 2001). The House of Lords held that for banks to have a valid security they must ensure that their customers have independent legal advice if they are a couple.
the decision is not clear-cut, one may have rigid and enigmatic legal solutions for decades.15

The great Anglo-American authors such as Bentham, Austin, Hart, and Dworkin showed that in common law, emphasis was generally placed on judges, whereas in France, it was placed on statutes. There were, therefore, theoretical traditions adapted to each country. I measured the excesses of the two systems, hypostasising the judge or the statute. It seemed, moreover, that the common law rule of mandatory precedent played a role equivalent to codification. However, the importance of legal relationships in common law struck me as much as in French law and represented a point common to both systems. I therefore wondered whether we could not approach law from the common angle of such legal relationships.

3.- Legal relationships have been relatively little studied in legal philosophy or legal theory compared with rule, institution, subjective right, norms, or legal order. They are sometimes presented as self-evident (e.g. by Blackstone16 or Bentham17 in the United Kingdom), or even at times as non-existent because they are metaphysical (e.g. Duguit in France18). Yet, they appear at the heart of the law. The notions of the juridical act19 and juridical person have been explored since the nineteenth century, as have norms and even human rights,20 especially in the twentieth century. However, the use of legal relationships can be observed in the doctrine and case law vocabulary of all traditions. Thus, we speak of contractual relationships, personal relationships (family ties) or business relationships. It does not mean that these concepts describe a reality that exists per se. Concepts are here to grasp realities that are difficult to grasp. Some legal theory or philosophy of law authors (e.g. Fichte,21 Levi,22 and Cicala23) have used concepts to describe a reality that exists in itself. They

16 See paragraph 13.
18 See paragraph 63.
21 See below.
22 See below.
23 See below.
have based their approach on the notion of legal relationships but have often remained without direct influence or successor. Nevertheless, the notion that was thus chased out of the door of theoretical monuments comes back from generation to generation through the window and insists as a kind of repressed law. It may well be that its time has come as there is much talk of ‘living together’ or, conversely, of disruption, in other words of social unbinding. It is, therefore, important to analyse the various existing theories of legal relations and try to propose an approach that can respond to contemporary challenges.

If there were a theory of masonry (in the literal sense, not in the sense of freemasonry!), there would undoubtedly be a normativist school that would give first place to the square and plumb line; a realist theory would place in the foreground materials such as cinder blocks or concrete but would also note the importance of the mason’s mood (and perhaps what he ate for breakfast!); and an institutionalist theory would emphasise the general ideas of construction projects and the mason’s status as an independent contractor or employee. The relational approach to masonry would state that what matters most are the joints: their composition, their application, their flexibility, and firmness. They remain essential even in dry stone construction because the way the stones are laid out holds them together. The void between them is a form of joint. Of course, all these approaches to masonry are complementary, but the question is whether one is more relevant to the mason when there are risks of landslides or earthquakes (the equivalent of disruption, to keep using the metaphor). It may well depend on the mason’s character, his sensitivity, and his approach to the world or the problem he has to solve. Nevertheless, joints are not what one intuitively puts forward and yet they are decisive in ensuring the building’s solidity as well as its flexibility.24

Legal relationships are, in a way, the legal world’s joints. The relationship approach to law does not pretend that other approaches are wrong, but it focuses on the least visible and, perhaps, the most central. That said, it exists in an underlying way but has generally been left in the shadows. It must be said that it poses formidable epistemological difficulties since it is not very visible and even implies making room for the vacuum.

4.- No one will be surprised, therefore, that the notion of legal relationships has had a contradictory fate. Unified in philosophy by Kant and then Fichte, it was unified in law by Savigny in 1835. However, despite its daily use in doctrine and case law, it struggles to find its place in legal theory. It is not intuitively what we think we will find in law; rather, we think we will find norms, rules, rights, and judgements. One naturally equates law with ought-to-be (*sollen*),

24 One form of a large-scale joint is the ability of buildings in seismic regions to deform without breaking (e.g., in Japan).
namely law with norm, as opposed to fact (sein) and non-law (everything that is not a rule and, in particular, human relationships regulated by law). However, the idea that the legal relationship is a crucial, even primary, notion in law is regularly recalled, in each generation, by a few authors and generally without much success. A few names have marked out different traditions: Pashukanis during the 1930s in the Soviet Union, Cicala and Levi in Italy during the 1950s, Ferrer Arellano in Spain during the 1960s, Achterberg in Germany during the 1980s, today Nedelsky in North America and Somek in Austria, etc. It may be inaccurate to equate law with norms since there are non-legal norms (social, technical, managerial). Indeed, it may be that we associate law with norms because we live in societies with leaders who give orders (and so create rules) and settle conflicts. However, it seems incorrect not to include in the science of law structuring concepts such as a person, contract, right or legal relationship. If we take a functional criterion of law – which settles conflicts and structures a group – there have been societies without leaders and law without rules, entirely horizontal societies consisting of a network of kinship. In the event of an unresolved conflict, one family would leave the village to found another one. Observing that a claimant has filed a lawsuit against a defendant before a court, one describes a legal situation involving a substantive relationship (the dispute) and a (temporary) procedural relationship before a judge. A special place should be given to the legal relationship, which is not the mere legal formalisation of a human relationship but the actual constitution of a human relationship. It may be that it is first in logic because legal norms emerge from legal relationships even if most of these relationships, in turn, involve the implementation of pre-existing norms. A legal order would thus be first and foremost composed of legal relationships that create and apply norms, as Achterberg argued in Germany during the 1980s. This change of view on law is not intuitive and may even cause unease. The excessive logic of normative theories, the weakening of States seen as closed systems of norms, a need to theorise private law as well as feminist and phenomenological approaches contribute to a renewed consideration of legal relationships. It is paradoxical, moreover, that the renewal of private law theorisation can pass

28 See paragraph 41.
29 See paragraph 83.
through the notion of legal relationships, whereas the renewal of the concept of legal relation was rather the work of publicists for the needs of public law.\(^{30}\)

The emotional and animal turns invite, furthermore, to question the relationships between humans and natural entities. The digitalisation of law and justice based on hyper-rationalism invites questions about what can be a law that remains human. If legal relationships channel emotions and rational arguments, they also pose formidable difficulties concerning the place of freedom and autonomy in law. It is thus at the heart of debates on theories of justice and legal discussions on relationships in environmental, family, public, and labour law.

5.- Two critical books on legal relationships were published in the 2010s. Nedelsky’s *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* and Somek’s *The Legal Relation*.\(^{31}\) Both are established authors who had previously published articles on these subjects. However, as far as I know, Somek does not quote Nedelsky and Nedelsky does not know Somek.\(^{32}\) Their frame of reference is different and, from their point of view, there is no mistake in not knowing each other’s approach to an object they consider different. The two authors are part of two distinct traditions, North America on the one hand and the German-speaking world on the other. In common law it is necessary to go back to Blackstone to find an empirical analysis of human relationships supported by law, whereas in German-influenced law, one has to go back to Kant, Fichte, and Savigny. Their philosophical foundations are opposed, Aristotelian realism and Hume’s empiricism for the one; Kantian idealism for the other. Mr Pavlakos (a Greek–English scholar) also wrote an article on legal relationships and is close to Mr Somek’s position. Thus, there would be two great philosophies of legal relationships that would not communicate with one other. In the past, there have also been jusnaturalist (in France, Domat and Villey; today in Belgium, X. Dijon;\(^{33}\) in Spain, Ferrer Arellano), normativist (Kelsen, Cicala, Nawiasky); and even realist (Petrazycki and Pashukanis in Poland and Russia) approaches.\(^{34}\) More sectorial relational approaches can also

\(^{30}\) See paragraph 94.

\(^{31}\) Nedelsky, note 7 above; Somek, note 8 above.


\(^{34}\) See the Bibliography.
be noted in property law, family law, international law, and even, from a broad perspective, the law of obligations.

In sum, there are not one but many theories of legal relationships, varying in particular according to their degree of abstraction (assuming a priori conditions of knowledge in the Kantian approach) or concreteness (assuming empirically observed affects).

It seems, however, possible to start from the analysis of existing legal relationships and determine their common elements, conditions, effects, and utilities. The aim is to reveal the intersection between all these theories without settling the underlying philosophical questions, based on the idea that it is not necessary to decide whether the legal relationship is real or ideal if the legal effect is identical according to the two approaches. The analysis leads additionally to the realisation that some elements of legal relationships are not covered by current theories, particularly the observation that a relationship can exist between two entities without legal personality. The importance of third parties in the definition of legal relationships further appears to be underestimated.

The analytical approach also shows that values revolve around legal relationships. Thus, a relational philosophy of justice assumes a third-party function. The various theories of legal relationships converge in noting that they oblige people to put themselves in the place of the other. Thus, an understanding of law based on relationships emerges that can no longer be attached to a current of legal theory that favours another point of entry: the norm, the institution (or legal order), human rights, or the judge. At the very least, it is possible to speak of theories of legal relations alongside a theory of norms, legal order (as put it Falcon y Tella), and values in law (Reale, Goldschmidt). One may wonder whether a new theory of law is not emerging, which, without excluding other theories and notions, emphasises legal relationships and could be called a relational or relationist theory of law. It implies, among other things, that legal relationships are not only forms given to human relationships but constitute these relationships. Our approach could, therefore, appear to be both analytical and constructivist. Legal relationship constructivism poses a problem because

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it presupposes a decisive intervention of lawyers, whereas the notion of legal relationship has almost always been left in the shade. It seems more likely to emerge according to different devices that evolve slowly over time than be artificially constructed; for example, the passage from a contractual bond presupposing a symbol (a clod of earth for the sale of a field, a stone for the sale of a house, etc.) to the modern contract presupposing a written document, now a digitalised one. The legal bond is neither natural nor consciously and theoretically constructed; it emerges and evolves slowly and spontaneously through successive adjustments. Linked to a relational theory of justice, this legal theory also has a critical and prospective side. It would make it possible to fill in the gaps in the understanding or denial of legal relationships by other legal theories.

6.- The notion of legal relationships is certainly elusive, but one can never completely do without it. It is worth trying to face up to this concept, which expresses an invisible reality. Suppose we define legal relationships as relationships that are recognised by law (marriage, contract, nationality, etc.). In that case, a logical problem arises: what is it in the law, which by construction is not a relationship, that recognises or establishes the existence of relationships? Rules, institutions, subjects, or rights? We enter a vicious circle if we say that other legal relationships recognise a relationship. However, if we say that a rule of law recognises a legal relationship (e.g. a rule on contractual relationships), we must be able to determine in what way this or that norm is a rule of law. A norm or standard may be medical (weight standard), managerial (e.g. ISO standards on quality management), technical (e.g. technical standards for lifts) or playful (the rules of a game). A rule can be said to be de jure because it is created by an institution, a State, or any other grouping that has the means to enforce it through courts and police that can impose sanctions. However, to create a rule of law, the institution or grouping must be legal or recognised by law. In this sense, a mafia is not recognised by law and cannot create rules of law even if it issues commands. This problem can, of course, be solved by distinguishing criteria for the legal nature of norms and groupings. One can adopt a normativist approach by saying that a norm (involving a sanction) is valid and, therefore, legal if it conforms to a higher norm (the Kelsenian solution). A legal relationship can then be seen as a relationship of norms. Nevertheless, who issues these criteria? If they are legal subjects, it is necessary to assume a pre-existing law characterising persons as legal subjects. Here again, it can be argued that norms create subjects (the Kelsenian solution). It is also necessary to assume the existence of a hypothetical initial norm, superior to all others, the Grundnorm. The system becomes so rational and systematic that it only remotely corresponds to the life of the law and the courts. For there to be a norm, a few related people have to come together at some point. In this view, the relationship would precede the norm.
Another approach is that the legal relationship is a correlation of prerogatives (right/duty, power/liability, privilege/no right, immunity/disability). This is the Hohfeldian solution. Since prerogatives are legal, the correlation of these prerogatives is also legal. Two problems then arise: How do we know that a prerogative is juridical? Is it certain that there is always a correlation between a right and a duty, a power and a liability, immunity and disability? Concerning the first question, we can answer that a prerogative is legal because it is recognised by a rule of law, which refers to the previous problem. Concerning the second question, one can find prerogatives that have no corollary (e.g. a personality right such as the right to one’s image) and legal relationships that are not composed of prerogatives (bonds between brothers and sisters or specific framework contracts that merely create a contractual relationship without providing for any right or duty).

If we reason from institutions (the Hauriou solution) and, in particular, from the State as it creates rules of law, the legal relationship is of little interest; it is diluted in an organism that exceeds and transcends it. Nevertheless, the question arises as to the birth of these institutions. There had to be initial relationships among the grouping’s members to create an institution. One can answer that these relationships were factual and pre-legal. Thus, a constituent assembly creates a constitution by an act of will. However, how was this assembly created? One can answer that it is a simple de facto meeting or a meeting involving relationships of power, which would suppose that one could pass from fact to law. Nevertheless, have we not approached the problem the wrong way round? Before complex societies’ institutions, families were made up of family ties. Do we have to wait until there is a State to recognise kinship ties, or can we say they have existed from the beginning in all societies? Of course, modern law, as we know it today, presupposes a State, and it can be argued that societies without a State had no laws at all in the modern sense. The discussion involves agreeing on what is called law. However, we know this is a daunting question that opens up endless discussions.

There is still one possibility that has hardly been explored: what if the relationship is primary in law? It is indeed within a relationship that rules and, therefore, rights are established, and it is from relationships that an institution is created. This seems to presuppose the existence of reasonable subjects with a free will that can decide to bind themselves together. Subjects would, therefore, be primary and create law in the sense of long-lasting relationships respecting each party’s autonomy (this is the Kantian, Fichtean, and Savignian solution). Since parties can enter into conflicts, it is appropriate to have judges, and since judges may be partial, it is appropriate to have general and abstract rules issued by a State or binding precedents. This way (Fichte model), the whole law system is reconstructed. However, this idealist and subjectivist approach comes up against stubborn facts: vulnerable persons who do not
have genuine autonomy of will also induce legal ties. Since representation mechanisms enable these people to be protected, the primacy of the rational agent is not called into question. It is sufficient to consider that the vulnerable person has the capacity to enjoy rights but not to exercise them. Except that there are cases where a party has no legal personality (a commercial company in formation or which has disappeared, a tribe, an animal, an organ of a public person such as a ministry or an independent administrative agency without legal personality, etc.). It becomes a question of legal personality and does not concern the theory of legal relationships. But again, we go round in circles: the question of legal personality is solved by a rule of law created by an institution formed by legal relationships. If we place the legal relationship in the first place from a logical point of view (and not from a chronological point of view because no origin can be found), what makes it possible to call it a law? There are not yet, by hypothesis, legal subjects, legal rules, legal institutions, and prerogatives. If it is not the subjects’ free will, what comes first? The question arises in other fields: if, in physics, we put infinitesimally small relationships first before any substance or wave, how can we ensure that they exist? Can there be relationships without relata or subjects? Ropes without anyone to pull on them? The question is bitterly debated in philosophy, but it is not excluded that we end up considering that the relationship is first and precedes its relata.\footnote{A. Marmordoro and D. Yates. 2016. The Metaphysics of Relations, Oxford: Oxford University Press, spec. J. Ladyman, p. 181: ‘Relationalism seems to have won and while spatiotemporal relations may not exist without material things there are not reducible to the intrinsic properties (locations in absolute space) of the latter’ and p. 196: ‘there may well be no simples, but rather entities that are fundamentally rela-

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ceremony, judicial rituals) involving acts of speech, gestures or symbols, and a neutral third party (a mayor, a judge, or a simple witness). An act of speech is not yet legal from a logical point of view because it does not appear to be sufficient to give rise to a relationship qualified as legal. Marriage is not just a performative act (the famous Austinian ‘yes’): it also requires an audience and a third party having authority (the mayor or a priest in certain countries). What makes a relationship legal is the whole device (presence of the public, a neutral third party, a rite), which makes it possible to make a long-lasting human relationship (difficult to undo). Does this definition imply that any rite performed publicly and with insiders is legal since it corresponds to the uncovered device? A purely religious rite of sacrifice to a God does not seem to create relationships between members of a group. Anthropologists debate the meaning of rites, and some recent authors believe (Houseman)\(^43\) that they serve to create, reinforce, modify or extinguish legal relationships (birth, death, and marriage rites). Without entering into this vast debate, it can be said that at least some rites affect relationships within a group. Not all rites may be about legal relationships, but all legal relationships might be the result from a ritual device. This device allows for tuning one’s emotions and the physical experience of changing relationships. What characterises modern law is not the absence of rite but its secularity (e.g. civil marriages or religious ceremonies in England, the Republican nationality ceremony in France, etc.). Sometimes the rite is reduced to its simplest expression: for example, the registration of a birth in a civil status register, which is sometimes even carried out in the hospital as a simple administrative formality. Thousands of contracts are concluded every day without the old rites (e.g. handing over the clod of earth of a field for the sale of a plot of land), but there is a sort of signing ceremony before a third party having authority (a lawyer, a notary) and a paper (today an electronic record) that keeps track of the meeting. The real difficulty today of the video-conference court hearing is to determine how to maintain some symbolism (robes, wigs, decorum of the rooms concerned), an audience (live or deferred), and a procedure (the rite).\(^44\) Justice generated by artificial intelligence can only be limited to assistance (which may be valuable) and cannot replace judges unless we imagine party avatars, an audience of avatars and judge avatars with wigs and robes. However, even there, the physical absence can probably prevent it from establishing lasting relationships (just think of

\(^{43}\) Houseman, above note 6.

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a video-conference marriage ceremony in which the two spouses would be at a distance, part of the public in the two places, the witnesses in a third place, and the mayor in a fourth one).

To put it another way, my argument is that there is no lasting relationship that is not legal. Law does not come from outside to govern human relationships because these relationships are, from the outset, long-lasting devices. Law is precisely this set of durable devices, some of which even provide the procedure for resolving internal conflicts. The norms decided or interpreted from within by the members of the relationship give direction to the legal relationship. The third party (judge, mediator, registrar, etc.) can end a legal relationship (e.g. divorce, insolvency proceedings) or modify it. Not everything is purely rational in the devices generating legal relationships, as bodies and emotions are involved (e.g. a handshake concluding a contract). However, some rationality is necessary to convince the parties of the appropriate adjudication of their conflict. Through these devices, human beings establish social bonds that replace the purely biological bonds between animals of the same species, which humans have lost (apparently due to their premature birth, a weakness that has proved in the long run to be a competitive advantage) and need to regain (just as they need to relearn to walk or swim). Today, we may also need to recover the lost relationships with other species and other aspects of the planet. The question arises whether legal arrangements generating legal relationships between humans and animal and plant species are feasible.

Two objections could be raised at this stage. First, the reference to a neutral third party with or without authority may imply the pre-existence of a legal order with institutions. Authority must have legitimacy that it can only derive from a legal order. However, we are not talking about a representative of a pre-existing institution or State but about a third party who has gained some authority through age and experience. In anthropology, it may be an initiate who organises the rite. He or she does not necessarily create a norm to settle a dispute and cannot claim to have power (such as a society without a State); he/she may even be a simple witness. He/she may play a neutral role as a mediator if there is a conflict or as an initiate if it is a rite of passage. A second objection might be raised: friendship is a lasting, not a legal relationship. Several responses can be given to this objection: Proust, who considered that no friendship lasts; certain religions, which set up friendship rites (see Middle Ages Christian Europe) by declaring them legal relationships; the consideration of friendship by the law (in terms of judges’ partiality, for example,

a judge cannot take up a case in which one of the parties is a friend). We can also refer to Foucault’s idea, which called for a relational law that would allow for the recognition of all human relationships and no doubt influenced the recognition of same-sex marriage.⁴⁶ According to the analytical approach, we can also consider that friendship is not a legal relationship because there is no device involving a public, a neutral third party, and elements of ritual.

A complex interplay of influences between different traditions (China is influenced by Japan, Russia, Germany, and the United States) resulted in the new 2020 Chinese Civil Code. The drafters of the Civil Code, supported by legal scholars, voluntarily chose to structure the Chinese Civil Code around the concept of legal relationships.⁴⁷ Anglo-American (Hohfeld and Hart) and Russian (Pashukanis) influences have been noted. Confucian influence can also be noticed. It shows that beyond a common basis in many legal systems, the notion of legal relationships is received and developed differently in different cultures. The double etymological meaning of relationship as a narrative and a connection in most Indo-European languages echoes a great cultural depth in other languages (in Arabic, Chinese, etc.). More precisely, one can detect a Romantic origin in the notion of legal relationships in the West, even if it is difficult to consider that romanticism forms a unity. Outside the West, the notion of legal relationship is acculturated from the depth of the term relationship, which enriches the term legal relationship. Thus, the Chinese notion of guanxi (minshi guanxi meaning ‘legal relationships’) is originally rather anti-legal since it describes tight social networks that can, in some cases, border on corruption. It translates the expression ‘legal relationship’ in the Civil Code to demonstrate China’s capacity to adapt to the West. Theories of legal relationships should, therefore, be combined with so-called cultural legal


⁴⁷ Z. Wei. 2016. 魏振瀛,《我们需要什么样的民法总则, 北方法学, 2016年第三期, 第5页 (‘What kind of General Principles of Civil Law do we need? A comparison with German Civil Law’, Legal Studies of the North, note 3, pp. 5–19): ‘The German civil law system is constructed with rights as the core, and the theory of legal relations reflected in it belongs to the stage of “rights relations”. China’s civil law is constructed with legal relations as its core, and the theory of legal relations reflected in it belongs to the stage of “rights, obligations and responsibilities”.’)
The aim is not to find a single, universal theory of legal relationships but a minimum of agreement between the existing theories to the point of being able to propose, in conclusion, a relational approach to law. Along the way, the notion of legal relationships can be confronted with the theories of justice because it is not a neutral notion from an axiological point of view.

I hypothesise that a legal relationship must have six elements so that it becomes binding per se: at least two parties; parties tending towards autonomy; a neutral third party who may have an authoritative role (judge, notary, witness, etc.); a form establishing the relationship (e.g. a family booklet where it exists, a written contract with amendments, a judicial file); a strong commitment (durability or at least seriousness); and a purpose. Prerogatives and norms are not elements of the legal relationship but consequences or the basis of it (in a dialectic). Juridical acts (performative speech) or legal facts may create, alter, or end a legal relationship, so they may be distinguished from the legal relationship. Legal acts and facts are chronologically first but remain on the threshold of the distinction between fact and law (but they have legal effects). In a way, it may be said that facts and legal acts are co-constructed by parties inside the legal relationship. Law begins with the legal relationship, which is binding in itself.

I will, therefore, argue the logical anteriority of the relationship in law by analysing the language used in the various legal systems (Chapter 1); the different theories of legal relationships developed in several traditions (Chapter 2); by establishing a typology and the possibility of retaining a standard body of solutions applicable to legal relationships while recognising significant differences linked to distinct cultures (Chapter 3); and by drawing the consequences of these solutions in terms of legal theory and theory of justice (Chapter 4).

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49 This brings the subject close to the Law and Literature and Law and Humanities scholarships; see for example: Short narratives on law: P. Goodrich and T. Zartaloudis. 2021. The Cabinet of Imaginary Laws, Abingdon and New York: Routledge.

50 See paragraph 130.