

From Conflict of Laws to Global Justice

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Abstract

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At the beginning of the 21st Century, conflict-of-laws theory lies in tatters. The determination of the applicable law could hardly be more disputed and insecure. At the same time, globalization requires a strong basis on which legal systems can be coordinated. It is therefore high time to reconsider the theory of choice of law.

In my analysis, I have focused on the three major players in the conflicts dilemma: individuals, states, and courts. I have tried to show how their roles have changed or should change in order to allow for more justice and global coordination.

I have started out with the individuals because they suffer most from the application of a certain law. Today, it is recognized in almost all legal systems that individual parties can choose the law governing their disputes. But this principle does not sit very well with traditional theory of conflicts, which is built on connections to states and state authority. That is why I have tried to give a theoretical justification for party autonomy.

Second, I have turned to the states because the reason we have conflicts is the existence of different countries with different legal systems. States claim application for their law either because a case arises in their territory, or because it is connected to their nationals, or because it touches upon their interest. In the modern world, though, it becomes difficult to establish these kinds of connections as social relations are

increasingly transcending state borders. In my second article, I have shown that the law of the states has reacted by “de-bordering” itself.

The final actor I have examined is the courts. One of the main problems of conflict of laws, in my eyes, is that courts consider themselves as organs of a certain state. I argue in my third article that this is a misconception and that their main preoccupation should be to render a just decision. If that would be accepted, they could very well turn out to be the key organizers of a more just global legal order.

Table of Contents

Acknowledgements	v
------------------------	---

Part 1:

Liberating the Individual from Battles between States	1
--	----------

<i>I. Introduction.....</i>	<i>2</i>
-----------------------------	----------

<i>II. The Gap in Conflicts Theory</i>	<i>5</i>
--	----------

1. The Growing Acceptance of Party Autonomy	5
---	---

2. Theoretical Questions	10
--------------------------------	----

3. Practical Questions	16
------------------------------	----

<i>III. The State-Centered Perspective of Conflicts Theory.....</i>	<i>20</i>
---	-----------

1. The Notion of Conflict of Laws	20
---	----

2. When do Conflicts Arise?.....	23
----------------------------------	----

3. Why Do We Apply Foreign Law?	26
---------------------------------------	----

4. Which Law do We Apply?	32
---------------------------------	----

<i>IV. A Theoretical Justification for Party Autonomy.....</i>	<i>38</i>
--	-----------

1. The Individual as the Center of the Conflicts Problem.....	38
---	----

2. Philosophical Underpinnings.....	42
-------------------------------------	----

3. A New Normative Theory: Relatively Mandatory Rules	45
---	----

4. The Reach of the Rule of Party Autonomy	49
--	----

<i>V. Practical Effects of the New Paradigm</i>	<i>51</i>
---	-----------

1. Effects on the Validity and the Reach of Choice-of-Law Clauses.....	51
--	----

2. Effects on Conflict of Laws in the Absence of a Choice by the Parties.....	56
---	----

<i>VI. Summary.....</i>	<i>62</i>
-------------------------	-----------

Part 2:

De-Bordering of the State and Conflict of Laws65

I. The De-bordering of the State..... 66

- A. The Metaphor 66
- B. The Borderless Civil Society 67
- C. The Legal Side of the De-Bordering of the State..... 69

II. Do Laws Have Borders? 71

- A. Territory as a Connecting Factor in Private International Law 71
- B. Joseph Story and the Doctrine of Territoriality..... 72
 - 1. Sovereignty as the Basic Tenet..... 72
 - 2. Collision with Reality 73
 - 3. Territoriality not Demanded by International Law 76
- C. Constitutional Territoriality 78
- D. Soft Territoriality 81
 - 1. Friedrich Carl von Savigny and the Seat of the Relationship..... 81
 - 2. Methodological Problems 82
 - 3. Auto-Limited Laws 83
 - 4. Problems in Cases with Multiple Connections..... 84
 - 5. Problems due to Dematerialization of the Modern World..... 86
- E. A Brief History of the Territorial State..... 87
- F. The Continuing Legacy of Territoriality in a Globalized World..... 94

III. Is Law Personal? 95

- A. Mancini and the System of Personal Law 95
- B. Terminological Remarks on Nationality, Citizenship, and Domicile..... 98
- C. Sociological Facts: Multi-Citizenship, Transnational Communities, Global Cities, and Mobile Persons 100
- D. Philosophical Justification: The Concept of the State as Social Contract 103
- E. The Rise and Fall of Personal Laws 105
- F. The Remaining Importance of Personality..... 109
 - 1. Loyalty and Solidarity..... 110
 - 2. Challenges and Limits..... 111

IV. Is Law Bound to Interests? 113

- A. The “Ptolemaic Turn” by Interest Analysis..... 113
- B. Separation of Powers and Democracy..... 114
- C. The Discontents 115
- D. Disinterested Law and the Disintegration of State Interests..... 118

E. Historical Framework and Concept of the State.....	121
F. The Remaining Importance of Interest Analysis	124
V. <i>A New Conflicts Methodology</i>	126
A. Transnational Policy Making through Choice-of-Law Rules	126
1. Environmental Conflicts Law.....	127
2. Protection of the Weaker Party.....	128
3. Making Global Trade Work	129
B. Unbound Law	131
1. Thesis and Examples.....	131
2. Exit, Voice, and Choice	134
3. The Limits.....	134
VI. <i>The State as a Rule-Provider</i>	135
A. A New Concept.....	135
B. The Historic Context	136
C. Other Rule-Providers.....	137
VII. <i>Conclusion</i>	138

Part 3:

A New Role for the Judge in Conflict of Laws: Building a Global Legal Order141

<i>Preliminary Question: Is Conflict of Laws Dead?</i>	142
I. <i>The (Sad) State of Affairs in Choice of Law</i>	144
A. The Rift Going through Conflicts Systems Around the World	144
1. The United States Against the Rest of the World	145
2. Differences Within Both Camps.....	146
B. Consequences for Individuals: The Example of “Limping Legal Relationships”	147
C. Attempts to Overcome the Problem	151
1. Uniform Substantive Law	151
2. Uniform Conflicts Rules	152
3. A Realistic Evaluation	153
II. <i>What Should a Judge Do When Faced With a Conflict of Laws?</i>	153
A. The Dilemma	153
B. Possible Solutions	154
1. Extending an Existing Conflicts Approach World-Wide	154
2. Developing a Completely New Approach.....	155
3. Lex Propria in Foro Proprio	156
4. Not Apply Law but Equity	158

<i>III. A New Proposal</i>	160
A. The Triangle Between the Parties, the Court, and States	161
B. The Answer by Current Conflicts Methodology.....	162
C. A Critique	165
D. The New Paradigm: Judges as Administrators of Global Law	167
<i>IV. Justification</i>	169
A. Disregarding the Forum’s Conflicts Law, Not Disregarding the Law	169
B. The Function of the Judge: Instrumentality in the Hands of the Legislature or Servant of Justice?.....	172
1. Separation of Powers and Legal Theory	173
2. The Limits of Democracy.....	176
3. Juxtaposition of Courts and Administrative Agencies	177
C. From Local Justice to Global Justice.....	179
D. Building a Global Legal Order	181
1. Notion Explained.....	181
2. Why States are not Well-Positioned for the Task	183
3. States as Rule Providers and Global Rule of Law	186
4. Is Judging Part of “Global Governance”?	188
5. Judges and Arbitrators in the Global Legal Order	189
E. Counter-arguments	192
1. Theoretical vs. Empirical Decision-Making.....	192
2. Judges Not Apt	196
3. States Take an Interest in the Resolution of Private Disputes.....	199
4. U.S. Conflicts Law.....	200
F. Examples of Judicial Global Legal Ordering	204
1. United States	205
2. France	207
3. Conclusion.....	209
<i>V. Implications</i>	210
Implication No. 1: Respect the Parties Choice Regardless of The Choice-of-Law Rules of the Forum.....	210
Implication No. 2: Give International Conventions a Paramount Role Regardless of the Forum’s Ratification	213
Implication No. 3: Compare Conflicts Rules in Order to Find the Suitable One for Global Legal Ordering	215
Implication No. 4: Intermediate Law is Possible.....	221
Implication No. 5: Use Global Standards of Justice When Applying Any (Home or Foreign) Law	222
<i>VI. Where to Go Next</i>	228
1. A Recipe for Judge-Made Universal Conflict Rules.....	228
2. The Need for an International Conference of Judges.....	230

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Halle (Saale), Germany

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To Eva and Paul

Liberating the Individual from Battles between States

Justifying Party Autonomy in Conflict of Laws

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Current theories of conflict of laws have one common feature: They all consider the question of the applicable law in terms of a conflict between states. Legal systems are seen as fighting with each other over the application to a certain case. From this perspective, the goal of conflicts methods is to assign factual situations to the competent rule maker for resolution. Party autonomy presents a problem for this view: if individuals are allowed to choose which law will be applied to their dispute, it seems as if private persons could determine the outcome of the battle between states – but how is this possible?

This article tries to give a theoretical solution to this puzzle. The idea is that conflicts theory has to be recalibrated. Its goal is not to solve conflicts between states, but to serve the individual, its needs and wants. Through this shift of focus, it becomes not only possible to justify party autonomy, but also to answer a number of practical questions raised by it. Furthermore, a new normative category, so-called “relatively mandatory rules”, will be proposed. Finally, some important implications that the new approach may have for conflict of laws in general will be discussed.

I. Introduction

When we think about the conflict of laws, we always think in terms of states and states' relations. Using the traditional method, for instance, we are looking for the state which has the closest connection to the situation, in which the case has its "seat".¹ Under a more modern paradigm, we analyze whether a state has an "interest" in the case before applying its law.²

While it is certainly true that the issue of conflicts arises from the fact that the world is composed of territorial states having separate and differing legal systems³, the solution to the problem is not necessarily to be found in seeing every case through the lens of states' territories or states' interests. What we tend to forget, thereby, is that in conflicts we are dealing, as in every other field of the law, with human relations. It might therefore be preferable to include other factors as well.

The idea can be illustrated by the principle of party autonomy. Within the last decades, it has taken over a steadily growing field of the law. More and more it is recognized that the parties are free to choose the applicable law.

While writers on conflicts have not overlooked this fact, they have failed to provide a theoretical explanation why the parties are allowed to choose the applicable

¹ See Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws* § 346 and § 360 (2d ed. 1880, transl. Guthrie, reprint Rothman 1972). This approach is still prevalent in Europe, see, e.g., Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* 310-311 (9th ed. 2004); Pierre Mayer & Vincent Heuzé, *Droit international privé* 83 (8th ed. 2004); José Carlos Fernández Rozas & Sixto Sánchez Lorenzo, *Curso de Derecho Internacional Privado* 399 (2d ed. 1993); Tito Ballarino, *Manuale Breve di Diritto Internazionale Privato* 3 (2002).

² See Brainerd Currie, *Selected Essays on the Conflicts of Laws* 190 (1963).

³ Restatement (Second), *Conflict of Laws*, § 1 (1971).

law. The possibility of a choice-of-law clause is mostly remarked as a side-issue, or as problematic.⁴ Although verbally recognized, party autonomy has always stayed a maverick within the edifice of conflicts theory.

Indeed, the freedom of the parties to choose the applicable law must cause theoretical headaches to any serious positivist. If the law that governs a legal relationship is objectively determinable by legal analysis, how can the parties be free to choose another law as applicable? If states' interests determine the choice-of-law process, why can the parties change the outcome? Why are they allowed to deselect even mandatory rules of the otherwise applicable law⁵? Does that not mean that they have legislative power?

Of course, one can try to dissolve these perplexities with the "killer argument" that the parties are free to choose the applicable law because the states' conflict rules allow them to do so. But this leaves open the question *why* the states give them this liberty. Also, it is far from clear what it means if a law does not apply by authority, but because of a choice by private parties. Does this make a difference as to the application of the law, its construction and interpretation? What is missing is an exact explanation of party autonomy, as a matter of policy, but also as a matter of legal theory.

Such reflections, though principally done from an abstract perspective, are not only of theoretical interest. On the contrary, they are of highest importance in practice.

⁴ For instance, Lea Brilmayer, *Conflict of Laws* 241 (1995) argues in the context of choice-of-law clauses that "standing by itself, consent may not be adequate". Luther McDougal, Robert L. Felix & Ralph U. Witten, *American Conflict of Laws* (2001), mention party autonomy only on p. 505 and immediately stress that it is subject to important limits. Larry Kramer is equally suspicious of party autonomy, although he proposes a canon requiring the courts to honor the parties' choice of law in contracts, see Larry Kramer, *Rethinking Choice of Law*, 90 *Col. L. Rev.* 277, 330 (1990). See also Russell J. Weintraub, *Commentary on the Conflict of Laws* 451 (4th ed. 2001) ("... party autonomy rules either go too far or not far enough").

⁵ See *infra*, under II 1.

First, they will help to clear the significance of a private choice of law, its extent and effects.⁶ Second, they might also change the way in which we approach the conflicts question when the parties have not chosen the applicable law: If we were to focus more on the parties involved in a case and not on the states, we might adopt a more individualized approach to the conflicts problem in general.⁷

But let us begin from the start. In this article, I will try to show why current conflicts theory is unable to account for party autonomy. After having outlined the rise of party autonomy in practice (part II), I will study the different concepts and instruments that are used in today's conflicts theory (part III). I will show that they are all based on the idea that conflicts of laws are battles between states and are therefore unable to grasp the increasing influence of the parties on the applicable law. As a contrast, I will propound a theory of conflicts in which the individual takes center-stage and which leads to a new category of legal rules, which I will call "relatively mandatory rules" (part IV). In the last part, I will try to indicate some implications of the new approach for conflicts in practice (part V).

Before I start, let me briefly say what I will not do in this article. I will not explore the limits to party autonomy. Most writers have focused on those limits and tried to understand thereby the nature of party autonomy.⁸ But there are two problems with this approach: First, the limits to party autonomy are mostly idiosyncratic to every legal system. By focusing on those limits, it is therefore not easy to discern the general nature of party autonomy as a concept that is important for conflicts theory. Second, to define party autonomy by its limits resembles the definition of a vacuum as being free from

⁶ See *infra*, under II 3 and V 1.

⁷ See *infra*, under V 2.

⁸ See, e.g., Mc Dougal, Felix & Witten, *supra* note 4.

atmosphere. But I think that party autonomy is more than a vacuum. It is an important legal principle that has its roots in the recognition of individual freedom. That is why I will take a different approach and try to explain party autonomy not as being void from something, but as justified in its own right.

But first, we have to explore more in detail the problems of today's conflicts theory.

II. The Gap in Conflicts Theory

1. The Growing Acceptance of Party Autonomy

A revolution has taken place in the conflict of laws. I am not talking about the American conflict-of-laws revolution, which dates back to the nineteen sixties and shifted the focus from factors such as territory and citizenship to the interests of the states involved.⁹ On a global level, the true revolution has been the growing acceptance of party autonomy as a way to determine the applicable law.

Within the last decades, party autonomy has become the one principle in conflict of laws that is followed by all jurisdictions.¹⁰ Although there are many precursors to party autonomy in history¹¹, the principle has never been as widespread in application as it is today. It has been said that “perhaps the most widely accepted private international law rule of our time is that the parties to a contract are free to stipulate what law shall govern

⁹ See the writings of its main proponent, Brainerd Currie, *supra* note 2.

¹⁰ See generally Symeon C. Symeonides, General Report, in: Symeonides (ed.), *Private International Law at the End of the 20th Century: Progress or Regress?* 38-40 (1999).

¹¹ In France, party autonomy dates back as far as the 16th Century, see Mayer & Heuzé, *supra* note 1, at 509. See also Eugene F. Scholes, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, *Conflict of Laws* 948 (4th ed. 2004).

their transaction.”¹² The Institute of International Law calls party autonomy “one of the fundamental principles of private international law”.¹³ More and more states allow the parties to cut the Gordian knot of conflict of laws by choosing the applicable law themselves. The spectacular rise of party autonomy can also be seen from the development of the Restatement on the Conflict of Laws: While the chapter on contracts of the first Restatement did not contain any provision allowing the parties to stipulate the governing law¹⁴, the second Restatement made it the general principle of this chapter.¹⁵

The principle of party autonomy is far from being applicable to all fields of the law. Yet its scope is increasingly extended. It is now applied in areas where it was unthinkable before.¹⁶ One field that in the history has resisted party autonomy are all questions related to the status of a person. The traditional idea is that the status needs to be determined objectively and therefore the applicable law cannot be changed at will. Today, however, legal systems have allowed private persons to influence the law governing such questions as their name¹⁷, their capacity to contract¹⁸, or the matrimonial regime¹⁹. Party autonomy is now also followed with regard to successions: Under the U.S. Uniform Probate Code, the testator is allowed, within certain limits, to choose the law that will be applied with regard to the meaning and legal effect of a deed or will²⁰.

¹² Russell J. Weintraub, Functional Developments in Choice of Law for Contracts, 187 *Recueil des Cours* 239, 271 (1984-IV).

¹³ Institut of International Law, Session of Basel 1991, Resolution on the autonomy of the parties in international contracts between private persons or entities, 2d consideration, 64 II *Yearbook* 383 (1992).

¹⁴ See Restatement (First), Conflict of Laws, §§ 311-331 (1934).

¹⁵ See Restatement (Second), Conflict of Laws, § 187 (1971).

¹⁶ On the following examples see Symeonides, *supra* note 10, at 56-57.

¹⁷ See, e.g., Art. 37 (2) of the Swiss Private International Law Act (1987).

¹⁸ See Restatement (Second) on the Conflict of Laws, § 198 (1).

¹⁹ See, e.g., Art. 52 of the Swiss Private International Law Act; Art. 15 (2) of the Introductory Law to the German Civil Code (EGBGB). For French case law, see Mayer & Heuzé, *supra* note 1, at 771.

²⁰ Uniform Probate Code, § 2-703 (2004). The notion “governing instrument”, which is used there, includes deeds and wills, see *id.*, § 1-201 (18).

Italy, Québec and Switzerland also allow the testator to choose the applicable law,²¹ and a Hague Convention proposes to make this principle an international rule²².

The will of the individual also has gained significance in another area in which it was held to be functionally excluded before: tort law. For a long time, it was thought that party autonomy could not play a role in torts because the two sides involved typically have no connection to each other. Increasingly however, tort victims are allowed to choose unilaterally the applicable law for their claim after the facts arose.²³ The same is true in products liability cases.²⁴ This is a special kind of party autonomy in two regards: first, because the choice is made only after the dispute arose, and second, because it is only one party that can choose the applicable law. The possibility of unilateral choice is designed to favor one side, the victim. Nevertheless, it is a case in which the will of a private individual determines the law that the judge will apply.

Party autonomy has also become an important procedural principle. In many countries, a court will apply its own law if the parties argue their case based on that law, even if under the conflict rules of the forum another law is applicable.²⁵ More and more,

²¹ Art. 46 (2) 1 of the Italian law No. 218/1995; Art. 90 (2), 91 (2) of the Swiss Private International Law Act; Art. 3098 (2) of the Civil Code of Québec.

²² Convention on the Law Applicable to Succession to the Estates of Deceased Persons from August 1, 1989, Art. 5 (1) 1.

²³ See, e.g., Art. 40 (1) of the Introductory Law to the German Civil Code (EGBGB); Art. 62 (1) 2 of the Italian law No. 218/1995. This solution also applies in Hungary, the Netherlands, Poland and Venezuela, see Symeonides, *supra* note 10, at 58.

²⁴ See Art. 63 of the Italian law No. 218/1995; Art. 135 (1) of the Swiss Private International Law Act; Art. 3128 of the Civil Code of Québec. See also Hague Convention on the Law Applicable to Products Liability from October 2, 1973, Art 6.

²⁵ See for French law: Cour de cassation, Civ. 1re, decision of December 4, 1990, Soc. Coveco et autres c. Soc. Vesoul transports et autre, Civ. 1re, decision of December 4, 1990, *Revue critique de droit international privé* 558, 559 (1991); for English law : I Dicey & Morris on the Conflict of Laws 221, para 9-003 (Lawrence Collins ed., 13th ed. 2000). For U.S. law: Scoles, Hay, Borchers & Symeonides, *supra* note 11, at 953, footnote 4.

parties are also allowed to explicitly choose the law that will be applied to their dispute.²⁶ Like in the case of tort law and products liability, this is an after-the-facts choice. Yet the peculiarity of procedural choice of law is that the parties can circumvent the normally applicable choice-of-law rules altogether. This makes clear how much the solution to the conflicts problem has become subject to the parties' intentions.

It is true, however, that the parties are often limited in their choice to certain legal systems. For instance, in the products liability setting the victim only has the choice between the law of the country in which the manufacturer has its establishment or residence and the law of the country in which the victim acquired the product.²⁷ In the marriage case, the parties typically can choose only between the law of the state of which one of them is a citizen or in which both are residing, or for immovables the law of the state where they are located.²⁸ In the succession case, the choice is mostly limited by the citizenship and the domicile of the deceased.²⁹

Yet more and more, parties are also allowed to choose legal systems that have no connection to them or to the facts of their dispute. That is the case in the classic area in which party autonomy applies, i.e. in contract law. The old rule was that the law chosen by the parties must have some connection to the parties or the case.³⁰ It has been replaced

²⁶ See, e.g., French Cour de cassation, Civ. 1re, Roho c. Caron et autres, decision of April 19, 1988, *Revue critique de droit international privé* 68, 69 (1989). The condition is that the parties can freely dispose of the rights that are the subject of controversy.

²⁷ See Art. 63 of the Italian law No. 218/1995; Art. 135 (1) of the Swiss Private International Law Act; Art. 3128 of the Civil Code of Québec.

²⁸ See, e.g., Art. 15 (2) of the Introductory Law to the German Civil Code (EGBGB).

²⁹ Art. 46 (2) 1 of the Italian law No. 218/1995; Art. 90 (2), 91 (2) of the Swiss Private International Law Act; Art. 3098 (2) of the Civil Code of Québec. But see § 2-703 of the Uniform Probate Act, which does not provide for such a limit.

³⁰ This view can be found, e.g., in § 1-105 UCC before its revision in 2001. It is still followed by the Restatement (Second), Conflict of Laws, § 187 (2), but only with relation to issues which the party could not have resolved by an explicit provision in their agreement. For other issues, there is complete freedom of

with the principle that the parties are allowed to choose the law of a state which has absolutely no relationship whatever to either of them or to the case.³¹

One particularly salient feature of party autonomy is that it allows the parties to deselect even the mandatory rules of a legal system.³² The limits to party autonomy are not drawn by mandatory law, but by public policy. Of course it is true that public policy puts up some important restrictions. But one could consider those cases as being outside the scope of application of party autonomy. Within the field of party autonomy, the will of the parties is unrestricted by mandatory law.

Another important feature of party autonomy is that within its realm, it trumps all other conflict rules. Whether under a conflict system a contract would be normally governed by the law of the state in which the contractual obligations are to be fulfilled or in which one of the parties has its domicile or seat does not matter as long as the parties have made an explicit choice. Party autonomy, thus, prevails over other conflicts rules, which are denigrated to mere default rules. Within its field, party autonomy is the master.

The principle of party autonomy is so firmly entrenched in today's law-making that it is even applied to the validity of the choice-of-law clause itself. There are considerable logical arguments against allowing the parties to "bootstrap" themselves and

choice, see Restatement *id.*, § 187 (1). On the meaning of this paragraph see *infra*, text accompanying note 44.

³¹ See, e.g., revised § 1-301 (c) UCC, which is explicitly motivated by "emerging international norms" (see Summary of Changes); Art. 3 (1) 1 of the European Convention on the law applicable to contractual obligations (Rome 1980) (hereinafter: the Rome Convention); Art. 7 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico 1997). See also for a peculiar field of the law Uniform Computer Information Transactions Act (UCITA), § 109 (a). On the UCITA and the revision of the UCC see William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. Rev. 697 (2001).

³² See Scoles, Hay, Borchers & Symeonides, *supra* note 11, at 960-961; Mayer & Heuzé, *supra* note 1, at 516; Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht* 654 (9th ed. 2004).

determine the applicable law to their own choice-of-law clause.³³ Yet such freedom is explicitly recognized in European law.³⁴ This shows how important party autonomy has become to the legislator. Instead of determining the applicable law objectively in case of doubt regarding the validity of the choice-of-law clause, it defers to the latter, presuming its validity.

In sum, party autonomy has become the most important principle in conflict of laws. This is underscored by the fact that Article 187 of the Second Restatement on Conflict of Laws, which provides for the liberty of the parties to choose the applicable law, is followed more than any other provision of the Restatement.³⁵ Why, it may be asked then, does party autonomy take such a marginal place in current conflicts doctrine? Why is the principle that is most applied in practice not discussed much in theory? The reason is certainly not that the concept would be so easy to grasp. On the contrary, party autonomy raises some serious theoretical questions, as we will see now.

2. Theoretical Questions

Joseph H. Beale, the author of the First Restatement on Conflicts, argued against party autonomy that allowing the parties to choose the applicable law would give them “permission to do a legislative act”. Freedom of choice of law would practically make “a

³³ O. Kahn-Freund, *General Problems of Private International Law* 196 (1976). See also *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5, 7, footnote 2 (1st Cir. 1981) (this would mean to be “putting the barge before the tug”).

³⁴ Under the Rome Convention, *supra* note 31, the existence and validity of the choice-of-law clause is determined under the chosen law. This is the combined effect of Art. 3 (4) and Art. 8 (1) of the Convention. See Mario Giuliano & Paul Lagarde, *Report on the Convention on the law applicable to contractual obligations*, J.O.C.E. 1980 No. C-282, p. 1, comment No. 1 on Article 8; see also Dicey & Morris, *supra* note 25, Vol. II, at 1222, para. 32-077, and at 1232, para. 32-100. For a different view, see Symeon C. Symeonides, Wendy Collins Purdue & Arthur T. von Mehren, *Conflict of Laws* 325 (1998) and Scoles, Hay, Borchers & Symeonides, *supra* note 11, at 956 (claiming that Art. 3 (4) would refer to the *lex causae*).

³⁵ See Symeonides, Purdue & von Mehren, *supra* note 34, at 318; Scoles, Hay, Borchers & Symeonides, *supra* note 11, at 980.

legislative body of any two persons who choose to get together and contract”.³⁶ Consequently, the First Restatement did not include any provision recognizing such freedom. The second Restatement took a sharp u-turn and claimed that Beale’s view “is now obsolete and in any event, falls off wide the mark”.³⁷ It says that party autonomy would be justified because it is the forum which allows the parties, through its conflict rules, to determine the applicable law.³⁸ But that leaves open why the conflict rules of the forum should give such widespread powers to the parties. Does it not thereby place them in a position above the law? Does it not give what the French call “l’autonomie de la volonté”,³⁹ an autonomy of the will?

One possible answer to this question is that there would be a general principle of freedom of contract which allows the parties to choose the applicable legal system and which precedes national law. This view is not so strange as it may seem at first glance. The principle that the parties are free to enter into contracts and are bound by their respective choices is so old that it is indeed a prime candidate for a universal principle of law. For instance, Justice Marshall called it a “universal principle of law” that “in every forum a contract is governed by the law with a view to which it was made”.⁴⁰ One could also cite a famous provision of the French Civil Code which recognizes that agreements have a binding force like laws. Article 1134 (1) reads: “Agreements lawfully entered into take the place of the law for those who have made them”.⁴¹

³⁶ Joseph H. Beale, II *A Treatise on the Conflict of Laws* 1080 (1935). For a similar view, see Kahn-Freund, *supra* note 33.

³⁷ Restatement (Second), *Conflict of Laws*, § 187, comment e.

³⁸ Restatement, *id.*

³⁹ See, e.g., Kahn-Freund, *supra* note 33, at 195; Mayer & Heuzé, *supra* note 1, at 511.

⁴⁰ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825).

⁴¹ “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites”. Translation taken from the official web-page of the French government <www.legifrance.gouv.fr> (last visited on November 29, 2005).

It is interesting to contrast this view with the one of Beale. However, such a discussion would end up in a typical hen and egg-problem: What was earlier, the freedom to enter into binding agreements or the provision of state law that recognizes it? The answer is troubling from a logical point of view. Also, a meta-legal principle of freedom of choice of law is hard to reconcile with the freedom the legislator has under the view of positivism to adopt any law that it wants. It is clear that the state remains free to restrict this principle, at least in its own courts.⁴²

Another theory is that party autonomy means nothing more than to allow the parties to incorporate the rules of law of a state into their agreement. This view once prevailed on the continent⁴³ and has influenced Article 187 (1) of the Second Restatement⁴⁴. According to it, the parties can choose the rules of another legal system, but only insofar as the rules of the otherwise applicable law allow them to do so. What law they designate is not important. Indeed, the parties could as well incorporate the standard terms and conditions of an industry's association or legal rules that are not in force anywhere, like the rules of the Roman twelve tables⁴⁵. But this theory downplays the importance of party autonomy too much.⁴⁶ Especially, it does not elucidate why under this principle the parties are free to deviate even from mandatory rules of the otherwise applicable law. Moreover, it cannot explain why party autonomy is a conflict-of-laws rule

⁴² A different view might be taken in an arbitral court, see for the specific context of arbitration agreements Matthias Lehmann, A Plea for a Transnational Approach to Arbitrability in *Arbitral Practice*, 42 *Col. J. Transnat'l L.* 753, 770-771 (2004).

⁴³ See George Melchior, *Die Grundlagen des deutschen Internationalen Privatrechts* 500 (1932). See also Kahn-Freund, *supra* note 33.

⁴⁴ See Restatement (Second), *Conflict of Laws*, § 187 (1), comment c.

⁴⁵ See the provocative remark by Pierre Mayer, in: *Transnational Rules in International Commercial Arbitration* 44 (International Chamber of Commerce ed., 1993).

⁴⁶ On the difference between reference to foreign law as a choice of law and incorporation of provisions of a foreign law into the contract see also Dicey & Morris, *supra* note 25, Vol. II, at 1226-1227, para. 32-086 – para. 32-088.

at all. For instance, the Second Restatement on Conflict of laws underlines that Article 187 (1) “is a rule providing for incorporation by reference and is not a rule of choice of law”.⁴⁷ However, if that is true, it may be permitted to ask why this provision was included in a Restatement on the “Conflict of Laws”?

A different view strives to avoid any radical solution, neither recognizing complete freedom to choose the applicable law nor denying the existence of party autonomy. It views the will of the parties as an element that helps to “localize” the contract within a specific legal system.⁴⁸ Although most of the time party autonomy prevails, there might be other factors as well which mandate a different localization than the one preferred by the parties. This approach has the advantage of bringing party autonomy into line with classic conflict-of-laws theory. Its problem, however, is that it cannot explain why it is more and more accepted in legislation that the parties can even choose a legal system that has no connection whatever to the dispute.⁴⁹ To say that they would “localize” their contract in these cases is a mere fiction.

A very common theory holds that the principle of party autonomy protects the reasonable expectations of the parties.⁵⁰ This theory correctly assumes that the parties have a vital interest in the outcome of the choice-of-law process. To cure any uncertainties about the applicable law, the theory proposes that parties should determine themselves the law that they want to be applied. But the argument is somewhat circular:

⁴⁷ Restatement (Second), Conflict of Laws, § 187, comment c.

⁴⁸ Henri Batiffol, *Subjectivisme et Objectivisme dans le droit international privé des contrats*, I *Mélange offerts à Jacques Maury* 39, 53 (1960).

⁴⁹ See the references *supra* note 31.

⁵⁰ See, e.g., Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 *N.Y.U.L. Rev.* 267, 283 (1966); Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 *U.Kan.L.Rev.* 471 (1989); Amos Shapira, *Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?*, 26 *Brook. J. Int'l L.* 199, 203 (2000). See also Restatement (Second), Conflict of Laws, § 187, comment e. The need for predictability is also stressed by Russell J. Weintraub, *supra* note 4, at 449.

if the parties were not allowed to choose the applicable law, than they could not expect their agreement to be taken into consideration; they therefore would have no “reasonable expectation” that the law chosen by them will be applied. Moreover, predictability could be secured also in other ways than by party autonomy. For instance, if courts adopted the same choice-of-law rules, parties would also be able to predict which law will be applied to their dispute. The applicable law would even be more predictable for two reasons: first, because choice-of-law clauses are often subject to questions about their validity, and second, because the conflict rules normally applicable from a general point of view could not be trumped by some coincidental choice-of-law clause. The theory which nevertheless favors party autonomy as a means to secure predictability is of course based on the experience that the states are unable to agree on uniform choice-of-law rules. But it does not provide an explanation why it is easier for the states to accept freedom of choice of law of the parties instead of universal rules on conflicts. Finally, it is far from clear why the need for predictability should allow the parties to deviate even from mandatory laws.⁵¹ States do not ordinarily allow parties to contract out of, let’s say, securities law, just to make their private relation more stable.

There might be other possible justifications for party autonomy. For instance, one could argue that the states would expect not to forgo anything in the process of individual choice of law because their law would be chosen as often as the law of other states. The idea is to view party autonomy as a kind of lottery in which one state’s law has an equal chance to be chosen as another’s. Yet such an assumption, if it was ever held by any state, would be wrong. Parties have clear preferences for certain laws. For instance, it is

⁵¹ For similar doubts, see Kramer, *supra* note 4. For doubts based on a “rule of validation” see Weintraub, *supra* note 4, at 449.

well known that in financial transactions choice-of-law clauses regularly point to English law or the law of New York as the applicable rules of law.⁵² In international arbitration, parties often submit their dispute to Swiss or French law. In international maritime and insurance transactions, parties have a tendency to choose English law.⁵³ Thus some states necessarily “lose” in the process of individual choice of law, if one sees non-application of their law as a disadvantage to them. It needs to be explained why states would agree to such a process.

Maybe the state’s common interest in international trade and commerce could be a reason. One could argue that states would honor freely negotiated choice-of-law clauses in order to secure the conditions necessary for the functioning of international commerce, which benefits them even if at times their law is not applied. There are some indications for this view in American case law.⁵⁴ However, this argument would not explain why the parties are given freedom to choose the applicable law even in areas that have no connection at all to trade and commerce, like marriage or tort law.⁵⁵

⁵² See, e.g., Kimmo Mettälä, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 *Int’l Law* 219, 222 (1986)

⁵³ See Dicey & Morris, *supra* note 25, Vol. II, at 1218-1219, para. 32-063 (noting that the choice of English law in insurance and maritime contracts has gained worldwide acceptance).

⁵⁴ See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S.Ct. 1907, 1912-1913 (1972) (“The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts”); cited by *Scherk v. Alberto Culver*, 417 U.S. 506, 519, 94 S.Ct. 2449, 2457 (1975); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 629, 105 S.Ct. 3346, 3355 (1985). Although *Zapata* concerned the validity of a choice-of-forum clause in favor of the English courts, its holding also affects choice of law since the Supreme Court concluded that the English courts would interpret the choice of the English forum as a choice of English law, see 407 U.S. 1, 13, 92 S.Ct. 1907, 1915, footnote 15. The case is therefore often cited to support the validity of choice-of-law clauses. See, e.g., *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1362 (2d Cir. 1993); *Bison Pulp & Paper Ltd. v. M/V Pergamos*, 1995 WL 880775 (S.D.N.Y. 1995); *Allen v. Lloyd’s of London*, 94 F.3d 923, 928 (4th Cir. 1996).

⁵⁵ See *supra* under II 0.

Given all the difficulties to justify party autonomy as a legal principle, an important German conflicts scholar has described party autonomy as a “stopgap”, which applies simply because one would have no other satisfactory conflicts rule to govern.⁵⁶ That is indeed an open admission of failure. How can the conflicts rule most accepted all over the world be a mere “stopgap”? Should the principle which trumps all other conflicts rules be nothing more than a makeshift? The puzzlement with which experienced theorists react to party autonomy testifies to the fact that there is something deeply wrong with conflicts theory of our days. It is simply not able to account even for the fundamental principle that is used most frequently to solve conflicts in practice.

3. Practical Questions

As indicated before, to justify party autonomy is not merely of theoretical interest. It is also relevant for a number of important questions in practice.

First, the scope of the choice of law: Does it also include the mandatory rules of the law chosen? This is a question of paramount practical interest. Do parties have to take into account the mandatory laws of the chosen legal system? Or can they just exclude those provisions, since they would not be applicable otherwise? And if so, are parties to be presumed to have excluded the mandatory rules, or not?

There is no easy answer to these questions. An old theory held that the chosen law applies in toto, including its mandatory provisions.⁵⁷ Yet one has somehow an uncomfortable feeling that, for instance, Swiss antitrust law should apply to a sales

⁵⁶ Gerhard Kegel, *Internationales Privatrecht* 208 (1st ed. 1960). See also Kegel & Schurig, *supra* note 1, at 653.

⁵⁷ See Kegel & Schurig, *supra* note 1, at 155; Anton K. Schnyder, *Wirtschaftskollisionsrecht*, 248-255, and for a critique *id.*, at 255-260.

contract between an American company and a German company simply for the reason that the parties chose to submit their agreement to this law. This uncomfortable feeling stems from the fact that mandatory law normally is applicable irrespective of the will of the parties. Mandatory law, it seems, is therefore outside of the realm of party autonomy. On the other hand, it appears inevitable that the parties must be subject to some mandatory rules. If they were free to deselect the otherwise applicable law and at the same time needed not to include into their choice the mandatory rules of the chosen law, they could avoid mandatory rules altogether.

A second question arising from the first is whether the parties are forced to choose any applicable law at all. Since they are absolutely free to determine the rules to be applied, it is not at all evident that they should have to choose a legal system of a state. One could also imagine that they would be able to write a sort of self-sufficing contract, a “contract without a law”,⁵⁸ or that they could resort to some rules not made by the state, like a “new law merchant” or “lex mercatoria”⁵⁹.

Another question is what happens if the parties choose a law under which their contract, or part of it, is invalid.⁶⁰ Since the invalidity of a contract is always based on mandatory law the question is related to the first; but it is not identical to it because not

⁵⁸ French: “contrat sans loi”, see Mayer & Heuzé, *supra* note 1, at 514.

⁵⁹ From the rich literature on the subject, see, e.g., Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, 2 *Current Law and Social Problems* 128-153 (1961); Berthold Goldman, 9 *Frontières du droit et lex mercatoria*, *Archives de la philosophie du droit* 177 (1964); Ursula Stein, *Lex Mercatoria – Realität und Theorie* (1994); Klaus P. Berger, *The Creeping Codification of the Lex Mercatoria* (1998); Friedrich K. Juenger, *Lex Mercatoria and Private International Law*, 60 *La. L. Rev.* 1133 (2000).

⁶⁰ See Restatement (Second), *Conflict of Laws*, § 187, comment e. Cases in which the parties have chosen a law that invalidates their contract or a contractual clause are legend, see, e.g., *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 769 (C.A.D.C. 1992) (invalidating a clause in a cruise ticket under the Italian law stipulated in the ticket); *Moyer v. Citicorp Homeowners Inc.*, 799 F.2d 1445 (11th Cir. 1986) (invalidating an interest rate-clause under a usury law of Georgia because Georgia law had been chosen); *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 823 (6th Cir. 1977) (holding a termination clause in a dealership contract to be without legal effect on the basis of Wisconsin law chosen by the parties).

all mandatory rules have the effect of making an agreement invalid. If the contract is invalid under the chosen law, we are facing a paradox: The chosen law applies because the parties want it to apply; at the same time, the application of the chosen law contradicts their intentions because by the very fact of contracting, they have shown that they want to be contractually bound. One could argue, of course, that the applicable law applies only to the extent that it upholds the contract.⁶¹ But this seems to imply a backlash on the parties' autonomy. Thus, rules on party autonomy have been criticized as going either "too far or not far enough" because they would sometimes point to a law that invalidates.⁶²

Party autonomy raises a further question: Can the parties split up the applicable law and submit some aspects of their relationship to the law of state A, others to the law of state B, and maybe still others to the law of state C? This problem is known under the French term "dépeçage".⁶³ The validity of such choice-of-law clauses is doubtful if one sees the legal system as a unity that applies as a whole. Under such a view, parties could submit their agreement to the law of state A, B, or C, but not to a patchwork of the rules of these states.

Still another question is whether the parties are allowed to agree on so-called "alternative" or "floating" choice-of-law clauses. Under such a clause, the parties leave the applicable law open; it will be chosen at a later point in time.⁶⁴ The validity of these clauses is subject to serious doubts: the later choice may create considerable problems in

⁶¹ This is the so-called rule of validation, see *infra* note 190.

⁶² See Weintraub, *supra* note 4. For a discussion of this statement, see *infra* under V.

⁶³ See Dicey & Morris, *supra* note 25, Vol. II, at 1211-1214, para. 32-046 – para. 32-052. On dépeçage in general see Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 Col. L.R. 53-75 (1973).

⁶⁴ See Dicey & Morris, *supra* note 25, Vol. II, at 1225-1226, para. 32-084; Scoles, Hay, Borchers & Symeonides, *supra* note 11, at 951-952.

interpreting and constructing the agreement. Moreover, it leaves open which law is applicable at the time the agreement is made.⁶⁵

A last question concerns the “petrification” or “freeze” of the applicable law: Does the chosen law apply as it was when the parties have entered into the choice-of-law clause, or do later changes affect it?⁶⁶ The problem is especially relevant with regard to contracts between private individuals and states, so called “state contracts”. In those contracts, stabilization clauses have been inserted to prevent the effects of a unilateral change of the applicable rules by the state party.⁶⁷ But it can also arise in merely private or commercial relationships. The solution seems to depend on why we apply the chosen law: because of the choice by the parties, or by the authority of the rule maker?

Current conflicts theories leave us with no answer to these questions. Only with a good theory of party autonomy can we hope to find a solution. In the following, I will therefore not try to devise any easy answer to the specific problems. It has already become clear that this is impossible if one is to depart from the current theories of conflicts. We have to dig deeper. Therefore, I will analyze why current theories have such difficulties in deciding the questions raised here. What is it that makes it so hard to come to terms with party autonomy? Why is it so difficult to ascertain the practical effects of a private choice of law? In order to answer these questions, we have to go back to the very basics of conflicts. We will see that the problems raised are all the product of

⁶⁵ See, e.g., *Armar Shipping Co. Ltd. v. Caisse Algérienne d'Assurance et de Reassurance*, [1981] 1 W.L.R. 207, 216 (C.A.) (“... there must be a proper law of any contract – a governing law – at the time of the making of the contract”).

⁶⁶ See, e.g., Dicey & Morris, *supra* note 25, Vol. II, at 1227, para. 32-088.

⁶⁷ See Georges R. Delaume, *The Myth of the Lex Mercatoria and State Contracts*, in: *Lex Mercatoria and Arbitration* 77 (Thomas E. Carbonneau ed. 1990), at 94-96; Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* 214-230 (1995); Wolfgang Peter, *Stabilization Clauses in State Contracts*, *Int'l Bus. L.J.* 875-891 (1998).

a particular attitude towards conflicts of law, one that focuses exclusively on conflicts between states and not between private parties.

III. The State-Centered Perspective of Conflicts Theory

1. The Notion of Conflict of Laws

All conflict theories share a common characteristic: They are built around the notion of the state. This can already be seen from the name of the field. The expression “conflict of laws” creates an impression of a struggle or battle between different states over the application of their laws. It has been rightly called a “war like expression”.⁶⁸ Finding rules for “conflicts” seems similar to the attempt to solve controversies between states peacefully.⁶⁹ Governmental interest analysis has tried to appease the tension between rule makers by eliminating “false conflicts”.⁷⁰ But a number of “true conflicts” remain in which the battle is fought even harder and in which, like in a war, only the allegiance to one or the other power counts.⁷¹

The term “conflict of laws” is therefore clearly impregnated by ideas of state relations. This is also true for the name the discipline carries in most other countries of

⁶⁸ Comte de Vareilles-Sommière, *La synthèse du droit international privé* (1897), cited by Beale, *supra* note 36, Vol. I, at 15.

⁶⁹ French authors have often described the object of conflict of laws as a “conflits de souveraineté”, see, e.g., Antoine Pillet, *Principes de droit international privé* 67 (1903). The same other thinks that courts would miss the respect of a foreign sovereign if they would not apply its law to its nationals, see *id.* At 275. Another French author has described the goal of private international law as being to separate sovereign powers, J.-P. Niboyet, *I Traité de droit international privé français* 79 (1938).

⁷⁰ See Currie, *supra* note 2, at 107, 163 and 189. See also Brainerd Currie, *Comments on Babcock v. Jackson – A Recent Development in Conflict of Laws*, 63 *Col. L. Rev.* 1233, 1242 (1963).

⁷¹ See Currie, *supra* note 2, at 190 (arguing that in a true conflict a court has to follow the interests of its own state in the first place).

the world: “private international law”.⁷² The notion reminds us of international law. *International* law, by its very concept, deals only with relationships between states, although there is a modern trend to include private actors as well.⁷³ It is also sometimes called public international law, in order to distinguish it from private international law. The parallel names create a strong tendency to view private international law as the little brother of public international law, in which its principles are applied to private relationships. Indeed, this is the approach that has been followed from its inception. Joseph Story, an adept of the term “private international law”⁷⁴, made “sovereignty” of the state over a territory the premise of his conflicts theory.⁷⁵ He departed from the “natural principle” that the laws of one country can have no force in the territory of another, a principle he derived from the equality and independence of nations.⁷⁶ Savigny also agreed with the assumptions that no state can require the recognition of its law beyond its boundaries, although he found it would afford little help to solve the problem of conflicts.⁷⁷ He based his theory instead on an “international common law of nations having intercourse with one another”.⁷⁸

This is international law-talk. Principles analogous to international law, like state sovereignty or a common law of nations, are employed in conflict of laws. State relations

⁷² “Derecho privado internacional”, “Droit international privé”, “Internationales Privatrecht”, “Diritto internazionale privato”, „Mishpat Ben-Leumi Pratee“.

⁷³ On the role of the private individual as a subject of international law see the references *infra* note 154. See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 124 S.Ct. 2739, 2766 (2004), footnote 20.

⁷⁴ Joseph Story, *Commentary on the Conflict of Laws* § 8 (2d ed. 1841) (reprint The Lawbook Exchange 2001).

⁷⁵ Story, *supra* note 74, §§ 18-19, 21.

⁷⁶ Story, *supra* note 74, §§ 7-8.

⁷⁷ Savigny, *supra* note 1, at § 348.

⁷⁸ Savigny, *supra* note 1, § 348. Although Savigny is rightly credited to have marked the “Copernican” turn from the conflicts between sovereigns toward the “community of law”, see, e.g., Fernández Roza & Sanchez Lorenzo, *supra* note 1, at 44-45, his ideas are heavily influenced by ideas of international and public law. For instance, he uses the term “local limits of the authority of the rules of law over the legal relations” to describe the problem of conflicts, see Savigny, *id.*, Chapter 1, thereby following a typical internationalist approach. See also *infra*, under 2 and 4.

are considered to be more important than private relations and therefore are superposed to them. Although it is recognized today that international law and conflict of laws are fundamentally different disciplines⁷⁹, the term “private international law” is more than a simple misnomer. “Name exacts thought”, one could paraphrase Currie.⁸⁰ Given the parallel nomenclature, one does not need to wonder that many attempts have been made in history to transfer the concepts from international law to conflict of laws.⁸¹ Still most of the literature employs terms like state territory, state interests, rights and so on, to deal with private relations that exceed the boundaries of one state.⁸²

Now, you might ask, what is wrong with that? Is not the very question of conflicts arising only because we have to choose between different legal regimes?⁸³ And are not states the authors of these regimes? Does it not follow necessarily there from that the applicable law must be determined by linking the case to one or another of these states?

Well, the answer to this question is “yes and no”. Indeed it is helpful and in many areas necessary to consider which states is the author of a rule to determine the latter’s scope of application. For instance, it makes sense to think about which state adopted a traffic rule in order to determine the latter’s scope of application. On the other hand, if one is constantly to link the applicable law to the power or interests of its author, one cannot explain party autonomy. If every set of facts would be objectively attributed to the authority of one state and its rules, there would be no room for the will of the private

⁷⁹ Beale, *supra* note 36, Vol. I, at 14; Jan Kropholler, *Internationales Privatrecht* 7 (5th ed. 2004).

⁸⁰ “As in many other instances, form exacts thought”, Currie, *supra* note 2, at 117.

⁸¹ See, e.g., Antoine Pillet, *I Traité pratique de droit international privé* 21 (1923); Ernst Zitelmann, *I Internationales Privatrecht* 71 (1897, reprint Duncker & Humblot 1914). On the tendency in Spanish law to use the notion “sovereignty” to link the two fields see Fernández Rozas & Sánchez Lorenzo, *supra* note 1, at 46. For a modern attempt to link international law and conflict of laws see Pascal de Vareille-Sommières, *La compétence internationale de l’État en matière de droit privé* (1997).

⁸² See *infra* under 4.

⁸³ See the Restatement *supra*, note 3.

individual selecting between different legal systems. Viewing conflicts as battles between states is therefore not wrong. If done exclusively, however, it closes the mind to the role of the individual.

2. When do Conflicts Arise?

The difficulties to accept party autonomy as a principle of conflict of laws can also be traced back to another fundamental problem, the question when conflicts of laws arise. As we have seen, current theories see the reason of conflicts in a clash between states over the application of their respective legal system. Now a legal system has many fields, which can roughly be categorized into private law, criminal law, and public or administrative law. Theoretically, it would be possible that conflicts of laws would arise in all of these fields.

Indeed, that is precisely the view of an important line of thought in conflicts literature. There is a growing tendency to see conflicts everywhere. For instance, authors work in self-defined fields such as “conflict of public laws”⁸⁴ or “conflict of criminal laws”⁸⁵. Underlying these “discoveries” is the assumption that wherever there are different laws made by different authors, there would be a conflict of laws. This conflict would have to be solved first before the dispute at hand can be decided. Every single case in the world would therefore be preceded by a problem: Which law should be applied? Necessarily, the rules applied to solve this problem would be different from the rules that

⁸⁴ See, e.g., Milena Sterio, *The Globalization Era and the Conflict of Laws: What Europe could learn from the United States and Vice Versa*, 13 *Cardozo J. Int'l & Comp. L.* 161, 178 (2005). Probably the earliest attempt to formulate conflict rules for administrative laws was done by Karl Neumeyer, *Internationales Verwaltungsrecht*, (4 vols., 1910-1936).

⁸⁵ Edward S. Stimson, *Conflict of Criminal laws* (1936); Carlos Alberto Alcorta, *I Principios de derecho penal internacional* (1931); Dietrich Oehler, *Internationales Strafrecht* (2d ed. 1983). It has to be noted that these authors do not deal with genuine international crimes, but with criminal law from a conflicts perspective.

apply to the dispute itself. As a consequence of this view, conflict of laws becomes an abstract problem. It is a kind of meta-question that arises before any legal problem can be solved. Of course, in most cases the answer to the question is easy because they present only contacts to state A, or only interests of state A are involved, so we apply the law of state A.⁸⁶ Nevertheless, from the theoretical point of view, the question would always be there.

Yet historically, the field of conflicts has been much more limited, and continues for most writers to be so. A “conflict of laws” in this traditional sense comes up in only very specific circumstances. To see when, it is enlightening to use another name that is used for the field, which is “choice of law”.⁸⁷ A “choice” over the applicable law can only exist for two kinds of persons: the parties or a judge. As has been seen earlier, the parties are free to choose the applicable law under the principle of party autonomy. The judge, under certain circumstances, can also “choose” between different legal systems. That is the case when a private dispute presents foreign elements and it is therefore at least thinkable to apply a law other than the law of the forum.

To see the particularity of this situation, it is useful to contrast it to others. For instance, in a dispute between a citizen and an administrative agency, like e.g. the SEC, the court cannot choose which law it will apply. It always has to follow the law of its own state. Similarly, a criminal court is not free to choose the applicable law. It has to enforce the law of a certain state, its own state. A constitutional court also has no choice but to apply the constitution of the state by which it was established.

⁸⁶ In reality, however, things are more complicated because almost any case presents some kind of contact to another legal system, see *infra* under IV 4.

⁸⁷ See, e.g., the title of Friedrich K. Juenger’s book *Choice of Law and Multistate Justice* (special ed. 2005).

A conflict-of-laws question therefore arises only in a specific area of the law: Where the judge has the freedom to choose the applicable law.⁸⁸ What is this field? The classic description has been “private law”, as opposed to public or criminal law. That is also the reason for the term “private international law”. But the notion of “private law” is laden with so many controversies and uncertainties that it is better to avoid it altogether. Instead, we might use a classic metaphor, although it is neither exhaustive nor precise: the “transient cause of action”.

A transient cause of action is one that may be prosecuted anywhere and any court can examine it,⁸⁹ provided its conditions for jurisdiction are fulfilled. In contrast, a “local” cause of action can only be brought to a certain local law court or agency, which will pursue it under its own law. An example is a crime. Each criminal court considers it only from the point of view of its law.

Of course, also in those cases a foreign element can be involved. For instance, under the active personality principle states can pursue crimes committed by their citizens in other states.⁹⁰ In this context, the judge might face a question of how far he or she should apply the national law, especially in light of the fact that other states – for instance the one where the crime happened – might also have an interest in applying their law to the case. As we can see there from, legal regimes overlap in many areas and the scope of application of a particular national law is an issue that arises frequently.⁹¹

⁸⁸ The judge is generally given more liberty to choose the applicable law than the parties. Therefore, one has to define the field of choice of law from the perspective of the judge.

⁸⁹ See Currie, *supra* note 2, at 316, and the examples from the case law cited there in footnote 122 on p. 314. See also Justice Holmes in *Slater v. National Railway Co.*, 194 U.S. 120, 126, 24 S.Ct. 581, 583 (1904) (using the expression “the theory of foreign suit”).

⁹⁰ See, e.g., Oehler, *supra* note 85, at 70.

⁹¹ That is why it would be too shortsighted to define the problem of conflict as one of drawing lines between the spheres of application of different national laws – as a “Grenzrecht”. Yet this view is defended by de Vareille-Sommières, *supra* note 81, at 19-107.

The typical conflicts question, though, is different. It is not a question of how far we should apply our own law. Rather, the judge can apply either the law of the forum or the law of state X or state Y. This is totally different perspective. It is the specificity of the field which it shares with no other.

Of course one can ask why the judges can choose the applicable law in those cases. We just have to phrase this question a little differently, and it becomes one that is often discussed in conflicts theory:

3. Why Do We Apply Foreign Law?

The easy answer to this question is the command of the legislator. The judge of state A applies the law of state B only if the legislator of state, has told him or her to do so.⁹² The legislator defines both the power and the limits of the judge's ability to apply foreign law. This view is in line with positivism, which sees law as a command by the lawgiver.⁹³ If the judge is an organ of the state – and there seems to be no doubt about that – she or he can apply foreign law only because the lawgiver has told her or him to do so. Each lawgiver therefore determines which law the judge will apply. This is the reason why each state has its own conflict-of-law rules.

The positivist view can, of course, hardly be attacked from the normative viewpoint. But a challenge comes from a historical perspective: When courts began to apply the law of other states, they were not statutorily mandated to do so. Major impulses to the application of foreign law did not come from the legislature, but from science. The starting point of modern conflict of laws seems to have been a comment to the Codex

⁹² See also the justification of party autonomy by the Restatement (Second), supra note 38.

⁹³ See, e.g., John Austin, *Lectures on Jurisprudence: The Philosophy of Law* 15 (1875).

Iustiniani by the glossator Bartolus.⁹⁴ Through writers like Savigny and Story the application of foreign law became a basic tenet of judicial practice. In contrast, conflict of laws has never been an area of legislative hyper-activity. Indeed, legislation and choice of law have often been described in “antithetical terms”.⁹⁵ Even in countries which tend to codify every area of the law, conflicts is often not exhaustively regulated.⁹⁶

But regardless of whether it is the judge or the legislator that is responsible for the application of foreign law, we are left with the fundamental problem: Why does one state apply the law of another at all? Basically, two answers have routinely been given.

The first is comity of nations. Foreign law is applied for being nice to other states. This attitude is grounded in the mutual interest of the states in having commercial and other contacts with each other. That was the view of both Story and Savigny.⁹⁷ They relied on the opinion of the Dutch jurist Ulrich Huber.⁹⁸ Huber had explained that the laws of a nation have force only within the limits of a government; therefore, they could apply not out of right in another state, but only by its courtesy.⁹⁹ Although the comity theory dates back to the 17th Century, it continues to be relevant. Comity has been cited in U.S. case law as the reason for applying other laws.¹⁰⁰ It underlies requirements of

⁹⁴ Juenger, *supra* note 87, at 11; Scoles, Hay, Borchers & Symeonides, *supra* note 11, at 10. Yet there is also evidence for much earlier conflicts solutions, see Juenger, *id.*, at 11; Scoles, Hay, Borchers & Symeonides, *id.*, at 9.

⁹⁵ See Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 *Willamette L.Rev* 1, 79 (2001). For an example, see Currie, *supra* note 2, at 84.

⁹⁶ See for instance French law.

⁹⁷ See Story, *supra* note 74, § 38; Savigny, *supra* note 1, § 348.

⁹⁸ Ulrich Huber, *De conflictu legum in diversis imperiis* (reprinted in Savigny, *supra* note 1, Appendix IV). Huber, in turn, could draw on the work of Paul Voet, *De statutis eorumque concursu* (reprinted in Savigny, *supra* note 1, Appendix III), who also used the term “comity” (*mores comiter*), see Voet, *id.*, Sec. IV Cap. II No. 17.

⁹⁹ See the first and the third of Huber’s three maxims, translation in *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 (1797).

¹⁰⁰ See, e.g., *Huntington v. Atrill*, 146 U.S. 657, 669, 13 S.Ct. 224, 228 (1892) (“Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states”); *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S.Ct. 139, 143 (1895) (“The extent

reciprocity in the application of foreign law and the recognition of foreign judgments¹⁰¹ and also such modern approaches as the governmental interest analysis.¹⁰²

Again, this view superimposes state-relations to private relationships. What counts is only the gesture towards the other sovereign. Certainly, we are not bound to apply another state's law. We do it for the sake of good relations with the other country.

But is the relationship with other states really the reason for which we apply its law? There are certainly areas where concerns for bilateral relations and cooperation with other states influence the choice-of-law process. Take for instance public policy. Some jurisdictions have enacted special rules to guide their judges when to give effect to the public policy rules of other states.¹⁰³ In this case, the policy of the foreign state and its interests will be subject to a special control by the forum before it is applied. These cases are special since they touch upon basic interests of the foreign state. But it has been argued that the state would take a considerable interest in all private cases.¹⁰⁴ As evidence it is offered to us that states sometimes file amicus-curiae-briefs in private litigation.¹⁰⁵ Indeed, it is clear that in those cases the foreign state might have a special interest: to see its national winning. But precisely for that reason we should ask ourselves whether it is wise to pay much attention to the state's plea for the application of its law. Should the

to which the law of one nation ... shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"); *Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227-228, 333 N.E.2d 168, 173 (N.Y. 1975) ("Laws of foreign governments have extraterritorial jurisdiction only by comity.").

¹⁰¹ See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139 (1895) (refusing the enforcement of a French judgment for want of reciprocity). On the continuing importance of reciprocity in the recognition of judgements see John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S. – A Matter of State Law in Federal Courts*, 13 U.S. – Mex. L.J. 85, 92 (2005). However, in general requirements of reciprocity are in retreat.

¹⁰² See Currie, *supra* note 2, at 184.

¹⁰³ See Article 7 (1) of the Rome Convention, *supra* note 31; Article 19 of the Swiss Private International Law Act, *supra* note 17. Note the difference to a public policy control that intervenes after the applicable law has been determined.

¹⁰⁴ See Symeonides, *supra* note 95, at 22.

¹⁰⁵ *Id.*

law not be something more neutral, independent of the rule maker? How can we accept that a legislator takes the side of one party in a litigation? Paradoxically, in many cases it is precisely the special interest of one state in the outcome of a litigation that should lead us to disregard its pleading to apply its law.

Another way to justify the application of another state's law is to see foreign law as a fact. This view was mainly developed in procedural law, because in many countries the judge informs himself about foreign law as he would do about questions of fact.¹⁰⁶ But it has also had an effect on the choice of the applicable law itself. For instance, the theory of vested rights is based on the idea that rights are facts which are created in other countries and therefore have to be respected as such by the forum.¹⁰⁷ The theory has also an impact on the interpretation and application of foreign law. For instance, it is often held that we have to apply the foreign law as it is interpreted in the other system.¹⁰⁸ According to this view, the judge should behave exactly the same way in which a judge of the other system would behave. This position is thought to advance the same result regardless of where the transient cause of action is adjudicated.

Although it is a little bit harder to see, this view is also influenced by considerations of international law. To understand why, you need to look at the notion of a "state" in

¹⁰⁶ See, e.g., *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 236 (1804) ("Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice."). This theory was overcome by Rule 44.1 of the Federal Rules of Civil Procedure. However, it is still followed in other countries, for instance in England, see *Dicey & Morris*, supra note 25, at 227, para. 9-002.

¹⁰⁷ See Joseph H. Beale, *A Treatise on the Conflict of Laws* 105 (1916); *Justice Holmes in Slater v. National Railway Co.*, 194 U.S. 120, 126, 24 S.Ct. 581, 583 (1904) (granting a claim brought under Mexican law on the theory that "although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found"). On the theory of vested rights, see also *infra*, note 112 and accompanying text.

¹⁰⁸ See, e.g., *Hughes Electronics Corp. v. Citibank Delaware*, 120 Cal. App. 4th 251, 263-265 (Cal.App. 2 Dist. 2004) (paying deference to the attitude of the New York Court of Appeals in applying New York law).

international law. It is a commonplace in international law doctrine that we will not inquire into the legitimacy of a state when recognizing it. For a state to exist, it is sufficient that a government is ruling effectively over a certain territory and a people and has at least the capacity to engage in relations with other states.¹⁰⁹ This theory has spread into the conflict of laws because we accept, within the limits of public policy, the foreign law as it effectively governs a state's territory and its people, never mind the character of the regime that enacted it.¹¹⁰

The advantage of the theory is that it frees the conflict-of-laws question to a certain extent from politics. It avoids that conflicts between states have repercussions on private relationships by insulating the latter as pure "facts". The problem with this view, however, is that it denies the normative quality of foreign law. Foreign law, as all law, has a regulatory function. It says how things should be, not how they are. It is therefore wrong to suppose that if a court follows foreign law in a specific case, it would not apply it, but merely take a foreign fact into consideration that already exists in the other state. If we render a decision based on foreign law, we follow basically the same intellectual process as if we apply our own law. No decision is so easy that there would not be some question of interpretation. It would therefore be naïve to expect that we could just look into the other legal system which would give us a mechanical answer. The judge always

¹⁰⁹ See Restatement (Third), The Foreign Relations Law of the United States, § 201 (1987). This is independent of the disputed question whether a state comes into being as a fact or through recognition by other states. For the first opinion, see, e.g., Antonio Sanchez de Bustamante y Sirven, *I Derecho internacional publico* 154-155 (1933), for the second view, see, e.g., Oppenheim, *I International Law* 125 (8th ed., H. Lauterpacht ed. 1995). Although the proponents of the latter theory deny that a government comes into being as a mere fact, they assume that the other states have a duty to recognize a state if certain conditions of fact are fulfilled, see Oppenheim, *id.*, at 127. See also Restatement (Third), *id.*, § 202.

¹¹⁰ For instance, U.S. Courts have traditionally withstood any attempt to inquire in conflicts situation into the legitimacy of acts of other governments, even if it was a hostile regime, see, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964) (on Cuban expropriations); *Bernstein v. Van Heyghen Frères S.A.*, 163 F.2d. 246, 248-249 (2d Cir. 1947) (on the transfer of a company forced by Nazi officials).

has to interpret rules and regulations and to render a normative decision on how the dispute should be solved.

So if neither comity nor the fact theory hold, why do we apply foreign law then? The best answer comes from the often criticized author of the First Restatement, Joseph Beale. Beale stressed the need for continuity of the law.¹¹¹ This need can hardly be fulfilled in a world that is divided into different legal systems. While the state is confined within the limits of its territory, private individuals are not bound by state limits. They can move around or transact over borders. Due to the mobility of civil society, a tension arises between the divisions of the law into different legal systems and the need for continuity of the law. When people move to another state or enter into transborder transactions, it happens that a legal dispute is brought before a court when the facts did not or not entirely take place in the state. Now it would be contrary to the interest of justice if the court would not recognize the legal relationship created, or would consider it only under its laws.

It is thus not exclusively, and maybe not even primarily, the foreign state and the interest of having good relations with it which makes us apply its law. Rather, it is the goal of doing justice, which is the ultimate goal of every legal proceeding. The term “justice” is certainly a very blurry term. It is used here to shift the focus from the states and their relations to the individual litigants who have a stake in the legal proceedings. Beale coined the term “vested rights” for their positions.¹¹² This was an unfortunate metaphor, because it paints a picture as if legal positions were facts happening in one

¹¹¹ Beale, *supra* note 36, Vol. I, at 46.

¹¹² Beale, *I A Treatise on the Conflict of Laws* 159 (1916). See also Beale *supra* note 36, Vol. I, at 307.

state and the other state would not have any choice but to recognize it.¹¹³ It was a reaction to the equally extreme theory that leaves the application of foreign law to the discretion of the state, its “comity” with other nations.¹¹⁴ It has to be granted to the latter theory that no state is obliged, under international law, to recognize what has happened in another state.¹¹⁵ But underlying Beale’s theory is the correct idea that it is the goal of doing justice to the private citizens for which we apply foreign law. That makes it also clear why private parties can renounce of the application of a certain state’s legal system and instead opt for another: “volenti non fit iniuria”. And it also explains the special value of party autonomy as a conflicts principle: Given the split into different legal systems, the best continuity of the law is achieved if all states stick to the law chosen by the parties in advance or after the dispute arises. Party autonomy thus helps overcome the adverse effects for private relationships that are caused by the division of the world into multiple legal systems.

4. Which Law do We Apply?

The central question of conflicts theory is how to determine the applicable law. There are a bunch of different methods that have been developed. There is not enough space in this article to treat them all. But most of them share a common characteristic: they are state-centered. This feature is particularly important because it will explain why they are unable to give party autonomy the role it deserves.

¹¹³ In *Slater v. National Railway Co.*, Justice Holmes used an equally ambiguous metaphor by saying that the foreign law would give “rise to an obligation” that “follows the person”, see the citation *supra* note 107.

¹¹⁴ See *supra* note 97 and 98 and accompanying text.

¹¹⁵ Insofar Story’s account was right, see *supra*, footnote 76.

Under the traditional method to solve conflicts, the judge has to apply the law of the state to which the legal relationship belongs, in which it has its “seat”.¹¹⁶ The functioning of this theory can be described as jurisdiction-selecting¹¹⁷: For every legal relationship there is a state which is competent. Private disputes are attributed to the jurisdiction of a state. The task of conflict is to “discover” the right state. Of course this is not so easy because conflicts cases by definition have connections to different states. The traditional method reacts to this by splitting up the legal relationship into a number of partial questions. For instance, in a contract case a different law may apply to problems such as form, agency, capacity, or damages. For each set of legal questions, there is a special conflicts rule. But under each of them, there is always one legal system that is competent to govern the question, and only one. Its competence has to be recognized by all other states. Since the applicable law is determined with universal validity, authors also speak of a “multilateral” approach to conflicts.¹¹⁸ The parallel to public international law is clear to see. The methodology resembles the approach from the Westphalian peace to the Congress of Vienna: The existence of different states is recognized and competences are attributed. But what this multilateral approach cannot explain is why the parties can have an influence on the applicable law. How is it possible for them to change the distributions of competences of legislators? How can they even choose the law of a state that has no contacts at all to their dispute¹¹⁹? The classic choice-of-law method is totally

¹¹⁶ See Friedrich Carl von Savigny, *supra* note 1.

¹¹⁷ See David F. Cavers, *A Critique of the Choice-of-Law-Problem*, 47 *Harv. L. Rev.* 173, 178 (1933).

¹¹⁸ See, e.g., Symeonides, *supra* note 95, at 18.

¹¹⁹ See *supra*, under II 1.

incompatible with such private freedom. This is the reason for the bewilderment with which traditional theorists have reacted to the growing recognition of party autonomy.¹²⁰

In contrast to the multilateral method of classic conflict theory, governmental interest analysis prefers a “unilateral” method. It starts from the assumption that each state pursues interests in its lawmaking. In a case where only the interests of one state are concerned, there is no conflict or a “false conflict”, and the law of this state has to be applied.¹²¹ In case of conflicts between the interests of the forum and those of a foreign state, the judge has to follow the rules of its own legislator.¹²² It is claimed that this theory is more realistic than the traditional one. But again, it is exclusively built around the idea of state relations. The issue of conflicts becomes the subject of a power game between the states fighting for their interests. Of course, it is true that the “states’ interests” are more often than not interests of individuals that are protected by the state.¹²³ Even the parties’ interest in enforcing contractual agreements can be apprehended as an interest of the state in this sense.¹²⁴ However, does a court really care for the interests of a foreign state when it, e.g., grants a contractual claim of a foreign citizen against a citizen of its own state? Or is not the interest of the foreign party in enforcing the agreement much more palpable and real to the judge than the interest of the foreign state in protecting its citizen? In its ambition to overcome the metaphysical mechanics of the traditional theory, governmental interest analysis has largely bypassed the importance of the individual. Instead, it has focused on the conflicts between the states. Yet more and more, states are paying deference to the individual’s choice of law. This embarrasses

¹²⁰ See *supra*, under II 2.

¹²¹ See Currie, *supra* note 2, at 107, 163 and 189.

¹²² Currie, *supra* note 2, at 119.

¹²³ See Currie, *supra* note 2, at 85.

¹²⁴ See, e.g., *Bernkrant v. Fowler*, 55 Cal. 2d 588, 594-595 (Cal. 1961).

interest analysis: Why can the result of the power game between states be changed by a simple agreement between private parties? How should it be possible that the all-important state preferences for certain interests may be trumped by ordinary individuals? Interest analyses thus cannot cope with party autonomy. The reason is that it suffers from the same weakness as classic conflicts theory: It focuses too much on international relations.

Other theories, less famous but equally ingenuous, share the same defect. For instance, von Mehren and Trautman propose to first determine the concerned jurisdictions, then to construct for each of them the applicable rule, and in case of conflict to apply the law of the “jurisdiction predominantly concerned”.¹²⁵ If there is irreducible conflict between several concerned jurisdictions, they suggest a policy-weighting.¹²⁶ It shall include a look into the relative strength of the several policies, the conviction with which the asserting community holds the policy, the appropriateness of the rule to the effectuation of the policy, and the relevant significance to the jurisdictions concerned of the vindication of their policies.¹²⁷ This theory is totally focused on the state. It leaves no room for the individual and its freedom to choose the applicable law.

Weintraub’s consequence-based approach equally focuses on the conflict between states.¹²⁸ Under it, one has to analyze the policies pursued by a state as to whether they are “real” and then to examine their justification in light of the consequences that may be experienced by the state that pursues the policy.¹²⁹ Weintraub includes the interests of the

¹²⁵ See Arthur T. von Mehren & Donald T. Trautman, *The Law of Multistate Problems* 76-77 (1965).

¹²⁶ von Mehren & Trautman, *id.*, at 376-392.

¹²⁷ *Id.*

¹²⁸ Russell J. Weintraub, *An Approach to Choice of Law that Focuses on Consequences*, 56 *Alb. L. Rev.* 701 (1993).

¹²⁹ Weintraub, *id.*, at 705-710.

parties only as a last point by checking whether the application of a particular state's law would be "fair" to the individuals involved.¹³⁰ This should be determined in relation to the number of contacts the parties have with the state whose law requires application.¹³¹ But Weintraub ignores that the application of a state's law may be "fair" even if there are no contacts to that law at all, simply because the parties have chosen it.

Of the five choice-influencing considerations developed by Leflar, three concern the state or state relations.¹³² True, he also says that the "predictability of results" is the first point to look for and cites a rule that permits parties to select the law that governs their transaction as a particular example that serves this purpose.¹³³ But overall his opinion is that predictability is not "the major consideration" and other arguments have to be applied in many cases.¹³⁴ Although Leflar's famous "better law" consideration¹³⁵ is designed to achieve "justice", he thought that could be done only on a case by case basis. He closed his eyes to the possibility of doing justice to the parties by applying general principles, like party autonomy.

The rights-based approach of Lea Brilmayer transfers models from political theory and constitutional law to conflicts.¹³⁶ It is especially state-centered because it views the choice-of-law problem as residing in the relation between the individual litigant and the judge. The litigant should have a "right" that a certain law is applied or not applied,

¹³⁰ Weintraub, *id.*, at 711.

¹³¹ *Id.*

¹³² See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 *N.Y.U.L. Rev.* 267, 282 (1966) ("maintenance of the interstate and international order", "simplification of the judicial task" and "advancement of the forum's governmental interests").

¹³³ Leflar, *id.*, at 283 (1966).

¹³⁴ Leflar, *id.*, at 285 (1966).

¹³⁵ Leflar, *id.*, at 296 (1966).

¹³⁶ Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *Yale L.J.* 1277 (1989).

which is directed against the state and its organs, not against the other party.¹³⁷ Although Brilmayer mentions consent as a justification for the application of a certain law, she thinks it is relevant only in the relation between the litigant and the state.¹³⁸ Yet the litigant that agrees to a choice-of-law clause gives his or her consent not to the state, but to the other party involved. If the consent is induced by fraud of the other side this invalidates the agreement, no matter whether the state knew of it or not. Furthermore, Brilmayer neglects that private choice of law is relevant also in other contexts than dispute resolution in state courts, like arbitration or simple contract fulfillment. The chosen law applies because the parties have agreed to it, whether a judge intervenes or not. Consequently, the judge that follows the law chosen by the parties does not “coerce” one party, but does nothing more than to enforce the parties’ agreement. Party autonomy plays in the horizontal relationship between the parties. It is also in this horizontal relation that the reason for applying the chosen law has to be found.

Larry Cramer’s canons of construction for true conflicts include a specific rule that the law chosen by the parties should be applied in contract cases.¹³⁹ But he has serious doubts about this canon and only advances it “tentatively”. He submits party autonomy to the condition that there must be a “potential for true conflict”. Even under those circumstances parties should be allowed to choose only a normally applicable, not any law.¹⁴⁰ We have already seen that modern legislation has largely bypassed this

¹³⁷ Brilmayer, *supra* note 136, at 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”).

¹³⁸ Brilmayer, *supra* note 136, at 1298.

¹³⁹ Kramer, *supra* note 4, at 329.

¹⁴⁰ Kramer, *id.*

restriction.¹⁴¹ Kramer justifies the restriction by the argument that a state has no reason to forgo the application of its law other than to accommodate the applicable law of another state.¹⁴² The idea that a state could also want to accommodate the parties does not cross his mind.

Enough: We have seen that both classical and current conflict theories are not able to account for party autonomy. Individual choice of law simply does not fit into their systems because they are built around the state and its relations. Indeed, if one starts from the assumption that laws govern legal relationships authoritatively, it is no small contradiction that the parties should be able to influence the applicable law. How can individuals have a say in the international distribution of legislative competences? How can their intentions be more important than the states' interests in a large field of the law? This puzzle has never been resolved because all conflict theories are based on the same mistake: They are focusing on international relations and consider the individual as being a mere pawn in a battle between states.

IV. A Theoretical Justification for Party Autonomy

1. The Individual as the Center of the Conflicts Problem

The justification of party autonomy has to start by recalibrating the problem of conflicts. The issue is not, as most theories suggest, a struggle between states. We should get rid of the idea that conflicts of laws are first and foremost conflicts between states. Rather, one

¹⁴¹ See *supra*, under II 1.

¹⁴² Kramer, *id.*

should think about when and why conflict problems start in the first place: with a dispute between individuals.

True, in a litigation touching upon more than one jurisdiction very soon the question arises which law to apply. The authors of the laws are states. It is therefore tempting to see every conflicts problem as a problem in the relation between those states. Yet it is the individual parties who will feel the consequences of the application of a particular law. It is their interests that are most directly concerned by the outcome of the dispute. States have understood this peculiarity better than theory. That is why they have allowed the parties to choose the applicable law. This has not caused them any theoretical headaches. On the contrary, it is totally in line with the purpose of the conflicts mechanism from the practical perspective. As we have seen, the application of another state's law is a pragmatic solution which serves primarily the interests of the individuals involved.¹⁴³ Only the application of another state's mandatory rules of law is seen as a favor to another state and therefore is subject to a policy weighing.¹⁴⁴ The goal of the normal conflict rules on issues such as the applicable tort or contract law, however, is not to favor another state, but rather the parties involved in the dispute. If the whole application of a foreign law is designed to serve the interests of the parties, why should they not be able to decide on the applicable legal regime themselves?

It is possible to justify party autonomy only if one shifts the focus from state relations and accepts that the parties are the center of the conflicts problem. They are allowed to choose the applicable law because it is their dispute that is in question. The state renounces to predict the outcome of the choice-of-law process. His policy is to put

¹⁴³ See *supra*, under III 3.

¹⁴⁴ See *supra* note 103 and accompanying text.

its other policies behind the one to allow the parties to design their individual relationships according to their wishes and needs.

In a way, party autonomy resembles the role of the will in national contract law.¹⁴⁵ Almost all states give important weight to the intentions of the parties. Most of these rules are designed to help the parties in shaping, changing and fulfilling their private agreement. Only some rules serve the protection of special groups, like consumers, and are therefore mandatory. The goal of the other rules is to enable private parties to structure their relationships autonomously.

But there is an important difference between freedom of contract and party autonomy: Under the latter principle, parties are allowed to deselect even mandatory legal provisions.¹⁴⁶ The crucial question is why the state allows private individuals to disregard the otherwise applicable law of the forum. The answer is plurality. In an international situation, the state has to recognize that its views of justice are not the only ones, but that they compete with the rules made by other states. It would of course be possible for the state to enforce its own laws in every case brought before its courts. But it is a wise kind of self-constraint not to do it and to give instead the parties the liberty to choose themselves which justice fits their relation best.¹⁴⁷ This particular attitude is an important building block for the conflict of laws. It is grounded in international relations and therefore bears some similarities with the assumptions of the traditional theories.¹⁴⁸

¹⁴⁵ For the view that contract law is based on the autonomy of the individual see Charles Fried, *Contracts as Promise: A Theory of Contractual Obligation* 21 (1981). In contrast, economic analysis justifies contract law by considerations of efficiency, see, e.g., Richard A. Posner, *Economic Analysis of Law* 94-95 (6th ed. 2003). While this view has some merit for exchange contracts, it cannot explain the binding force of contracts in other areas, for instance in family law. For an overview of the philosophical foundations of contract law see Calamari & Perillo on *Contracts* 6-12 (Joseph M. Perillo ed., 5th ed. 2003).

¹⁴⁶ See supra note 32 and accompanying text.

¹⁴⁷ See also the citations from the Supreme Court jurisprudence, supra, note 54.

¹⁴⁸ See supra, under II 3 and 4.

Yet the important difference is that by adopting a rule of party autonomy the state makes the choice-of-law process independent of state relations and lays it in the hands of private parties. No longer will state interests or state preferences for certain interests determine the applicable law. Instead, it is the parties themselves that decide which law applies. One could therefore describe party autonomy as a private solution to a state-made problem.

In spite of the tremendous extension of party autonomy in the last decades¹⁴⁹, there remain many areas in which the states exclude the parties' freedom to choose the applicable law. Interestingly, the field of contract law in which party autonomy is most restricted and which the major legal systems agree upon is consumer law.¹⁵⁰ In this area, the conditions of autonomy, especially equal bargaining power, are not fulfilled. It is therefore understandable that the choice of the parties is not given much weight.

But there are other fields in which parties are not allowed to choose the applicable law themselves: those in which the states take such a predominant interest. A classic example is antitrust law. In this field, the interests of the parties to a transaction are superseded by interests of the community at large. Self-regulation is not the primary concern, because there is more at stake. Therefore the state does not allow the parties to choose the applicable law.¹⁵¹ In the area in which party autonomy is excluded, the legislator gives clear commands to the judge which law to apply. The judge functions here less as an arbitrator committed to the idea of justice, and more like an administrative

¹⁴⁹ See *supra*, under I 1.

¹⁵⁰ See § 1-301 (e) UCC; Art. 5 of the Rome Convention, *supra* note 31. See also Restatement (Second), Conflict of Laws, § 187, comment b on adhesion contracts, and § 109 (b) (2) of the UCITA, *supra* note 31.

¹⁵¹ See the famous footnote 19 in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 637, 105 S.Ct. 3346, 3359 (1985) (noting that the Court would not accept the circumvention of American antitrust law by a combined choice-of-forum and choice-of-law clause).

agency. Consequently, there is a clear dominance of the *lex fori* in this area, while laws of other states to the same effect are viewed very suspiciously.¹⁵²

In sum, we can see that there are two different fields of conflicts: One that is largely dominated by state interests, and another in which private parties are allowed to choose the applicable law. These two fields form the main strands of the conflicts problem. Theorists have so far mainly focused on the first area, and extended the lessons from there well into the second. It is of course true that the state might also have relevant interests in the resolution of cases which fall into the field of potential party choice of law.¹⁵³ Realistically, almost no law is enacted without some special purpose for the community in mind. But it is very important to see that the state, by adopting a rule of party autonomy, makes these considerations subject to the choice of the parties. If the parties don't like a law, they are allowed to exclude it by a simple sentence. It can be reasonably concluded there from that the state itself considers the public interests served by the law to be not as important as the goal to accommodate the parties bound in a conflict of laws. Underlying this attitude is the realization that in those disputes, the most important is the individual, its needs and expectations. Any parochial considerations based on state interests have to stand behind.

2. Philosophical Underpinnings

It might be interesting to give some philosophical basis to the results found. The growing recognition of party autonomy implies that the individual occupies a more prominent

¹⁵² See the famous axiom that "The Courts of no country execute the penal laws of another", *The Antelope*, 23 U.S. (10 Wheat) 66, 123, *Huntington v. Atrill*, 146 U.S. 657, 666, 13 S.Ct. 224, 227 (1892). For hesitations to apply foreign tax law see *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929).

¹⁵³ See *supra*, under II 3.

place in the conflicts system than it was thought before. The individual is recognized as an actor in choice of law. Its wants and needs are taken into consideration.

One could parallel this development with the growing acceptance of the individual as a subject of international law.¹⁵⁴ Thereby, the traditional alignment of conflicts and international law is reestablished on a new level. But there is more. Party autonomy acknowledges not only the existence of a person with own rights, but its freedom to choose the applicable legal regime. The freedom to choose the applicable law is a necessary expression of the autonomy of the individual. In fact, the Greek word “autonomy” means just that: to give oneself a law.

By adopting the principle of party autonomy the legislator, consciously or unconsciously, recognizes the fundamental principle of private autonomy also in choice of law.¹⁵⁵ No longer is choice of law an abstract, “value-free”¹⁵⁶ discipline. Instead, it is acknowledged that one of goals of the conflicts-of-law process is to serve the individual, its needs and wants.¹⁵⁷ The person, as an autonomous being with its own preferences, is put at the centre of choice of law. It is in line with the goal of all law from an individualistic perspective: The purpose of legal rules should be oriented towards the individual, not the state. For philosophical support, one could cite authors that like Kant,¹⁵⁸ Hayek,¹⁵⁹ or Nozick¹⁶⁰. The freedom of choice of a law has also been justified

¹⁵⁴ See, e.g., Hersch Lauterpacht, *International Law and Human Rights* 27-47 (1973); Ian Brownlie, *Principles of International Law* 65 (6th ed. 2003); Pierre-Marie Dupuy, *Droit international public* 147-149 (2d. ed. 1993); Knut Ipsen, *Völkerrecht* 95-96 (5th ed. 2004).

¹⁵⁵ See, e.g., for freedom as the basis of contract law Fried, *supra* note 145.

¹⁵⁶ See Juenger, *supra* note 87, at 185.

¹⁵⁷ For an early criticism of individualism in conflicts of laws, see Batiffol, *supra* note 48, at 70; see also Batiffol, *Aspects philosophiques du droit international privé* 70-77 (1956).

¹⁵⁸ Immanuel Kant, *The Metaphysics of Morals* (1797, transl. Mary Gregor, Cambridge University Press 1991), part I.

¹⁵⁹ Friedrich August Hayek, *Law, Legislation and Liberty*, Vol. 1 (1973).

¹⁶⁰ Robert Nozick, *Anarchy, State, and Utopia* (1974).

from a Rawlsian perspective of justice.¹⁶¹ The idea of the individual as an autonomous being with freedom to choose is well-known in national laws. In conflict of laws, it has taken time to embrace the same concept because positivism taught that autonomy could be exercised only within the state. Slowly, but steadily the idea is gaining momentum that a person can also have autonomy on the international – or better: transnational level.

But there are counterarguments to that. It is important to bear in mind that many countries do not adhere to the “Western” ideals of individual autonomy and private freedom. They still restrict the liberty of their citizens in important ways. Indeed, these states’ law will also often restrict party autonomy significantly.¹⁶² Even in Western states, we have numerous exceptions to the liberty of the individuals to choose the applicable law.¹⁶³

The lesson is simple: Although party autonomy enjoys growing acceptance, it is far from being unlimited. Every state is free to restrict party autonomy by heaving mandatory provisions to the level of public policy. There is no natural law principle that would stop him to do so. Private liberty only goes so far as the state allows.

This does not make party autonomy an unimportant principle. It is just that its application is, as any other principle, subject to the states’ continuing power to restrict it. Yet it remains that party autonomy is the most universally recognized of all conflict-of-laws principles. The thrust of the argument made here was not grounded in philosophy, but by the tendency to recognize party autonomy in practice.¹⁶⁴

¹⁶¹ See Jean-Yves Carlier, *Autonomie de la volonté et statut personnel* 23-24 (Bruylant 1992) (arguing that if justice is based on an agreement on the applicable rules under the veil of ignorance, parties could also not create their own justice system).

¹⁶² See, e.g., the restrictions many states have on foreign investment.

¹⁶³ See *supra*, under I.

¹⁶⁴ See *supra*, under II 1.

3. A New Normative Theory: Relatively Mandatory Rules

The recognition of party autonomy has important implications for normative theory. The fact that states allow parties to exclude whole legal systems, including even their mandatory rules, creates a problem for the traditional categorization of legal sources. The classic dichotomy between mandatory rules and default rules simply does not hold anymore. It has already been superseded in other areas of the law. For instance, in public international law, a third kind of law has been discussed under the heading “soft law”.¹⁶⁵ In conflicts, we can find another kind of legal rules. They cannot be deviated from in a national context, but at the same time they are subject to the parties’ choice when seen from an international perspective. The existence of this type of rules is explicitly recognized in European law.¹⁶⁶ It has now also found its way into U.S. legislation.¹⁶⁷ To understand this type of rules better, I suggest a parallel to language.

One can describe a language as a system of symbols through which persons can communicate.¹⁶⁸ Each language contains a number of phonological, morphological, semantic and syntactic rules. These rules determine how the sounds can be put together, how words can be made from morphemes, how meaning can be expressed through

¹⁶⁵ See, e.g., Joseph Gold, Strengthening the Soft International Law of Exchange Arrangements, 77 Am.J. Int’l L. 443-487 (1983); Ulrich Fastenrath, Relative Normativity in International Law, 4 European Journal of International Law 305-340 (1993); see also the contributions in Commitment and Compliance, The Role of Non-Binding Norms in the International Legal System (Dinah Shelton ed., 2000).

¹⁶⁶ Cf. Rome Convention, supra note 31, Article 3 (3) and Article 7 (distinguishing between “mandatory rules of law” and “rules of the law ... applicable irrespective of the law otherwise applicable to the contract”). On the historical roots of the distinction, see Mayer & Heuzé, supra note 1, at 516.

¹⁶⁷ See § 1-301 (f) UCC (introducing the notion of a “fundamental” policy of a state as the only limit to party autonomy) and comment 6 (distinguishing between legal rules that are mandatory in national law and laws that cannot be deviated from through a choice of law). See also Scoles, Hay, Borchers & Symeonides, supra note 11, at 961-963.

¹⁶⁸ Bruce L. Pearson, Introduction to Linguistic Concepts 4 (1997); Edgar Sturtevant, A Definition of Language, in: Perspectives on Language (John A. Rycenga & Joseph Schwartz eds., 1963), at p. 5; John Lyons, Introduction to Theoretical Linguistics 50 (1969). See already Ferdinand de Saussure, Cours de linguistique générale 23-35 (1916, reprint Payot 1972).

words, and how words can be combined to create sentences.¹⁶⁹ Now rules on language are certainly mandatory from an inner point of view. For instance, participants to a communication in French cannot use semantic or syntactic rules totally unknown in French and pretend they are still speaking French (not even “bad French”). On the other hand, language is not obligatory from an outer point of view. Obviously, the parties can switch to another language if they want to.

The latter kind of freedom is similar to party autonomy. To see why, take a look at how languages are employed. Mostly they apply within a certain territory. In their territorial delimitation, they resemble the law according to the traditional theory that is based on the notion of territorial sovereignty.¹⁷⁰ But territory and the use of a language do not totally overlap. Apart from bilingual or multilingual regions, foreign languages can be used within the borders of a certain language territory. For instance, parties that meet for a business negotiation in Paris can choose not to communicate in French. They can choose to employ the system of another language to do their transaction.

The functioning of the choice of language bears a number of important similarities to party autonomy in choice of law. The parties can choose a language freely, as they can choose a law for their contract. The need to choose a language mostly comes up if one of the partners is a foreign party. The language the parties choose will often have a connection to one of them, but not necessarily. For instance, if one side is from France and the other from Argentina, they may choose, e.g., English as a means of communication, even though none of them has any connection to the English-speaking

¹⁶⁹ See Pearson, *id.*, at 9-12; Lyons, *id.*, at 50.

¹⁷⁰ See the traditional conflicts theory, *supra*, under III 4.

world. This freedom to choose a “neutral” language resembles the freedom to choose a law as applicable that has no connection to either of the parties or the case.¹⁷¹

The parallel to language also explains why some laws are used more often than others. English is a language that is favored in international communication. English and American law are also favored in cross-border transactions that have no relation to the United Kingdom or the United States.¹⁷² Perhaps this symbiosis of language and law is not as surprising if one is aware that it makes no sense to choose a law without an intimate knowledge of the language in which it is set out. After all, law is understood through language.

This does not mean that language and law would be the same thing. For instance, the language parallel does not work in inter-state conflicts, except if one were ready to regard the New York and the Texan dialect as different languages (as indeed linguists do¹⁷³). It is also not implied here that choosing the law and the language would be the same thing. There was a rule in old Egypt according to which the parties by choosing a certain language to a contract also chose the applicable law.¹⁷⁴ This idea seems strange to us today. We make a clear distinction between choosing the applicable law and language.

The parallel between law and language is meant here not as a metonymy, but more as a metaphor. Both resemble each other in the way in which they function as a system. They are mandatory in the sense that you cannot deviate from their rules once

¹⁷¹ On that freedom, see *supra* under II 1.

¹⁷² See *supra*, notes 52-53 and accompanying text.

¹⁷³ See, e.g., Adrian Akmakjian, Richard A. Demers, Ann K. Farmer & Robert M. Harnish, *Linguistics* 260 (4th ed. 1995); Lyons, *supra* note 168, at 34-35; Ronald W. Langacker, *Language and its Structure* 53 (2d ed. 1973).

¹⁷⁴ Hans Lewald, *Conflits de lois dans le monde grec et romain*, 57 *Revue critique de droit international privé* 419, 438-439 (1968); (referring to a decree from 120-118 B.C.; however, the precise interpretation of the decree is open to doubt, see Juenger, *supra* note 87, at 8).

you are in the system. But whether you use one or the other system is up to a private, individually made choice.

I would suggest calling this kind of rules “relatively mandatory”. It signifies that a system is mandatory from the inner point of view, but not from the outer. One cannot deviate from certain rules as long as one is within the system, but one can choose a totally different system instead.

Relatively mandatory rules therefore make a system optional for the parties’ use. It is even more crucial that the autonomous choice of relatively mandatory rules does not affect the authority of the rules’ author. The classic view which sees party autonomy as a means to decide conflicts between states must arrive at the conclusion that the party’s choice of a law would mean that the state whose law is chosen would extend its sovereignty to the contract.¹⁷⁵ But it is not like that. The rule maker does not get any closer to a disputed set of facts by virtue of a private choice of its rules. For instance, Italy – or the Italian people, if one considers it in a somewhat figurative sense to be the “author” of the Italian language – does not get any authority over a communication simply by the fact that it is done in Italian. Similarly, the parties’ choice of Italian law does not give the Italian state an authority over them it did not have before. The authority of the rule maker is thus not affected by a private choice of its rules. In other words, party autonomy does not mean to assign a case to the authority of the state that has enacted the rules, but just to use the rules without extending the state’s authority. Where private choice works, the international distribution of competences between the states is left untouched. You might think of this as just a more complicated way to say that party

¹⁷⁵ See Marcel Cahn, *Le principe de l’autonomie de la volonté en droit international privé* 56 (1926).

autonomy does not decide in a battle between states over their respective competences. Yet the idea has important consequences for the practical application of party autonomy, which will be shown later.¹⁷⁶

4. The Reach of the Rule of Party Autonomy

Every rule has its restrictions. So does party autonomy. As said from the outset, this article does not focus on the limits that are drawn to the principle by public policy.¹⁷⁷ Those limits exist, and most of them are defined by each state in its own, peculiar way. But there is a fundamental condition for party autonomy to apply, which is the same all over the world. This condition is that the case is possibly subject to the laws of more than one state. If there is no choice-of-laws situation, parties are not allowed to discard the mandatory law of their jurisdiction.¹⁷⁸ They are, of course, free to incorporate the law of another state into their agreement.¹⁷⁹ But such a choice is not a conflicts rule. It is a pure case of freedom of contract under national law.

Before the application of the rule, we have thus to ask whether there is a potential for application of at least two laws. Now you may be confused and ask: Does this mean that the state-centered view of conflicts is right, according to which every conflicts problem arises from a battle between states over the application of their respective legal rules¹⁸⁰? The answer is that party autonomy is indeed based on the divergence between

¹⁷⁶ See *infra*, under V.

¹⁷⁷ See *supra* under I.

¹⁷⁸ A counter-example seems to be the UCITA, *supra* note 31, which allows parties to choose foreign law also in “domestic” transactions, see Woodward, *supra* note 31, at 738. However, the computer information transactions covered by UCITA are characterized by the fact that they have no situs. Therefore, there is always a potential insecurity about the applicable law, and no transaction can be called “domestic” in the proper sense of the word.

¹⁷⁹ See Restatement (Second), Conflict of Laws, § 187 (1).

¹⁸⁰ On this view, see *supra*, part III.

different legal orders. But party autonomy allows the parties to dissolve the links of the case to particular states and determine the applicable legal rules freely. It uses a private perspective to get rid of the eternal quarrels between states.

When, you might further ask, is a case sufficiently international to justify party autonomy? This is an important question. To solve it, think of an ideal purely domestic case. How do we know that it is domestic? You will say because it does not have contacts to any other state. But think again: are there really such cases? For example, it is not improbable that a contract for the sale of a high-rise in Manhattan between two New Yorkers will be written on a computer that was manufactured in China or Malaysia.¹⁸¹ We would not say for this reason alone that it is an international transaction. Nevertheless, there is a contact to another jurisdiction – we just don't think that it is an important one. What this example teaches us is that almost all cases in the world have links to more than one state. Yet it would not cross our mind to apply the law of another state in many of them. Whether we regard a case as purely domestic or international depends on whether it raises a choice-of-law question – i.e., whether we would seriously think about applying the law of state A or B.¹⁸² Now when this is the case cannot be said with absolute certainty. It depends on how we value the importance of the contacts to other jurisdictions. This, in turn, is largely a function of the rules of our domestic law and the weight it attaches to certain facts.

It can thus be said that the reach of party autonomy is insecure because it depends on a condition that is neither objectively nor uniformly determined. But this insecurity it shares with the whole discipline of conflicts. There is simply no precise criterion to

¹⁸¹ For similar examples used in literature, see Fernández Rozas & Sánchez Lorenzo, *supra* note 1, at 49-50.

¹⁸² See also *supra*, under II 2.

determine when there is a “conflict of laws”. We can live with this problem, because we intuitively know in most cases whether there is a conflict or not. In the borderline cases, it is up for each legal system to decide: Is the insecurity about the applicable law big enough to raise the issue which law should be applied? Only if the answer is yes will the legal system possibly allow the parties to decide the issue themselves. This means that the reach of party autonomy is ultimately in the states’ hands – but how could it be otherwise? It also means that the applicability of party autonomy depends on the fact that there is a collision of laws at all. But the important point is that party autonomy allows to solve this collision outside the conflict between states by taking it to the level of the private relationship between the parties, where the consequences will most clearly be felt.

V. Practical Effects of the New Paradigm

1. Effects on the Validity and the Reach of Choice-of-Law Clauses

Where does the new paradigm lead us with regard to the practical questions mentioned above¹⁸³? It would be wrong to suppose that the theory developed here would solve them all at once. The ideas of individual autonomy and relatively mandatory rules of law are not talismans that just need to be touched to provide the answer to all questions. Yet they make it easier to understand why some solutions that have been intuitively reached by courts and writers can also be justified theoretically.

First, there is the question whether the mandatory rules of the chosen law apply. From the perspective of the individual, it is wrong to assume that by choosing a certain legal system they would automatically need to follow all other mandatory rules of this

¹⁸³ See *supra*, under II 3.

law. It would be like thinking that by choosing to speak Chinese, you would submit yourselves to all commands of the Chinese government. Party autonomy does not change the authority of the rule makers.¹⁸⁴ Therefore, a choice of law does not have the consequence that you would place yourself completely into the legal system chosen. The implication of the theory of relatively mandatory rules is that the parties may use foreign law as a source for constructing and interpreting their agreement, without submitting themselves to the legal regime of the state as a whole.

The second question was whether the parties should be free to refer to some system that is not state-made law.¹⁸⁵ If one focuses on conflicts between states, then of course it makes sense to restrict the parties' choice to one of the laws that are at variance.¹⁸⁶ By dropping the idea that party autonomy is meant to resolve a conflict between states, it becomes understandable that the parties should also be able to choose principles that are not state-made. To use the parallel to language: the parties could also create their private language and choose it as a code in which to communicate. This possibility has been recognized in international legal texts.¹⁸⁷ It does not mean that the parties would be allowed to free themselves from state-law completely. Public policy rules remain of course applicable. But there is simply no reason why one should allow the parties to use the contract rules of Burma and not the rules of a business organization like the International Chamber of Commerce. The parties should also be able to choose a

¹⁸⁴ See *supra*, under IV 3, at the end.

¹⁸⁵ See *supra*, under II 3.

¹⁸⁶ See the position held by Kramer, *supra* note 140 and accompanying text.

¹⁸⁷ For instance, Article 28 (1) 1 of the UNCITRAL Model Law on International Commercial Arbitration (Vienna 1985) speaks of "rules of law" that the parties can choose. The term is carefully distinguished from "law" and is meant to give the parties a wider range of options. They can, for instance, select rules that are not part of the legal system of a state, see *id.*, Explanatory Note by the UNCITRAL Secretariat, No. 35.

religious law if it contains provisions on contract law.¹⁸⁸ Of course, a problem occurs if the system chosen by the parties does not provide exhaustive rules to cover all questions of the dispute. In this case, the court has to supplement the chosen rules with those of another system. But this system should be chosen carefully by taking the choice of the parties into account.

The third problem concerns the effect of the choice of a law that invalidates the agreement. It is clear that the parties' intention will most likely be to have a valid contract and to disregard the choice of law insofar as it leads to a contrary result. The one thing that you want at the moment of entering – in good faith – into a contract is that your agreement is binding.¹⁸⁹ This result is so important that some authors have summarized it under a special name: the “Basic Rule of Validation”¹⁹⁰. Weintraub suggests that this rule was even more important than party autonomy.¹⁹¹ However, this would mean to “put the barge before the tug”. Two issues have to be distinguished: The liberty of the parties to choose the applicable law, and their willingness to enter into a binding contract. One should not be played against the other. Party autonomy stands as the main principle because it is important not only for the validity of a contract, but also for its construction and interpretation. Yet the choice of the parties also has to be interpreted. Their goal of validating the contract can most easily be achieved if one overcomes the idea that conflict

¹⁸⁸ A different opinion has been voiced by the English Court of Appeal in *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others*, [2004] 1 W.L.R. 1784, which held a choice of Sharia law and English law combined to be meaningless and void. Yet if Sharia law indeed did not provide anything on contracts, one could easily have justified the exclusive application of English law. If, on the contrary, Sharia law invalidated the agreement, the considerations regarding the choice of an invalidating law following in the text would apply.

¹⁸⁹ See also Restatement (Second), Conflict of Laws, comment e (“The parties can be assumed to have intended that the provisions of the contract would be binding upon them”).

¹⁹⁰ See Albert A. Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 Colum. L.Rev. 874 (1959); Ehrenzweig, *Contracts in the Conflict of Laws- Part One: Validity*, 59 Colum. L. Rev. 973, 975 (1959); Weintraub, *supra* note 4, at 449-452.

¹⁹¹ See the citation from Weintraub, *supra* note 62 and accompanying text.

of laws means to attribute competences to states. If one dissolves the rules from the rule maker, it becomes easy to see that the parties, through a choice of law, do not need to completely submit themselves to a legal system, including its invalidating provisions. As in choice of language, the private conception of choice of a law leaves room for some deviation if both parties at least implicitly agree to it. If they used, for instance, some term of a foreign language in a wrong sense, but would both want the same, then the judge would have to follow their will. The Romans described this with the expression “*falsa demonstratio non nocet*” – The false designation does not hurt. The same applies to a choice of an invalidating law with the goal to enter a binding agreement. The theory of relatively mandatory rules of law explains why it is possible to submit the contract to a legal system without simultaneously applying its rules that invalidate the contract.

The fourth question was whether the parties can split up the applicable law to the contract. Under most conflicts theories, such a possibility is not easy to explain, because it would mean that more than one state would be competent to rule on the same or a related question. But if one follows the theory that focuses on the individual and not on the state, there is no reason to think that the parties should not be able to split the legal regime. Since choosing the law does not mean to assign the case to the competence of a rule maker, it is possible to combine the laws of different states. The language parallel suggests the same result: As in conversations or in poems sometimes expressions from different languages are employed, parties can use rules of different legal systems to apply to their contract. This solution has been recognized by legislation.¹⁹² However, a limit to

¹⁹² See Article 3 (1) 3 of the Rome Convention, *supra* note 31.

dépeçage is intelligibility: if the notions and rules of the chosen laws cannot work together, the judge has to think about deviating from the parties' choice.

The fifth question was whether the parties can agree on an alternative or floating choice-of-law clause.¹⁹³ The focus on the individual suggests that they could. Yet the parallel to language creates some doubts: Obviously you could not draft a document and leave open the language in which it is written. But you could write a text in a language that has two very similar versions, like Serbo-Croatian, and determine later in which version you want it to be interpreted. This comparison does not provide any response as to the validity of an alternative or floating choice-of-law clause. But it shows at least why this question is so problematic: If the language is to be determined later, how is the document to be constructed and interpreted in the meantime? What if the ex post-choice has the effect that the text does not make sense anymore because its terms cannot be understood under the chosen language? For much the same reasons, one could imagine that a court finds itself unable to understand the agreement under a floating or alternative choice-of-law clause. The limit to validity of this clause is thus again intelligibility, not the dogma that the competent state law must be determined from the creation of the agreement.

Lastly, the question was asked whether the parties can “petrify” or “freeze” the applicable law. From the standpoint of individual autonomy and in line with what has been said earlier with regard to the validity of the contract there is no doubt that they can. This is because by choosing a certain system of law, the parties can use its rules on validation, construction, and interpretation, without submitting themselves to the

¹⁹³ See *supra*, under II 3.

authority of the rule maker. Abstracting the rule of law from its author, as it has been suggested here, makes it possible to render the law immune from any later changes. The language parallel works to the same effect: As you can choose to speak in French of the 17th Century, you can freeze the applicable law to a former time. Yet everything depends on the intention of the parties. As language, law is a living animal. Parties should normally not be presumed to have the intention to cut themselves from any future changes, or improvements, of the law that they have chosen. For the petrification or freeze of the applicable law, you need a specific clause. Without it, the chosen law applies as it is at the time of the judgment.¹⁹⁴

2. Effects on Conflict of Laws in the Absence of a Choice by the Parties

Although the new paradigm was developed for party autonomy, it could also have an effect on how we deal with conflicts of laws in general. In the majority of conflicts there is neither a public policy limiting party autonomy nor an explicit or implicit choice of law by the parties. This is the classic area of conflicts, and the one that arguably raises the most problems in practice. The question is how this middle field should be dealt with: more from the view of the parties or from the view of the states involved?

The traditional answer has been the latter. Absent any choice by the parties, theories look for “connecting factors” to states, for states’ “interests”, the “predominantly concerned jurisdiction”, and so on.¹⁹⁵ But the approach could also be different: Since party autonomy trumps all other conflict rules, except for public policy, it might also influence the default rules that apply in absence of an autonomous choice. For we could

¹⁹⁴ For the same view, see *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 822, footnote 2 (6th Cir. 1977).

¹⁹⁵ See *supra*, under III 0, and the references cited there.

see the cases in which neither the parties have agreed on the applicable law nor public policy stops them to do so as an area of possible choice of law. Instead of looking on this field from the point of view of states' policy, we could also look at it from the individuals' perspective who were able to choose the applicable law, but failed to do so. Through this shift of perspective, we would see the question of conflicts very differently. Considerations related to the preferences of the parties would no longer be a mere maverick of conflicts theory, but become a central idea.

The justification for such a different approach lies in the fact that the states themselves have allowed the parties to choose the applicable law in these cases. By doing so, they have implicitly recognized that the convenience and needs of the parties are more important in this area of the law than the jurisdiction, interests or policies of the state. They have subordinated their other policies to the idea of the autonomy of the parties. Only in the field of public policy states are overriding a choice of law by the parties by their own interest preferences. In all other fields, they accept that the parties can deviate from their policies by an express choice. If this is so, is it not more sensible then to give the parties' intentions and needs a prominent place even if they have failed to make them explicit?

One could argue against such an approach that it would force the judge into a complicated and futile investigation of the parties' hypothetical intentions. This result would be the most undesirable.¹⁹⁶ It is hard to find out the will of the parties if they have not expressed it themselves. Such a method would necessarily substitute the parties'

¹⁹⁶ The Restatement and the Rome Convention both reject hypothetical choice of law, see Restatement (Second), Conflicts of Law (1971), § 187, comment a; Giuliani & Lagarde, *supra* note 34, comment 3 on Article 3.

intentions by what the judge thinks they would prefer. That is not what is proposed here.¹⁹⁷

Instead, what is meant is that the shift to the parties gives the judge more liberty than the focus on the states that have connections to the case. For instance, he would not be bound to apply the law of the state where a particular tort occurred. Instead, he could focus on the parties to a tort action. In what law does it make sense to address them? Is there a particular law that fits them best? If they are both from the same state, it makes sense to apply the law of that state, because that law both parties know well and can identify with. This law is not strange to them. Both would understand if the judge applied it since they can best argue on the bases of it. Like their language, it fits their culture and their background.

The result is, of course, not new: it is the same as the New York Court of Appeals under Judge Fuld reached in the famous decision in *Babcock v. Jackson*.¹⁹⁸ The difference is that Judge Fuld relied on governmental interest analysis to reach the result, while here another method is suggested. It is not the interests of a state concerned, but the interest of the parties for which the law of their common domicile has to be applied. The advantage of such justification is that it liberates the analysis from more abstract ideas of state interests. What the interests of New York are in a private litigation between its citizens over a car accident in Ontario is difficult to decide. Yet it is quite easy to see that

¹⁹⁷ I leave out cases in which a reasonable argument could be made for an implicit choice of law. As such, I regard the famous decision in *Milliken v. Pratt*, 125 Mass. 374 (1878), in which the defendant wanted to enter into a binding contract but could not do so under the law of her home state which invalidated the consent of married women to contracts. It therefore makes sense to suggest that she implicitly agreed to the law of the other party under which the contract was valid. See *supra*, under 1 on the rule of validation. Public policy did not exclude such a choice, see *Milliken v. Pratt*, *id.* at 383. The case is normally analyzed very differently, see Currie, *supra* note 2, at 76-121; Lea Brilmayer, *Governmental Interest Analysis: A House without Foundations*, 46 Ohio St. L. J. 459, 467 (1985).

¹⁹⁸ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (N.Y. 1963).

it is in the interest of two citizens of New York that the law of their state is applied to a dispute between them. The focus on the individuals replaces the fight on the inter-state level with a bottom down approach that focuses on the interests of the parties.

This approach can equally explain the result of the decision in *Dym v. Gordon*¹⁹⁹. In this case both parties were residing in New York, but had teamed up to go as summer students to Colorado. Since they lived together in this state and their whole personal relationship was based on their being together in Colorado, it may have made sense to address them under Colorado law. Judge Burke at least thought so. He cited “the general intent of the parties as inferred from their actions” to justify the application of the law of Colorado.²⁰⁰ As an argument why New York law was not applicable, he stressed that it would be a law the parties in “no sense had adopted”.²⁰¹ But he has given no indication why the intentions of the parties or their “adoption” of a law was to be considered under the standard he used: governmental interest analysis. It requires at least a number of abstractions and intellectual distortions to think that Colorado’s interest as a state could be influenced in any way by the decision of some New Yorkers to do their summer studies there. Judge Fuld, in his dissenting opinion, had every reason to be puzzled over the application of its own doctrine.²⁰² In reality, Burke relied not on states’ interests, but on the argument that the application of Colorado law would neither be “unfair” nor “fortuitous”.²⁰³ But unfair or fortuitous to whom? Can the application of the law of one state be at all “unfair” to another state? Is it not the parties that could have considered it “unfair” or “fortuitous” if the judge had not applied the law of Colorado?

¹⁹⁹ *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463 (N.Y. 1965).

²⁰⁰ *Dym v. Gordon*, 16 N.Y.2d 120, 125, 262 N.Y.S.2d 463, 467 (N.Y. 1965).

²⁰¹ *Dym v. Gordon*, 16 N.Y.2d 120, 125, 262 N.Y.S.2d 463, 467 (N.Y. 1965).

²⁰² See his dissenting vote, *Dym v. Gordon*, 16 N.Y.2d 120, 129, 262 N.Y.S.2d 463, 470 (N.Y. 1965).

²⁰³ *Dym v. Gordon*, 16 N.Y.2d 120, 125, 262 N.Y.S.2d 463, 467 (N.Y. 1965).

It is not possible at this place to include all possible conflicts cases and analyze them under the new paradigm. It is likely that the results will often be the same that have been reached under the influence of the American conflict-of-laws revolution. The difference is that the focus on the individual provides a consistent theoretical framework for the results that the revolutionist sought for. Arguments such as “fairness”, “fortuitousness” or justice in the individual case that so far had to be hidden under alleged state interests, become the center concern of conflicts theory. Even more, the new approach can also solve the cases which interest analysis did not provide for: If no state has an interest in the application of its laws, governmental interest analysis does not yield any solution.²⁰⁴ But the individual approach shows why in these cases a law has to be applied: because it is in the interest of the parties of the case. The focus on the parties of the case may also show the way to find the applicable law in those cases in which no state has an interest.

Just for illustrating the flexibility of the approach, one could finally decide a hypothetical example, slightly deviating from the fact pattern of *Babcock v. Jackson*²⁰⁵: Suppose that a German and a Spanish tourist have an accident while driving together in a rented car in Ontario. Suppose further that the guest statute cited in *Babcock v. Jackson*,²⁰⁶ which excludes any damages, is still part of Ontario law, and that Germany and Spain allow for compensation, but would grant a different amount of damages. Under the new paradigm, it would be possible to explain why Ontario law should not apply, even though the parties do not come from the same state as they did in *Babcock*. It would not be appropriate for the judge to communicate with the German and the Spaniard using

²⁰⁴ See Currie, *supra* note 2, at 152-153.

²⁰⁵ *Babcock v. Jackson*, 12 N.Y.2d 477, 191 N.E.2d 279 (N.Y. 1963).

²⁰⁶ *Babcock v. Jackson*, 12 N.Y.2d 477, 191 N.E.2d 279 (N.Y. 1963).

Ontario law; it would be strange, unexpected as to its content, and therefore entirely “fortuitous” and unfair to apply Ontario law to them. The fact that they both come from different countries, which is different to Babcock, would not matter. We could take into consideration such facts as their common European culture, which binds them closer to each other than to Ontario. It would even be possible to strike a balance between the German and the Spanish law by giving some intermediate compensation. Or the judge might choose to apply a law of a state that has no connection to one of the parties, but is closer to them than Ontario, like Switzerland. Such considerations are totally banned under any of the other conflicts theories, which focus on the authority of the rule maker, not on the needs and interests of the parties.

The private approach to conflicts of law thus provides a large amount of flexibility. And it provides a consistent theoretical framework to justify the application of a law other than where a contract was made or the facts of a tort occurred. In focusing on the private relationship, it allows the judge to consider the parties, their background and understanding, when choosing the applicable law. He or she is not restricted by any geographical or other connection to a certain state.

One might worry about such widespread discretion of the judiciary. Does it not put too much power into the hands of the judges, contradicting the need for predictability? One can replicate here answers that have been given by the proponents of interest analysis: First, predictability, as seen from the parties’ point of view, is more endangered by the traditional methods than by an increase in the judge’s control over the applicable law.²⁰⁷ Second, legislation is inherently inept to deal with the problem of

²⁰⁷ See Currie, *supra* note 2, at 181.

conflict of laws.²⁰⁸ It takes a view from within the system and normally does not overlook the consequences in lawsuits that involve foreign parties. The judge is in a better position for doing justice in the individual case than a legislator.

Of course, legislation is thereby not excluded from the conflicts realm. There might be policies that influence the applicable law even in the absence of mandatory laws. The state could, for instance, adopt a policy to favor the victim of torts and point to the law that provides the larger amount of damages. The approach suggested here should not be understood as being isolated from such legislative directions. It can overlap with policies, and even be superseded by them. The inclusion of considerations regarding the parties was not meant as general rule for all conflicts cases, but rather to as a general reminder that we should focus more on the individual, and less on the state as the author of the rules when deciding on the applicable law.

VI. Summary

Traditional conflicts theory is not able to cope with a new phenomenon: the growing importance of party autonomy. Although freedom of individual choice of law is more and more recognized in legislation and is the one principle that is most applied in practice, it takes only a marginal place in conflicts theory. Through this article, it has become clear why this is so: because all theories view choice-of-law problems as disputes between states over the application of their legal system. The parties' power to choose the applicable law cannot be squared with this perspective. It is impossible to explain why the parties would be able to influence the relations between states, their competences and

²⁰⁸ See Currie, *supra* note 2, at 84.

interests, and why they can even make the law of a state applicable that has no connection to or interest in the dispute.

The solution suggested here is to radically shift the focus from the state that has connections to the case to the parties involved in the dispute. It is their needs and wishes that have to be accommodated by the choice-of-law process. Thereby, it becomes clear why the parties can choose the applicable law, within the boundaries only of public policy. If we put the individual in the center of the conflicts analysis, we are able to justify the possibility of private choice of law.

This new method could also have an effect on how we deal with conflicts of laws in general. For we could see the cases in which neither the parties have agreed on the applicable law nor public policy stops them to do so as an area of possible choice of law. Instead of looking on this field from the point of view of states' policy, we could also look at it from the perspective of the individuals who are able to choose the applicable law, but failed to do so. Considerations related to the parties would no longer be a mere maverick of conflicts theory, but become a central idea. I have hinted to this possibility, without having enough space to put the idea further.

Another result of this study is a new normative category: relatively mandatory rules of law. I have compared these rules to those of another system that applies flexibly on the transnational level: language. Relatively mandatory rules of law and language are similar because both are binding from an inside view, but the parties are free to choose another system to apply. The rise and the effects of this new category of legal rules are related to the changing position of the individual in the choice of law.

Finally, I want to emphasize again that I left outside the analysis the rules of public policy, which limit the parties' power to choose the applicable law. These rules are related to the authority of the state over a certain territory and persons, the state's interests, and so on. They pose intricate problems, which are very different from the ones raised by party autonomy. I feel justified in not treating them because they have been intensively debated by others. The goal of this article was to establish the idea that outside of these problems another field of "conflict" of laws, or choice of law, exists: It is the field of individual liberty.

De-Bordering of the State and Conflict of Laws

Territory, Population, and Governmental Interests
in the Age of the Mobile Society

It is generally accepted that the state has fixed limits. From that, it is derived that the applicability of a legal rule depends on the reach of authority of the state that has enacted it. National law, it is thought, must have some limits and these limits must coincide with those of the state that is its author.

The object of this article is to challenge these traditional assumptions. It will be shown that society has developed in a way that has deprived the limits of the state of their sense. As a consequence, legal rules are applied to cases even if they have little or no connection to their author, be it territorial, personal, or interest-wise. This fact, it is submitted, reflects a change in the function of the state: No longer is it correct to view it as exclusively governing over a limited territory and a defined people, or as pursuing selfish interests. Instead, the state has become a “rule provider”: It supplies rules that can be used by individuals all over the world.

I. The De-bordering of the State

A. The Metaphor

Imagine a house with many rooms. Each of the rooms houses a different group of people, loosely connected by family ties. Let's say people in room number one usually go to bed early. Accordingly, they have agreed on a rule that after 10 PM there shall be no noise. People in room number two love to listen to music. Their rule is that until 12 AM it is allowed to play instruments. People in room number three are very lively so they have no rule about when to go to sleep at all.

Everything is fine as long as everybody stays within his or her room. There will be occasional noise coming from a room that might disturb the others. But the house is well built, and its walls are generally thick enough to withstand most of the sounds.

Suppose now that the people start to visit each other and stay overnight. For instance, people from room number one visit room number two. At first, they are fascinated by the different customs and the way of living. But then they might get a little disturbed by the fact that the music continues after 10 PM. If they visit room number three, they will most probably not only be disturbed but deeply shocked and irritated by the noise that continues throughout the night.

Now let's imagine that not only do people from the different rooms visit each other, but that they also bring down the walls, maybe to be closer together. As brick after brick is taken away, it becomes obvious that the three rules are not compatible. Either

you go to bed at 10 PM, or you are allowed to play music until 12 AM, or you party all night. Inevitably, the question comes up: Which rule applies?

B. The Borderless Civil Society

This story is, of course, a metaphor for the world and the law as they stand today. The globe is divided into different spheres, called states, with different people each living under their own rules. The states might agree on some policies for common areas. But in its domain each state is the “master” that determines what rules are to be followed.

In recent years, however, important changes have occurred. People are increasingly mobile. They move from country to another. Of course, people have always traveled regardless of borders. *Frédéric Chopin* spent his youth in Poland, but made his career in France and died there; the German-born *Albert Einstein* immigrated to the United States. But what is different in modern society is that means of transportation make it possible, at least for those that can afford it, to be on virtually any place in the world in less than 24 hours. There is a global workforce that is searching for jobs across borders. Some people can live in one country and work in another. People also mix with each other. Bi-national marriages are on the rise. As a consequence, the link of a person to a specific state is getting more and more ambiguous. While this is not true for everybody, it is true for an ever increasing number.

At the same time, states come closer together than ever before. What happens in one country has direct consequences in others. Just think of the environmental dangers that do not stop at national borders.¹ Or political upsurge that spreads through media from

¹ International courts repeatedly had to deal with transboundary environmental problems. For an early example, see the famous Trail Smelter Case (United States of America v. Canada), III Reports of Int'l Arb.

one country to the next. Products of global brands will be sold all over the planet.² Financial instruments developed in one country are finding their way to investors in others. Information flows over the world in quantity and with a speed that was unimaginable a few years ago.

Political theory has depicted the phenomenon under the term “de-bordering” of the state.³ It is part of the more general trend of “globalization”.⁴ However, the essence of the de-bordering thesis is not that the economies are intertwined or that societies and life styles are approaching each other. It is a little more specific: De-bordering means that the frontiers written on maps do no longer matter the way they used to. Borders become more and more meaningless. The result is that states are no longer enclosed units that can be neatly separated from each other. The once clear division of the world starts to dwindle. In the words of our metaphor: You can still see where each room is supposed to end, but the walls have become porous.

Awards 1905, 1939 (1938) (April 16, 1938) (awarding damages for pollution caused by a Canadian smelter on U.S. territory). See also ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 241-242 (July 8, 1996) (recognizing a general obligation of states to ensure that activities within their jurisdiction respect the environment of other states); ICJ, Case Concerning the Gabcikovo-Nagymaros Project (Hungaria v. Slovakia), 1997 I.C.J. 7, 41 (Sept. 25, 1997) (recognizing an “essential interest” of one state in the environmental consequences resulting from a construction project in another state).

² See also the famous quote by the supreme court of Illinois: “Advanced means of distribution and other commercial activity ... have largely effaced the economic significance of State lines.” *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961).

³ Mathias Albert & Lothar Brock, *Debordering of the World of states: New Spaces in International Relations*, in Mathias Albert, Lothar Brock & Klaus Dieter Wolf (eds.), *Civilizing World Politics: Society and Community Beyond the state* (Rowman and Littlefield 2000), pp. 19-43; Joachim K. Blatter, *Debordering the World of states: Towards a Multi-Level System in Europe and a Multi-Polity in North America? Insights from Border Regions*, 7 (2) *European Journal of International Relations* 175-209 (2001). The term “de-bordered state” resembles the notion of the “disaggregated state” used by Anne-Marie Slaughter, *A New World Order* 12 (2004). Others speak of an “unbundling of the territorial state”, see Albert & Brock, *id.* at 20.

⁴ The literature on globalization is abundant. For an overview of the different issues involved, see John Baylis & Steve Smith, *The Globalization of World Politics* 451 – 705 (3d ed., Oxford University Press 2005) (treating, inter alia, the environment, terrorism, nuclear proliferation, nationalism, culture, humanitarian interventions, global trade and finance, the internet, poverty and hunger, gender issues and human rights). See also Anthony Giddons, *Sociology*, 5th ed., Polity Press, Cambridge, 2006, pp. 31-71, Ulrich Beck, *What is Globalization?*, Polity Press, Cambridge, 1999.

C. The Legal Side of the De-Bordering of the State

Although lawyers generally are familiar with the phenomenon just described, they do not leap to the conclusion that it has any important *legal* implications. They still cling to the traditional conception of the state as a unit with a fixed border. Lawyers have not given up the old concept of the territorial state, no matter the rhetoric about globalization.⁵ Although a change of the function of the state and the emergence of global government networks has been advocated in the literature⁶, this has not called into question the meaning of borders as delimiting the field of legal influence of the state. According to the classic doctrine of international law, a state is an entity composed of a determined territory and a population over which a government exercises effective authority.⁷ These three components also set the limits to its legislative authority.

The object of this article is to challenge this model. It will be shown that the concept of the state as we know it is not cast in stone. Rather, it is nothing more than a snapshot of a particular time. Like all concepts, it has developed over the course of history and will one day become history itself. It is suggested here that we are about to witness such a change. The state is becoming borderless.

The most promising route to test this assertion is to examine when and how legal rules that are emanating from a certain state are applied. If they were to extend beyond

⁵ For a recent reiteration of the importance of territory, see, e.g., Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 Am.J.Comp.L. 631, 635 (2009) (arguing that territoriality and extra-territoriality are claims of authority made by sovereign states that have legal meaning within the individual legal regimes).

⁶ See, e.g., Anne-Marie Slaughter, *supra* note 1; Slaughter, Sovereignty and Power in a Networked World Order, 40 Stan. J.Int'l L. 283 (2004).

⁷ James Crawford, The Criteria for Statehood in International Law, 48 Brit. Y.B. Int'l L. 93 (1976-77); Fernando R. Teson, A Philosophy of International Law, 1 Regent J. Int'l L 105, 106 (2003); Diane M. Ring, What's at Stake in the Sovereignty Debate? International Tax and the Nation-state, 49 Va. J. Int'l L. 155, 160 (2008).

the state's territory or citizens or anything that affects its interests, then one could indeed say that the state has become unbound. This article therefore focuses on the discipline in which the reach of law in the international sphere is most crucial: conflict of laws, also called choice of law or private international law. Conflict of laws deals with the application of a state's law over that of other states. It attributes cases to legal systems by using certain connecting factors. Basically, there are three: territory, citizenship and governmental interest.⁸ It is no coincidence that they parallel the three elements of the state under the traditional doctrine of international law: territory, population and effective government.⁹ Since the latter three elements delimit the scope of the state's legislative authority, they are also used to determine the applicable law.

It has often been argued from an anthropological and sociological perspective that this classic methodology needs to be adapted to reality.¹⁰ I will show that such a change has already taken place. While the public has taken little notice of it, a new conflict-of-laws revolution has occurred: Although superficial deference is still paid to the principles of territoriality, personality and governmental interests, they no longer determine exclusively which law is applicable. Instead, they have been gradually relativized and superseded by other ideas. Conflicts lawyers increasingly accept that legal rules have effects beyond the state's geographical limits, its citizens and the interests of its

⁸ See *infra* III and IV.

⁹ See *supra* note 7.

¹⁰ See, e.g., Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *Col. J. Transnat'l L.* 485, 489 (2005) (calling for an interdisciplinary approach to international law and conflict of laws that includes anthropologists, sociologists, critical cartographers, and cultural studies scholars); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests In a Global Era*, 153 *U. Pa. L. Rev.* 1819 (2005) (proposing a "cosmopolitan vision" of conflict of laws that focuses on "substantive community affiliation" rather than concepts of sovereignty or territoriality); Ralf Michaels, *The Re-state-ment of Non-state-Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 *Wayne L. Rev.* 1209 (2005) (suggesting to include rules made by non-state actors into the conflict-of-laws methodology).

government. This is their way to come to terms with the phenomenon of the de-bordering society.

In making my point, I will not restrict myself to any particular legal system of choice-of-law rules because that would obviously undermine the universal validity of the argument. It is also not my goal to try to criticize one these conflict systems as offering superior results than another from a consequentialist perspective.¹¹ Rather, I will analyze to what extent they have become estranged from the traditional model of the state.

I will expound each of the three traditional conflicts criteria (territory, personality and governmental interest) in turn and show why they are outdated under today's conditions of the de-bordering (II-IV). Afterwards, I will analyze alternative ways that have been found to determine the applicable law (V) and the ensuing implications for the concept of the state (VI).

II. Do Laws Have Borders?

A. Territory as a Connecting Factor in Private International Law

Most conflict-of-laws rules are based on geographical criteria. For instance, if one wants to know which law applies to a car accident, the traditional starting point is the law of the place where it took place.¹² When the question arises whether a marriage is formally

¹¹ That has been done elsewhere. See, e.g., for a critique of governmental interest analysis Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *Mich. L. Rev.* 392, 402-417 (1979-1980); Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 *Recueil des cours de l'Academie de droit international de la Haye* 91, 180-207 (1964-II); Alfred Hill, *The Judicial Function in Conflict of Laws*, 85 *Col. L. Rev.* 1585 (1985).

¹² On the *lex-loci-delicti* rule, see, e.g., Art. 3 of the Convention on the Law Applicable to Traffic Accidents, done at the Hague on May 4, 1971; Art. 4 of Regulation (EC) No. 864/2007 of the European

valid, U.S. conflict rules refer to the law of the state in which the marriage was celebrated.¹³ In order to determine who is the owner of a certain piece of land or chattel, we apply the law of the place where the immovable or movable good is situated.¹⁴ Territorial criteria are ubiquitous in conflict of laws; they can be found in nearly every conflicts system.

B. Joseph Story and the Doctrine of Territoriality

Territory as a connecting factor has a long history. The first to set out a complete doctrine of territoriality was Joseph Story, the father of the theory of conflict of laws in the English speaking world.

1. Sovereignty as the Basic Tenet

Story's main argument for territoriality was sovereignty. He started from the "first and most general maxim" that every nation possesses an exclusive sovereignty and jurisdiction within its own territory.¹⁵ From this, he derived that "no state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein".¹⁶ Similar arguments have been made before by the Dutch jurist Ulrich

Parliament and of the Council of 7/11/2007 on the law applicable to non-contractual obligations ("Rome II"), Official Journal of the European Union (O.J. EU) 2007 L 199, p. 40. In the U.S., where the rule has come under severe criticism, it nevertheless continues to be important, see Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, *Conflict of Laws*, 4th ed., Thomson, St. Paul (Minnesota) 2004, pp. 713-722. See also Restatement (Second) on Conflict of Laws (1971), § 145(2)(a), (b).

¹³ See Restatement (Second) on Conflict of Laws (1971), § 283(2).

¹⁴ See on the so-called situs rule Scoles, Hay, Borchers & Symeonides, *supra* note 12, pp. 1056-1057; Restatement (Second) on Conflict of Laws (1971), Intro., ch. 9, top 2; Art. 43 of the Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB).

¹⁵ Joseph Story, *Commentary on the Conflict of Laws* 25 (§ 18) (2d ed. 1841) (reprint The Lawbook Exchange 2001).

¹⁶ Story, *id.*, at 36 (§ 20).

Huber, who in turn drew on the work of another Dutch lawyer, Paul Voet.¹⁷ Huber set out three axioms, which he thought could “not be disputed”, the first of them being that the laws of every empire have force within the limits of that government, and are obligatory upon all who are within its bounds.¹⁸ Joseph Story not only accepted this premise, but derived from it that “no nation is bound to respect the laws of another nation”, and that “the obligatory force of such laws of any nation cannot extend beyond its own territories”.¹⁹ Every nation would have “an exclusive right to regulate persons and things within its own territory according to its own sovereign will and public polity”²⁰. He built his whole conflicts theory on this assumption.

2. Collision with Reality

Story’s theory is fascinating for the sharpness and dryness with which it depicts the modern realities. We are in front of a powerful vision of the state as the beholder of the monopoly to legislate and use power within its realm. Yet the idea of neatly enclosed territorial units stands in sharp contrast to reality. Today, laws are frequently applied to events outside of the borders of the state that is their author. For instance, a New York court will apply New York law to an accident in Ontario involving only New York residents.²¹ A court in Switzerland will allow the Portuguese parents of a baby to select the name according to Portuguese law, even though the baby was born on Swiss

¹⁷ See Paul Voet, *De statutis eorumque concursu*, and Ulrich Huber, *De conflictu legum in diversis imperiis*, reprinted in Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws* (2d ed. 1880, transl. Guthrie, reprint Rothman 1972, Appendix III and IV). Alan Watson, *Joseph Story and the Comity of Errors* (1992), contends that Story has misunderstood Huber. This claim does not need to be verified here, since I am not analyzing ideas for their historical correctness, but for their content.

¹⁸ Huber, *id.*

¹⁹ Story, *supra* note 15, at 29 (§ 22).

²⁰ Story, *supra* note 15, at 30 (§ 22).

²¹ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (N.Y. 1963).

territory.²² A judge in the European Union will subject a contract for the sale of a machine by a company based in Paris to a Czech company to French law regardless of the fact that the contract has been concluded in Prague and the seller has to perform there.²³ We are living in a world in which legal rules are no longer confined to the frontiers of the country in which they were enacted, but are applied in other states as well. The result is a global muddle of different laws. This is due precisely to the conflict-of-laws rules that Story has developed. They demand the courts to respect and apply foreign laws to cases that have occurred in their circuit if there are good reasons to do so, for instance because the event is more closely connected to the other state. Paradoxically, it was the success of Story's theory that has led to the demise of territoriality of laws.

However, Story and the other authors did not object to the actual application by laws in foreign countries, which they thought of as some benevolent act out of *comity*.²⁴ What they meant was rather that a state cannot *force* the application of its laws to things and events situated outside of its territory, simply because it has no power over them. The question they care about is thus one of power to enforcement, not one of the actual applications of laws in the international sphere.

One might doubt the correctness of Story's view, however. As a sociological fact, law actually *is* influencing events that happen outside of the state that is its author. It was already remarked by Walter Wheeler Cook that while the law of a given state or country can be enforced only within its territorial limits, this does not mean that the law of that

²² See Art. 37(2) Schweizerisches IPR-Gesetz (Swiss Private International Law Act) (1987).

²³ See Art. 4(1)(a) Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual situations ("Rome I"), O.J. EU 2008 L 177/1).

²⁴ On the role of comity, see Story, *supra* note 15, § 38; Huber, *supra* note 17, Appendix IV). Voet, *id.*, Sec. IV Cap. II No. 17.

state cannot affect the relations of persons outside its limits.²⁵ States often impose their laws with regard to persons in other countries. Some recent events illustrate the point: In 2009, U.S. tax authorities compelled a Swiss bank to turn over about 250 names of U.S. clients that have accounts in Switzerland.²⁶ Earlier, SWIFT (Society for Worldwide Interbank Financial Telecommunication), a company incorporated in Belgium, was “asked” by U.S. counterterrorism officials to transfer the data of suspicious transactions and “complied” with that demand.²⁷ Another example is provided by corporate law: Due to the Sarbanes-Oxley Act, many non-American companies have against their will been forced to structure their organization in conformity with U.S. law.²⁸

Legal rules of this kind are often depicted under the term “extra-territorial legislation”.²⁹ It will not go unnoticed that they mark a significant departure from Story’s concept of the state as a simple territorial unit. What he neglected, it seems, was the ambiguity in the use of the notion of “force”. It is true that no state can deploy its police or other power in the territory of another country. Yet there are other, more subtle enforcement mechanisms. A state can use assets that foreigners have in its territory as a means of putting pressure on them. Or it can threaten a company with the fact that it will not get any more commissions from the government. Or it can punish those that are doing

²⁵ See Walter Wheeler Cook, *The Logical and Legal Basis of the Conflict of Laws* 41 (1942).

²⁶ *New York Times*, April 1, 2010, section B.

²⁷ *New York Times*, June 23, 2006, p. A 1.

²⁸ See the Sarbanes-Oxley-Act, Pub. L. No. 107-204, 116 Stat. 745. On the extra-territorial ramifications of the Act, see, e.g., Chris Charter, *What's Good For The Goose - Extra-Territorial Application of The Sarbanes-Oxley Act*, Mondaq Bus. Briefing, Sept. 9, 2004, 2004 WLNR 12300455 (explaining the most important requirements for foreign issuers); Justin Kent Holcomb, *Solutions for Regulating Offshore Outsourcing in the Service Sector: Using the Law, Market, International Mechanisms, and Collective Organization as Building Blocks*, 7 U. Pa. J. Lab. & Emp. L. 539, 575 (2005) (noting that many European Companies are quietly adhering to Sarbanes-Oxley); Larry Cata Backer, *The Sarbanes-Oxley-Act: Federalizing Norms for Officer, Lawyer, and Accountant Behavior*, 76 St. John's L. Rev. 897, 929 (noting that Congress expected the Act to have broad extra-territorial effect).

²⁹ See, e.g., Buxbaum, *supra* note 5, at 643; Karl M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, Kluwer, London, 1996; Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 Va. J. Int'l L. 1 (1992).

business with the company. In sum, even if a state has no enforcement facilities outside of its territory, this does not mean that they have no compulsory effect there. Especially in a globalized world, the vision that laws of a state would have no “force” beyond its borders is false. It is true that the state’s exercise of legal power is limited to a certain geographical area, but its factual powers are much broader.

3. Territoriality not Demanded by International Law

Against such a view, it could be objected that the enforcement of laws beyond borders might be possible in practice, but that it would not comply with international law. Specifically, it could constitute a flagrant violation of another state’s sovereignty under international law.³⁰ Yet surprisingly, international law does not equate territorial sovereignty and territoriality of the law. As early as 1927, the Permanent Court of International Justice dissociated the two in the famous *Lotus* case.³¹ It held that Turkey could legally institute criminal proceedings, based on Turkish law, against a French officer that was involved in a ship collision on the high sea with a Turkish steam ship. The court said explicitly that the power of a state to apply its law was not confined to its borders. Rather on the contrary, the state would be free to apply its law to every set of facts that it pleases, absent any specific limitation by international law. In the opinion of the Permanent Court of International Justice, the principle of territoriality of law, although universally recognized, would not constitute such a limit.³²

³⁰ On international law’s influence on the extraterritorial application of competition law, see, e.g., Buxbaum, *supra* note 5, at 653-666 (describing the role of international law relative to the scope of German competition law).

³¹ Permanent Court of International Justice, judgment of September 7, 1927, Series A, No. 10.

³² Permanent Court of International Justice, *id.*, at 20.

The successor of the Permanent Court of International Justice, the International Court of Justice, implicitly confirmed this view in a judgment rendered in 2002. The dispute was about an arrest warrant that was issued by Belgium against the Congolese Minister of foreign affairs for the violation of human rights. In its decision, the majority of the court dodged the question whether a state has so called “universal jurisdiction” to prosecute such violations regardless of where they happened.³³ But a considerable number of its members thought the court should have dealt with the problem and discussed in their opinions the import of the *Lotus* decision. Only a part of the Justices took the view that some territorial link to the state – if only the presence of the offender within the territory – is a necessary condition for a state’s jurisdiction³⁴. A considerable number were of the opinion that no such limit exist³⁵.

The case law of the international courts leaves us with an important distinction: the power to use force in a territory is different from the power to legislate extra-territorially. The Permanent Court of International Justice in the *Lotus* case had identified only one “first and foremost” restriction that international law imposes on the states: not to exercise power outside of their territory. In this sense, the Court said, jurisdiction was certainly territorial.³⁶ But it did not prohibit to legislate on events outside the borders of the state and to enforce this legislation *within its borders*. By adopting this lenient position, the Court has in fact paved the way for so-called extraterritorial legislation and

³³ International Court of Justice, judgment of February 14, 2002, Democratic Republic of the Congo v. Belgium, 2002 I.C.J. 3.

³⁴ Separate opinions of Justices Gilbert Guillaume, p. 35, at 37-40, Raymond Ranjeva, P. 54, at 58, and Francisco Rezek, p. 91, at 93. The first two specifically invoked the *Lotus* case. Another judge even took the opinion that beyond the confines of national territory “in principle the exercise of state authority, whether legislative, executive, or judicial, must end”, see Justice Sayeman Bula-Bula, p. 100, 123.

³⁵ Separate opinions of Justices Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal, *id.*, p. 63, at 77-79, and of Justice Christine Van den Wyngaert, *id.*, p. 137, 167-175.

³⁶ Permanent Court of International Justice, *id.*, at 18.

acts. The Restatement (Third) on Foreign Relations Law transposes this division with the distinction between “jurisdiction to prescribe” and “jurisdiction to enforce”. While the latter is geographically limited, the former is not.³⁷ It follows that states can apply their law to events outside their territory, but can enforce them only within their realm. A more correct concept of the state would therefore be to describe it as a territorial enforcement unit with potentially unlimited legislative competences.

C. Constitutional Territoriality

But international law is not the only legal field that has to be taken into account. Douglas Laycock offers a different rationale for territoriality: In his view, the Constitution limits each state’s legislative power to events that occur inside of its borders.³⁸ From this, he derives that states can, apart from minor exceptions, constitutionally only rule within their territory and that the basic conflicts rule therefore must be territorial.³⁹

Laycock’s view of the state is one of an inward-looking type of government that only cares for what happens within its frontiers. It is doubtful whether it is adapted to the times of globalization. For instance, many states care about the behavior of their nationals in other countries. Child abuse laws frequently permit the prosecution of events that took place elsewhere.⁴⁰ The Foreign Corrupt Practices Act prohibits issuers registered under the U.S. Securities Exchange Act from bribing foreign officials.⁴¹ States also care about human rights violations that occur in other countries and give victims the opportunity to

³⁷ Restatement (Third) on Foreign Relations Law of the United States (1987), § 402 and § 431.

³⁸ Laycock, Equal Citizens of Equal and Territorial states: The Constitutional Foundations of Choice of Law, 92 Colum. L.Rev. 249, 259 (1992).

³⁹ Laycock, *supra* note 38, at 321.

⁴⁰ See, e.g., §§ 6 No. 6, 184 b German Penal Code (Strafgesetzbuch – StGB) (punishing the production, publication and dissemination of pornographic material relating to minors in other countries).

⁴¹ Foreign Corrupt Practices Act of 1977 (FCPA) (Pub.L. 95-213, Title I, Dec. 19, 1977, 91 Stat. 1494), 15 U.S.C. § 78 dd-1 (a).

sue before their courts.⁴² Such attitude can hardly be demonized as unconstitutional. Rather, it seems correct to say that the modern state is open to take account of and deal with the reality around it.

The point shall be illustrated by two cases decided by the United States Supreme Court that deal with the scope of application of the U.S. Constitution. In *Rasul v. Bush*, the Court had to consider whether it could apply to review the legality of detention of aliens outside of the territory of the United States. The problem came up because of a writ of *habeas corpus* that had been filed by prisoners detained at the Guantánamo Bay Naval Base in Cuba. The territory of the Base had been leased by the United States, but Cuba retained “ultimate sovereignty” over it.⁴³ On the basis of an earlier decision⁴⁴, the defendant argued that a writ of *habeas corpus* could only be filed by aliens detained inside the sovereign territory of the United States. The Supreme Court did not follow this argument. Although it noted in passing that the U.S. exercises “exclusive jurisdiction and control” over Guantánamo Bay⁴⁵, the issue was not given much importance in the decision⁴⁶. Instead, the writ of *habeas corpus* was allowed independently of whether the aliens were detained within or outside U.S. territory.

In the wake of *Rasul v. Bush*, Congress had adopted statutory law that was meant to exclude the jurisdiction of U.S. courts to decide on *habeas corpus* applications from Guantánamo Bay prisoners. In *Boumediene v. Bush*⁴⁷, the Supreme Court had to decide

⁴² See the case law on the American Tort Protection Act and the Alien Tort Claims Act, e.g. *Bauman v. Daimler-Chrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009) (establishing jurisdiction over an out-of-state defendant for alleged human rights violations by a subsidiary in Argentina).

⁴³ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁴⁴ *Johson v. Eisentraeger*, 339 U.S. 763 (1950).

⁴⁵ *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

⁴⁶ This was heavily criticized by Justice Scalia, see his dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined, 524 U.S. 466, 501 (2004).

⁴⁷ 553 U.S. 723, 128 S.Ct. 2229 (2008).

whether this legislation is constitutional and, more specifically, whether it complied with the Suspension Clause in the United States Constitution⁴⁸. The defendant claimed that this Clause would not at all be applicable in Guantánamo. He based this claim on the argument that the government would not retain *de jure* sovereignty over the naval base. The Court granted that point, but held it was not determinative. In particular, it rejected the underlying theory that the Constitution necessarily ends where *de jure* sovereignty ends.⁴⁹ Not only would such a view be historically unfounded. In addition, it would raise troubling separation-of-powers concerns.⁵⁰ Referring to a decision from 1885⁵¹, the Court made the remarkable statement: “Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’”⁵²

Both cases show that we should not think of the validity of the U.S. constitution as being limited to the territory of the United States.⁵³ Rather, it applies even to events that take place outside its borders. Rightly so: Any other position would create unacceptable routes of escape for the government because it could flee the constitutional guarantees by just moving the facts to another territory.⁵⁴ The Constitution’s validity can thus not be limited to actions done within the confines of the United States. Wherever the

⁴⁸ U.S. Constitution, Art. 1 Section 9.

⁴⁹ *Boumediene v. Bush*, 128 S.Ct. 2229, 2253 (2008).

⁵⁰ *Boumediene v. Bush*, 128 S.Ct. 2229, 2258 (2008).

⁵¹ *Murphy v. Ramsey*, 114 U.S. 15 (1885).

⁵² *Id.*, at 2259.

⁵³ See George P. Fletcher, *Citizenship and Personhood in the Jurisprudence of War*, 2 *Journal of International Criminal Justice* 953, 964 (2004) (emphasizing that the Constitution applies to any exercise of governmental power regardless of where it takes place). See also Kal Raustiala, *The Geography of Justice*, 73 *Fordham L. Rev.* 2501, 2550 (2005) (claiming that the Constitution is not presumptively spatially limited). But see Philip Hamburger, *Beyond Protection*, 109 *Colum. L.R.* 1831 (2009) (pleading for a principle of protection that is based on geographic measure).

⁵⁴ See also Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 *Wayne L. Rev.* 1105, 1131-1132 (2005) (drawing a comparison between the government setting up the Guantánamo prison in Cuba and corporations moving offshore to avoid local taxation or regulation).

military acts, the constitutional safeguards apply. As the exercise of factual power of the government is not geographically limited, the power of the Constitution cannot be either.

What is true for the constitution itself must also be right for U.S. laws. In fact, it would seriously limit the powers of Congress to give its acts a purely territorial application. They can govern every situation occurring everywhere. Whether and how they can be enforced is a different matter. Thus, constitutional territoriality does not hold either.

D. Soft Territoriality

The mainstream of the contemporaneous conflict-of-laws authors does not rely on a strict principle of territoriality based on international or constitutional law. They adopt a different concept, which I want to call “soft territoriality”. Soft territoriality means that the validity of the laws of the state is not necessarily confined by its borders, but that it is nevertheless advisable to apply them only to sets of facts that are connected to the territory of the state that is the author.

1. Friedrich Carl von Savigny and the Seat of the Relationship

The classic explanation of soft territoriality stems from Friedrich Carl von Savigny, Story’s counterpart on the continent. Savigny admits that no state can require the recognition of its laws beyond its bounds, because its sovereignty is limited.⁵⁵ But at the same time, he believes that these propositions “afford little help in the solution of our problem”.⁵⁶ He suggests instead to turn the focus from the applicability of the rules to the facts to which they apply. His idea is to consider all facts as “legal relationships”

⁵⁵ Savigny, *supra* note 17, at 68 (§ 348).

⁵⁶ *Id.*

(*Rechtsverhältnisse*) which must have their “seat” in a certain legal system. In his opinion, one has to look for this “seat” in order to find the law applicable to the legal relationship.⁵⁷ Thus, the order is inversed: instead of first analyzing the reach of the law, we shall establish the geographical seat of a set of facts and then determine the law applicable to it. This has been called the “Copernican turn” in conflict of laws.⁵⁸

2. Methodological Problems

From a general methodological viewpoint, Savigny’s theory is subject to doubt because it transfers criteria from natural science – the seat as a certain position in space – to law. Legal relationships are not planets in the universe, but the consequence of legal thinking. There is no scientific method to find out their geographic position. It is therefore not possible to determine the applicable law to such a relationship with the same precision as it would, for instance, be possible for the Eiffel tower.

But one can read Savigny also to the effect that the search for the seat was meant only in a metaphorical way. The basic idea then would be that every set of facts has some relation to the territory of a state and that its law shall apply. Savigny gave no explanation for this preference for territoriality. But underlying his look for the “seat” of the relationship is again a certain concept of the state. This concept is different from the international and the constitutional model of the state we have already seen.⁵⁹ At its core is the idea that the state, from an internal viewpoint but also in light of the global division of competences, would be a unit which is primarily responsible to rule in a certain

⁵⁷ Savigny, id. at 57 (§ 346).

⁵⁸ See Jan Kropholler, *Internationales Privatrecht*, 6. Aufl. Mohr, Tübingen, 2006, p. 13; Alfonso-Luis Calvo Caravaca & Javier Carrascosa González, *Derecho Internacional Privado*, vol. 1, 5. ed., Comares, Granada, 2004, p. 197.

⁵⁹ See supra 2 and 3.

geographic area and that cases that touch upon this area should be submitted to its legal system in conformity with the demands of international harmony.⁶⁰ Although the state *could* act beyond its borders, normally its laws should be understood as being restricted to its geographical limits.

3. Auto-Limited Laws

There are arguments which buttress this position. States themselves often consider their laws should only be applied to facts that happened in their territory. In the United States, for instance, the Supreme Court has repeatedly held that congressional legislation is presumed to have no extra-territorial application unless such intent is clearly manifested.⁶¹ This view is based on the assumption that Congress is primarily concerned with domestic questions.⁶² Why should it rule on events that happen outside its territory? It is none of its business. Thus, the law of states is “auto-limited”, so to speak, by the function of the state to govern a specific territory.

Lea Brilmayer has expressed a similar idea and applied it to the modern context. She underlines the continuing importance of territory for instance for conduct-regulating norms and provisions that define who should benefit from welfare rules of a state.⁶³ Indeed, many laws can be thought of as having a territorial limitation built in. As an example, one could take traffic rules. It is clear that the rules of the road adopted by state A are meant to cover that state only and not state B. Under no circumstances should they

⁶⁰ On the underpinnings of Savigny’s teachings in public international law, see Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 *Vanderbilt Journal of Transnational Law* 381, 399-400 (2008).

⁶¹ See *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *EEOC v. American Arabian Oil Co.*, 499 U.S. 244, 248 (2001); *Morrission v. Australia National Bank*, decided June 24, 2010.

⁶² *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

⁶³ Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *Yale Law Journal* 1277, 1305 (1989).

be extended to the latter.⁶⁴ This limitation, one could say, reflects the state's task to provide for security – and wealth distribution – within a certain piece of the Earth's surface.

Soft territoriality also has important advantages as a conflicts principle: It provides for a logical distribution of competences between states. The world being divided into different territorial states, there is simply no other clear method of determining the applicable law. In this sense, the territoriality is a prime candidate to fulfill the condition of a universally applicable conflict of laws rule.⁶⁵

4. Problems in Cases with Multiple Connections

There are hence good arguments for the soft version of territoriality. Yet the argument carries only so far. For instance, to say that a state's sales law would cover its complete territory would not be helpful at all to solve even the most basic conflicts case. Let's assume that a resident of state A and a resident of state B enter into a contract in state C that is to be fulfilled in state D. This case has connections to the territories of four states. The principle of territoriality itself does not provide an answer which law has to be preferred.

One can try to overcome this problem by adopting a more flexible approach. Savigny himself demanded in cases which have links to several states to search for the so-called "seat" of the relationship⁶⁶. Similarly standards have been suggested by others,

⁶⁴ This is even conceded by the proponents of interest analysis, who are generally averse to any kind of territorial thinking. See Brainerd Currie, *Selected Essays On the Conflict of Laws* 58 (1963) (calling the rule of the road "pointedly local in purpose"). On interest analysis see *infra* IV.

⁶⁵ See Perry Dane, *Vested Rights, 'Vestedness', and Choice of Law*, 96 *Yale Law Journal* 1191, 1205-1213 (1987) (holding as a condition of a universally applicable conflicts rule that it yields the same set of criteria to determine the applicable law no matter where a case is adjudicated).

⁶⁶ Savigny, *supra* note 17, at 57 (§ 346).

such as the “centre-of-gravity”⁶⁷, the “closest connection”⁶⁸ or the “most significant relationship”⁶⁹.

The drawback of such malleable criteria is that they require considerable efforts from the courts in determining the applicable law. The American case law under the Second Restatement on conflicts bear rich testimony. To make the criteria more operational, judges have been given stiff rules in other parts of the globe. For instance, in European conflicts law the “closest connection” has now been replaced by a rule which submits a sales contract to the law of the country in which the seller has his habitual residence.⁷⁰ Obviously, such a rule is based on a fiction. There is no reason to think that a sales contract has any closer connections to the country of residence of the seller than to that of the buyer. Other rules are equally fictitious, for instance the rule that the obligations between two spouses would be most closely connected to the place where marriage was held.⁷¹ These fictions try to overcome a dilemma: inter-personal relations between people from different states are not connected to one or the country, but are precisely in between. Finding a “seat” of the relationship or the “most significant contact” comes close to trying to square a circle.

⁶⁷ The term was first used by Otto von Gierke, see Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht*, 9. Aufl., C.H.Beck, Munich, 2004, p. 132.

⁶⁸ Le “principe de proximité”, see Henry Batiffol & Pierre Lagarde, *Droit international privé*, vol. 1, 8th ed., Dalloz, Paris, 1993, p. 450.

⁶⁹ See Restatement (Second) on the Conflict of Laws (1971), § 145(1). It must however be noted that the “significant relationship” is not only meant to encompass geographical links, but also arguments derived from governmental interest analysis. See Restatement *id.*, comment b and *infra* IV.

⁷⁰ Art. 4(1) lit. a of the Rome I Regulation, *supra* note 23. Strictly speaking, the habitual residence is not a territorial, but a personal criteria, see *infra* III 2.

⁷¹ See Scoles, Hay, Borchers & Symeonides *supra* note 12, at 563.

5. Problems due to Dematerialization of the Modern World

Technological and economic advances of our time tend to exacerbate these problems to the point where it becomes impossible to determine the applicable law by geographical methods. The “de-materialization” of the world around us makes it increasingly difficult to establish any visible and meaningful territorial link of a set of facts. The notorious cases of torts committed on the internet are legend.⁷² But there are also many others. Where, for instance, is a company located: at the place of its incorporation, its headquarters, its most important industrial site or the place of sales activities⁷³? Where do financial instruments lie, such as shares or obligations, which are no longer backed by documents⁷⁴? Where is a bank account⁷⁵? Where is a copyright⁷⁶? Where do damages to the right of privacy occur, such as the publication of compromising photos in a newspaper with global distribution⁷⁷? Where does a loss in income occur that an investor suffers due to false advice by a bank⁷⁸?

These and other questions put the proponents of soft territoriality under considerable pressure. The rules, presumptions and analogies they create as an answer

⁷² On the internet cases see, e.g., Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. Chi. Legal F. 35; Dan Jerker B. Svantesson, *The Characteristics Making Internet Communication Challenging Traditional Models of Regulation – What Every International Jurist Should Know About the Internet*, 13 Int'l J. L. & Info. Tech. 39 (2005); Thomas Schulz, *Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 Eur. J. Int'l L. 799 (2008); Jonathan Zittrain, *Be Careful What You Ask For: Reconciling a Global Internet and Local Law*, in: Adam D. Thierer and Clyde Wayne Crews (eds.), *Who Rules the Net? Internet Governance and Jurisdiction*, Cato Institute, Washington D.C., 2003, pp.13-30.

⁷³ See the discussion over the applicable law to companies in Scoles, Hay, Borchers & Symeonides supra note 12, at 1219-1223.

⁷⁴ On this question, see the Hague Convention on the Law Applicable to Certain Rights in Respect of securities held with an Intermediary, done in 2006.

⁷⁵ Joseph Sommer, *Where is a Bank Account?*, 57 Md. L. Rev. 1 (1998).

⁷⁶ See *Itar Tass v. Russian Kurier*, 153 F.3d 82, 88-92 (2d Cir. 1998) (discussing conflicts issue with regard to copyright).

⁷⁷ On the conflicts problems of defamation and invasion of privacy, see Scoles, Hay, Borchers & Symeonides supra note 12, at pp. 872-874; Calvo Caravaca & Carrascosa González, supra note 58, vol. 2, p. 718.

⁷⁸ See the decision of the Swiss Federal Court (I. Zivilabteilung), November 2, 1998, BGE 125 III 103.

seem increasingly strained and localization a matter of pure determination. They depart more and more from the idea of a geographically close connection.⁷⁹ The territorial nexus is sometimes nothing more than a smokescreen behind which quite different considerations are hidden.⁸⁰

E. A Brief History of the Territorial State

A conception of the law that binds its application to the territory of the enacting state thus cannot be justified from a theoretical viewpoint. This leaves us with a basic riddle: Why is the paradigm of territoriality so strong that we are naturally inclined to think that laws must have borders? And how can the role that it obviously still plays in the modern world be explained? These questions can only be answered by taking a jump back in history. It will be shown that the state has not always been considered as a territorial unit, but that this concept emerged slowly and for a rather restricted purpose.

There were earlier times in which state and territory were not identified. The Greek City-States were not surrounded by frontiers as we know them. The outer areas of Athens, for instance, cannot be understood in a modern, liminal sense.⁸¹ Rather, they were bursting with social life and there was a constant exchange with the neighbors.⁸² The Romans, in turn, erected physical walls (the so-called *limes*) in order to defend their territory. Nevertheless, these did not constitute hard-and-fast demarcations but rather zones of transition between the Empire and the rest of the world.⁸³ Consequently, neither

⁷⁹ See Raustiala, *supra* note 53, at (noting that geographic borders coincide quite imperfectly with the reach of national laws).

⁸⁰ See on these considerations *infra* V 1.

⁸¹ See in more detail Irene Polinskaya, *Liminality as Metaphor*, in: David B. Dodd & Christopher A. Faraone, *Initiation in ancient Greek narratives and rituals*, pp. 85 and seq.

⁸² Polinskaya, *id.*, pp. 93-94.

⁸³ See Albert & Brock, *supra* note 3, at 22.

the Greek nor the Romans ever thought about applying their laws territorially. Tribunals in ancient Greece followed the *lex fori*, or the law of the forum, but allowed foreigners very limited access to court.⁸⁴ Roman law governed only relations between Roman citizens. For all others, a special law was applied, the so-called *ius gentium*, or “law of nations”.⁸⁵ It was composed of very basic principles of natural law that the Romans supposed would be followed by all people of the world.

After the Roman Empire had broken down, boundaries were unclear because people were in constant movement. The law that was applied to disputes was determined according to the principle of personality, i.e. dependent on the belonging of the parties to a certain tribe or people.⁸⁶

It was not until the end of the Thirty Years War that the first border in the modern sense was marked on the ground by means of stones.⁸⁷ Its purpose was to establish the frontier between Sweden and Brandenburg in Germany. After that, the doctrine of territoriality gradually took hold in the minds of thinkers until it reached its heyday in the 19th Century. But what were the reasons?

The ascendance of the concept of territorial jurisdiction is generally associated with the feudal system.⁸⁸ Under it, the ruler to which the property over a certain

⁸⁴ See Friedrich K. Juenger, *Choice of Law and Multistate Justice* 7 (spec. ed., Transnational Publishers 2005).

⁸⁵ On the *ius gentium*, see Max Kaser, *Ius gentium*, Böhlau, Köln, 1993; Okko Behrends, *Che cos'era il ius gentium antico?*, in: Collana "Cinquanta anni della Corte Costituzionale della Repubblica Italiana"; vol. 1/1, *Scientifiche Italiane*, Naples, 2006, pp. 481-514.

⁸⁶ See *infra* III 1.

⁸⁷ See Martin van Creveld, *The Rise and Decline of the state* 143-144 (Cambridge University Press 1999), (noting that the first border to be marked on the ground by means of stones was the one established between Sweden and Brandenburg after the Thirty Years War).

⁸⁸ F. Laurent, *I Le droit civil international* 267 (1881); Fernando Laghi, *I Il diritto Internazionale Privato* 29-30 (1888); 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 règles générales du Droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles*, Report to

geographical area was assigned also had the right to govern over the people living in it. In other words, property was mixed with the “imperium”.⁸⁹ Territory became so important in people’s life because the ownership of a certain territory gave the power to make laws.

Feudalism did not mean that the laws of the ruler would apply to all events within its fief. Initially, kings and dukes did not care about foreigners that happened to be in their territory. For instance, a merchant from one territory could be lawfully robbed in another by its residents. That changed slowly as the ruler tried to protect their merchants in other countries. Laurent cites a letter of Frederick Barbarossa to Louis VIII asking him to “assure peace and security” to foreigners and to force damages from a villain that had mugged its merchants, lest he would retaliate against French merchants traveling through Germany.⁹⁰ For these and similar reasons the lawmakers gradually extended their laws to foreigners. John Locke concluded therefore that the person who owns property in a foreign territory or enters it tacitly accepts to be submitted to the laws of that state.⁹¹ Although this proposition has been very disputed as a matter of moral philosophy,⁹² there is no doubt that it gives an accurate account of the political realities in the 16th Century. Everybody that entered the territory was subject to the power of the king.⁹³

the Institut de Droit International, session of Geneva August 31, 1874, reprinted in Pasquale Stanislao Mancini, *Della nazionalità come fondamento del diritto delle genti* 123, 124 (1851, reprint Giappichelli 1994, Eric Jayme ed.), also printed in 1 *Journal du droit international* 221, 222 (1874).

⁸⁹ Later, theorists of international law would have to disentangle property of the territory and the power of sovereign rule-making, see, e.g., L. Oppenheim, *I International Law* 452 (Hersch Lauterpacht ed., 8th ed. 1955); E. Catellani, *Diritto internazionale* 125-126 (Cedam 1929); Antonio Sanchez de Bustamante y Sirven, *Derecho Internacional Publico* 255-257 (Carasa y Cia 1933).

⁹⁰ Laurent, *supra* note 88, at 261.

⁹¹ John Locke, *Second Treatise of Government*, reprint Hackett, Indianapolis, 1980, at 97 (claiming that every man who has any possessions or enjoyment of any part of the dominions of any government or is “barely travelling freely on the highway” thereby gives his tacit consent to the laws of that government).

⁹² See Lea Brilmayer, *Consent, Contract, and Territory*, 74 *Minn. L. Rev.* 1, 5 (1989).

⁹³ Mancini has described this with the formula that the focus of the law has shifted from the man to the land, see Mancini, *supra* note 88, at 124.

Still the law was not completely territorialized. States exercised power in the realm of other countries, through consuls and representatives, which decided over disputes between their fellow countrymen that happened to live abroad.⁹⁴ Sanctuaries, such as monasteries, were carved out from the prince's territorial realm.⁹⁵ Such exceptions, however, faded after the Westphalian peace in 1648. For the first time Western and Central Europe were divided into independent states that recognized each other's absolute authority in their respective territories.⁹⁶ Sovereignty over a certain geographical area was assigned. This paradigm shift was facilitated by military inventions such as the cannon and the musket, which allowed the transition from feudal hosts to the modern army and gave the state the monopoly of power to apply force in its domain.⁹⁷

We can see the aspect that played the most important role in the territoriality of the law: security.⁹⁸ The concern for security and peace was the main reason for shaping the concept of a unitary, enclosed territory. Michel Foucault has shown how the idea of security gradually raised the awareness for the territory in the 16th Century.⁹⁹ The task to

⁹⁴ See Shih Shun Liu, *Extraterritoriality: Its Rise and Decline* (1925). Consular courts continued in some parts of the world for much longer than in others, see Raustiala, *supra* note 53, at 2511 (noting that extraterritorial courts still existed in non-Western nations such as Turkey, Morocco and China until World War II).

⁹⁵ See Garrett Mattingly, *Renaissance Diplomacy*, Cape, London, 1962, at p. 269.

⁹⁶ See van Creveld, *supra* note 87, at 86.

⁹⁷ van Creveld, *supra* note 87, at 156; Philip Bobbitt, *The Shield of Achilles*, Alfred A. Knopf, New York, 2002, pp. 98-99.

⁹⁸ The special function of security has already been underlined by Robert Nozick, who justifies the modern state as a territorial unit as a "protective mutual association", see Nozick, *Anarchy, state, and Utopia* (1974). However, Nozick fails to provide an explanation why the power of the protective association should be defined *territorially*.

⁹⁹ Michel Foucault, *Sécurité, Territoire, Population* (Course at the Collège de France 1977-1978).

guarantee the security within a certain area was that of the sovereign. In order to uphold peace and safety, it was necessary to extend his power to the whole realm.¹⁰⁰

The beginning of territoriality as a paradigm of legal science is equally connected to security, though in a complex way. It is usually dated back to a particular statement in the Codex of Justinian that deals with the vexed question which religion one should follow. This statement holds that all subjects should adhere to the religion of the emperor, which was the Christian religion.¹⁰¹ At first blush, there seems to be little connection to the principle of territoriality. But the comments that were put next to the text by the glossators in the 13th Century provided it. Their so-called “statutist” theory is generally considered to be the origin of conflicts thinking.¹⁰² The glossators sought to combine the text with the realities of Northern Italy at the beginning of the 13th Century. In that time, a number of independent cities had developed between which commerce flourished. Within the walls ringing these cities, a local law applied that was different from the Roman law that governed in the rest of the country.¹⁰³ The reality of these laws and the applicability within the Cities’ territory was hard to neglect. The glossators therefore strived to explain their existence and reach. In their gloss to the text, they established that there are two kinds of laws: real statutes that govern within a certain territory and

¹⁰⁰ Even the notion of the state (“lo stato” as used by Machiavelli) is connected to the rise of a territorial polity, see Brian R. Nelson, *The Making of the Modern state* 57 (2006).

¹⁰¹ Codex Justinian, *Institutiones* 1.1.1. The beginning is famously phrased: “Cunctos populos...” The translation is provided by Juenger, *supra* note 84, at 11: “We want all peoples which are subject to Our reign of mercy to live in the religion that according to religious tradition the Divine Apostle Peter gave to the Romans...”.

¹⁰² See Juenger, *id.* at 11; Scoles, Hay, Borchers & Symeonides, *supra* note 12, p. 12; Laurent, *supra* note 88, at 274; Armand Lainé, *I Introduction au droit international privé* 104 (F. Pichon 1888); Max Gutzwiller, *Geschichte des Internatinoalprivatrechts* 29-48 (Helbing & Lichtenhahn 1977).

¹⁰³ Description by Juenger, *id.*, at 12-13.

personal statutes that apply to persons.¹⁰⁴ They used the text of the Codex and effectively transformed it into a device to recognize territorial rules of law.

Later, the connection between religion and territoriality was established even more blatantly. Machiavelli and Thomas Hobbes both recommended that subjects be made to practice the religion prescribed by the sovereign as best adapted to the maintenance of public order.¹⁰⁵ After the wars sparked by Reformation in the 16th Century, everybody who lived in a certain territory was made subject to the religion of the sovereign. This was translated by the Latin maxim: “*cujus regio, ejus religio*”, first used in the peace of Augsburg 1555.¹⁰⁶

The subsequently dominating French conflicts scholars relied heavily on territoriality. D'Argentré made it the most important principle of his theory.¹⁰⁷ He advocated that the local customs governing in certain regions of France had to be applied to everything that happened within these areas. He extended the territorial principles introduced by the glossators to the point that territoriality ultimately replaced personality. Montesquieu tried to give a philosophical explanation as to why laws had to apply within a certain country. He argued that the circumstances under which a particular people lived, like the climate and the soil, would influence the spirit of a nation, which in turn would have an impact on the spirit of their laws.¹⁰⁸ Similar arguments can be found in

¹⁰⁴ See Juenger, *supra* note 84, at 14; Scoles, Hay, Borchers & Symeonides, *supra* note 12, p. 11. About the process of transformation, see Lainé, *supra* note 102, at 101-115; Laurent, *supra* note 88, at 296-305. Laurent claims that the principle of territoriality was so prevalent in feudalism that the true revolution was not the introduction by the glossators of territorial laws, but of the rule of personality was a “révolution”, see *id.*, at 306. However, the principle of personality was much older, see *infra* under III 4.

¹⁰⁵ See van Creveld, *supra* note 87, at 73.

¹⁰⁶ See J. Leclercq, *Les origines et le sens de la formule: cuius regio, ejus religio*, 37 *Recherches de Science Religieuse* 18-36 (1950).

¹⁰⁷ Juenger, *supra* note 84, at 18; Laurent, *supra* note 88, at 395; Lainé, *supra* note 102, at 316; Gutzwiller, *supra* note 102, at 98.

¹⁰⁸ Montesquieu, *I De l'Esprit des Lois* 221-291 (book XIV-XVIII) (transl. T. Nugent, Hafner Press 1949).

Rousseau's treatise on the social contract.¹⁰⁹ These reflections make us smile today. But it is striking that we find exactly the same thoughts on the first page of Story's treatise.¹¹⁰ Clearly, one can see the desire to give a naturalistic explanation to the transformations that had shaped the new political reality.

During the French Revolution, the concept of territoriality was rendered in terms of absolute to the point where the idea of the unitary state was identified with the territorial application of all legal rules. The Revolutionists abolished Roman law and the different customs that had governed in France under the *Ancien Régime*. The uniformity of the law within the limits of the state became the mark of its unity. But as often with the revolutionist's ideas, this was mere symbolism.¹¹¹ The fact that the old regime had existed with different laws clearly showed that the concept of the state does not require legal uniformity in all matters. The revolutionist themselves admitted that not all laws must necessarily apply territorially. Their main concern was the application of the law regarding security within all of France. That concern is reflected in a famous provision of Article 3(1) of the French Civil Code, which reads: "Statutes relating to public policy [French: *ordre public*] and safety are binding on all those living on the territory".¹¹² This phrase was used by the courts in France to solve many different conflicts problems.¹¹³

¹⁰⁹ See Jean-Jacques Rousseau, *Du contrat social* 86, 89 (1762, reprint Flammarion 2001) (mentioning the climate when discussing why the laws of the world have to be different).

¹¹⁰ Story, *supra* note 15, p. 1 (§ 1) (noting that "climate, and geographical position, and the physical adaptations springing from them, must at all times have had a powerful influence in the organization of each society, and have given a peculiar complexion and character to many of its arrangements").

¹¹¹ Territory functioned much like other symbols that are crucially important for constructing the conception of the state, see Ernst Cassirer, *The Myth of the State* (1946).

¹¹² Les lois de police et de sûreté obligent tous ceux qui habitent le territoire. Article 3 (1) French Code civil. Translation taken from the official website of the French Government, www.legifrance.gouv.fr (last visited May 11, 2006).

¹¹³ See Pierre Mayer & Vincent Heuzé, *Droit international privé*, 8th ed., Montchrestien, Paris, 2004, p. 86.

But originally it means only that: laws about public order and safety apply throughout the territory.

F. The Continuing Legacy of Territoriality in a Globalized World

As we have seen, the idea of territoriality emerged from the concern for security within the states' borders. This connection obviously has survived to our days. The link between territory and the application of the law is closest for all matters that relate to the monopoly to use force, to security and peace. That is why criminal law and conduct related rules are generally thought to be territorial. As new threats for security have emerged that may originate very far from the state territory, it is often strived to extend criminal laws beyond frontiers.¹¹⁴ Nevertheless, it remains that the states' powers to ensure security continue to be clearly demarcated, and every transgression of these lines will be considered by other governments as an attack on their sovereignty.

From the area of security, states have extended the concept of territoriality to all kind of other domains. They try to territorially control every kind of issue, from the High Seas to the internet.¹¹⁵ Yet as was shown, the idea of sovereignty and the territorial application of laws are not identical.¹¹⁶ International law clearly distinguishes between jurisdiction to enforce, which is territorially limited, and jurisdiction to prescribe, which is potentially unlimited. That the state's enforcement power is limited to a territory hence does not justify the conclusion that its laws would end at its geographic borders.

¹¹⁴ For a critical appraisal, see Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harv. J. Int'l L. 121 (200) (identifying potential constitutional limits on the ability of the U.S. to extend extraterritorially its anti-terrorism laws).

¹¹⁵ See Albert & Brock, supra note 3, at 21-22.

¹¹⁶ See supra 2 c.

Moreover, it was demonstrated that neither constitutional nor soft territoriality are convincing as logical conceptions.¹¹⁷

This does not mean that law could not be limited to a certain space. All that was proven was that the territorial limitation of law is neither required as a matter of sovereignty, nor by the Constitution or by natural science. It had first been developed because of concerns for security and peace. To other issues, it has been applied by analogy. It is a solution *faute de mieux*, because one often could not think of another principle to determine which law shall apply to cases that have connections to other states. In the modern world, however, territorial connections are often difficult to establish, and seem sometimes artificial. That makes territoriality of law as a legal principle and the concept of the territorial state increasingly outdated.

III. Is Law Personal?

A. Mancini and the System of Personal Law

The big counter-concept to the territorial character of the law is the theory that a specific national legal system would govern only certain persons. The idea was most comprehensively expounded in the 19th Century by Pasquale Stanislao Mancini. Mancini was an Italian professor of international law and a contemporary of Savigny, with whom he was involved in an academic quarrel over the question whether territoriality or nationality is the overarching principle of conflict of laws. To understand Mancini's preference for nationality, it is essential to know his particular conception of international law. Mancini thought of international law as being based not on relations between states,

¹¹⁷ See supra 3 and 4.

but nations.¹¹⁸ Not the state, but the nation would therefore be the essential element of international law. This is, by the way, also an explanation why the discipline is called “*international law*” or “*law of nations*”, and not “*inter-state law*”. To underline his point, Mancini drew a comparison between the two perpetual forms of association, the family and the nation. He asserted that the family had determined the development of the law from its beginning, alluding to the fact that legal rules first emanated within tribes. According to Mancini, the nation would in the same way determine international law because it is its original unit.¹¹⁹

Again, we see a powerful conception of the state. This time, the state is conceived of as an entity that mainly consists of persons.

From international law, Mancini extended his teaching to the area of conflict of laws. He argued that the applicable law would have to depend on the nationality of the person involved, because as a matter of international law, a person could not be submitted to the laws of another state. With that argument, he established a direct link between his concept of a state and the determination of the applicable law.

Mancini also offered a substantial reason why a person could only be submitted to the laws of his or her nation. That would be so, he argued, because the laws of a country would be adapted to the circumstances in which the nation lives, such as the climate, the geographic situation, mountainous or maritime, the nature and fertility of the soil.¹²⁰ We find the ideas of Montesquieu that have been mentioned above revitalized.¹²¹ But

¹¹⁸ Pasquale Stanislao Mancini, *Della nazionalità come fondamento del diritto delle genti*, (1851, reprint Giappichelli 1994, Eric Jayme ed.), p. 19–64.

¹¹⁹ Mancini, *id.*, at 37.

¹²⁰ Mancini, *supra* note 88, at 154. In another piece, Mancini insisted that the Alps and the sea had shaped the Italian character, see Mancini, *supra* note 118, at 38.

¹²¹ See *supra*, note 108.

Mancini employs them to a different end: He uses them in order to justify not the concept of the territoriality of law, but the primacy of personality as the general connecting factor. According to him, because the law was adapted to the particular situation of the nation, the individual could ask, in the name of its different nationality, that the laws of its nation are applied to it.¹²² By basing legal decisions on a person's national law, respect would be shown for the individual's legitimate and inviolable autonomy.¹²³

Mancini's ideas had a deep influence on European conflicts theory and practice. A number of private-international-law provisions based on nationality were inserted in the Italian *Codice civile*, elaborated under the auspices of Mancini himself.¹²⁴ Following his report, the Institut de Droit international adopted in 1880 a resolution that made the status and the capacity dependent on the person's nationality and submitted succession to the law of the state to which the deceased belonged.¹²⁵ The nationality principle spread to countries as far away as Egypt, Iran, Ethiopia, China, Japan, Brazil, and Chile.¹²⁶ The first conventions adopted by The Hague Conference on Private International law – another creation of Mancini's thinking – sanctioned the principle of nationality.¹²⁷ As one

¹²² Mancini, *supra* note 88, at 155.

¹²³ *Id.*

¹²⁴ On Mancini's influence on Italian private international law, see, e.g., Tito Ballarino, *Diritto Internazionale Privato*, Cedam, Padua, 1996, pp. 30-34.

¹²⁵ Article VI and VII of the resolution adopted in Oxford, September 7, 1880, 5 *Annuaire de l'Institut de Droit International* 56-58 (1881-82).

¹²⁶ L. I. De Winter, *Nationality or Domicile? The Present State of Affairs*, 128 *Recueil des cours de l'Académie de droit international de la Haye* 347, 373 (1969-III). On Mancini's influence on Japanese Conflicts Law, see specifically Nashitani, *Mancini and the Principle of Nationality in Japanese Private International Law*, in: *Festschrift für Eric Jayme*, Sellier, Munich, 2004, pp. 627-641.

¹²⁷ See Article 1 of the Convention relating to the settlement of the conflict of laws concerning marriage (subjecting the right to marry to the national law of each spouse), Articles 1 and 2 of the Convention relating to the settlement of the conflict of laws and jurisdictions as regards to divorce and separation (making the divorce dependent, *inter alia*, on the national law), and Article 1 of the Convention relating to the settlement of guardianship of minors (submitting the guardianship of a minor to its national law), all three conventions done at The Hague on June 12, 1902.

commentator has put it: “The whole legal world was at Mancini’s feet!”¹²⁸ During the 20th Century, he had many followers.¹²⁹ Still today, Mancini’s legacy lives on. For instance, in many legal systems the applicable law to successions depends on the nationality or citizenship of the deceased.¹³⁰

B. Terminological Remarks on Nationality, Citizenship, and Domicile

Nationality and citizenship are often mentioned interchangeably, as has been done in the last sentence. Lawyers tend to identify the two.¹³¹ But there is a big difference between them.

The term “citizenship” denotes the fact to be a member of a state. It is meant in a very technical, juridical sense. “Nationality”, in contrast, is more sociological. It refers to a group of persons sharing a common consciousness, which may be based, for instance, on a common language, religion, race, customs, or history.¹³² Nationality may be totally independent of any existing political unity.¹³³ Indeed, when Mancini suggested using nationality as a connecting factor, he did so in order to promote a common applicable law to all Italians, although Italy as a unified state was not yet existent. As Mancini already made clear, the notion of the state and the nation are not identical.¹³⁴ The United States Code tries to reflect the distinction between nationality and citizenship by considering as

¹²⁸ De Winter, *supra* note 126.

¹²⁹ See, e.g., Antoine Pillet, *Principes de droit international privé* 275 (1903) (stating that courts would miss the respect of a foreign sovereign if they would not apply its law to its nationals); J.-P. Niboyet, *I Traité de droit international privé français* 73-74 (Sirey 1938) (“avec la nationalité l’Etat se délimite; sans nationaux, il n’existerait pas”).

¹³⁰ See, e.g., Article 25 (1) Introductory Law to the German Civil Code (EGBGB) (determining the applicable law to a succession according to the citizenship of the deceased).

¹³¹ See, e.g., Oppenheim, *supra* note 89, at 642-643.

¹³² See Carlton J.H. Hayes, *Essays on Nationalism* 4 (1928); Sydney Herbert, *Nationality and its Problems* 21, 33 (1919); Mancini, *supra* note 118, at 37.

¹³³ Hayes, *supra* note 132, at 5.

¹³⁴ See *supra*, under 1. See also Herbert, *id.* at 15.

a national a person who, though not a citizen, owes permanent allegiance to the United States.¹³⁵ At the same time, however, the Code considers all citizens to be nationals *de jure*.¹³⁶ Such a fiction has a benefit: it prevent any discrimination between “national citizens” and “non-national citizens”. Nevertheless, from a conceptual viewpoint, nationality and citizenship must be distinguished.

Both nationality and citizenship have to be differentiated from domicile. To be domiciled means to have an indefinite residence without the intention to change it.¹³⁷ In the Common law, domicile is of special prominence since it functionally replaces nationality and citizenship: Where continental rules of private international law refer to one of the latter two concepts, the Anglo-Saxon conflict rules typically use domicile.¹³⁸ This is understandable because most Common law countries are immigration countries. The use of domicile as a connecting factor is characteristic for states with large numbers of foreign nationals and citizens.¹³⁹ Domicile avoids the chaos that would result from the application of multiple laws of different nationals or citizens present within the same state.

Although nationality, citizenship and domicile can thus be distinguished, they share at least one characteristic: All of them relate to a person, not to a territory. They are

¹³⁵ 8 U.S.C. 1101(a)(21)(b).

¹³⁶ 8 U.S.C. 1101(a)(21)(a).

¹³⁷ As to the requirements for the acquisition of domicile, see Scoles, Hay, Borchers & Symeonides, *supra* note 12, at 251-265.

¹³⁸ On the origins of domicile, see P.E. Nygh, *The Reception of Domicil Into English Private International Law*, 1 *Tasmanian University Law Review* 555-568 (1960) (seeing the triumph of domicile in a compromise between the personal law system of the Dark Ages and the feudal territorialism of the Middle Ages); De Winter, *supra* note 126, at 361-363 (tracing domicile to the Roman notion of “domicilium”, which gained importance as a concept separate from citizenship in Medieval times); Savigny, *supra* note 55, at 97-109 (§ 353) (stressing that the Roman notion *domicilium* is different from residence and was the result of the free will and the act corresponding with it).

¹³⁹ Scoles, Hay, Borchers & Symeonides *supra* note 12, at p. 242; De Winter, *supra* note 126, at 412-413 (noting that Brazil, where large bodies of immigrants had settled, could no longer uphold the nationality principle in 1942).

traits of the individual and not geographical facts. A conflicts rule that relies on them is following the concept of personality of the law, not that of territoriality. At first sight, it seems quite difficult to maintain this claim with regard to domicile. It appears much more to be a geographical criterion: After all, it is determined by the *territory* in which a person lives. Yet a closer look reveals that in essence it is personal. For where an individual is domiciled does not depend on her current position in the territory of another state. The law of domicile remains the same wherever she goes, provided she does not establish a new indefinite residence there. Domicile is just another method to attribute a person to a certain community and to submit her to its laws. Thus, if a conflicts rule uses domicile, it connects law personally. The attention is shifted from facts or acts happening in a certain territory towards the person that is involved.

C. Sociological Facts: Multi-Citizenship, Transnational Communities, Global Cities, and Mobile Persons

Under the conditions of the de-bordering of the state and the mobile society, the concept of personal law no longer fits realities. The idea that the state is composed of a homogenous group of persons and that its law applies to all of them is not correct. This can be shown, for instance, with regard to nationality. People do not belong to one nation, but have two or even more nationalities. Instead of “pure” French or Algerians, there are more and more French-Algerians or Algerian-French persons. In countries like the U.S., people with a mixed background even form the largest part of the population. In some areas, clusters of people with several cultural identities have formed. Sociologists have

long taken cognizance of their existence and call them “transnational communities”.¹⁴⁰ An example is the British-Indian Diaspora that has connections to both the U.K. and to other Indian communities all over the world. That social relationships transgress traditional states is not a single incidence, but part of a larger trend. Some authors even forecast that cosmopolitanism would take the place of citizenship in a Nation-state.¹⁴¹ They go so far as to speak of a “global citizenship”.¹⁴² One may consider this as a fantasy for the future. But what is sure is that nationality as a unified concept is obsolete. It therefore makes no sense to build a concept of the state around a certain “model national”.

The same loss of meaning affects citizenship. Due to the constant flow of immigrants around the globe, an ever increasing number of people have dual or more citizenships. The citizens of a country no longer form a uniform corpus of human beings that owe an undivided allegiance to “their state”. Instead, they are connected to different political entities. As the concept of citizenship falls more and more apart, it loses its epistemological value for the science of conflicts of laws. It becomes increasingly difficult to use it as a basis for the determination of the applicable law. One particular piece of evidence for this fact can be found in a special rule of the Introductory Law to the German Civil Code.¹⁴³ It provides that persons with multiple citizenships are submitted to the law of the state to which they are most “closely connected”, but in case

¹⁴⁰ See, e.g., Martin Albrow, John Eade, Jörg Dürrschmidt & Neil Washbourne, *The Impact of Globalization on Sociological Concepts: Community, Culture, and Milieu*, in: *Innovation, The European Journal of Social Science Research* 7 (4) 1994; Martin Albrow, *The Global Age: State and State Society Beyond Modernity*, Polity Press, Cambridge, 2007; Ludger Pries, *New Transnational Social Spaces: International Migration and transnational companies in the early twenty-first century*, Routledge, 2001.

¹⁴¹ Gerard Delanty, *Citizenship in a Global Age: Society, Culture, Politics*, Open University Press, 2000.

¹⁴² Darren O’Byrne, *The Dimensions of Global Citizenship: Political Identity Beyond the Nation-state*, Routledge, 2003.

¹⁴³ Article 5(1) 1 and 2 EGBGB.

that they are also German citizens, German law shall prevail. The first of these rules begs the question of what the closest connection is, while the second is nothing else than a politically motivated and nationalistic fiction. Thus, the notion of having “a citizenship” becomes more and more estranged from reality.

The more factual domicile is also losing its value as a connecting factor. On the basis of the concept of domicile is the old habit to spend a lifetime at one place. This habit is, however, outdated. Under today’s circumstances of permanent movement and uncertainty, it is unusual that somebody would take an “indefinite residence” at some place. More often than not, a person moving to a new home has an intention to change it because he has already planned to go elsewhere, the only question being left open is when. Moreover, experience in legal fields like divorce and tax law has shown that domicile can be easily faked since the subjective intention it depends on does not lend themselves to easy control.¹⁴⁴ Yet the most crucial deficiency of domicile is that it has lost its value as a connecting factor. It no longer indicates much about the domiciled person. Once the place where you live said something about your cultural upbringing and socialization. For many, this is not the case anymore. This is most obvious for people living in cities such as New York, London or Tokyo, in which numerous different nationalities dwell side by side. Sociological research calls them “global cities” and underlines that they are less connected to the country they are situated in and much more

¹⁴⁴ See, e.g. Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 *Wm. & Mary L. Rev.* 1, 3 (1997) (discussing the case *Perito v. Perito*, 756 P.2d 895 (Alaska 1988) in which one spouse flew to Alaska and pretended to take residence there in order to divorce from her husband with whom she had lived in New York during the entire time of marriage); Robert J. Misesy, Jr., *Simplifying International Jurisdiction for United States Transfer Taxes: Retain Citizenship and Replace Domicile With the Green Card Test*, 76 *Marq. J.* 73, 87 (1992) (explaining that the subjective requirement of intent poses a problem in tax litigation).

to the global economy.¹⁴⁵ The residents of these cities form a colorful bunch that often has no relation to the state they happen to live in. They are “mobile citizens” in the sense that they move from one country to the other without taking deep roots there. What is true for the residents of global cities becomes more and more a reality for others as well. The fact that a person lives in a certain country does not really say anything about him or her. It is therefore doubtful whether it makes sense to apply the law of that place to them. In many cases, they will not have any knowledge of this law and it will not correspond to their cultural background.

Thus, the de-bordering of the state belies the idea of the Nation-state as well as domicile as a connecting factor.

D. Philosophical Justification: The Concept of the State as Social

Contract

In spite of all these drawbacks, Mancini’s theory has a lot of attractiveness from a philosophical perspective. There can be no doubt that law is addressed to persons, and not to territory. The fundamental question why certain legal rules apply to people has occupied philosophers for the last hundreds of years. The answer they came up with was the theory of the social contract, a real or imaginary agreement between the members of a state. This theory has been developed from Hobbes to Rousseau, from Kant to Rawls.¹⁴⁶ If the state is indeed founded on such an agreement, its laws can theoretically bind only

¹⁴⁵ Cf. Saskia Sassen, *The Global City: New York, London, Tokyo*, 2d ed., Princeton University Press 2001 (describing from a viewpoint of urban planning the central role of certain agglomerations in the process of globalization).

¹⁴⁶ See Thomas Hobbes, *The Leviathan* (1660); Jean-Jacques Rousseau, *Du contrat social* (1762, reprint Flammarion 2001); Immanuel Kant, *Metaphysik der Sitten*, Part 1 - *Metaphysische Anfangsgründe der Rechtslehre* (1797); Rawls, *A Theory of Justice* (1971).

those that are parties to the contract. Only who has consented to the contract can be bound by it. In other words: a state's rules are binding on you only if you are the member of a club.

In order to determine who belongs to the club, it is necessary to use some criterion. It seems obvious that this criterion must depend on the person, and not on the outer geographical limits of the state, since only persons can agree to the social contract. "Nationality" and "citizenship" are therefore perfectly logical criteria to determine who is bound by a state's laws. An apparent problem for the theory of social contract is, however, that only the first persons could agree on the contract and that their successors cannot influence their nationality or citizenship easily: You have no say on your nationality, and your citizenship is to a large extent beyond your control. In reality, you can therefore not choose whether you are "a member of the club" or not that is based on any of these two criteria. But that does not disturb the contract theorists too much, since they start from a more abstract idea of a contract, an "original contract" between the members of a real or imaginary first state. The rules of this first state are binding on all descendants, whether they like it or not. In that, the contract theory resembles a more forced association, an inherited personal link. We are reminded of Mancini's parallel between the nation and the family.¹⁴⁷

Even domicile could be interpreted as the acquiescence to become part of the "family" of a state. Although domicile creates a bond less strong than citizenship or nationality, it is still a connection to the state that may serve as the basis of applying the law. It conforms even more to the idea of an agreement because it is based on a voluntary

¹⁴⁷ See *supra*, under I.

decision. By choosing to live in a certain country, one can indeed presume that the person has submitted itself to its laws.¹⁴⁸ That does not mean that the person really consented to these laws. Instead, it is considered to be part of the community that has established the law.

E. The Rise and Fall of Personal Laws

It results from the foregoing that the concept of personal law makes perfect sense from a philosophical perspective. Nevertheless, this concept has lost its practical value as has been shown before. The questions that have to be asked are: 1. what are the reasons for the spectacular demise of personal law, and 2. what is the proper place of personal laws in conflicts theory today? Once again, an inquiry into the history may be helpful to find the answers.

The principle of personality is in fact much older than Mancini's theory. It goes back to the first state. Although it is hard to trace the state's beginnings, one would certainly agree that the Greek cities, or *poleis*, were states in the modern sense of the word. Now it is an interesting feature that they applied their law not to a certain territory, but using personal criteria. Only citizens of the *polis* enjoyed the protection of the law. In contrast, foreigners had no rights. They were just "barbarians" considered to be outside of the legal community.¹⁴⁹ The best proof is that they could be made slaves.¹⁵⁰ They also

¹⁴⁸ This was Locke's view, see *supra* note 91.

¹⁴⁹ Laurent, *supra* note 88, at 121-122; Fernando Laghi, I Il diritto internazionale privato nei suoi rapporti colle leggi territoriali 5 (Nicola Zanichelli 1888).

¹⁵⁰ Laurent, *supra* note 88, at 129; Laghi, *supra* note 149, at 3.

had no right to appear in court.¹⁵¹ If they wanted to bring a claim they had to appoint a special representative, a *proxenos*, which would appear for them in court.¹⁵²

As the Greeks, the Romans did not extend their law, the *ius civile*, to foreigners, or *peregrini*. It was reserved as a privilege to Roman citizens. To disputes among the *peregrini*, and between a *peregrinus* and a Roman citizen, the Romans applied the so-called *ius gentium*. These were principles of justice which are so basic that it was assumed that they must be followed and known by all peoples of the world.¹⁵³ The *ius gentium* was not a conflict-of-laws rule in the modern sense. Instead, it made such rules obsolete by replacing them with special substantive rules.

When Rome collapsed, the system changed. The German tribes that invaded the Empire each lived under their own laws. The Lombards would apply Lombardic law to their disputes, the Visigoths Visigothic law. This method of assigning the applicable legal rules has been called the system of personal laws.¹⁵⁴ The Teutonic conquerors applied it even to the defeated Romans, who were allowed to continue to live under Roman law.¹⁵⁵ This kind of tolerance of a victor is strange indeed. Even more strange was the split in the applicable law that was the result. Montesquieu described it in the following terms:

The country was common, the government peculiar; the territory the same, and the nations different.¹⁵⁶

People governed by diverging laws often lived side by side. This led to the famous sentence of Argobard, the Archbishop of Lyon, according to which it often

¹⁵¹ Laurent, *id.*, at 121.

¹⁵² Laurent, *id.*, at 128; Laghi, *supra* note 149, at 12.

¹⁵³ See *supra* note 85.

¹⁵⁴ W.F. Maitland, A Prologue to a History of English Law, 14 L.Q. Rev. 13, 23 (1898). Heinrich Brunner, *Deutsche Rechtsgeschichte* 259 (1887) speaks of “Personalitätsprinzip”, Enrico Levi Catellani, *Il Diritto Internazionale privato e i suoi recenti progressi* 205, Vol. 1: *Storia del diritto internazionale private*, Unione, Turin, 1895, speaks of “il sistema della personalità delle leggi”.

¹⁵⁵ Maitland, *id.* at 24; Brunner, *supra* note 154, at 261-268 (1887).

¹⁵⁶ Montesquieu, *supra* note 108, Vol. II, at 95.

happened that five men would be walking or sitting together and each of them would own a different law.¹⁵⁷ Obviously, this created fantastic conflict-of-laws problems. In disputes between people from different tribes a choice had to be made. Special rules had been developed to solve this situation. For instance, in a murder case, the law to be applied was the law of the slain, not of the slayer; the law of the grantor prescribed the ceremony to be followed for conveying title to land; legitimate children received their law from the father, while “bastards” were governed by the law of the mother.¹⁵⁸ The problems were even bigger with regard to contracts between members of different tribes. In that case, the law of one side could not be imposed on the other lest one was willing to put the equality of the contracting parties into question.

Regardless of these problems, one may feel certain sympathy with the system because it seems to be built on an individualist approach. Everyone is different by its origin, and these differences have to be respected.¹⁵⁹ But it would be wrong to try to explain personal law by liberalism in the modern sense.¹⁶⁰ Rather, it is a product of an under-development: the Germans did not know the idea of the state and its unity.¹⁶¹

Even after the advent of the territorial state, personal ideas remained relevant. The only difference was that the point of reference now became the nation, not the tribe. In the 19th Century, the idea gained wide currency. Before Mancini, it had made a sharp rebound during the romantic period in Germany, where it was crystallized in Hegel's

¹⁵⁷ Quoted by Friedrich Karl von Savigny, *I Geschichte des Römischen Rechts* 116 (1834); the English translation is taken from W.F. Maitland, *supra* note 154. See also Juenger, *supra* note 84, at 10.

¹⁵⁸ Maitland, *supra* note 154, at 24-25.

¹⁵⁹ See also the justification for the application of national law to nationals by Mancini, *supra* note 120 and accompanying text.

¹⁶⁰ Savigny, *supra* note 157, at 118.

¹⁶¹ Laurent, *supra* note 88, at 238.

term “Volksgeist” (“spirit of a people”)¹⁶². Savigny used the similar concept of *Volksbewusstsein* (“conscience of a people”) in his publications.¹⁶³ Remarkably though, he did not apply it in his treatise on the conflict of laws, in which he preferred territory.¹⁶⁴

Indeed, when Mancini defended the principle of nationality in the 19th Century, it was a kind of anachronism. It had already been overcome by the rise of the territorial state, in which persons of different origin were fused in one community.¹⁶⁵ The importance that the nationality principle gives to ideas of “blood” or even “race” is contradictory to the reality of the modern world in which peoples are increasingly mixed.

The system of personal laws is a conflicts rule which is essentially fitting tribal societies.¹⁶⁶ The system came about as a way to deal with conflicts inside of a tribe. It has no place where members of different communities get in closer contact. This is most

¹⁶² The term was coined by Georg Friedrich Wilhelm Hegel, see his *Elements of the Philosophy of Right* (Allan W. Wood ed., Cambridge University Press 1991), § 340.

¹⁶³ See Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Mohr, Heidelberg, 1814, p. 8. See also James Gordley, *The State’s Private Law and Legal Academia*, 56 *Am. J. Comp. L.* 639, 648 (2008) (noting that Savigny took the idea of a “Geist” – spirit – from Herder and possibly Hegel).

¹⁶⁴ See Savigny, *supra* note 17, at p. 59 (§ 346) (arguing that territoriality “in course of time, and with the advance of civilization”, more and more supplanted nationality).

¹⁶⁵ Enrico Levi Catellani, *Il diritto internazionale privato e i suoi recenti progressi*, Vol. 2: *Il Savigny, la scuola italiana e gli sviluppi più recenti della dottrina dell’ordine pubblico*, Turin 1902, at p. 233. See also Eugen Ehrlich, quoted in Michaels, *supra* note 10, at 1245-1246 (“If one speaks today of a national law, this is more and more not understood to mean the law of a people, as a community held together by origin, language, history and culture, but the law of a state, as a governmental organization resting on a specific territory, which can either extend over a number of peoples, or only comprehend parts or particles of a people.”)

¹⁶⁶ See note, *Products Liability and the Choice of Law*, 78 *Harv. L. Rev.* 1452, 1465-1466 (1965) (“Personal law was perhaps appropriate in the era following the barbarian invasions of Italy, when a Lombard or Roman in the Kingdom of Alboin obeyed only the law of his own people, largely no doubt because ethnic differences were great and because the royal authority was too weak to impose uniformity. In the modern setting there seems little reason to magnify artificially the difference between citizenship in one or another of the American states.” - footnote omitted). See also John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 *William and Mary Law Review* 173, 192 (1981).

apparent for international business, in which personal law is completely outdated. In transactions between enterprises, nationality hardly plays any role.¹⁶⁷ De Winter remarks:

One has to be devoid of nearly all sense of realism still to attribute decisive importance to the nationality principle in international commerce and with regard to the transactions giving rise thereto.¹⁶⁸

A last but not least important reason of the retreat of personality of the law is the growing importance of human rights.¹⁶⁹ Through the basic liberties applicable to everybody, the focus has shifted from the concept of the citizen to that of the person.¹⁷⁰ Each human being is attributed rights regardless of its origin. When the same rights are attributed to everyone, the concept of personal law loses its importance.

F. The Remaining Importance of Personality

Today, nationality, citizenship and domicile continue to play a role mostly in one respect: in the relation between the individual and the state. One could summarize this relation with the terms loyalty and solidarity.

¹⁶⁷ As early as 1930, Cassin remarked: “When it is a matter of determining the law applicable to the relations between the leaders of industries or trading enterprise and their employees, their financiers, their suppliers and their customers, it is surprising to discover to what extent the concept of nationality is useless on account of the intense interpenetration of international elements that business life nowadays brings into play.” René Cassin, *La nouvelle conception du domicile dans le règlement des conflits de lois*, 34 *Recueil des cours à l’Académie de droit international à La Haye*, 655, 760 (1930-IV). The translation is taken from de Winter, *supra* note 126, at 413.

¹⁶⁸ De Winter, *supra* note 126, at 413.

¹⁶⁹ In fact, other states accept the application of interest laws, see Article 7 (1) of the European Convention on the law applicable to contractual obligations (Rome 1980) (Rome Convention); Article 19 of the Swiss Private International Law Act (1987). Both encourage the courts states to apply mandatory rules of laws of other states provided that the interest they serve are considered legitimate and that it seems necessary to apply them regardless of territorial and other connections.

¹⁷⁰ See George P. Fletcher, *Citizenship and Personhood in the Jurisprudence of War*, 2 *Journal of International Criminal Justice* 953, 954 (2004).

1. Loyalty and Solidarity

Loyalty means that nationals and citizens have a number of duties towards the state. For instance, Blackstone speaks of “perpetual or natural allegiance” which is due from all men born within the king’s dominions immediately upon their birth, and he calls it “a debt of gratitude; which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature”.¹⁷¹ The loyalty that the state requires can be seen in many instances. For example, citizenship determines whether you have to serve in the army. Together with nationality, citizenship is also crucial in the law of war. It distinguishes friends from foes.¹⁷² The crime of treason only applies to nationals.¹⁷³ Finally, the influence of loyalty is visible in tax law. Although the advent of the territorial state has introduced a geographical element, it is still true that citizenship and nationality play an important role here. Many tax statutes apply to all revenues of a national or resident, regardless of where they are earned.¹⁷⁴

As a counterpart to the many duties that are imposed in the name of loyalty, the members of a state also have certain rights. Citizenship allows you to enter the state’s territory and stay there. It also is decisive for the right to vote in a national election. Many other important consequences flow from nationality, citizenship and domicile. One of the most significant is the right to receive welfare. Personal allegiance to the state is the basis of the redistribution of wealth between the members of the club. It is also crucial for the

¹⁷¹ William Blackstone, I Commentaries of the Laws of England 369-370 (4th ed. by James deWitt Andrews, Callaghan Co. 1899).

¹⁷² In the law of war, it is traditional to assume that the citizens of the enemy are themselves enemies. See *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1946).

¹⁷³ See George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. Rev. 1611 (2004).

¹⁷⁴ This is the principle of so-called “worldwide taxation”, see section 1 of the Internal Revenue Code, 26 U.S.C. § 1 and Joseph Isenbergh, *International Taxation* 7 (2000). See also § 1(1), (2) of the German Revenue Code (Einkommensteuergesetz).

right to receive an education. From that, it becomes clear that personal criteria reflect a certain amount of solidarity amongst people. They live together, decide together on the rules under which they want to live, and support each other mutually. Another way to call this phenomenon is “the social bond”,¹⁷⁵ or the “cohesion of society”¹⁷⁶.

2. Challenges and Limits

While these ideas play a vital part in the relation between the state and the individual, they are of much less use in transnational relationships. Modern conflicts situation involve more and more persons from diverging origins. In those situations, neither the loyalty nor the principle of solidarity to one nation is of any help when deciding which law is to govern. For instance, in a marriage between a German and a U.S. citizen, it would be equally unfair to apply only German or only U.S. law. The reason is simple: on the inter-national level, the idea of social contract does not work. Since there is no world-community, there is also no common law that is governing world citizens. The split of the world into different nations makes it impossible to follow Mancini’s idea of personal law. The more transnational relations there are, the less the personality principle works.

Regardless of these drawbacks, we still apply personal conflict-of-laws criteria. For instance, citizenship or domicile are used in order to determine a person’s capacity to contract or the law applicable to his succession in movables.¹⁷⁷ But this has nothing to do with loyalty or solidarity. Personal criteria are used here for a very different reason: They have an important advantage over territorial criteria because they avoid a split of the applicable law regarding all questions related to one person. For instance, in the case of

¹⁷⁵ See Werner Stark, *The Social Bond*, 5 volumes, Fordham University Press, New York, 1976-87.

¹⁷⁶ See Albert & Brock, *supra* note 3, at 20.

¹⁷⁷ See Restatement (Second) on Conflict of Laws (1971), § 198(2); § 260. On the latter provision, see also the following note and accompanying text.

succession, applying the territorial principle would divide the applicable law if the estate of the deceased is scattered over the territories of different states. In contrast, applying the personal law of the deceased allows for a single legal regime to apply. All issues related to one person therefore are preferably regulated by a single personal law.¹⁷⁸

These considerations are important ones, but they do not have the same quality as the ones that were made in the context of citizens' rights and obligations. They have been used for determining the law to be applied, but that does not mean that it would be logically necessary to do so. There is a great deal of discretion whether to employ them or others. As with territory, the application of personal law in conflict of laws today is a matter of policy, not of necessity.¹⁷⁹ Factors such as domicile or citizenship do not "determine" the applicable law, but are voluntarily chosen in order to find a solution that works on the transnational level. Once again, the de-bordering of the state over its traditional forms has rendered the application of law in space more difficult. It is not possible to cling to the old concept of the state as an enclosed unit to solve conflicts of laws.

¹⁷⁸ See, e.g., Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154, Art. 16 (suggesting that the law applicable to the succession "as a whole" shall be that of the state in which the deceased had their habitual residence at the time of their death). See also Restatement (Second) on Conflict of Laws (1971), § 198(2); § 260 (providing that the devolution of interests in movables upon intestacy is determined by the law applied by the courts of the state where the decedent was domiciled at the time of his death).

¹⁷⁹ See *supra*, note II 6.

IV. Is Law Bound to Interests?

A. The “Ptolemaic Turn” by Interest Analysis

Traditionally, territorial and personal factors served as limits in the application of a state’s law. The advent of governmental interest analysis in the U.S. in the 1960’s marked a sharp u-turn. Its main proponent, Brainerd Currie, suggested that courts facing a conflict of laws should inquire whether the application of a legal rule of their own state would further the policy underlying the statute. If so, the court should apply its law, regardless of any territorial or personal connection of the case to a certain state.¹⁸⁰

That was a true paradigm shift. For the first time, law is considered independent of objective concepts like territory or citizenship. Instead, its scope of application depends exclusively on the policy that the lawmaker pursues with the statute.¹⁸¹ One could compare the importance of this change of perspective to the switch from the Ptolemaic to the Copernican system, just the other way around: instead of taking a global viewpoint, Currie put the state into the center. He was strongly convinced in the state’s far-reaching powers over the courts, which could mandate them to apply its laws irrespective of abstract and academic concepts like the principle of territoriality or personal law.

¹⁸⁰ See Currie, *supra* note 64, at 119.

¹⁸¹ It is sometimes suggested that even governmental interest analysis could not do without some territorial or personal connection. For instance, Lea Brilmayer has underlined that in Currie’s view the person which should benefit from the application of a law are only those that live in the territory, see Brilmayer, *supra* note 11, at 396. She concludes that Currie would in some way also have adopted territorial thinking. Yet such a view underestimates the importance of governmental interest analysis. Although local or personal interests can well be the motive, the *application* of a law is not limited in such a way: The point of governmental interest analysis is that if it is in the interest of the government, law can apply to any territory or person.

The prime goal of Currie was quite modest: He wanted to exclude “false conflicts”.¹⁸² By this, he meant situations in which a law had to be chosen under the traditional theory, but in which the policies of the different legislators involved did not clash with each other. These cases should be simply eliminated from the conflicts mechanism.¹⁸³ Only in cases in which there was a true conflict, Currie told the judge to follow the rule of its own state. This view was based on the argument that the judge is nothing else than a servant of its community and has to apply its rules whenever its legislature demands it. For Currie, whether and in what way a case is “connected” to a state’s territory or to the persons living there is a question of second order. What counts in the first place is to push through a certain policy.

B. Separation of Powers and Democracy

There are serious constitutional arguments that speak in favor of governmental interest analysis. In particular, the principles of separation of powers and democracy seem to not only support but even require this conflicts theory. Separation of powers demands that the task of the judiciary and the legislature are distributed in a clear fashion. Democracy means that this distribution is done in a certain way: The elected legislature has a command over the courts, which have to apply the rules that the former has enacted.

Both separation of power and democracy have been frequently invoked by Currie as a justification of his theory.¹⁸⁴ Interest analysis does nothing more than drawing the

¹⁸² See Currie supra note 64, at 110 (claiming that the situation could be improved at least by eliminating the false problems constituted by the traditional method) and at 187 (“Let us fist clear away the apparatus that creates false problems...”).

¹⁸³ Currie, supra note 64, at 107, 163 and 189. See also Brainerd Currie, Comments on *Babcock v. Jackson* – A Recent Development in Conflict of Laws, 63 Col. L. Rev. 1233, 1242 (1963).

¹⁸⁴ See Currie, supra note 64, at 144 (“The business of courts in conflict-of-laws is not to judge the politics of the state”), at 151 (“... it is not the business of courts in conflict-of-laws cases to appraise the relative

consequences from these principles in conflicts cases: The judge is obliged by the commands of its own legislature, which will reflect the interests of the majority of people of the state. Therefore, it seems to make sense to determine the scope of the law by taking these interests into account and to disregard the interests of other constituencies in case of a real conflict with those of the forum.

Moreover, this kind of selfishness is allowed under international law, because it sets no limit to the application of domestic law. As was shown earlier¹⁸⁵, states are free to apply their legal rules to any event they wish. Hence, they are at liberty to pursue the interests of their constituency regardless of territorial or personal factors.

C. The Discontents

In spite of these advantages, Currie's theory has come under heavy attack. Many authors have reprimanded the "unilateral" or "parochial" approach that they think is characteristic for governmental interest analysis.¹⁸⁶ To illustrate the point of their criticism, let us apply governmental interest analysis to the metaphor of our house.¹⁸⁷ If one were to go by the interests, one would not be able to determine objectively which law governs a certain case. Each group could claim that it is in its interest that there has to be music or silence, and interest analysis would support both claims. That is because governmental interest

merits of the laws and policies of the respective states..."), at 182 (noting that the assessment of respective values of competing interests is "a function that should not be committed to courts in a democracy" but is a "job for a legislative committee").

¹⁸⁵ See supra, under II 2 c.

¹⁸⁶ For a critique, see Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 *Ohio St. L. J.* 459 (1985); see also Brilmayer, *Conflict of Laws* 47-67 (1995); Brilmayer, supra note 11, at 408-423; Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 *Mich. L.R.* 2448, 2477 (1999); Alfred Hill, supra note 11, at 1593-1597; Douglas Laycock, supra note 38, at 255. From a European perspective, see, e.g., Henri Batiffol/Paul Lagarde, *I Droit international privé* 406 (1993); Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 *Recueil des cours de l'Academie de droit international de la Haye* 91, 180-207 (1964-II).supra note 11.

¹⁸⁷ See supra under I 1.

analysis takes a completely different view of the conflicts problem than the previous theories. It does not pretend that the applicable law could be determined *in some objective way* that would be valid always and everywhere. Instead, it introduces an actor that we have neglected in the metaphor: the decision-maker. The applicable law is no longer dependent on objective criteria, but on who is deciding a particular case. Conflict rules become *subjective*.

In that sense, governmental interest analysis does not provide an answer to the question which law applies from a global viewpoint. On the contrary, it supports mutually inconsistent positions and justifies conflict with other lawmakers. Yet to criticize the theory for this reason as “unilateral” and “parochial” is shortsighted. The peaceful regulation of international conflicts has never been the object of this theory. It is a problem it is just not trying to solve. Instead, it gives an accurate account of what the legislature demands from its courts. It says how the rooms will define the scope of application of their rules in order to maximally satisfy their interests. In that sense, interest analysis gives a correct description of how states behave in reality. It is therefore true to its roots in the teachings of the legal realists.

Another argument that has been made against Currie and his theory is that he would not be true to his own statements. The herald of this criticism is Lea Brilmayer, which belongs to the “second generation” opponents of governmental interest analysis.¹⁸⁸ In a series of articles, she has claimed that Currie’s methodology would in fact be fake. He would accept the policies of the legislature only insofar as they were in line with his concept. Where the legislature had explicitly given a direction for the resolution of

¹⁸⁸ I take the categorization from Bruce Posnak, Choice of Law – Interest Analysis: They Still Don’t Get It, 40 Wayne L.R. 1121, 1130 (1994) at footnote 45.

conflicts cases that would follow the classic territorial connections, Currie and his followers would balk at following the state's command claiming that these connections were too formalistic and sterile.¹⁸⁹ Currie would thus have abided by the legislature's will as long as he liked them, but not beyond that point.

While this observation is as such correct, it is not likely to convince adepts of the new theory, for on the basis of the criticism lies a misunderstanding of the word "policy": When Currie claimed that legislative "policy" has to be followed, he did not simply want to say the commands of the legislature have to be followed – that would be in and of itself a pure truism. Instead, he meant that the best way to solve conflicts cases is to analyze the policy underlying a *substantive* law statute and then to implement it to the extent that is best possible on the international level.¹⁹⁰ What governmental interest analysis says, essentially, is that the application of a law on the international level should hinge upon the same consideration as the ordinary construction of substantive law.¹⁹¹ This idea was also recommended to the legislature itself who should abstain from using the "metaphysical irons" that were forged by the classic theory when determining the

¹⁸⁹ Brilmayer, 78 Michigan L.R. 392, 400 (1979-80) (highlighting that Currie and his followers criticized legislative choice when it contradicts the principles of interest analysis), Ohio St. L.J at 468 (claiming that Currie preached that the greatest good is obedience to the legislative will while balking at following the legislature's lead when it adopted a choice of law approach of which he disapproved). Lea Brilmayer adds further criticism. In particular, she maintains that the constitutional justification of the governmental interest theory would be wrong and that the Federal constitution would put certain limits upon the selfish pursuance of interests by the states. See Brilmayer, 46 Ohio St. L.J. 459, 472-476. This criticism is less relevant for the purpose of this article because it relates solely to the internal law of the United States. It will therefore not be pursued here.

¹⁹⁰ See the very sharp criticism of Posnak, *supra* note 188, at 1137 (pointing out that Lea Brilmayer would "not get" that whether a state has an interest does not depend on what that state "wants" but whether a policy behind a law would be advanced if that state's law was applied).

¹⁹¹ See also William F. Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 17 (1963) (claiming that a state's interest consists in making effective that resolution of contending private interests the state has made for local purposes).

reach of its laws.¹⁹² The defects of governmental interest analysis do not lie there, but elsewhere.

D. Disinterested Law and the Disintegration of State Interests

Although much time has passed and many articles have been written, it seems that the true deficiency of the theory has yet to be spelled out. This deficiency lies in the concept of the policy of legal rules. Currie started from the – unexplained – proposition that the policy of every legal rule is to serve a certain “interest” of the community. Yet many legal rules are not inspired by some interest of the community. Instead, they are the product of the quest to find the most just rule to a certain case. The “policy” of this rule can hardly be expressed in terms of an “interest”.

The most striking examples of such rules that do not serve the interest of a particular group are those that are conveniently summarized under the category of “human rights”. Take the right of religious freedom that foreigners and immigrants are enjoying to the same extent as citizens. How can this right be integrated in the rhetoric of governmental interest analysis? Does the government indeed have an “interest”, in the palpable and inward looking sense in which Currie used the expression, to promote freedom of religion of foreigners? Or, to take a different example, think about the right to live. Does such a rule merely serve the members of our community? Would we apply it only if the interests of the community are affected? Would we not look in every legal regime for such a rule, and in case it does not provide for it supplant it with our own rule?

¹⁹² See Currie, *supra* note 64, at 131-132 (congratulating a California law reform commission for not having intervened in the California Supreme Court’s case law that followed interest analysis).

I would like to call such rules “disinterested law”. These legal rules do not serve any direct purpose of the community. Rather, they are an expression of a certain idea of justice that the state, its legislature and courts believe in. Indeed, not all legal rules are based on parochial and nationalistic concerns as Currie would have liked to have it. Often they are committed to more abstract ideals. In these cases, the legislator goes beyond the simple defense of local interest and remembers a more universal function of the law: to create justice. Interest analysis is not able to cope with this dimension of the law.

Even if laws are made to serve the interests of certain parts of the constituency, they are not necessarily only favoring a single interest. Rather, they seek to combine the diverging interests of the different parts community and strike a balance that is acceptable for everyone. It is therefore often hard to state the policy behind a legislative provision in a sentence that refers to only one single interest. For instance, a rule according to which a seller is liable if he intentionally or negligently destroys the good before it is received by the buyer does not benefit exclusively the buyer or the seller. Rather, it aims at finding a reasonable compromise between the two different positions involved. It is therefore impossible to say that this rule aims at protecting either the buyer or the seller and should thus be applied in case that one of them is a domiciliary of the state that has enacted the rule. It is a compromise rule that takes into account the positions of both sides. Most other provisions of sales law, but also of the law of leasing, factoring, lending, products liability or unjust enrichment are intended to strike a balance between the interests of the parties involved. These rules cannot be classified into purely protective of one side or the other. Instead, they aim for the just resolution of the case. That is because they have been drafted for satisfying the needs of an electorate that has diverse interests.

It is therefore much more realistic to look at law as a kind of compromise or “deal” that has been struck by the representatives of a certain state in order to balance different interests within the community. The law comprises diverging positions at a time. Hence, the ultimate error of Currie’s theory is that it is based on a false concept of the state: It views the state as an enclosed unit having common preferences. Yet the interests of the community are not unitary. The country is split up into divergent camps, none of which has a permanent majority. In order to adopt a law, solutions must be found which serve the interests of more than one fraction of society. The reason why members of Parliament vote in favor of a law is particular for each of them. There is therefore no such thing as an unequivocal “governmental interest”. It is as much an abstraction from reality as to say that a law would reflect the “will of the people”.¹⁹³ The way in which Currie had to speculate about legislative intent¹⁹⁴ bears testimony to the difficulty to discern a coherent interest that the law serves.

This criticism also holds true when the domestic situation is left and replaced with an international one. To speak of the fact that a law would serve the interests, e.g., of the “Americans”, is an ideal that often does not hold up to reality. It may have been on point in a situation such as the war, where all citizens can be supposed to stand on one side. But it is not true for the individualistic relationships we are involved in on a daily basis. In

¹⁹³ The lack of meaning and ambiguity of the concept of the will of the people and the will of the majority has been shown by William H. Riker, *Liberalism Against Populism* 11-12 (W.H. Freeman and Co. 1982); cf. also William H. Riker and Barry R. Weingast, *Constitutional Regulation of Legislative Choice: Consequences of Judicial Deference to Legislatures*, 74 *Va. L. Rev.* 373-401 (1988); Kenneth A. Shepsle, *Congress is a ‘They’, not an ‘It’*, 12 *Int’l Journal of Law and Economics* 239, 239-249 (1993). On the other hand, Eerik Lagerspetz, *Collective Intentions, Legislative Intents, and Social Choice*, in: *Pluralism and Law*, Arend Soetemann (ed.) (Kluwer 2001), p. 375-385, thinks it would be justified to speak of collective intentions if they were arrived at by following a generally accepted rule in society. However, that only refers to the legitimacy of the rule, not to the fact that its policy reflects different interests.

¹⁹⁴ See, e.g., Currie, *supra* note 64, at 86.

these situations, not all citizens of one state have the same interests. It is therefore impossible to state a coherent policy that would benefit all of them.

One could try to escape this problem by the admonition that the courts should apply in trans-boundary disputes only those rules that are favorable to the citizens of their state. The task of the courts would be to get “the best deal possible” for their residents¹⁹⁵ or to decide every case in favor of their citizens.¹⁹⁶ But such a result is even shied away by proponents of interest analysis.¹⁹⁷ Indeed, it would hardly be in conformity with the rule of law to apply a statute only if it helps the members of the community to win a case. And it would contradict its proposition that internal and international cases have to be treated on the same policy as a footing.¹⁹⁸

E. Historical Framework and Concept of the State

Since we have been examining in the context of the other theories the historical background against which they have been developed, it might be interesting to do the same for governmental interest analysis. Methodologically, the theory is closely associated with the movement of legal realism in the United States.¹⁹⁹ But though the teachings of legal realism have long been overcome, governmental interest analysis continues to be influential. Hence, there must be something more that explains for the tremendous success of the theory in the second half of the 20th Century. One major

¹⁹⁵ See Brilmayer, *supra* note 11, at 409.

¹⁹⁶ See Berman, *Towards A Cosmopolitan Theory of Conflict of Laws*, *supra* note 10, at 1846.

¹⁹⁷ See Posnak *supra* note 188, at 1146 (noting that Currie did not assume that a state has an “interest” only when the application of its law benefits a resident). See also Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. Ch. L. Rev. 227, 237 (1958) (rejecting the possibility that the courts must decide every case in favor of the state’s residents).

¹⁹⁸ See *supra* 1.

¹⁹⁹ The groundwork was laid by Walter Wheeler Cook in his seminal article *The Logical and Legal Basis of Conflict of Laws*, *supra* note 25.

reason, it is submitted here, may be found in the concept of the state that was underlying. Currie portrayed the state as being “self-interested”.²⁰⁰ He encouraged the courts to think of their legislator as selfish and to apply its law to whatever circumstances in which it can help their interests. Although Currie focused on cases inside the United States, he painted a certain picture of the state that fitted in the international arena as well.²⁰¹ That his ideas were so widely accepted and applauded was due to the fact that they were coinciding with particular developments that made them plausible. Over the last decades before Currie set out his theory, the view of the state had essentially changed. Far from the peace and justice-seeking entity that was bound by a “common Christian morality”, which Savigny took as a model for his private international law²⁰², states had started to be involved in deep conflicts. Even neighboring countries with a common heritage recklessly tried to further the interests of their communities, or rather what they thought to be such interests. The two world wars had deeply shattered the sacrosanct model of the state as a disinterested arbiter that is committed to the ideals of justice, peace and world harmony. The ensuing period of the cold war showed that even countries which once shared a certain common ideal could turn into enemies when it came to their national interests. Therefore, the new paradigm of the state was one of a selfish unit that was following its interests brutally. In a way, the state had achieved the ultimate level of sovereignty in that it was only to serve the will of its constituency.

Another reason for the spectacular success of governmental interest analysis was the technological development that had deeply changed the outer conditions of life. Airplanes and nuclear bombs had made it possible that one state could affect the live in

²⁰⁰ Currie, *supra* note 64, at 191.

²⁰¹ See also Berman, *supra* note 10, at 1848 (linking Currie’s teaching to “international legal realism”).

²⁰² Savigny, *supra* note 17, at 70 (§ 348).

others very far from its soil. The telephone, the telegraph and other devices had proven any efforts to “localize” events like the conclusion of a contract futile. Modern means of transportation led to tort cases in which the application of the local law seemed fortuitous. The principle of “territoriality” of the law therefore became increasingly obscure, and its application mechanical and sterile.

Finally, more and more “paternalistic” laws had been enacted in the first half of the 20th Century that were designed to protect the citizens and the community from certain perceived disadvantages of the new age. The function of private law and of the state has undergone a profound transformation.²⁰³ Among the chief problems that had to be solved were the increasing information asymmetry and difference in bargaining power between the contractual partners, the dangers of industrial products and the complexity of modern standard terms and conditions. In order to cope with them, the classic principle of freedom of contract was more and more restricted by legislative interventions that annulled or superseded the agreement made by the parties. In order to achieve their goal, these restrictions had to be mandatory even on the international level. They had to apply whether the contract was concluded inside or outside the state, with or without the involvement of foreigners.

It may be that Currie did not have these facts in mind when he wrote his article about married women’s contracts. But they were clearly “in the air” at the time and shaping the ideas about the state and its function. They provided the fertile ground on which Currie’s revolutionary conflicts ideas were given a warm reception.

²⁰³ See Christian Joerges, *Zum Funktionswandel des Kollisionsrechts. Die „Governmental Interest Analysis“ und die „Krise des Internationalen Privatrechts“*, de Gruyter and Mohr Siebeck, Berlin, Tübingen, 1971, at pp. 151-154.

F. The Remaining Importance of Interest Analysis

The proper area of interest analyses are those laws that do serve a clear, distinguishable interest of the state and not some interest mix. This is true for those rules that serve the interests of the community at large. When they are confronted with the interests of a foreign nation or a situation outside its borders, the state's courts must apply them nevertheless.

Antitrust law provides an excellent case in point. Most states apply their rules on cartels and restraints of competition which affect their market, never mind that the actual conduct took place in another country and was done by foreign companies.²⁰⁴ Even the European Union, which otherwise rejects governmental interest analysis in its conflict-of-laws regulations²⁰⁵, follows a tough interest approach when it comes to its antitrust rules.²⁰⁶ Similar developments can be found in securities law. Domestic standards are applied as soon as the internal securities market is affected in any way.²⁰⁷ Territorial or personal factors such as the place of establishment or the nationality of a broker or other intermediary offering his service hardly matter.

There is a similarity between antitrust and securities law, which explains why they are a preferred subject for governmental interest analysis: Both fields of law are full

²⁰⁴ The leading case in U.S. antitrust law is *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). One could of course say that there would be a territorial connection in that such agreements would influence the prices on the market *within* the State. From this perspective, the Alcoa decision would not have overcome but only re-conceptualized the territorial paradigm. See Buxbaum, *supra* note 5, at 674 (arguing that territoriality should not be understood as a mechanical standard but as an expression of a specific understanding about fairness and legitimacy in cross-border regulation). Yet it remains that the only physical conduct discernable in the Alcoa case happened outside the United States. The decision thus stands for the proposition that law could be applied to events outside a state's borders.

²⁰⁵ See, e.g., its Rome I and II Regulation, *supra* note 23 and 12.

²⁰⁶ E.C.J., Case 89/85, "Wood Pulp" Case, 1988 E.C.R. 5193 (1988).

²⁰⁷ See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *rev'd*, 405 F.2d 215 (1968) (en banc).

of so-called internationally mandatory rules.²⁰⁸ These rules defy the traditional conflicts-of-laws methodology in that they demand their application regardless of the contacts to other jurisdictions. It follows from that the proper field of interest analysis is not pure private law, on which its proponents misleadingly started. It is rather those areas that are heavily influenced by ideas of public law.²⁰⁹ These areas are actually growing because modern legislation is increasingly marked by such legislation.²¹⁰ The result is that governmental interest analysis has considerable importance. It is best able to explain why a state may want to apply its law to conduct outside of its borders done by non-nationals. This is often the case when its economic interests are involved, but may be more and more the case in other fields. For instance, anti-terrorism measures fall into the same category.²¹¹

The conclusion on governmental interest analysis is that it is valuable as a conflict-of-laws mechanism, but that it would be a mistake to consider it as an overarching theory. That is because the concept of the state that is underlying the theory is way too particular to be adopted as a general proposition. Governmental interest analysis views the state as being a single unity that defends the common interests of its members. While this might be true under some circumstances, the reality of the state is that the interests of the citizens are rather diverse and antagonistic. The state has disintegrated. The application of its law in space can thus no be determined by a coherent “policy” that would be underlying the law.

²⁰⁸ On the difference between mandatory rules on the international level and “relative mandatory rules”, see Lehmann, *supra* note 60, at 419.

²⁰⁹ See already Kegel, *supra* note 11, at 181-184 (explaining the difference between the application of public and private law and the ensuing consequences for conflicts cases).

²¹⁰ See Joerges, *supra* 203.

²¹¹ On the extraterritorial character of certain criminal laws, see *supra* note 114 and accompanying text.

V. A New Conflicts Methodology

The three theories that have been expounded limit the application of the law by certain criteria, be they territorial, personal, or interest-related. These criteria are connecting legal situations to the state that is the author of a certain legal rule. If a situation happens within its frontiers, if it is affecting one of its nationals or its interests, than its rules apply. This is the classic methodology of conflict of laws.

It has been shown that this methodology is far from wrong. In fact, the three criteria play a crucial role when it comes to define the scope of application of many legal rules. Territorial connections, for instance, are of the utmost importance with regard to security issues.²¹² Personal factors – nationality, citizenship, domicile – are essential for voting rights or the distribution of welfare.²¹³ And governmental interests are significant in the area of economic regulation, such as antitrust and securities law.²¹⁴

A. Transnational Policy Making through Choice-of-Law Rules

It has also been shown that the principles of territoriality and personality of the law are extended by analogy to cases that do not really require their application in a strict logical sense. As an example, one can think of the law that is applied to succession: There is no necessity to apply the legal rules of the state in which the deceased was domiciled. But it is nevertheless done in order to have a unitary law applying.²¹⁵

The example shows that choice-of-law theory uses the old connecting factors to new ends for which they have originally not been made for. That is by far not a singular

²¹² See supra II 6.

²¹³ See supra III 5 a).

²¹⁴ See supra IV 6.

²¹⁵ See supra note 178 and accompanying text.

case. Conflicts lawyers often “play” with the conventional categories. The same is true for legislators that determine the applicable law. Within the last years, they have realized the relative value of territory, nationality and governmental interests. They have become aware that they are not absolute dogmas that must be slavishly followed because they put a definite limit to the state’s competence. Rather, they are now considered as considerations that can be employed for a specific end. For want of a better word, I want to call this technique “transnational policy-making”. Transnational policy-making means that the applicable conflicts rules are chosen in function of a specific goal. This goal is, generally, to make the split of the world into different legal systems less harmful. The rules in the “house”, which is our globe, shall work together as smoothly as possible. In pursuing this goal, different needs of the world citizens and the international community may be taken into account. Three examples will highlight this new methodology.

1. Environmental Conflicts Law

The first example concerns environmental damage and the ensuing liability in case that harm is done to a persons’ body or property. The question is how to determine the law that applies to this liability. The so-called Rome II Regulation of the European Community, which governs the applicable law in extra-contractual obligations,²¹⁶ provides for a special conflicts rule. According to its Article 7, the law that governs is that of the place where the damage is sustained by the person or the property. But there is an important caveat: The victim may choose instead the “law of the country in which the event giving rise to the damage occurred”. This optional conflict rule was introduced with a clear policy in mind. Since the Treaty on the European Community (now Treaty on the

²¹⁶ See supra note 12.

functioning of the European Union) requires a high level of protection for the environment, the legislator chose to discriminate against the tortfeasor and to allow the victim a unilateral choice of the law of the place in which the damaging conduct occurred.²¹⁷ Obviously, such a rule cannot be justified by a pure territorial connection, because geography could not explain why the victim can choose between different legal systems. Instead, what was done was to introduce a policy in the way the conflict of laws is solved. Notice the difference to governmental interest analysis: The applicability of a state's legal system is determined without having regard to its substantive rules and the policies that are pursued by it. Rather, it is assumed that the protection of the environment is a global concern that needs to be furthered generally and that is done by a specific provision on the level of private international law.

2. Protection of the Weaker Party

A different example is consumer law. It is now almost universally admitted that the protective rules in force at the habitual residence of the consumer should have some impact on contracts that are entered into by him.²¹⁸ This conflicts principle was adopted not because the country of residence of the consumer would be in any way geographically closer to the contract than the state in which the business is headquartered, nor because the personal ties were any stronger than those to other countries or because the state of residence would have a more important interest in protecting its consumers

²¹⁷ See also the reference in Preamble 25 of the Rome II Regulation.

²¹⁸ See U.C.C. § 2A-106 (2008) (invalidating choice-of-law clauses in lease contracts which point to a different law than that at the residence of the consumer), Uniform Consumer Credit Code, § 1.201(8)(a) (invalidating clauses in consumer credit transactions by which the law of another state than that of the residence of the consumer is chosen); Rome I Regulation, *supra* note 23, art. 6(1), (2) (declaring that the law applicable to consumer contracts in general is that at the place of their habitual residence and limiting the effects of the choice of a different law). For limits to the free choice of law in contracts of adhesion, see also Restatement (Second) on Conflict of Laws (1971), § 187 cmt. b.

than the state of the business would have in applying its rules. Rather, the underlying idea is that consumers are used to the protective rules of their state of residence, and that they could refrain from transacting internationally had they to fear that these rules would not govern.²¹⁹ This means that a certain conflicts rule was chosen in order to achieve a transnational policy goal: to make cross-border consumer contracts reliable for the consumer.

3. Making Global Trade Work

The final example concerns the assignment of receivables. The biggest problem in this context is which law shall govern the question of who is the owner of a certain receivable. Take the following example: Bank A, which has its main administration in state X, has a credit card claim against a client from state Y. It assigns this claim to Bank B, established in state Z. Which law shall decide on whether A or B or a different bank is owner of the receivables? In the solution of this problem, territorial, personal or interest arguments do not yield any palpable result. The problem is just too abstract and too complex to employ any of these criteria. When the United Nations' Commission on International Trade Law (UNCITRAL) was elaborating a convention on the assignment of receivables, different considerations determined the discussion. At the end, it was decided that the law at the place where the assignor is located shall govern the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.²²⁰ The primary reason that was given in favor of this rule is that it subjects

²¹⁹ See James J. Healey, *Consumer Protection Choice of Law: European Lessons for the United States*, 19 *Duke J. Comp. & Int'l L.* 535, 551-552 (2009) (noting that the European approach is based on the idea that the confidence of consumers will be strengthened when they expect equal rights and remedies regardless of where the transaction took place, which in the end also benefits the markets).

²²⁰ See United Nations Convention on the Assignment of Receivables in International Trade, done in New York, 2004, Art. 22.

“priority conflicts to a single law, one that is easy to determine and is most likely to be the place in which the main insolvency proceeding with respect to the assignor will be opened”.²²¹ This argument is remarkable: It is not even pretended that the law at the place where the assignor is located would *have* to govern, but rather that from a policy standpoint it *should* govern in order to facilitate international credit transactions.

When one revisits these examples, the paradigm shift that has happened in conflict of laws becomes clear: No longer is a situation neutrally checked for its connection to the territory of a certain state, to its population or to its interests. Instead, the applicable law is determined with a certain policy in mind, which often depends on the general policies of the legal field in question. This policy is not a governmental policy in the sense of governmental interest analysis. Rather, it is one that is inspired by concerns that transcend the single state and that are presumed to be in the interest of all citizens or the world-wide community, such as such as the protection of the environment or of the weaker party or the functioning of global trade.

The methodology is a far cry from the old one that was prevailing in the discipline. The territorial, personal and interest-related criteria have lost their all-dominant value. Although they continue to play a role, they are not understood as absolute dogmas. They are purposefully employed to pursue certain policies. They are used to determine the applicable law so that there is the least friction and tension possible between different legal systems and that the global well-being is furthered. Within the metaphor: The rules are chosen in such way as to maximize happiness and prosperity in

²²¹ See Explanatory note by the UNCITRAL secretariat, No. 4. On this point, see also Harry C. Sigman & Eva-Maria Kieninger, *Cross-Border Security Over Receivables*, Sellier, Munich, 2009, pp. 60 et seq.; Spiros V. Bazinas, *Key Policy of the United Nations Convention on the Assignment of Receivables in International Trade*, 11 *Tul. J. Int'l & Comp. L.* 275 (2003).

the house. Not jurisdictional questions or the interests of certain rooms are of primary concern, but the needs of the individuals.

Parallel to the new revolution in the methodology, a change in the epistemology of conflict of laws occurred. The modern method has turned from mere geography or ethnology or legal hermeneutics to a kind of architecture of a global legal order. Conflicts theory and practice is adjusting the different national laws in a way that yields the most useful results for global harmony and prosperity. Certainly, there is not much publicity about this new task of conflict of laws. It is less visible than the big conferences on climate change or weapons reduction. Nevertheless, it is a necessary task, given that some splits between legal systems will never be surmounted. Without the silent and continuing work of conflicts lawyers, the world would drown in the chaos of different laws clashing with each other.

B. Unbound Law

1. Thesis and Examples

Transnational policy making employs the classic criteria to determine the applicable law – territory, nationality, and governmental interest – in order to achieve new ends. The question that remains is whether there are also legal rules that can be used without such restrictions. Does law exist that applies even though there is no geographic, personal or interest connection to the state that is its author?

Indeed, there are such rules. A good example is corporate law. Under the theory of incorporation that is reigning today on both sides of the Atlantic²²², everybody that

²²² While the theory of incorporation was traditionally followed in Common law countries, it had little effect on the European Continent. However, within the last decade, the Court of Justice of the European

wants to create a company has a choice where to do it: She can incorporate it, for instance under the laws of Delaware, or those of California, or those of England. That choice is independent of where the founders, the shareholders or the directors reside, or where the company carries sells or markets its products. Neither the incorporators nor the business need to have any connection to the state of incorporation. Many states require that an agent of the corporation has a registered office and a registered agent in the state.²²³ Yet to emphasize this point as a territorial contact would totally miss the reality of incorporation. Through freedom of incorporation, the corporate form has become available for any individual without any geographical or personal restrictions. Anybody can register a company in Delaware, and this company is allowed to do business in most states of the Earth. The result of this development is that corporate law is applicable on a global basis. From a law that is adopted for the territory and the benefit of citizens of a certain state, corporate law has become an easily available set of rules that can be used all over the world.

There are many other cases in which the parties are allowed to use the rules of a state even though they have no connection to it. For instance, parties have been allowed to do arbitration proceedings under the law of a certain state regardless of the fact that the case does involve a resident or citizen of the state or a contract that has been passed there.

Communities (E.C.J.) has handed down a series of judgments which require Member states to recognize companies in the corporate form of their state of origin. See ECJ, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, case C-212/97, 1999 E.C.R. I-1459; *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, case C-208/00, 2002 E.C.R. I-9919; *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, case C-167/01, 2003 ECR I-10155. From the rich literature on the subject, see e.g. Wulf Henning Roth, *From Centros to Überseering: Free Movement of Companies, Private International Law, And Community Law*, 52 *Int'l & Comp. L.Q.* 177-208 (2003); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 *Duke J. Comp. & Int'l L.* 149, 173-183 (2004); Friedrich Kübler, *A Shifting Paradigm of European Company Law?*, 11 *Col. J. Eur. L.* 219, 226-229 (2005).

²²³ See, e.g., *Del. Gen. Corp. L.*, 8 *Del. C.* §§ 131 (a), 132 (a).

Under international conventions, the result of such arbitration proceedings will be recognized in many states all over the world.²²⁴ International arbitration has liberated itself to a remarkable extent from the restrictions by the law of the seat. For instance, awards that have been annulled by the authorities of the state in which it was rendered have nevertheless been recognized as valid and binding by other states. In this context, one has spoken of the “delocalization” of international arbitration.²²⁵

A similar development can be witnessed in contract law. Formerly the applicable law to contracts was mostly determined in relation to the territory of a state where the contract was concluded (*lex loci contractus*).²²⁶ That has now changed. According to the overwhelming majority of conflict rules in the world, parties can select the applicable rules independently of any contact to the state which has promulgated them.²²⁷ The application of a legal system has become purely and simply a matter of the parties’ choice. The principle that is underlying this development is party autonomy. It is now the most widely recognized principle in conflict of laws.²²⁸

The phenomena that have been described entail a considerable paradigm shift. The applicable law has become independent from either territory, personality or governmental interest. It can govern for nothing but a choice of the parties. Another way to describe this fact is to say that certain parts of national law have become boundless.

²²⁴ See, e.g., the Convention on the Recognition and Enforcement of Arbitral Awards, done at New York (1958), 21 U.S.T. 2517, T.I.A.S. No. 6997, which places a chief importance on the choice of the parties.

²²⁵ Jan Paulsson, Arbitration Unbound: Award Detached From the Law of Its Country of Origin, 30 Int’l & Comp. L.Q., 358, 360 (1981); Delocalisation of International Commercial Arbitration: When and Why It Matters, 32 Int’l & Comp. L.Q. 53-61 (1983); Pierre Mayer, The Trend Towards Delocalisation in the Last 100 Years, in The Internationalisation of International Arbitration: The LCIA Centenary Conference 37-48 (Martin Hunter et al. eds., 1995); Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 89-93 (para. 2-16 – 2-20) (3d ed. 1999).

²²⁶ See, e.g., Restatement (First) on the Conflict of Laws (1934), § 332.

²²⁷ See Lehmann, supra note 60, at pp. 385-390.

²²⁸ For a justification of party autonomy, see Lehmann, supra note 60, at pp. 413-419.

They can be used by anybody anywhere in the world. This corresponds to the de-bordering of the state: rules are governing events that occur outside of the state's borders, that do not relate to its population and in which it has no interest. In the age of the mobile society, law itself has become mobile. Since it is increasingly difficult to determine where events took place, who is a national of which state and what are the governmental interests, lawyers have overcome these criteria and let people choose the applicable law themselves.

2. Exit, Voice, and Choice

Let us examine unbound law a little closer, because it is extremely important. As an analytical tool, it is useful to employ the well-known distinction introduced by Albert O. Hirschman between “exit and voice”.²²⁹ Applied to the legal context, exit and voice means that citizens which are unhappy with the way in which their state exercises its power can either use their voting rights during elections or leave the country.²³⁰ Now a third option has been added to exit and voice: choice. Unbound law creates the opportunity to change the applicable law without going the long way through the use of one's voting rights. It is also unnecessary to alter one's geographical position or affiliation to a certain state. Instead, there is a new alternative: People can change the legal regime by simply opting for another.

3. The Limits

Of course, party autonomy is not possible in any case. In the context of the metaphor²³¹, it would make no sense to allow the inhabitants of the different rooms to choose the rule

²²⁹ Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970). *id.*, at 60-61, 83-84.

²³⁰ For an application to conflict of laws, see Brilmayer, 98 *Yale L. J.* 1277, 1307 (1989).

²³¹ *Supra* under I 1.

when the noise has to stop. Where the state's function to provide order and security is at play, the applicable law cannot be selected. The same is true where the bond between a person and the state is concerned, or where overarching community interests are at stake. This underlines that the three criteria examined in the first place will continue to play their role and that not all law can be considered as unbound. Yet the very fact that there are some rules of law that can be considered unbound should make us think about our concept of the state.

VI. The State as a Rule-Provider

A. A New Concept

As the discussion of the "classic" conflict principles has shown, in many areas the traditional state functions are still crucial. Territorial borders continue to be important as long as the state is the hegemonic guarantor of security within its realm. Personal connections play a role when the question is who may vote or who is entitled to welfare and who must fulfill duties towards the community. Governmental interests must be taken into account where the legislator is pursuing policy goals that do not yield to foreign law. The state is therefore still the supreme body that is organizing and protecting a certain unit of the Earth and its population. In this function, the reach of its law is limited.

But there are many cases in which the state has taken on a different role. It has made its rules available to persons that have no territorial or personal or other connection to it. And law – its own or foreign – is increasingly applied for the purpose of

“transnational policy-making” in which jurisdictional or interest considerations are subordinated to global concerns. In other words, the state is no longer only governing over a certain geographical region and a certain people and protecting its interest. In addition, it is part of a process that is contributing to the establishment of a global legal order in which the rules of different nations can be employed freely without their being any of the traditional connections to the state’s characteristics.

Although it is difficult to find a general term, one could call this new function of the state to “provide rules” that are available in the globe. The government is setting normative standards that can be used by individuals all over the world. The state gives a framework for relationships between citizens everywhere, a backdrop against which civil society can flourish and private persons can rely on. It offers them its national law, e.g. to set up companies or enter into contracts, and it allows for the rules of other legal systems to apply if they are preferred by the individuals that are concerned.

“Rule providing” in the sense of offering its law is not new. What is new is that states apply their rules not to a specific community, but offer them on a worldwide basis. That has conceptually transformed the function of the state. It is no longer the limited unity that is responsible only for a certain territory and a certain people. In the de-bordering world, law is now available without restrictions by the limits of the state that is its author.

B. The Historic Context

The backdrop against which the state has taken on its new function is the mobile society. More and more relationships cannot be “located” within a certain geographical area; they

exceed the limits of the state. Many people do not live anymore within enclosed frontiers and cannot be pinpointed down to a “clear” origin. Interests are not so easily defined in a fragmented society. What is needed more and more are individualized rules that are available on a global basis.

Of course, there have always been situations that transcended one state. The historical “solution” was to assign the case to the competence of one rule-maker by using the classic criteria – territory, personality, interest – as approximations²³². Yet more and more these factors turn out to be abstract and fictitious. Due to the mobility of civil society, the state’s borders have started to become meaningless. The mix between different people makes concepts of nationality less and less important. Also, the interests within the community itself have become so diverse that a coherent analysis is impossible. In the end, the concept of the link of a certain situation to a state has proven to be elusive. In a globalized world, a connection to a state can be created in almost any case. Therefore, the requirement of a connecting factor is increasingly dropped altogether. Private law has become “borderless” in that it has been opened up to situations with no connection to the state that is the author; and the applicability of states’ legal rules that are not determinative for its security, political organization or governmental interests has been made subject to transnational policy concerns.

C. Other Rule-Providers

When calling the state a “rule-provider”, it must not be forgotten that there are also other actors that fulfill the same function. More and more, rules are provided not only through national legislatures, but also through non-state bodies that provide legal regimes for the

²³² On the value of the classic criteria as approximations, see supra II 6, III 5.

use of private individuals.²³³ One could mention, for instance, the International Chamber of Commerce (ICC) in Paris with its INCOTERMS or rules on documentary credits. These rules can be chosen in the transnational relations, and they are so quite often. That's why they have often been likened to state law.²³⁴ Whether they indeed have the same legal value as rules made by the state depends in part on whether the states recognize such other "rule providers" next to them, a question that cannot be pursued here.

VII. Conclusion

This article has outlined the major concepts of conflict of laws. It has shown how they have developed historically and what their importance is today. The article has depicted a development: from the traditional concepts such as territory or nationality, the state has gradually extended its law beyond its confines. Today, many rules of national law are "unbound" in the sense that they are available for actors all over the world. They can be applied even in cases that have no connection to the state that is the author of the rules.

From this extension of the law a change in the function of the state can be witnessed. The state is no longer only the sovereign that is governing exclusively and

²³³ On the importance of this development, see Ralf Michaels, Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 *Wayne L. Rev.* 1209, 1121-1224 (2005) (surveying the development from state legal pluralism to global legal pluralism); Buxbaum, *supra* note 5, at 673 (emphasizing that territory-bounded nation-states are not the only relevant actors in jurisdictional debates); Nils Jansen and Ralf Michaels, *Beyond the State? Rethinking Private Law: Introduction to the Issue*, 56 *Am. J. Comp. L.* 527, 537-538 (2008) (summarizing the conditions under which private law can be considered a system separate from the state).

²³⁴ See Jürgen Basedow, *The State's Private Law and the Economy-- Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 *Am. J. Comp. L.* 703 (2008) (describing how business law is rooted in both state made and privately made rules); Gunther Teubner, *The Global Bukowina: Legal Pluralism in the World Society*, in: Gunter Teubner (ed.), *Global Law Without a State*, Dartmouth, 1996, pp. 3-28 (showing a new body of law emerging from civil society); Michaels, *supra* note 11, at 1215-1220 (giving examples of non-state normative orders).

authoritatively over its territory or citizens. It is also not the self-interested monster that governmental interest analysis has suggested it would be. Rather, it has taken on a new function: to be a provider of clear and well-defined rules for a globalizing society.

At the same time, the traditional functions, namely to provide security, to uphold mutual solidarity, and to protect other interests of the community, continue to be important. That is why most laws are still applied territorially or personally or according to the interests of the state. But what is important is that these factors do not fit private trans-boundary relationships. The latter are not limited to one state. One can apply territorial or personal or interest criteria to select the applicable law for them. But these criteria do not apply with the logical necessity as in the other cases. They are approximations only.

The result of this study is that none of the traditional parameters for the application of law is right or wrong. They all correspond to different functions of the state, and are sometimes extrapolated from them. What has been achieved here is not to find the one and only method to determine the applicable law, but to *integrate* the different choice-of-law theories. As for the concept of the state, there is no single formula that be used to solve all conflicts. Rather, truth lies – as often – in plurality.

A New Role for the Judge in Conflict of Laws: Building a Global Legal Order

The way in which foreign law is applied today is totally ill-adapted to a globalized society. Frictions between different states' regimes appear everywhere. But seeking a new comprehensive conflict-of-laws theory has little chance of success. Some other solution has to be sought, one that integrates the existing approaches while making sure that the goal of legal harmony is met.

This article tries to develop such an alternative. Its focus is on the function of the judge in the choice-of-law process. It will be argued that the judge should understand and apply foreign law not as expressions of a foreign sovereign, but as rules that are part of a global legal system. Such a shift in perspective implies a number of far-reaching consequences: for instance, judges can apply the law selected by the parties regardless of restrictions by their forum law; they are required to follow international treaties even if they have not been signed by their home state: they can apply intermediate law; and they do not have follow strictly the interpretations of the courts of the country of origin.

These fundamental changes result from a reinterpretation of the judge's role: No longer is he just the obedient servant of his own state. Rather, judges should see their task as one of administering justice in a global system. The salient feature of this system is that it is composed of rules made by different states. It is proposed that the judge should view them on an equal footing and apply them by using the same methodology.

Preliminary Question: Is Conflict of Laws Dead?

If one looks at the structure and curriculums of U.S. law schools today, one can easily get the impression that “conflict of laws” or “private international law”, as it is sometimes called, would no longer be of any interest. The researchers dealing with the topic are mainly old veterans that have taken part in battles fought in the past. Students are not particularly interested in the matter. They see no reason to be so as any sophisticated knowledge in conflict of laws is not required to become a lawyer. Crucially, the subject has been dropped from most state bar examinations in the U.S.¹ Some law schools have drawn the logical conclusion and do not even offer courses on conflicts anymore, or only under disguised names, such as “International Civil Litigation”, “International Sales Law” or “International Business Transactions”, in order to attract crowds.

This development is not fully explained by the sudden disinterest of the bar associations. The problem goes much deeper. The main cause is the absence of any clear methodology to solve conflicts of laws. Suggestions in the literature abound, but a clear guideline that courts could follow to determine the applicable law is missing. Any writer who dares to add another theory to the already existent panoply is met with strong suspicion by the scientific community.² This attitude is understandable to the extent that the long-standing efforts that have been made in the field have been largely fruitless. The increasing fragmentation of the theory could very well be the death knell for conflicts, which could be turned into a sort of appendix question of substantive law.

¹ Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future*, Martinus Nijhoff Publishers, Leiden, Boston, 2006, p. 427, margin no. 372 (mentioning that the subject has been taken off the bar examinations); Russell J. Weintraub, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come*, 75 *Ind. L.J.* 679, 679 (2000) (noting that enrollment in conflict of laws courses dropped precipitously when the subject was taken off the bar examinations).

² See the references *infra* notes 113 to 115.

At the same time, the problem which is at the heart of conflict of laws has not gone away over time. On the contrary, it is more crucial than ever under the conditions of a globalized society. In the world that we live in, conflicts are constantly arising between different laws, and the solutions they receive in the various jurisdictions do not coincide. Conflict of laws is therefore not dead at all. The only thing that is dead is the *research* dealing with the issue.

The object of this article is to lead to a kind of *renaissance* of the science under the conditions of the 21st Century. In order to revive conflicts' initial goal, it is necessary to find a common way to determine the applicable law that is shared *worldwide*. In other words, we must overcome the divergences of conflict rules in different nation-states. This effort, it will be argued, has to be undertaken by the judges, which take a central role in the solution of conflicts. But a necessary precondition for the start is a clear guideline which can serve as an orientation. Judges needs to be told 1) why and 2) how they must overcome diverging conflict rules. What is needed, thus, is a new methodology.

This methodology is what this paper tries to give. It will be argued that judges deciding over transnational disputes, i.e. disputes involving a foreign element, shall engage in what I call "global legal ordering". Global legal ordering is an effort to adapt different national legal systems to each other in a way that they produce a sensible result. The goal is identical to that of traditional conflicts. But the method employed to attain it is different. Through the new context of global legal ordering, judges are freed from the limitations and restraints by the choice-of-law rules of the forum. This will have dramatic consequences. It can lead the judge, for instance, to disregard the internationally mandatory rules of its own law or to interpret the law of a foreign state differently than

the courts of this very state. In this way, conflicts of laws will become yesterday's problem, and a novel discipline will be borne.

To explain these results, the rift currently going through conflict-of-laws methodology will be described first (part I). In a second step, the dilemma that a court faces and possible solutions to it will be analyzed (part II). After that, a suggestion will be made on how the court should deal with the issue (part III). This proposal needs to be explained and defended against objections (part IV). Finally, the implications of the new methodology will be detailed (part V).

I. The (Sad) State of Affairs in Choice of Law

A. The Rift Going through Conflicts Systems Around the World

When modern conflict of laws was founded in the 19th Century, its primary goal was to overcome contradicting decisions of different states. This goal is known under the name of decisional harmony.³ Friedrich Karl von Savigny put it to the fore in his foundational book, the 8th volume of the *System of Modern Roman Law*.⁴ His main aim was that a legal relation must be treated identically in all courts of the world, no matter in what state they are sitting in.

Yet present practice tremendously falls short of the initial idea of conflict of laws. Courts of different countries do not reach the same solution in the same case, because they do

³ On the history of decisional harmony („Entscheidungseinklang“, „harmonie des solutions“), see Friedrich K. Juenger, *Choice of Law and Multistate Justice*, Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993, p. 39 (tracing the idea back to medieval times).

⁴ Friedrich Carl von Savigny, *Private International Law* (transl. William Guthrie, Stevens & Sons, Edinburgh, 1869).

not adhere to the same conflict-of-laws rules. There is even no agreement on the method to use when determining the applicable law.

1. The United States Against the Rest of the World

Basically, and with abstraction made from all local peculiarities, two approaches to choice of law collide⁵:

One is the method to be called here the “classic approach”, which is today prevalent in most legal systems except for the United States.⁶ It consists of characterizing the disputed relationship in question as belonging to a certain category (e.g. “contract” or “tort”) and then selecting, based on this classification, the nation-state to which “it truly belongs”, in which it has its “seat” or to which it has the “closest connection”.⁷ This approach consciously abstracts from the differences between the substantive rules of the different states. It uses a geographical method to determine the applicable law. The objective is to allow for a “neutral” or “objective” choice of law.

⁵ The number of approaches varies in function of the understanding of the term “approach”. A Canadian writer for instance has counted four existing “approaches” and added a fifth one. See William Tetley, *International Conflict of Laws – Common, Civil, and Maritime*, International Shipping Publications, Montreal, 1994, pp. 7-43. For him, all European and American style conflicts rules are just one approach. The other approaches are “private conflicts codes”, such as Dicey & Morris’ book on conflicts, and “general texts, commentaries, and essays” as well as “national legislation and international conventions”. But at least the latter do not seem to be “approaches” in the ordinary sense of the term, but rather *sources* of conflicts law.

⁶ The adherence of most countries of the world to the classic methodology does not exclude that sometimes particularities of the legal system do play, see, e.g., Mohamed Charif, *L’influence de la religion dans le droit international privé des pays musulmans*, in : *Recueil des cours*, 203 (1987), no. III, pp. 321-454, Volume 203 (1987-III) (describing the influence of religion on conflict-of-laws rules in Muslim countries).

⁷ On that approach, see Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht*, 9th ed., C.H. Beck, Munich, 2004, pp. 311 et seq.; Pierre Mayer & Vincent Heuzé, *Droit international privé*, 8th ed., Montchrestien, Paris, 2004, margin no. 114; Alfonso-Luis Calvo Caravaca & Javier Carrascosa González, *Derecho Internacional Privado*, vol. 1, 10th ed., Comares, Granada, 2009, pp. 233 et seq.

The other method, which will be called the “modern approach” – no value judgment implied – is followed by many, albeit by far not all, courts in the United States.⁸ There are different versions of it, such as governmental interest analysis, comparative impairment or better law.⁹ But what they have all in common, and what distinguishes them from the classic approach, is that they insist on the importance of the substantive law rules which will be used to decide a case. Courts are invited to not blindly follow an “objectively applicable” foreign law, but to analyze the “policies” behind the rules purporting to govern and determining on the basis of these policies which of the rules mandates its application.¹⁰ Thus, under this approach the content of substantive rules plays an important role in the determination of the applicable law.

2. Differences Within Both Camps

Obviously, if courts are using one or the other approach they will often arrive at different results. But the dilemma does not stop there. Two additional facts make matters even worse.

First, within the countries that follow the classic conflict-of-laws methodology there is no uniformity in the determination of the law. The primary reason for this lies in the codifications on private international law which most of these countries have adopted. They are meant to reflect the classic approach and to improve it by making the law to be

⁸ See Symeon C. Symeonides, *supra* note 1, pp. 63-121, margin nos. 57-103 (including tables for the states adhering to one or the other method). See also the yearly chronology by the same author, lastly Symeonides, *Choice of Law in the American Courts 2009: Twenty-Third Annual Survey*, 58 *Am. J. Comp. L.* 277 (2010).

⁹ For an overview, see Lea Brilmayer, *Conflict of Laws*, 2. ed., Aspen Publishers, 1995, pp. 47-76; Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, *Conflict of Laws*, 4th ed., Thomson, St. Paul (Minnesota) 2004, pp. 79-105, margin nos. § 2.18 – § 2.25; Symeon C. Symeonides, *supra* note 1, pp. 13-30, margin nos. 14-31.

¹⁰ See e.g. Brainerd Currie, *Selected Essays on the Conflict of Laws*, Duke University Press, Durham, 1963, pp. 58-60 (analyzing the reach of Georgia’s and Kansas’ shop keeping laws).

applied more clear and predictable. In reality, they do the contrary: Since the codifications are not identical but diverge from each other, the applicable law will be determined differently depending on which country's courts decide. Thus, conflicting solutions will be arrived at. That is true even in the seemingly ideal situation in which countries have identical conflict-of-laws rules, because their courts might interpret them differently. For instance, they may understand the categories that are used in the uniform conflicts provisions (e.g. "marriage" or "succession") differently and put different questions into them – a problem called "characterization".¹¹

On the other hand, by far not all courts in the United States are following the modern methodology. Many still adhere to the classic approach, while some blend it with governmental interest analysis or other methods.¹² Thus, even within the United States we have a complete divergence of approaches to conflict of laws.¹³

B. Consequences for Individuals: The Example of "Limping Legal Relationships"

The different manner in which the applicable law is determined has important ramifications for the individual involved in transnational relationships. To see them in full, let us consider two examples.

In the first case, A and B, both citizens of state X, live in state Y where they marry in a traditional religious ceremony. This procedure is allowed under the law of state X, which claims to be applicable because the bride and the groom are nationals of X. Under

¹¹ See Veronique Allarousse, A Comparative Approach to the Conflict of Characterization in Private International Law, 23 Case W. J. Int'l L. 479 et seq. (1991).

¹² See reference supra note 8.

¹³ See references infra note 127.

Y's conflicts rules, however, marriages celebrated in its territory must comply with the formal requirements of its substantive law, which excludes religious marriages.¹⁴ The result of this is that A and B are married from the point of view of the law of state X, the country of their common nationality, but not from the point of view of state Y, the state of their domicile. Such cases really occur.¹⁵ They create all sorts of problems for the persons involved. Imagine, for instance, A would remarry without getting divorced from B. The new marriage would be valid from the point of view of the law of Y. In contrast, in state X it would be regarded as invalid and A would even be punishable for bigamy.

A second example: D and E, both nationals of state V, are married. D falls in love with F, another national of the same state. Together they move to state W. Two months after she has been divorced from E, D gives birth to a child. F immediately acknowledges paternity. Nevertheless, a dispute arises about who is the father of the child. Under the law of state V, the former spouse will be considered *de jure* as a parent because the child is born within 300 days of the end of the marriage.¹⁶ The law of state W, however, does not contain such a presumption, but rather relies on acknowledgement and paternity tests. Thus, the crucial question is which law applies to the determination of parentage. Conflicts rules around the world are quite diverging in this respect.¹⁷ To take just two of the solutions: Some states determine the applicable law to parenthood in accordance with

¹⁴ Such a rule has been adopted in Germany, see Art. 13(3) 1 Introductory Law to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB).

¹⁵ See, e.g., BayObLG (former highest court of Bavaria in civil matters), decision of Oct. 29, 1999, 1 Z BR 79/99, FamRZ 2000, 699. The court eventually held that the marriage was valid because a German official had entered it – by mistake – into a register.

¹⁶ This period corresponds roughly to the maximal length of a pregnancy.

¹⁷ See Khalil A Sfeir, *Droit international privé compare*, vol. 1, Sader Editeurs, Beyrouth, 2005, p. 630-643, margin nos. 503-515.

the nationality *of the potential parent*.¹⁸ According to these legal systems, the law of V would determine who is the father of the child, and this would effectively be E. Other countries apply the law of the habitual residence *of the child*.¹⁹ These legal systems would consider the law of W as being applicable and F to be the father. For the baby, this means effectively that it has two fathers: In some countries of the world, it is E, while in other, it is F. As one can easily imagine, these situations create a number of difficulties for all persons involved.

The cases just described are sometimes denoted with the figurative notion of “limping legal relationships”.²⁰ It means that a legal bond or relation between private individuals is recognized in some parts of the world, while not in others. Cases like these are not rare. On the contrary, in today’s globalized world in which people ever more often get married to foreigners, they occur with increasing frequency.

The phenomenon of “limping relationships” is not restricted to questions of family law. Similar problems also occur in other contexts, for instance in company law. This is because some countries apply to companies the law of the state where they have been incorporated (state of incorporation theory), while others apply the law at the seat of their main administration (real seat theory).²¹ The co-existence of these two theories on the

¹⁸ E.g., Belgian, Chinese, Dutch, Egyptian, Finish, Spanish, and Japanese Law. See Sfeir, *supra* note 17, at pp. 633-635, margin no. 506.

¹⁹ E.g. Bulgarian, German, Hungarian, Polish, and Swedish law, see Sfeir, *supra* note 17, at p. 631 margin no. 504. Common law systems often apply the law of the domicile of the child, see *id.*

²⁰ See Katharina Boelke-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 6 *La. L. Rev.* 1053, 1055 (2000); Friedrich K. Juenger, *supra* note 3, at pp. 222, 225.

²¹ For an overview, see David C. Donald, *Approaching Comparative Company Law*, 14 *Fordham J. Corp. & Fin. L.* 83, 170-172 (2008) (describing the replacement of the real seat theory by the state of incorporation theory in EU countries); Seth Chertok, *Jurisdictional Competition in the European Community*, 27 *U. Pa. J. Int’l Econ. L.* 465, 510-511 (highlighting the EU’s choice of the real seat theory for the *Societas Europaea* (SE)); William W. Bretton, Joseph A. McCahery & Erik P.M. Vermeulen, *How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis*, 57 *Am. J. Comp. L.* 347, 372-373 (2009) (analyzing the continuing relevance of the real seat theory after the ECJ’s *Cartesio*-decision).

globe creates a quandary: Since a company can be incorporated in a different state than that in which it is headquartered, it would have to comply with two different sets of corporate laws – a virtual impossibility. As a consequence, the company will be recognized in the states that apply the law of its state of incorporation, but may be regarded as not existent in others that follow the law of the real seat. This leads to many inconveniences for the shareholders of the corporation. To take just one, in the countries following the real seat theory they may not rely on their limited liability granted to them by the law of incorporation. Again, the problem is exacerbated in a globalized society in which companies operate on a worldwide basis.

Limping legal relationships are by far not the only consequence of the divergences between states' conflicts rules. There are others too, which are more benign, but nevertheless unwelcome. Think of the numerous cases in which a claim is granted by the courts of one country but dismissed by that of another on the basis of a different law. A good example is a libel claim. Here, the choice-of-law rules radically diverge. The consequence is that the victim can go shopping for the applicable law in different states if the offending publication has been distributed in more than one country.²²

The result reached by the different laws of the world in these cases, when seen from a global viewpoint, can be described by one word: inconsistency. This inconsistency will be felt primarily by the individuals that are involved in those relations. It is them who suffer most from the split of the world into different conflicts systems. From their viewpoint, there is no such thing as a predictable outcome or global justice. Rather, the opposite is reigning: unfairness and uncertainty. This should not be allowed to continue.

²² On libel tourism, see Trevor C. Hartley, "Libel Tourism" and Conflict of Laws, *ICLQ* 59 (2010), 25-38 (arguing for a rule that would point to only one law for offending publications distributed in more than one country).

C. Attempts to Overcome the Problem

There have of course been attempts to overcome these problems, which are going on as these lines are written.

1. Uniform Substantive Law

The straight-forward approach seems to be the harmonization of substantive law. If the material standards would be the same all over the globe, conflicts would no longer arise. It would even be superfluous to determine the applicable law.

Many fora and organizations, like UNIDROIT or UNCITRAL, aim at precisely that harmonization. Substantial progress has been made, for instance, in the area of commercial law.²³ Yet who thinks that we could anytime soon have one and the same law is living in a dream world. In areas like family law a globally uniform regime will probably never be achieved. The reason is that it seems impossible to reconcile the different political and cultural positions: They are just too far apart. Even *within* states like the U.S. or Spain, it is difficult to find agreement on issues such as same-sex marriages. Between different countries, it is virtually impossible. The way that family law and other areas are dealt with reflects a certain culture, attitude and way of living predominant in a region. They are among the main reasons to have different states. States do not want to compromise the ability to promote and maintain their own values in order to create a global law.

Moreover, internationally uniform substantive law has a number of other drawbacks. Not the least of them is that it cannot be changed as easily as domestic law because every

²³ For an overview, see Matthias Lehmann, *The State of Development of Uniform Law in the Fields of European and International Civil and Commercial Law*, 7 *European Legal Forum* 266-270 (2008) (describing conventions for the harmonization of civil and commercial law).

amendment requires consent by all signatory states.²⁴ Furthermore, even if there are uniform substantive rules, this does not by itself guarantee uniformity of decision-making, for judges of different countries might interpret the same text differently. An example of this is the Vienna Sales Convention: The variety in its interpretation by national courts has become famous.²⁵ The problem is that there is no global court which could ensure a uniform application. Efforts to coordinate the interpretation among national courts have been made, but are not as efficient.

2. Uniform Conflicts Rules

If it is not possible to achieve uniformity on the level of substantive law, it would at least be useful if the states were to determine the applicable law in the same way. That would avoid limping legal relationships.

Conflict-of-laws harmonization efforts have been undertaken since the 19th Century. The main forum for that has been the Hague Conference on Private International Law. Its achievements are considerable.²⁶ Despite the impressive number of conventions, however, not nearly all issues have been resolved. For instance, there is still no convention on the law applicable to marriage or to parentage. Moreover, every year new issues are emerging, such as surrogate motherhood. In addition, even if all fields of potential conflicts were covered by treaties, this would not make the problem of different

²⁴ See Juenger, *supra* note 3, p. 190 (underlining that multilateral treaties are unresponsive to changing realities).

²⁵ See, e.g., John Honnold, *The Sales Convention in Action – Uniform International Words: Uniform Application?*, 8 J.L. & Com. 207 (1988) (underlining that the CISG provides “uniform words” but what is needed is a “uniform application”). See also Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System - Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & Com. 187-217 (1998) (pleading for a “federalist” approach to the principle of uniform interpretation enshrined in the CISG).

²⁶ See the account by Christophe Bernasconi, *Some Observations from the Hague Conference on Private International Law*, 101 Am. Soc’y Int’l L. Proc. 350 et seq. (2007).

applications disappear as long as there is no court with world-wide jurisdiction to interpret these conventions.

3. A Realistic Evaluation

Harmonizing the laws of the world is a noble and commendable task for the states. So far, they have failed to provide comprehensive common rules on the level of either substantive or conflicts law. Thus, the inconsistency between the applicable rules continues.

II. What Should a Judge Do When Faced With a Conflict of Laws?

A. The Dilemma

The judge who has to pick between two or more potentially applicable laws to a case before him is in a difficult dilemma. He must immediately decide which legal system he will follow. He cannot wait for harmonization to come at some far-away point in time. The question is what he can do right now to avoid or at least diminish the harmful consequences of the world's split into different legal systems.

I am willfully making a premise here. That premise is that overcoming the rifts between legal systems, i.e. achieving decisional harmony, is indeed the main problem. Others might strongly dispute that premise. They might argue that there are much more important issues, such as fulfilling domestic policies of the forum in international cases. Inconsistencies with other countries would be the necessary costs of legal diversity. As the world is split into different legal systems, it would only be logical that different outcomes would be reached with regard to the same situation. We do not want,

apparently, to have those differences go away. Otherwise, we would not live in states as organizational units with different laws. Legal diversity is a cornerstone of the current setup of the world, and one that has its own virtues.

To that argument I reply that legal diversity shall continue. The aim of the judge could nevertheless be that one and the same relation is treated under the same law so that negative results such as limping legal relationships are avoided. Treating the same set of facts according to the same law would even strengthen legal diversity since all courts would recognize that the relation is governed by a certain law. A universal approach to the conflict-of-laws problem would thus not diminish legal diversity. It would just make the deleterious consequences of the split of the world into different states disappear.

B. Possible Solutions

1. Extending an Existing Conflicts Approach World-Wide

One obvious way to accomplish the goal of uniform decision-making would be for all judges to agree on one of the already existing approaches to conflicts. It would in fact not matter which approach they agree on, whether the classic or the modern approach and which of their various facets. The important point is that they follow one and the same method, so that the applicable law is determined in the same way.

The problem of this proposal is that it is unrealistic. Given the long-standing and entrenched positions of the courts on the subject, it seems far-fetched that they would give up their choice-of-law method in favor of another. The question is also not totally at their discretion, since legislators in many countries have laid down rules for choice of law. The judge is bound by them. Since they are different, conflicts practice will remain

divergent. We are in the presence of a typical prisoner's dilemma: Since no one knows what the other will do, nobody will agree on the solution that is best for all. It is thus more than unlikely that an existing approach will be agreed upon.

2. Developing a Completely New Approach

Another idea would be to introduce a new conflict-of-laws theory. Take for example the "multifactor approach" that was recently suggested by Lea Brilmayer and Rachael Anglin.²⁷ The authors argue that the single-factor or "trigger" approach, which so far has been followed in choice of law, should be replaced by a multifactor approach that looks for the state having a preponderance of contacts to the facts of the case.

It cannot be disputed that this suggestion – although it is not as new as the authors would like to make us believe²⁸ – has certain theoretical merits. But even if the courts in the U.S. were to follow it, it is more than unlikely that it would be accepted in the same form anywhere else. Thus, this suggestion would not improve the situation. On the contrary, it would only add to the current confusion as the rift to other countries is deepened. Developing a new approach therefore does not help. Scores of theories have tried to determine the applicable law "in the right way". It is time to come to the conclusion that there is no such thing as an "objectively governing law", but only different approaches that collide with each other, thus creating all sorts of harm for individuals. The modern task is not to look for a totally new approach to determine the

²⁷ Lea Brilmayer & Rachael Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 Iowa L.R. 1125 et seq. (2010).

²⁸ See Restatement (Second) on Conflict of Laws, § 6. European law also contains a, albeit different, kind of "multifactor approach" with rules and exceptions and exceptions to exceptions, see e.g. the Rome I and the Rome II Regulations.

applicable law, but for a methodology that can be mutually agreed upon and that leads to harmonious decisions.

3. *Lex Propria in Foro Proprio*

A most radical solution to overcome the conflicts dilemma has been given by Albert A. Ehrenzweig.²⁹ He suggests treating cases with international elements just like any other dispute, i.e. to apply the law of the state in which the court is situated, or *lex fori*.

At first sight, the theory does not help to solve our problem at all. On the contrary, it even seems to exacerbate it: if the *lex fori* were consistently followed, courts of different countries would reach a different conclusion in *any* case, because they would *always* apply a different law. The *lex fori*-theory only makes sense when it is combined with Ehrenzweig's second proposition, namely that the jurisdictional rules have to be improved in such a way as to lead to one and only one "proper forum" that will decide a case.³⁰ Such reform could be based, he suggested, on the doctrine of *forum non conveniens*.³¹ Indeed, if each and every case would be assigned to the exclusive jurisdiction of a single court, then it would not matter which law this court will apply. The judgment that is rendered would never be contradicted by other countries, and we would have decisional harmony.

The practical problem of Ehrenzweig's theory lies in its second part. The worldwide harmonization of jurisdictional rules is something that appears to be close to impossible. Efforts for a multilateral treaty on jurisdiction have been undertaken at the Hague, but their result has been very limited in scope and effectiveness. The new Convention on

²⁹ See Albert Armin Ehrenzweig, *Private International Law, General Part*, A.W. Sijthoff, Leyden, Oceana Publications, Dobbs Ferry (NY), 1967, pp. 92-93, margin no. 39.

³⁰ Ehrenzweig, *supra* note 29, at pp. 107-110, margin no. 49.

³¹ See Ehrenzweig, *supra* note 29, at p. 108, margin no. 49.

choice-of-court agreements, which has yet to enter into force, only deals with the comparatively rare cases in which the parties have agreed on the competent court.³² A more far-reaching treaty was impeded by the different approaches of the United States and Europe to questions of jurisdiction and procedure which proved to be an insurmountable obstacle during the negotiations.³³ The principle of *forum non conveniens*, in particular, is far from being accepted outside of the common law countries. The European Court of Justice has even explicitly rejected it for the EU.³⁴ Thus, world-wide agreement on jurisdictional rules seems to be more improbable than ever.

But even if such an agreement would be reached, it is more than unlikely that Ehrenzweig's theory would always lead to sensible results. Let's take the following example: Assume that A and B have married 20 years ago in their home country X. Since then, they have lived in country Y. In case they want to divorce now, it is clear that the courts of Y should be available for them. Under Ehrenzweig's *lex fori* theory, this would imply the following: Whereas at the time of marriage, the courts of state X were competent and the law of that state was applicable, now jurisdiction should lie with the courts of state Y and accordingly the law of that state should govern. A and B could be surprised by the outcome: It is possible that their marriage might be held to be invalid from the start since it was not in conformity with the laws of Y.

³² Hague Convention on Choice of Court Agreements, done on June 30, 2005.

³³ For more details, see Arthur T. von Mehren, Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?, 49 Am. J. Comp. L. 191 (2001) (citing fundamental discordance between the views of the United States and European Union States regarding the role of adjudication in contemporary society); Linda Silberman, Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?, 52 DePaul L. Rev. 315 (2002) (comparing contrasting approaches of the U.S. and Europe to judicial jurisdiction).

³⁴ ECJ, case C-281/02, Owusu, [2005] E.C.R. I-1383, margin nos. 37-46.

This outcome is a direct result of the *lex fori* theory's mixture between the determination of the competent court and the applicable law. For Ehrenzweig, both questions must receive the same answer. But in reality, they are guided by very different considerations: whereas the applicable law should be close to the parties' cultural environment and their expectations at the time a relationship is created, jurisdiction depends on matters of convenience when the dispute arises, such as the residence of the defendant, the place of service of the claim to him, the location of evidence and so on. Thus, it is a fundamental mistake to identify the two issues. This deprives the *lex fori* approach of its sense.

4. Not Apply Law but Equity

Another idea would be to decide cases with a foreign element not by the application of any state's law, but on the basis of a sort of global equity. This idea has been propounded recently by Koresuke Yamauchi.³⁵ In fact, the guidance by equitable rules is only part of Yamauchi's proposal. He also calls for the establishment of an arbitration court with global jurisdiction who should take up all private cases that are referred to it. I am skipping over this – central and innovative part – of Yamauchi's piece since it requires action by governments: they would need to cooperate with the court to make it workable³⁶. I only consider his statement with regard to the applicable law. Yamauchi suggests that judges should decide the private cases brought before them disregarding

³⁵ Koresuke Yamauchi, *Das Globale Internationale Privatrecht im 21. Jahrhundert – Wendung des klassischen Paradigmas des IPR zur Globalisierung*, Beiträge zum Internationalen Wirtschaftsrecht, No. 88. The paper can be downloaded from <http://www2.jura.uni-halle.de/tietje/html/publikationen.html> (last visited August 5, 2010).

³⁶ See Yamauchi, *id.*, at pp. 14-15.

substantive rules of national law.³⁷ Their objective should be a “reconciliation” of the parties. To that end, they should refer to general concepts such as *bona fide* or equity.³⁸ They should also take into account international conventions and uniform law.³⁹ If they think it fits, they should be allowed to give priority to a national law, but they do not need to justify which rules they apply.⁴⁰ Their preference for one or the other solution should not be questioned. His argument culminates in the claim that the conflict-of-laws paradigm has to be given up.⁴¹

These are strong words, especially if one takes into account that they come from the chairperson of the distinguished Private International Law Association of Japan, the very task of which is to elaborate and refine conflict-of-laws rules. They testify to the despair in which many people familiar with the problems of global choice of law have fallen. A lot of Yamauchi’s considerations deserve a more specific treatment, in particular his suggestion to establish a global arbitration court. But let us take here just the point on the applicable law and transfer it to national courts: Would it be better for them to solve cases with an international element by following equitable principles instead of national law?

Indeed, it is tempting to do away with the different national laws since they are the source of the inconsistencies that were criticized.⁴² However, there are serious counter-arguments for applying a sort of “global equity”. Such a system would open the doors to arbitrary decisions. The judge could determine the outcome just as he pleases. It is true that after some time, a new system of substantial law applicable to transnational

³⁷ Yamauchi, *id.*, at p. 13.

³⁸ *Id.*

³⁹ Yamauchi, *id.*, at p. 14.

⁴⁰ Yamauchi, *id.*, at p. 13.

⁴¹ Yamauchi, *id.*, at p. 15.

⁴² See *supra*, I B.

relationships could be developed on a case-by-case basis. But until then, one would have to accept a kind of *khadi*-justice, in which the judges would be all powerful.⁴³ In addition, it seems unlikely that courts, even if they were entrusted with that task, could create a whole global legal system from scratch. The modern way of life calls for many sophisticated rules. Consider not only of securities law and corporate law, but also non-economic fields such as the law of maintenance. States have answered this need with complex legislation. It would be a step back to forget about these rules and create everything on a case-by-case basis. In the best of circumstances, it would take decades to build a global legal system. In the worst, this goal would never be achieved, and we would be stuck with chaos.

III. A New Proposal

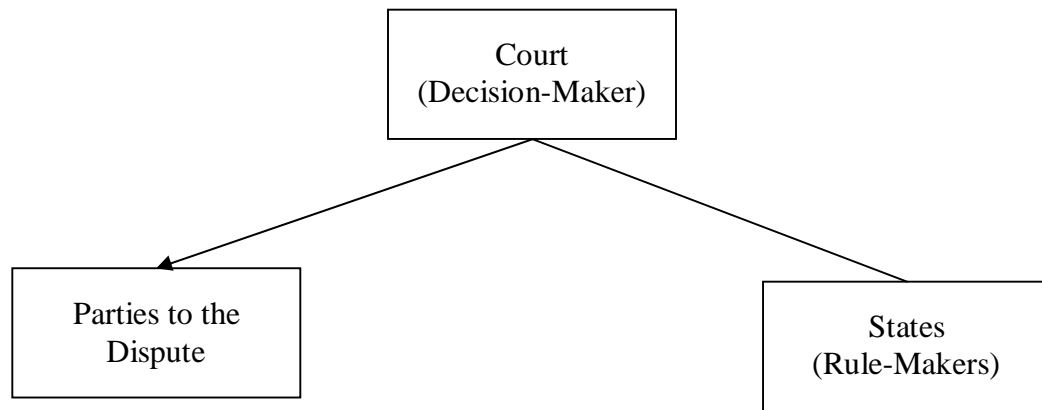
Given that the alternative avenues which have been examined do not lead anywhere, it is time to make a new proposal on how the court shall deal with conflicts of laws. The goal of this proposal is clear: The judge should decide cases such that divergences with other courts are avoided as much as possible. We also know some more things: Neither extending an existing approach or developing a new one would work. The application of the *lex fori* is also not possible, nor can the judge ignore the substantive laws of the states and resort to mere equity.

⁴³ The notion “khadi-justice” was used by Max Weber to describe a system of non-formal adjudication in which decisions will be determined by ethical or political considerations or by feelings oriented towards social justice. See Weber, *Economy and Society* (Guenther Roth & Claus Wittich, eds.), vol. 2, University of California Press, Berkeley, Los Angeles, London, 1978, p. 813 (claiming that theocratic and patriarchal-authoritarian groups would be better served by khadi-justice than by formal justice). See also the rejection of “cadi justice” by Currie, *supra* note 10, at p. 153.

So how should the judge decide? In order to answer this question, it seems necessary to think over the problem of conflicts once again from the “fundamentals”.

A. The Triangle Between the Parties, the Court, and States

Basically, one can say that every conflicts situation involves three kinds of actors: the parties, a court, and states. The parties are the ones that bring the dispute to court and that have to suffer the consequences of the law’s application. The court is deciding the issue between them. To do so, it has to choose between the laws of different states that are available. The situation can thus be represented by the following chart.



Not all situations involving two or more different national laws have to be decided by a judge. On the contrary, it is probable that most of them will be contractually or otherwise settled. However, such settlement always occurs “in the shadow of the law”, i.e. with the

possibility in mind that the case might go to court. Thus, it seems fair to assume that a court would be present as the final decision-maker.⁴⁴

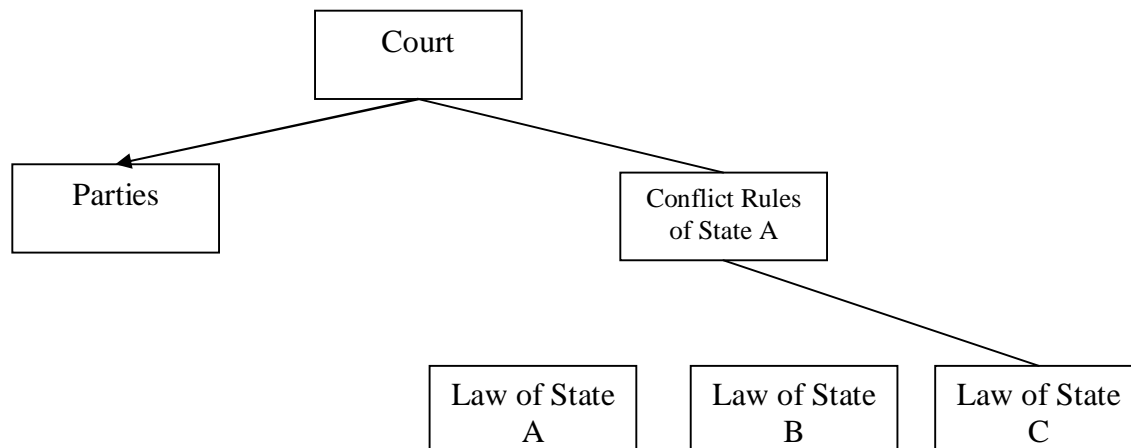
B. The Answer by Current Conflicts Methodology

The current method to solve the conflicts problem looks like this: In order to find out which national law applies, the judge uses the conflicts rules of its forum. Such rules exist everywhere. In the United States, they often take the form of judicial precedent, but they are no less binding than in those countries in which private international law is codified in special legislative acts. Their binding force results from the rule of *stare decisis*, while in the other countries it follows from legislative command.

The conflicts rules will point to the applicability of one specific national law. The judge has to apply this law. He is not allowed to resort to a mixture or to intermediate law, since it is assumed that for every situation in the world there is one legal system that is competent to rule on it.

In a chart, the current methodology's structure looks like this:

⁴⁴ See also Juenger, *supra* note 3, at p. 163 (noting that it seems fitting to look at the conflicts problem from the “judicial vantage point” because “adjudication is the crucible for testing the soundness of choice-of-law approaches”).



As can be seen, the conflicts rules of the forum function like an interface between the court and foreign law. They determine when it has to apply foreign law and which law to apply.

Putting the conflict-of-laws rules of the forum to work can often be a complex task. For instance, judges in classic approach-countries need to follow the so-called *renvoi*, i.e. if the foreign legal system that would normally be applicable from the viewpoint of the forum refers the case to another legal system or back to the forum law, this reference must be obeyed.⁴⁵ That requires the court effectively to take cognizance not only of the conflict rules of its own law, but also of those of the foreign jurisdiction to which these

⁴⁵ On *renvoi*, see Lawrence Collins (ed.), Dicey, Morris & Collins on the Conflict of Laws, vol. 1, London, Sweet & Maxwell, 2006, margin nos. 4-001 et seq., pp. 73 et seq.; Kegel & Schurig, supra note 7, pp. 389-414; Mayer & Heuzé, supra note 7, pp. 157-166; Calvo Caravaca & Carrascosa González, supra note 7, at pp. 288 et seq. Proponents of the modern approach claim that it would eliminate the problem of *renvoi*, see Currie, supra note 10, p. 184 (emphasizing that under interest analysis there can be no question of applying anything other than the internal law of the foreign state). It is disputed whether this claim really holds, see Brilmayer, supra note 8, p. 107 (arguing that *renvoi* would be endemic to the very structure of the choice-of-law problem).

rules refer, and to those to which the latter refer, and so on. Theoretically, this chain has no end.

Not less are the demands of the modern approach. Under governmental interest analysis, for instance, the judge has to determine the policies of all national rules that are potentially applicable. He has to find out whether they demand the statute's application to the present case, or whether there is only a "false conflict" because in reality only one law requires its own application.⁴⁶ In case of a "true conflict", the decision is easy: the judge has to follow the rules of his own law.⁴⁷ Much more difficult is the decision in the "unprovided for-case", i.e. when no statutes requires to govern.⁴⁸ But at any rate, to analyze the policies of all potentially applicable laws requires a formidable amount of energy and time.

If the judge comes to the result that a foreign law is applicable, the problems are far from over for her. As a next step, she has to inquire into its content. Current methodology requires her to decide the case exactly in the way a foreign court would decide it.⁴⁹ Many times she will not be familiar with that way, so she needs to make use of the special instruments available to her to inform herself, such as appointing an expert. Current methodology asks her to respect the foreign law as far as possible, even if its application should strongly contravene the values of her own legal system or of the international community. There is only one limit: public policy. As long as the foreign law does not

⁴⁶ See Currie, *supra* note 10, at pp. 184-187 (claiming that first, false problems created by the traditional approach shall be cleared away).

⁴⁷ Currie, *supra* note 10, at p. 184 ("If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of a contrary policy ...").

⁴⁸ On that special situation, see Currie, *supra* note 10, at pp. 152-156 (suggesting four different approaches, of which he prefers the application of the forum law).

⁴⁹ See Kegel & Schurig, *supra* note 7, at pp. 505-506 (claiming that the foreign sources of law have to be respected and that the foreign literature and the foreign case law has to be taken into consideration to the same extent as it would be by the courts of the state from which the rule originates).

contravene the public policy of the forum, i.e. its most fundamental notions of justice, judges have to follow it.⁵⁰

C. A Critique

To the uninitiated, it is surprising to which extent this methodology is technical. Laymen and even lawyers that are not familiar with conflicts of law are often stunned about the complexity of conflict of laws.⁵¹ That is true regardless of whether the classic or the modern approach is followed. Each of them requires an impressive amount of experience, knowledge and resources. For instance, to follow a *renvoi* or to analyze the governmental interests involved in a case demands a lot of expertise, information and time on the part of the judge.

Inquiring the content of the applicable foreign law equally is a very demanding task. It is so demanding that it is highly unlikely that the judge will be able to fulfill it herself. More often than not, it will be impossible for her to correctly analyze a case under a foreign legal system in which she has not been trained. True, she might rely on experts. But different experts are often reaching different conclusions when it comes to determine how a particular case would be handled by a foreign court. Sometimes, the courts in the foreign legal system have themselves reached different conclusions on the same question, or there is a gap in the foreign law and no solution readily available. In the end, the judge will therefore have to make a decision herself as to the content of the foreign law. Inevitably, she will be tempted to escape this dilemma by interpreting the foreign law in

⁵⁰ See Scoles, Hay, Borchers & Symeonides, *supra* note 9, p. 143, margin no. § 3.15 (noting that the public policy exception to the enforcement of rights based on foreign law has to be construed narrowly).

⁵¹ See Juenger, *supra* note 3, pp. 162-163 (noting that practitioners have compared conflict of laws with a “labyrinth”, “tattooing soap bubbles” or a “sealed book”).

the sense of her own law. Even if she rejected this approach, she will be guided unconsciously by the principles of the legal system she has learned in law school. But technically, under the current methodology, that is error.

A further problem is that the conflicts mechanics requires the judge to apply foreign law exactly in the sense in which it is interpreted in the country of origin. Many times, this will impossible. For instance, it is hard to imagine that a court in a Western country could solve a case in exactly the same manner as a Mongolian court would do, taking account not only the legislation, but also the relevant cases as well as possible other sources of law, such as local custom, and sociological, ideological and political influences. Most courts of the world will not dispose of the necessary information and time to fulfil that task. Calling in an expert does not necessarily help as different experts might come to different opinions. In any case, an expert opinion cannot alleviate the court's task to render its *own* decision. The judge, who is trained in her own legal system but rarely in a foreign, is not equipped for the task of applying foreign law in the manner that a foreign court is. The result is that the identical application of the law regardless of the forum will often remain a fiction. As Friedrich Juenger put it: "what courts apply in practice is all too often but an inferior replica of the foreign law in action".⁵²

A further problem is that the conflicts mechanics forces the judge to respect the foreign law unless it leads to a result that is outrageous.⁵³ He is called upon to apply foreign law exactly in the sense in which it is interpreted in the country of origin. To take an extreme example, a U.S. judge might be called upon to imitate a family law court in

⁵² Juenger, *supra* note 3, at p. 158.

⁵³ The only exception is the "better law" theory, which allows the judge to choose from various laws the one that produces the most sensible results. The theory is recognized in some states of the U.S., but not in most parts of the world.

North Korea. Even if she has severe qualms about North Korean law and the interpretation given to it by the courts there, she has no choice but to follow it – provided she will be able at all to get sufficient and reliable information on its content.

The whole process seems to be even absurd if one takes into account that it does not produce the result that it intends to produce, namely decisional harmony.⁵⁴ For all the efforts made to determine the correct law and apply it in the same manner have only lead to more divergence. As the example of the limping legal relationships⁵⁵ clearly shows, individuals suffer from this. It seems preposterous that for them that more than one law should govern the same situation and that they cannot know in advance which law that is. To ordinary people, this appears just to be the ultimate example of injustice.

D. The New Paradigm: Judges as Administrators of Global Law

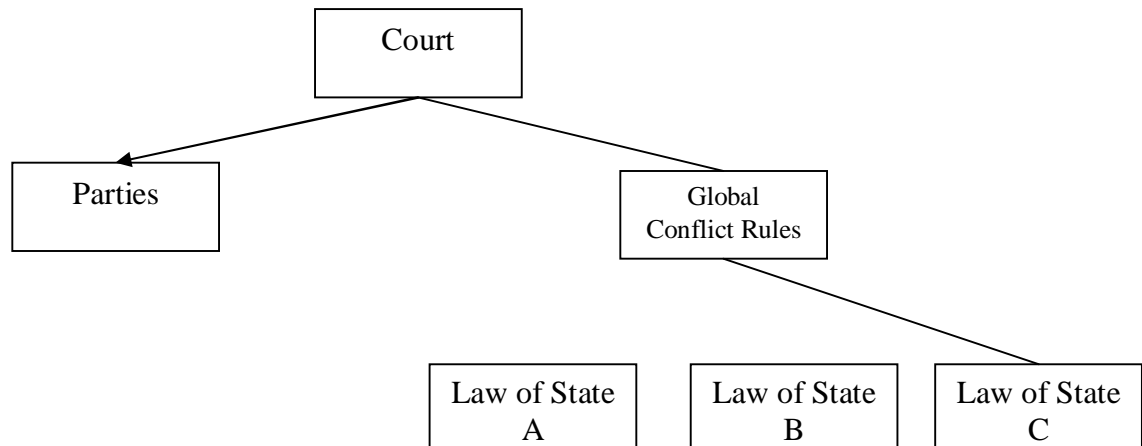
The proposal that is made here is that courts should apprehend their task differently. They should not view themselves as the instruments of the state they are sitting in. Instead, they should understand themselves as administrators of global justice.

Obviously, there is no agreement between different states as to what “justice” is and what it requires. Under the current split of the world into different legal systems each of them has his own conception of justice and they are diverging from each other. It is suggested here that the judge should respect these differences. But in approaching them, he should not look through the lens of his own forum conflicts law and try to determine which legal system governs. My proposal is that he should take a more holistic approach to conflicts. He shall consider the different legal conceptions and find out which one

⁵⁴ For the fact that decisional harmony historically was the prime goal of conflict of laws, see supra note 4 and accompanying text.

⁵⁵ See supra, I B.

should, seen from a global viewpoint, apply. There should be no preference for any of those systems, not even for the conflict rules of the forum. Instead, the court is asked determine the applicable law by using globally accepted conflicts rules. In a chart, this would look like this:



At first glance, this methodology looks quite similar to the one currently used. The crucial difference is that the judge is no longer bound by the conflict rules of the forum in deciding which law applies. He should select the applicable law in conformity with world-wide accepted principles of conflicts. He should do so even if he is thereby violating the forum's law.

The reader might ask how this deviance from the judge's own legal system can be justified. I will try to answer this question shortly.⁵⁶ Another question might concern the existence of global rules of conflicts law. In particular, the reader might doubt that there can be such rules given that, as has been shown, there is no agreement between national

⁵⁶ See *infra* IV.

conflicts rules.⁵⁷ The short answer to this puzzle is that the global rules lie on a different level of abstraction than national conflict rules. They are more general in character and less concerned with detail than national law. Their content will be expounded later.⁵⁸ Here, it suffices to say that above all the choice of the parties has to be respected and that international conventions must be given a paramount role; that in the absence of both the court should not rely on the conflicts rules of the *lex fori* but rather use a comparative approach to choice of law; that once the applicable law is determined it should be interpreted in line with global values and standards. These rules are still very rudimentary. But it is suggested that they lead to more justice than the administration of the differences we find today in global practice. If they are followed, then indeed one and the same set of facts will receive identical treatment in all courts of the world.

IV. Justification

A. Disregarding the Forum's Conflicts Law, Not Disregarding the Law

In the foregoing, an extraordinary suggestion has been made: Judges should not view themselves as instruments of the state who has entrusted them with their task. In international cases, their main concern should be to achieve decisional harmony with other courts. They should even disregard the law of the forum if it is necessary to achieve global justice.

These claims must seem outrageous to lawyers, in particular to those with a background in constitutional law. In the current organizational framework, the place of

⁵⁷ See *supra* I A.

⁵⁸ See *infra* V.

the courts is clearly defined: Their task is to interpret and apply the acts of their legislature. They are not free to disregard these acts. Any other opinion would impair the rule of law. This principle belongs to the very foundation of democracy. It reflects Parliament's primacy, which is justified because of the latter's backing by the majority of the population. The importance of the principle of the rule of law goes even beyond democracy, as it also applies to non-democratic constitutional systems. Its history can be traced back to 1215, when Magna Carta was drafted.⁵⁹ It means that judges cannot decide cases according to their personal preferences, but have to follow the law.⁶⁰

So how can the validity of this long-standing, fundamental principle be challenged? In effect, the claim that is made here does not question the rule of law. It is submitted that judges are bound by the law – the question is just *which* law. In cases involving parties or facts from different countries, more than one law may legitimately claim its application. What is suggested here is that the judge in this situation should not start from a local approach to conflicts to advise him on the applicability of foreign law. Instead, he should take an internationalist position. That is because in a global legal system, there is no such thing as a “foreign law”, strictly speaking. Each of them is as good as the other. The judge therefore has to make an independent choice between them, one that is more inspired by inter- or transnational principles of law than by idiosyncratic rules of his own state. In case that the forum's conflicts rules stand in the way of harmonious decision-making on the global level, he shall ignore it and follow the rules that the other courts in the world would apply.

⁵⁹ See Tom Bingham, *The Rule of Law*, Penguin Books, London, 2010, pp. 10-12.

⁶⁰ On other aspects of the rule of law, see Bingham, *id.*, at pp. 37-129.

I have no illusions about the fact that virtually all adherents of the current conflicts approach will reject this proposition. That is only natural, as the view expounded here questions one of their most basic premises: the supremacy of the forum's rules in the court's decision-making. This premise is embraced by all conflicts scholars no matter what school they belong to. For instance, a mind as elucidated as that of Albert A. Ehrenzweig opined that a foreign interest can become relevant only by virtue of an interpretation of the spatial reach of the forum law.⁶¹ Others that claim to have developed novel methodologies equally do not question that the court's own law has to be applied first.⁶²

The prevalence of forum law was most clearly expressed by governmental interest analysis. Brainerd Currie, its spiritual father, wrote that in the event of a conflict between the forum's interests and those of another state, the court should prefer those of its own state.⁶³ He even wanted to take away any power of the courts to make conflict rules and entrust that task exclusively to the legislature. The reason he gave was that weighing conflicting governmental interests would be "a function of a high political order", which "should not be committed to courts in a democracy".⁶⁴

Paradoxically, this view prevails today less in the United States and more in Europe where Currie's ideas are faithfully transposed. The legislators of most continental countries give their courts exact indications as to what law they should apply in cases involving foreign elements. Recently, the European Union has joined them in the effort

⁶¹ Ehrenzweig, *supra* note 29, at pp. 94-95, margin no. 40.

⁶² See e.g. Tetley, *supra* note 5, at p. 40 (suggesting that the court should apply the forum's conflicts rules).

⁶³ Currie, *supra* note 10, at p. 184; see also Currie, *Comments on Babcock v. Jackson – A Recent Development in Conflict of Laws*, 63 *Colum. L. Rev.* 1233, 1242-1243 (1963).

⁶⁴ Currie, *supra* note 10, at p. 182. Other authors have particular trouble with that part of Currie's theory. See Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts – Today and Tomorrow*, 298 *Collected Courses of The Hague Academy* 1, 45 (2002) (calling Currie's solution to true conflict cases "questionable").

of codifying conflicts rules.⁶⁵ This is very much what Currie wanted, although he certainly would have denounced the *content* of the European rules as “mechanical” and “sterile”.

There are other seemingly strange parallels between governmental interest analysis and European law. Although formally Curries’ preference for the forum law is sniffed at as being too “parochial”, the same approach is followed in hard case that involve “overriding mandatory provisions” of their forum law: The EU explicitly allows national judges to apply such provisions of law even if a foreign law would normally govern.⁶⁶ Moreover, there is no doubt that the EU Member State courts always have to apply the Regulations and Directives of the Union if their policy so requires.⁶⁷

Thus, it is correct to say that the forum’s prevalence over other law is the basis of conflicts rules on both sides of the Atlantic. It is so widespread that one can even speak of it a globally accepted legal principle. At the same time, it is at the root of the currents conflicts muddle. Therefore, it is suggested that it has to be overcome.

B. The Function of the Judge: Instrumentality in the Hands of the Legislature or Servant of Justice?

Before I can go on explaining the notion of a global legal order, it is useful to reflect some more on the idea that the legal rules of the forum are automatically binding for the

⁶⁵ See Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual situations (“Rome I”), O.J. EU 2008 L 177/1; Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 7/11/2007 on the law applicable to non-contractual obligations (“Rome II”), Official Journal of the European Union (O.J. EU) 2007 L 199, p. 40.

⁶⁶ See Article 9(2) Rome I Regulation; Article 16 Rome II Regulation.

⁶⁷ For a decision in point, see ECJ, case 381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, [2000] E.C.R. 9305.

judge. Only if the reasons of this axiom are well understood can we go on and find out its limits.

1. Separation of Powers and Legal Theory

Underlying the supremacy of the forum conflicts rules is a conception of the judicial process that is deeply imbued by constitutional ideas. It views the judge as an organ of the state that has entrusted him with his task. He is obliged to follow its rules – conflicts or other –, no matter what their content is, as long as the legislator wants him to do so.⁶⁸

Obviously, that has something to do with the division of tasks between the legislature and the judiciary. It is generally accepted that courts have to follow legislative acts of their state. That is part of the separation of powers, a hallmark of constitutional law since the times of Montesquieu. Why should the judge be able to disregard the law of the forum? Is he thereby not assuming to be above the law?

The argument is of course powerful. There can be no doubt that the judge must follow some rules of law, and that the legislator of his state is the one that has the authority to enact them. However, it seems that over all the discussion about separation of powers the true aim of legal proceedings has been forgotten. This aim is not to execute the forum's laws. Rather, it is to achieve justice. Legal philosophers from Aristotle to Ronald Dworkin have recognized that the goal of judicial proceedings is to render a just result.⁶⁹

Applying the commands of the legislature is part of that enterprise, but it is not the primary goal.

⁶⁸ For an explicit statement of that view, see, e.g., Judge Hall's statement in: *In Re Paris Air Crash of March 3, 1974*, 399 F.Supp. 732, 745 (C.D.Cal. 1975) (calling a federal court "an instrumentality created to effectuate the laws and policies of the United States").

⁶⁹ See Aristotle, *Nicomachean Ethics* (transl. Terence Irwin, Hackett Publishing, Indianapolis, 2d ed. 1999), Book V, Chapter 4, § 7 (margin no. 1132a); Ronald Dworkin, *Law's Empire*, Hart Publishing, Oxford, 1998.

The comment I am making here is of a general nature. Today, we have come to an age in which the judiciary is perceived as a mere appendix to the legislative power. Courts have lost their independent function. They are viewed as instrumentalities in the hands of the legislature – except for those few courts that may in some jurisdictions nullify acts of Parliament. Yet the task of the judiciary goes way beyond the mere execution of orders by elected representatives.⁷⁰ It is to do justice in the individual case before them.

This role of the court is epitomized in *Justitia*, or Lady Justice, the blindfolded female figure that is holding a balance in one and a sword in the other hand. It was very clear to see in the Roman legal system where the magistrates, were asked to “speak the law” – *ius dicere* in Latin, from which the word “jurisdiction” is derived.⁷¹ The process was two-staged – first, a *praetor* would determine whether a valid claim had been brought and define the legal issue to be decided, then he would transfer the decision of the relevant factual questions to a *iudex* or an *arbiter*.⁷² There was no legislation involved. The independence of the judicial task from the legislature was also very visible in the original Common law, in which judges were endowed with unfettered powers to solve individual disputes brought before them. There were hardly any acts of Parliament for the courts to obey in order to accomplish their mission.

⁷⁰ See also Juenger, *supra* note 3, p. 160 (noting that “[n]o judge has ever been impeached for sacrificing forum interests”, and that “to cast courts as handmaidens of a legal imperialism is as artificial as making them enforcers of vested rights”).

⁷¹ Cf. Max Kaser & Karl Hackl, *Das Römische Zivilprozessrecht*, Beck, Munich, 2d ed. 1996, pp. 40.

⁷² See Kaser & Hackl, *supra* note 71, pp. 45-48 (speculating about the reasons for the split of the judicial function).

Even Currie admitted that the court should strive to do justice to the parties if there are no conflicting interests among states.⁷³ But why only if there are no such interests? The interests of state are not the central concern of the judicial process. Rather, it is doing justice to the individual litigants. It seems that this goal has been lost sight of.

Today's general preference for the state's rules and interests testifies to a fundamental reversal of our conception of the judicial process. This reversal has been caused by the advent of the nation-state. Since its firm establishment, the interests of the presupposed "common weal" take precedence over those of the individuals. The legislature is free to regulate any aspect of private individual's life, including the law that applies in the relations between them. Hence courts have learned to look primarily into statutory law when they seek the solution for a private dispute. They get into trouble, however, if there is an international element in the situation to be decided, because then often two or more different legislators claim that their rules would apply. In such situation, the judge seems to be constitutionally required to obey the laws of the forum. Like in war, he has to choose his side.

Elsewhere it was argued that we should overcome the idea that conflict of laws has some similarity to battles between states.⁷⁴ It was also tried to show that the conception of the state following a uniform interest is outdated.⁷⁵ We should certainly not think of courts as a theatre in which states take out their differences over conflicting interests and

⁷³ Currie, *supra* note 10, at p. 65 (remarking that justice between the parties becomes the sole consideration where no conflict of interest among states being apparent).

⁷⁴ See Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 *Vand. J. Transnat'l L.* 381 (2008).

⁷⁵ Matthias Lehmann, *De-bordering of the State and Conflict of Laws*, unpublished manuscript. See also Paul Heinrich Neuhaus, *Die Grundbegriffe des internationalen Privatrechts* 71 (2d ed. 1976) (claiming that "the idea of sovereignty, which in our century has become dubious even in international law, does not, at least in private international law, perform any useful service." – translation from Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 *Ind. L.J.* 403, 415 (2000))

would use for that purpose the parties as their marionettes. In court as in life, the real litigants of a dispute are the individuals involved. It is them who are most concerned by the procedure's outcome.⁷⁶ They act in their private capacity and not as representatives of states. Hence rendering justice between individuals should be the primary goal of the judicial process, not securing state's interests.

2. The Limits of Democracy

The claim made here that the judge's task would be merely to render justice, not to enforce state laws, could arouse some doubts. Today, justice exists almost exclusively in the form of state legislation. What is just and what is not is decided in a democracy by the will of the majority. The enactments of the legislature reflect this will. They cannot be circumvented by judges in international cases who seek to fulfill their own ideal of what justice entails.

This point is certainly right to the extent that justice, even when seen from a global viewpoint, is possible mainly only within the framework of national law. In the absence of a global legislator, the definition of what is right and what not must come from nation-states. There can therefore be no question that courts need to apply substantive national law to the disputes before them. That does, however, not answer conclusively how they have to select the applicable law. In this regard, it is necessary to face the limits of the principle of democracy. In a world divided into different states, one parliament might be as well democratically elected than the other. Why does the court have to apply one law and not the other? This question cannot be answered by a simple reference to the

⁷⁶ See also Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 *Ind. L.J.* 509, 510 (2000) (stressing that conflicts scholars should take account of what they are doing to "real people" that are litigants in multistate cases).

principle of democracy and the binding force of state law. Since there are different legitimated bodies who issue legislative enactments, to say that the court must obey the law begs the question which one.

3. Juxtaposition of Courts and Administrative Agencies

The claim made here is that the judge is more than a mere instrumentality in the hands of the legislature which just has to obey the latter's commands. This claim can be corroborated by a comparison of courts and administrative agencies. Certainly everybody agrees that administrative agencies are charged with enforcing the law of their own state. Rules of other state may be occasionally looked at, but not "applied" in the sense of enforcing them. For instance, the SEC might have to take cognizance of the corporate law of a foreign state in order to know the exact powers of the directors of a company registered with it. It might also lend a hand to foreign agencies in administering their laws. But it will certainly not "apply" foreign securities law as it is exclusively charged with enforcing U.S. legislation.⁷⁷

With the judiciary, it is all different. Courts usually apply foreign law; for some it has become their daily bread and butter. It would be ludicrous to argue before a judge of Ohio that he is not charged with enforcing French law and thus could not apply it to a dispute between two French spouses before him. Using foreign law to render its decision seems somewhat natural for a judge. The difference to the agency is striking. Obviously, it calls for an explanation.

⁷⁷ The SEC may, under sec. 21(a)(2) of the Securities Exchange Act 1934, provide "assistance" on request from a foreign securities authority. But it is not its task to enforce these laws, which is shown inter alia by sec. 4(f) of the Act, which allows the SEC to demand payment and reimbursement of expenses from the foreign securities authority for its assistance.

The positivist would argue that judges apply foreign law because the forum state has charged them to do so. According to his view, the legal rules made by another state have no intrinsic value of their own. They only bind the court to the extent that the court's own legislature has said that they shall be followed.⁷⁸ This stance seems to be logical and required not only by constitutional law, but also by the principle of sovereignty under public international law.

But on the other hand, it is quite strange that rarely any state so far has prohibited the courts to apply foreign law. In all states of the world, the acts of foreign legislatures are obeyed. Moreover, in those countries that belong to the common law family and others like France, courts have never been legislatively instructed to apply foreign law. They did so of their own accord.

But why? Why do courts all over the world accept to enforce foreign legislation, but not administrative agencies? That is because courts are charged with the very special task to render justice. To do so sometimes requires application of the laws of another legislator. They do it not in the interest of the foreign sovereign or that of their own state, but in order to give a just answer to the litigants that have sought their decision. Thus, in the triangle between parties, courts and states⁷⁹, judges are using the rules of the rule-makers interchangeably to accomplish their special mission.

It is interesting to note that courts are very wary to follow that recipe when foreign criminal or tax law is at stake. For instance, the Supreme Court has found it to be self-evident that the "courts of no Country execute the penal laws of another"⁸⁰, while an

⁷⁸ On the underlying assumptions derived from public international law, see Lehmann *supra* note 74, at pp. 403-404.

⁷⁹ See *supra* III A.

⁸⁰ *The Antelope*, 23 U.S. (1 Wheat.) 66, 123 (1825), Justice Marshall.

English court held that “no country ever takes notice of the revenue laws of another”⁸¹. The foundation of this “public law taboo” was questioned with very good arguments.⁸² But the underlying reasoning is clear: the courts do not want to be mere instrumentalities at the service of a foreign state. In other words, they do not want to act as a kind of administrative agency through which another government pursues its claims against private individuals. But they do not have any qualms about applying foreign private law to private relationships, because here this danger does not exist.

The only possible explanation for the differences between the role of foreign law before courts and administrative agencies is that the function to decide disputes between private individuals is quite different from executing the law of a state. Thus, the courts should not be seen as mere instrumentalities in the hands of the legislator, which would have to follow each and every of its commands. Their first and foremost task is to render justice to the parties before them. This is the true reason why they do not hesitate to follow foreign law, if that is what it takes to give a just solution to the parties’ dispute.

C. From Local Justice to Global Justice

In the foregoing, it was demonstrated that the main goal of judicial proceedings is not to enforce the laws of a sovereign but to achieve a just result in a dispute between individuals. “Justice” is of course a very vague notion. It is crucial to make it more precise. When it comes to international cases with elements in different states, apparently two possible interpretations of the notion “justice” have to be distinguished: a local and a

⁸¹ Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775), by Lord Mansfield.

⁸² Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness* 3-5 (1996) (doubting that the non-application of foreign securities law to private litigation would be justified); William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 189-193 (2002) (distinguishing civil suits by a private party to recover damages from suits brought by the government).

global one. The local interpretation means that the case would have to be decided according to the rules that from the forum's point of view would be the best to apply. This interpretation is designed to make the national policy prevail in conflicts. It is a possible attitude and the one that all the current approaches adopt.

A more global interpretation of the notion "justice", however, insists on the plurality of global law. It acknowledges that there are different versions of what constitutes a just legal system, and that each of them has as a matter of principle equal value. The judge has to make a decision as to which of these versions applies. In that decision, he must be guided by the general goal of doing justice to the individual parties, not furthering the interests of one or the other state.

Now what can be the content of "global justice"? Obviously, the notion would remain empty if we were not able to point to any principles or rules that are part of it. As the methodology that is applied here is rather new, it is difficult to find any substantial or conflicts rules that are unequivocally agreeable on. But there is at least one fundamental axiom that must be followed to achieve global justice in any given case. This axiom is that courts should strive to avoid results in the same case that differ from each other. The proposition is immediately appealing. We can be quite sure that this is required by global justice because the opposite would be ultimate injustice: that the same relationship would be treated in different ways by different courts.⁸³

The precept that courts should strive for decisional harmony is of course formal and without any substantive content. But that fact does not render it subject to criticism. On the contrary, the very formality of the axiom is the condition for its neutrality. This, in turn, is key for its success because it guarantees that the axiom can be followed by the

⁸³ See *supra* I B.

courts in very different legal systems without hurting anybody's interests more than that of others. It is a sort of *a priori* rule in the Kantian sense, one that one could wish that its maxim would become a general law and everybody would follow it. In other words, it is of universal validity, a type of modern "golden rule".

Of course, this rule is not new at all. As has been mentioned, it was already the goal of the conflicts theory in the 19th century, most artfully expounded by Savigny.⁸⁴ But over time, the idea has lost its panache, giving way to more palpable state interests that the court should strive for. Even those authors and courts that still adhere to the old goal of choice of law assume that it can only be pursued through the conflicts rules of the forum. These rules have over the years become more elaborated, and by the same token more diverging. It is hence necessary to re-establish the true goal of the conflicts mechanism.

This is done here under the new paradigm of the "global legal order". In our globalized society, the goal to decide disputes in the identical way is more important than ever. It is indeed part of building up a global legal system, in which judges play a crucial part.

D. Building a Global Legal Order

1. Notion Explained

The foregoing arguments contain a sea change. It was said that courts should not follow slavishly the conflict rules of their legislation. Instead, they should strive to achieve a sort of global justice. If the courts were to follow the precept that is given here, it is

⁸⁴ See supra note 4 and accompanying text.

submitted, the application of law within the world would become more coherent. There would be fewer contradictions, hence less limping relationships and less injustice. Judges could thus contribute to what can be called a “global legal order”.

Now “global legal order” is a notion not much less abstract than “justice”. It can be illustrated by comparing the world to a house with a many different groups. Each group houses principally in one room, though they also move around. Every group has adopted its own rules. That is not *per se* problematic. The problem, however, is that they do not agree which rule applies when: Each of them has developed its own approach of determining when its rules or those of another group apply. That is because each thinks that it would hold a version of justice that is superior to that of the others. One can understand this attitude from the group’s individual perspective. If one looks at the house as a whole, however, the result is mere chaos.

A global legal order can be conveniently apprehended as the opposite of the situation just described. It is a system in which there are diverse rules, but not chaos. That is because although the groups hold different views of justice, everybody agrees on when which rules apply. There is a consensus that conflicts between different rules have to be avoided. On the basis of this lies a common understanding that the gravest injustice would be if two groups apply different laws to the same event. It is something that has to be avoided at – almost – all cost. This can be achieved if none of the groups claims superiority of its version of justice over that of the other groups. It must recognize that the others’ systems of rules have an equal value. That does not mean that the differences between the groups’ rules must be negated. On the contrary, they can even be more fully developed if the instances to which they apply are clearly defined. In such a situation,

everybody will know which rules she has to obey. Moreover, peace and harmony will reign within the house. A pluralistic society will flourish as long as everybody agrees to the applicability of the rules to certain situations.

There are currently many books discussing the “global legal order”. They concern issues such as human rights⁸⁵, global business regulation⁸⁶ or climate preservation⁸⁷. In these contexts, we like to adopt the view of the house rather than that of a particular room. But it is startling that for conflict of laws, no such global approach is undertaken.⁸⁸ Conflicts lawyers still argue on the basis of the old premise that the forum’s rules must be considered first. That is very surprising: when you build up a global legal order, one in which different legal systems can coexist, the first that you would do is to determine the situations to which one or the other applies. It is a fundamental question, worth to be put in the foundational text of any community. If it is not dealt with, innumerable frictions will occur. Thus, conflict of laws forms an essential part of a global legal order, it is its cornerstone.

2. Why States are not Well-Positioned for the Task

The claim that is made here is that judges should play a central part in building a global legal order. They should disregard the forum’s rules if necessary to ensure harmonious

⁸⁵ See, e.g., Fuyuki Kurasawa, *The Work of Global Justice: Human Rights as Practices*, Cambridge University Press, 2007 (examining how groups and persons struggling against injustices construct and enact global human rights).

⁸⁶ See, e.g., John Braithwaite & Peter Drahos, *Global Business Regulation*, Cambridge University Press, 2000 (arguing that effective global business regulation depends on engaged individuals able to confront concentrated economic interests); Wolfgang H. Reinicke, *Global Public Policy: Governing Without Governments?*, The Brookings Institution, Washington D.C., 1998 (analyzing the role of governments in the regulation of global financial markets and money laundering).

⁸⁷ See, e.g., Frank Biermann, Phillip Pattberg & Fariborz Zelli (eds.), *Global Climate Governance Beyond 2012: Architecture, Agency and Adaption*, Cambridge University Press 2010 (a collection of articles on the emerging structure of global climate control).

⁸⁸ There is one notable exception: Ian Shapiro & Lea Brilmayer (eds.), *Global Justice*, New York University Press, New York, 1999 (a collection of articles dealing with conflict of laws from the viewpoint of universal justice).

decisions with their fellow courts in other countries. Thus, the central role for the solution of conflicts lies with the courts.⁸⁹ Others take the diametrically opposite position. Brainerd Currie, for instance, argued that the task of finding solutions for conflicts cases should not be entrusted to judges.⁹⁰ He preached instead in favor of legislatively made conflicts rules.

Obviously, therefore, some explanation is needed why the courts are trusted here more than the legislators. This explanation must start from the idea that conflicts rules are part of a process that shall result in “global legal ordering”. Parliaments are not the best actors to rely on to achieve this result. That is because they are naturally biased towards their own constituency. They even have to be so. Their task is, above and before all others, to serve their citizens. It is from this perspective that they approach international relations, and they handle conflict of laws in this manner as well. Indeed, it would seem difficult for them to switch their personality and argue from a global viewpoint when dealing with conflict of laws.

The existing legislative choice-of-law rules do confirm this conjecture. Just take the example of the German rules of private international law. Some of them are unilateral in character: they only deal with the reach of the forum’s rules and leave the question of the application of foreign law to the courts.⁹¹ Others give a clear preference to the substantive law of the forum.⁹² All of this, obviously, does not help building a global legal order.

⁸⁹ Accord Juenger, *supra* note 3, at p. 165 (“Legal history demonstrates that courts are quite capable of devising apt solutions to multistate problems”).

⁹⁰ See Currie, *supra* note 64.

⁹¹ See Art. 17a Introductory Law to the German Civil Code (submitting the use of the marital home in Germany and its household articles as well as connected restraining orders to German law).

⁹² See, e.g., Art. 5(1)(2) Introductory Law to the German Civil Code (declaring that persons with multiple citizenships are to be considered as German nationals regardless of their domicile or other connection to Germany).

This description of the legislators' behavior is not meant as a reproach. Given the task that they have and the way they are composed, it is only natural that their attitudes are heavily biased towards their community. Moreover, considering the nature of the political process, it is not at all surprising that legislators extend the values cherish in domestic relations to international ones. They typically reason like this: If the forum condemns same sex marriages, why should they be recognized between foreigners?⁹³ Or: Given that paternity of the former spouse is presumed by the forum law for a baby born within a certain delay after divorce, why should the same rule not apply to children of couples with different nationalities?⁹⁴

It is a fact that governments tend to follow their political convictions when dealing with conflict of laws. They constantly mix issues of domestic policy with private international law. It is close to impossible for them to strip off their values and assess trans-border relationships in a neutral way. To make matters even worse, if there is internal disagreement about the substantive policy to be followed, diverging conflicts rules will be suggested. An example is provided by the American discussion about the proper conflicts rule for torts, in which liberals and conservatives have clashed with one another over the issue of which law should apply.⁹⁵

This does by no means imply that states could *never* take responsibility for the global legal order. The large number of international conventions containing uniform conflicts

⁹³ In the U.S., a special legislative act was necessary to deal with that situation, see 8 U.S.C. § 1738C (known as the Defense of Marriage Act or 'DOMA'). On DOMA and its constitutionality, see Symeon C. Symeonides, *American Private International Law*, Kluwer Law International, Alphen aan den Rhijn, 2008, pp. 238-246, margin nos. 514-533.

⁹⁴ See the example *supra* I B.

⁹⁵ See, e.g., Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 Mich. L.Rev. 1631, 1645 (2005) (describing how the factions in tort conflicts doctrine have become increasingly politicized and split into liberals and conservatives). See also Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 Ind. L.J. 403, 415 (2000) (observing that the forum bias in modern conflicts approaches has lowered interstate justice in conflicts cases).

rules on which they have agreed demonstrates the contrary. One of the principal recommendations given here to the courts is to follow the international rules before making up a rule themselves.⁹⁶ But there remains ample room in which there is no such agreement between states. That is because more often than not, governments will fail to find an agreement on the applicable law. The reasons are mainly political. They may seem dear to the politicians that hold them, yet they are insignificant when one takes into account the costs they produce on the world level. In these cases, it is suggested, judges should go forward and devise a rule that satisfies the exigencies of global legal ordering. They should leave behind the states embroiled in their disputes and strive for the just solution of the case. To paraphrase one of Currie's aphorism, one could say that "we are better off without (differing) legislative conflict of laws rules".⁹⁷

3. States as Rule Providers and Global Rule of Law

If justice is the real goal of the judicial process, and if states are unwilling and even utterly incapable of achieving it in transnational cases, then why should courts take all the hassles of identifying global choice-of-law rules? Could they not make up the rules of law for cross-border relations?

In fact, this idea extends the office of the judge too far. The courts' task is to solve disputes according to the applicable rules of law. They do not have the power to just make those rules up. The global order is composed of – sometimes very – different versions of what justice requires. The judge has to accept this fact. She has to recognize the legislatures' power to determine what justice required. They decide on "the rules of

⁹⁶ See *infra* V 2.

⁹⁷ Currie, *supra* note 10, p. 183.

the game”. In other words, they are the “rule providers” for the global legal system⁹⁸. It is the obligation of the judge to follow the legislature-made substantive rules. This is required by the principle of the rule of law. The difference to the conventional version is that under the view expounded here, the court does not only have to follow the laws of the forum, but also those of other states. One could call this new paradigm the “global rule of law”.

The global rule of law also explains why another suggestion cannot hold. Many writers have argued in favor of more substantive elements in choice of law. For instance, Robert A. Leflar’s “better law approach” has come to fame⁹⁹. Under that approach, the judge would be called upon to decide which state’s law, under the circumstances at hand, would achieve the best results. Friedrich K. Juenger has argued as well for a “teleological approach”, which would allow the judge to select the applicable rules according to the results they would lead to.¹⁰⁰

In regard of this and other substantive theories, one cannot but endorse the opinion of Brainerd Currie, who stated:

“Conflict-of-laws cases do not provide courts with a license which they do not otherwise have to condemn the law and policy of a state on the ground that it is archaic, or misguided, or socially and economically unwise”.¹⁰¹

The reason is that otherwise the powers of the court would be nearly unlimited.¹⁰² The substantive approach would allow them to select the applicable law as a function of how

⁹⁸ On the notion “rule provider”, see Lehmann, *supra* note 75.

⁹⁹ See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 296-297 (1966) (arguing that choice of the better law will advance justice between the litigating parties).

¹⁰⁰ See Juenger, *supra* note 3, at pp. 191-194.

¹⁰¹ Currie, *supra* note 10, at p. 175.

¹⁰² See also Mayer & Heuzé, *supra* note 7, at p. 102 (criticizing Cavers’ better law approach because it would give “exorbitant” liberty to the judge).

they want to decide a certain case. They could be tempted to abuse such a far-ranging power. To counter human weakness, it is not advisable to write judges a blank cheque.¹⁰³ It would inevitably lead to the kind of *khadi*-justice that was denounced before.¹⁰⁴

The principle of global rule of law is designed to countenance such perverse effects. It has the advantage of introducing a healthy division of tasks between the legislature and the judiciary: one branch makes the rules, the other applies them to disputes that may arise. That division is well known from domestic law. It should be maintained, but this time on the global level. This implies the following: Courts should be forced to respect the law of the state that is applicable, and which law that is should be decided according to a rule the content of which they are not able to influence. The only change is that the conflicts rule which determines the applicable law is no longer exclusively in the hands of one legislator, that of the forum.

4. Is Judging Part of “Global Governance”?

The objective of this article is to underline that judges play an important role in building a global legal order. Others have described courts as “performing global governance functions”¹⁰⁵. On the face of it, this description may seem quite similar to what has been proposed here. In effect, however, it means something quite different. The major difference lies in the following: the “global governance theory” conceives the judiciary’s role from top down. It argues that domestic courts would “allocate governance

¹⁰³ To the same effect, Otto Kahn-Freund, General Course, 143 Collected Courses of the Hague Academy of International Law 139, 466 (1974-III) (“However much ... in practice the judge’s choice of law may be influenced by this preference for the content of one law, it is inadvisable to elevate a fact of human weakness to a principle of legislative policy”).

¹⁰⁴ See supra note 43 and accompanying text.

¹⁰⁵ Christopher A. Whytock, Domestic Courts and Global Governance, 84 Tul. L.R. 67 (2009) (emphasizing that courts are pervasively involved in regulating transnational activity).

authority”.¹⁰⁶ It asks courts to become aware of their special function to “determine the rights and obligations of transnational actors”.¹⁰⁷

The role that is given in this article to the court is much more restricted. It is to follow the law and to do justice in the individual case. True, by doing so, courts will unavoidably contribute to the creation of a global legal order. But they will do that by deciding individual cases and looking at particular facts before them, not by conceiving of their general task as “global regulators”. The courts’ role is not that of an eagle building its nest high in the mountains. They are more like ants that, by assiduously collecting the little parts, have to build an anthill from bottom up.

The emergence of a global legal order from the chaos of national legal systems is not the main aim of the suggestion made here. It comes as a by-product of the judge’s activity, because later cases will be decided along the same lines. This view of the judge’s role is much more modest than that which assigns them an active role in global governance. The advantage of this modesty is that it does not require courts to tackle a completely new task. Judges are called upon to do precisely their job, which is to render justice. They do not therefore need to alter their position with regard to the other branches of government. Instead, they shall just do what they have always been charged with. That allows more realistically to achieve the goals than to call for a fundamental upheaval of the judge’s office in international cases.

5. Judges and Arbitrators in the Global Legal Order

It was argued that the court, when facing a conflict of laws, should not feel restricted by the commands of its legislator.¹⁰⁸ The global methodology that is suggested here calls for

¹⁰⁶ See Whytock, *supra* note 105.

¹⁰⁷ *Id.*

the judge to be concerned instead about the just resolution of the case at hand. In order to do so, he has to choose one of the rules of the world that guarantees such a result. In its choice, he should make sure that it is in conformity with the selection that other courts will make in the same or similar situation, in order to produce a harmonious result.

One can compare this function of the judge to that of an arbitrator. He shall decide on equity-like principle which law applies. He shall not take sides. Like an arbitrator, he shall consider himself as not being committed to any particular legal system. He shall determine the applicable law in the interest of justice, not of his state. If all judges do so, they will smooth out clashes and conflicts between different states.

It may seem somewhat mysterious why the courts shall leave the legislatively-made law aside when it comes to conflicts, but respect it in all other situations. The reason is provided by the paradigm of the global legal order: if all legal systems are considered to be part of one global order, then there is no reason to prefer one over the other. In such an order, judges are confronted with different laws of equal value. Functionally, they act as multistate decision-makers.¹⁰⁹ They have to make a decision as to which rules shall apply. Logically, the rules of the forum cannot have any more influence on that decision than the rules of the other states.

There is another striking reason why the judge should behave in international situations like an arbitrator. Arbitration nowadays plays an important role in transnational disputes. Given the shortcomings the states' judiciaries which are suspected of leaning in

¹⁰⁸ See supra III D.

¹⁰⁹ See Juenger, supra note 3, at p. 169 (noting that when sitting as the ultimate arbiters of an integrated legal system or dealing with disputes touching upon coordinate jurisdictions, courts act as multistate decisionmakers). See also *id.*, at p. 165 (judges having a dual function as local and multistate decisionmakers), at p. 212 (deploring that Judge Hall in the Paris Air Crash case failed to acknowledge "that he was in fact assuming the role of a multinational decisionmaker").

favor of their interests and their nationals, it is even the preferred method of settling those disputes.¹¹⁰ The literature generally accepts today that the arbitral tribunal is not bound to any particular system of conflicts rules.¹¹¹ Courts, on the other hand, are thought to be bound by the conflict laws of the forum. This has led to a situation in which courts and arbitrators, even sitting in the same state, determine the applicable law in a different way. The result is paradoxical. It also gives the wrong incentives. If the parties, for instance, want to overcome the forum's conflicts rules, they can do so by including an arbitration clause in their contract. The consequence is an unnatural preference for arbitration over adjudication by state courts.

If the suggestion made here would be followed, judges and arbitrators would have to deal with choice-of-law issues in exactly the same manner. The same law would be applied not only by different courts of different states, but also by state judges and private

¹¹⁰ See Stefania Bandurant, *A Practitioner's Guide: An Overview of the Major International Arbitration Tribunals*, 3. S.C.J. Int'l L. & Bus. 21, 22-23 (2006) (giving reasons of why businesses in international commerce prefer resolving their disputes through arbitration); Bernard E. Le Sage, Department: Practice Tips: Seeing The Sites: The Choice of an International Arbitration Forum: Contracting Parties Can Avoid The Uncertainty of Foreign Tribunals, 21 Los Angeles Lawyer 19, 20 (1998) (underlining that the parties have significant autonomy in modelling arbitration proceedings); Piero Bernardini, *L'arbitrato Commerciale Internazionale*, Dott. A. Giuffrè' ed., Giuffrè' Editore Milan 2000, p. 12 (explaining the preference of the parties for arbitration in international commercial disputes).

¹¹¹ See Gary B. Born, *International Commercial Arbitration*, vol. 2, Wolters Kluwer, Alphen aan den Rijn, 2009, p. 2111 (noting that arbitrators generally possess broad power to select and apply choice-of-law rules); Bertold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 Journal du droit international (Clunet) 475, 492 (1979) (claiming an almost total abandonment of the application of the rules of conflict of the "so-called" arbitral forum); Julian Lew, *Conflict of Laws Rules in Arbitration*, in: Albert A. van den Berg (ed.), *Planning Efficient Arbitration Proceedings, The Law Applicable in International Arbitration*, Kluwer, The Hague, 1996, pp. 447, 448 (claiming that in international arbitration, there is no "national" jurisdiction or conflict of law rules); Pierre Lalive, *Les règles de conflits de lois appliquées au fond du litige par l'arbitre international*, 1976 Rev. arb. 155 (comparing the assumption of binding force of the *lex fori* by the arbitrator to a Procrustean bed). Several awards have rejected the application of the *lex fori* of the country in which they are sitting, see, e.g., Award in ICC Case No. 1422, 101 J.D.I. 884 (1974) (questioning the appropriateness of applying the forum law, whose connection to the case might be "purely fortuitous"); Award in ICC Case No. 7375, 11(12) Mealey's Int'l Arb. Rep. A. 1, A-37 (1996) (emphasizing that the choice of the arbitral situs by the parties cannot justify the conclusion that they intended to subject themselves to the law of that situs); Award in ICC Case No. 117/1999 (2001), 2002:1 Stockholm Arb. Rep. 59, 64 (noting a distinct tendency in international arbitration to disregard the choice of the situs as an indication of a choice of governing law).

judges. That means that we would have killed two birds with one stone. Harmony within the global legal system would be achieved throughout all methods of dispute resolution. At the same time, unnatural incentives for the parties to choose one or the other would be eliminated.

E. Counter-arguments

There are important arguments against the suggestion made here. In the following, I will try to answer some of them. Although I will strive to present the counter-arguments as clear and sharp as possible, I can of course not exclude that the reader will have other, better reasons to refute my thesis. It is to be hoped that a debate will ensue that will bring these arguments to light.

1. Theoretical vs. Empirical Decision-Making

First, a very fundamental argument can be made against the structure of my proposition. Let me summarize what I was doing: I am about to develop a new – or rather recalibrated – approach to the question of how judges shall determine the applicable law. For that purpose, I have started from a premise, namely that disputes should be handled in the same manner no matter which court decides. I will later develop this into a more full-fledged methodology.¹¹²

Against this kind of theorizing, important objections have been made. In the past, many conflicts theories have been suggested that start from a general premise, like comity, the “seat” of the relationship, vested rights, governmental interests, better law, to name just a few. Writers that have introduced similar arguments were accused by Albert

¹¹² See *infra* V.

A. Ehrenzweig of trying to create “superlaw”.¹¹³ He denounced this kind of reasoning as being circular, because it produces the very results it was intended to produce.¹¹⁴ Instead of bringing order into the system, it seems to be the recipe for more chaos. It was remarked that if six or seven hundred years of debate among the statisticians of conflicts theory did not solve the unilateralist/multilateralist debate, differences of opinion on such fundamental questions are not likely to disappear.¹¹⁵

I agree that a court faced with a specific conflicts question in real life will often find the better answer than a professor staring at the books on his writing desk. It is precisely for this reason that this contribution does not suggest any new rules on how the applicable law should be chosen. It merely provides judges with an axiom they should follow and some examples how it can be achieved. The rules are left for the courts to find out. It even explicitly asks them to follow the solutions to conflicts cases that have been found through adjudication.¹¹⁶

But even making such a general proposition might be too much. Most writers in the U.S. have given up the search for any theoretical basis of conflict of laws. It would be better, they argue, to just observe what the courts do and distil rules from that.¹¹⁷ The

¹¹³ See Ehrenzweig, *supra* note 29, at pp. 93-94, margin no. 39.

¹¹⁴ Ehrenzweig, *supra* note 29, at p. 94, margin no. 39.

¹¹⁵ James E. Westbrook, A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism, 40 *Mo. L. Rev.* 407, 446-447 (1975).

¹¹⁶ See *infra* V 3.

¹¹⁷ See Symeonides, *supra* note 1, p. 434, margin no. 378 (suggesting to privately extract rules from a study and comparison of the decided cases and to restate them in a treatise or in other academic publications); Scoles, Hay, Borchers & Symeonides, *supra* note 9, p. 842 (suggesting to allow courts to “experiment further without the restraints of any rule or presumption” in the area of loss-distributing conflicts, which will “in due time” lead to “new rules capable of producing rational results in the majority of ... cases”); Robert A. Sedler, Rules of Choice of Law in Conflicts Torts Cases: A Third Restatement of Conflicts or Rules of Choice of Law, 75 *Ind. L.J.* 615, 615-616 (2000) (claiming that rules of choice of law are derived from the decisions of the courts in actual cases and serve as precedents for the resolution of future cases); William M. Richman & William L. Reynolds, Prologomenon to an Empirical Restatement of Conflicts, 75 *Ind. L.J.* 417, 426 et seq. (2000) (pleading for an inductive instead of a deductive approach to choice of law); Shirley A. Wiegand, Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and

virtue of such method has been compared to finding the most convenient way over the faculty's lawn: instead of long planning, it is better to just seed the entire area with grass and wait to see what ways will be worn by travelers in their daily round.¹¹⁸

The argument, in its essence, means that theorists must keep their hands off conflicts of laws. This suggestion touches upon the basic relation between legal science and the courts. What is the proper role of academics in law? Shall they stay out and just observe what the courts do? Or shall they take a more active stand, trying to lead the way in some direction?

Probably the majority of the U.S. conflicts writers today adopt the empirical approach. They think that conflicts law cannot be deduced from general premises or principles, but just in an inductive way by observing the courts' practice. The future in conflicts is seen not in new in sweeping theoretical principles, but rather in an empirical approach.¹¹⁹ Even statistical analyses have been undertaken on how courts solve conflicts cases, with the intention to use them as guidelines for future decisions.¹²⁰

This attitude is deeply skeptical of the existence of any a priori principles in law.¹²¹ It has obvious connections to the "legal realists", who thought that law is just a prediction

Legislative Endorsement, 65 *La. L. Rev.* 1 (2004) (recommending that each state begins by conducting empirical research and analysis of its own choice of law jurisprudence to determine how judges have approached conflicts issues).

¹¹⁸ William M. Richman, A New Breed of Smart Empirically Derived Conflicts Rules: Better Law than "Better Law" in the Post-Reform Era: Reviewing Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future*, 82 *Tul. L. Rev.* 2181, 2188 (2008).

¹¹⁹ See William M. Richman, A New Breed of Smart Empirically Derived Conflicts Rules: Better Law than "Better Law" in the Post-Reform Era: Reviewing Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future*, 82 *Tul. L. Rev.* 2181 (2008).

¹²⁰ See Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, 24 *Ga. L. Rev.* 49, 81 et seq. (1989) (comparing tort conflicts solutions in supreme state courts and United States Courts of Appeals); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 *Wash. & Lee L. Rev.* 357 (1992) (presenting a study of the result patterns in 802 U.S. tort conflict-of-laws cases).

¹²¹ On skeptical views of the law, see Dworkin, *supra* note 69, at p. 95.

of what the courts will decide¹²². But as the legal realist attitude, it is exaggerated. On the heart of both the empirical method in conflict of laws and the realists' theory that is its cornerstone lies a basic misunderstanding. Both confound legal science with natural sciences, in which "objective" rules would govern that one can find out through experiments.¹²³ But law is different. Law is intimately connected to justice, and justice is part of ethics, as Aristotle made clear.¹²⁴ Ethics is about finding out the good and the bad way of life. It is therefore never value free, and neither is law.¹²⁵ In applying the law, courts need to be guided by axioms and principles. The task of legal science is to reveal them and make them better understood.

Paradoxically, it is an *empirical* account of adjudication that confirms this view. One of the leading empiricists has remarked that 40 years after the choice-of-law revolution, the understanding of the conflicts issue by the bar and the bench has not improved.¹²⁶ It was also observed that courts in the U.S. have produced an enormous amount of inconsistent case solutions.¹²⁷ If we were to speak in the lawn-picture mentioned above, it

¹²² See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"). For a new interpretation, see Anthony D'Amato, *A New (and Better) Interpretation of Holmes's Prediction Theory of Law*, Northwestern University School of Law, Public Law and Legal Theory Series, no. 08-28, available at SSRN.org (last visited October 15, 2010).

¹²³ In the same vein Gene R. Shreve, *Conflicts Empiricism*, 37 Willamette L.Rev. 249, 254 (2001) (criticizing the parallel between empiricism in natural sciences and prospects for conflicts).

¹²⁴ Aristotle, *supra* note 69, Book V (margin nos. 1129a et seq.) (treating justice as part of ethics and describing the "lawless person" as being "unjust").

¹²⁵ See also Shreve, *supra* note 123, at p. 253 (observing that for law and social sciences, "theory also must be an instrument for good"). See also Maurice Rosenberg, *Comment on Reich v. Purcell*, 15 UCLA L. Rev. 551, 644 (1968) ("Scholars, in their fascination with conflicts, should not forget that the game is not being played so they can flex their jurisprudential muscles, but in order to better the human condition through law").

¹²⁶ Symeonides, *American Choice-of-Law Revolution*, *supra* note 1, at p. 427, margin no. 372.

¹²⁷ See Russell J. Weintraub, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come*, 75 Ind. L.J. 679, 679 (2000) ("There is no coherent body of case law on choice of law."); Courtland H. Peterson, *Restating Conflicts Again: A Cure for Schizophrenia?*, 75 Ind. L.J. 549, 551 (2000) (observing a consensus that "a sorry state of affairs exists in the general run of conflicts cases"); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 Am. J. Comp. L. 465, 466 (1991)

could be said that the judges have worn out myriad ways in the grass so that no real way is visible at all. Practice seems to need an axiom more than ever. It was even said that they would have a right for more guidance than has been provided so far.¹²⁸

This guidance is provided here. Courts are not told what solution to adopt in a precise conflicts case. Instead, they are just given an axiom to follow in devising their own solution. There is nothing presumptuous for law professors to do so. It is my understanding that the professions' task precisely is to point out general axioms and principles of law that are too easily forgotten over the ephemeral details of the courts' day-to-day practice. If there were no such axioms and principles, then we could simply stop legal research altogether.

Still the quest for a general methodology might in the end prove worthless and without practical effect. Albert A. Ehrenzweig has ridiculed the efforts of conflicts scholars as “nicety”, “humanism”, “fiction” or “dreaming”.¹²⁹ I am happy to be accused of “nicety” and “humanism”, if that shall really be an insult. I think it is the essence of what legal science is about. I can even live with the reproach that my theorizing will result in nothing more “fiction” or “dreaming”. After all, every improvement has to start with some fiction and dreaming, even in the law.

2. Judges Not Apt

A further argument that can be made against my position is that judges would not be apt for the task that was ascribed to them here. They would not be able to develop anything

(“it is hard to read a lot of choice of law opinions without being terribly disappointed by the quality of the analysis, which tends to be unsophisticated, unthoughtful, and often unreasoned.”).

¹²⁸ Scoles, Hay, Borchers & Symeonides, *supra* note 9, p. 108, margin no. § 2.26 (“Courts need and are entitled to more guidance than the iconoclastic literature has provided.”)

¹²⁹ See Ehrenzweig, *supra* note 29, at pp. 93-94, margin no. 39.

like a coherent approach to solving conflicts of laws. To hear the argument in full, it is worthwhile to quote one of its proponents. William Tetley writes:

“When one studies the state of conflicts law today, one must conclude that broad, general advances and solutions will not come from the courts... The courts have less and less time for day-to-day commercial and civil matters, let alone the difficult problems of conflict of laws. Nor do most courts have the time to become familiar with, and expert in, these complicated and relatively rare problems. In consequence, only limited new direction can be expected from the Bench.”¹³⁰

This view is somewhat the counter-position of the empirical approach: while the latter puts all hopes for improvement in the courts, this opinion does not expect anything from them at all. But like the empirical approach, this skeptical position seems to be exaggerated. Normally, we put trust in the courts to make advances and find the right solution in all kinds of matters. There is no reason to think that they would not be able to do so in conflicts. On the contrary, they are especially fit for the task.¹³¹ That is because they see the intricacies of international cases and their problems in practice clearly. It is therefore safe to assume that they will find better solutions than professors or legislative committees.¹³² They are experts of justice; their daily job is to find the just solution to the case at hand. If guided by some general axiom of what the notion “just” means in the international setting, there are many grounds to presume that they will find the solution most in conformity with the requirements of justice.

¹³⁰ Tetley, *supra* note 5, at p. 33.

¹³¹ See also the quote by Juenger, *supra* note 89 (“Legal history demonstrates that courts are quite capable of devising apt solutions to multistate problems”).

¹³² Accord Juenger, *supra* note 24, at p. 179 (noting that legislators, who are often academicians beholden to an orthodox doctrine, do not feel the same pressure as a judge who has to decide the case at bar).

There is another reason why courts are especially well positioned to create rules for the global legal order. That is because they are not biased towards their constituency as legislators are.¹³³ Their focus is on the dispute and the individuals involved, not on some state interest. It is therefore likely that courts from different countries will agree more easily on the just solution of a case with cross-border elements than different legislators. Judges are not embroiled in conflicts wars. They can see the pressing need of global coordination. There are good reasons to think that they will submit the – ostensible – particular interests of their nations to the requirements of global legal ordering. Some instances where courts have done this will be cited later.¹³⁴

That being said, there are of course cases in which the courts can be expected to take diverging positions. Judges of different countries will sometimes disagree about the correct determination of the law to be applied or the quality of the substantive rules that pretend to govern a case. Such differences cannot even be excluded within the judiciary of a single state. They are much more likely to occur when courts of different nations are involved. Judges coming from a different background will often have diverging views of what is just. In a world that is split into states with their own body of courts, it will necessarily come to conflicting decisions as to the applicable law. Due to the decentralized system of adjudication, there is no supra-national or international court that could be called upon to overcome such differences.

Does that call the idea of global legal ordering into question? I think not. The axiom that has been proposed here requires to be obeyed even if sometimes courts miss the mark. The reason for this is that it has no requirement of reciprocity built in. It appeals to

¹³³ See supra D 2.

¹³⁴ See infra F.

each judge to strive for a harmonious result, independent of whether the other judges do the same. That is because the judge has always to achieve justice in the individual case. Of course there may be some courts that will stand in the way of globally harmonious decision-making. But that should not inhibit the others to seek it.

3. States Take an Interest in the Resolution of Private Disputes

After these two more methodological counter-arguments, a different kind of criticism needs to be explored that will almost certainly be mounted against the proposal made. It was argued here that the judge should focus on achieving the just result in the individual case before him, leaving the rules of states and even of the forum aside if they inhibit a harmonious decision-making. But since the days of Brainerd Currie's fundamental article on married women's contracts, it has been recognized that states take an interest in the solution of private disputes.¹³⁵

It would be nonsense to deny that states have an interest in the application of their law to international cases. Governments do care about which individual wins in court. They must do so because they have a particular duty to protect their citizens against injustice. This duty applies not only to domestic disputes, but to cross-border cases as well. For instance, it may be as important for a government to protect a married woman or a fatherless child in a transnational setting as it is in a domestic situation, or even more important.

Although I thus agree with the point that legislators have an interest in the solution of transnational cases, I totally disagree with the argument that the courts should recognize

¹³⁵ This point is even conceded by scholars that are otherwise wary of governmental interest analysis. See, e.g., Symeonides, *supra* note 1, p. 371 (noting the many times in which the state appears in private litigation as *amicus curiae*).

this interest. On the contrary, my view is that they should ignore the states' conflict rules precisely because they are inspired by an interest in the solution of the case. If you want a conflict to be solved in a just way, you do not ask the view of an interested party. This axiom is generally accepted in legal theory.¹³⁶ It also applies to conflicts. Following the different governments' pretence to determine the applicable law is pernicious for the global legal order. It produces more harm than it does any good. Suppose that a court would adopt its legislature's view and apply the forum law to the validity of a married woman's contract or to the determination of fatherhood of a child. That will be of little use for the woman or the child if the courts of other states apply a different law. It may even worsen their situation, because they might get caught in a judicial war between two states. This is hardly what they have wished for. Hence, it seems better for the court to disregard the forum's rules in the determination of the applicable law.

4. U.S. Conflicts Law

A final objection has to be faced. It is derived from the situation of choice of law in the United States. The argument could go something along the lines of this: "In 200 years, American courts have not been able to solve conflicts of laws in a homogeneous way. There is no federal choice of law, and the states do not agree on a common approach. If thus there is not even within the United States uniformity in the determination of the applicable law, how can it seriously be argued that there would be a possibility for a world-wide conflicts methodology?"

¹³⁶ See the original position in the work of John Rawls, *A Theory of Justice*.

The argument is apparently very powerful. Indeed, if within one and the same state of the world no consensus can be achieved on the way in which conflicts cases are solved, it is not only improbable that there could be world uniformity. It is even logically excluded.

Now a very easy way out of that dilemma would be to criticize and dismiss the U.S. practice. American conflicts law has repeatedly been denounced for its “parochial” approach to choice of law, which would be inspired by the solution of domestic cases.¹³⁷ One author regretted that American choice-of-law no longer inspired by cosmopolitan ideas,¹³⁸ and another even denounced it as “provincial”¹³⁹.

I will not join this “American conflicts law bashing”. Rather, I want to draw the attention to the unique way in which interstate cases in the U.S. present themselves and compare it with the challenges that international cases pose. The basic peculiarity of interstate conflicts laws is that the federal states have very similar legal systems. With the exception of Louisiana, all of them belong to the Common law family. Although they might differ in detail, it is a peculiar feature of these systems that they all are based on very similar legal institutions and principles. They are built on a “common grammar”.

Given this basic understanding between the states’ legal systems, it is not at all surprising that conflicts theory in the U.S. has turned to the relatively sparse cases in which legislators have adopted peculiar rules that deviate from the Common law. Examples include the legislatively ordained invalidity of contracts by married women¹⁴⁰, the statutory non-liability of drivers for damages inflicted upon passengers under a guest

¹³⁷ See Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 *Tul. L. Rev.* 1309, 1324-1326 (1999) (complaining about the revolutionist’s lack of understanding of legal history and comparative law); Mathias Reiman, *A New Restatement – For the International Age*, 75 *Ind. L.J.* 575, 578 (2000) (criticizing the Second Restatement as the “heyday of parochialism” in American conflicts theory).

¹³⁸ See Juenger, *id.* at 1327.

¹³⁹ Reiman, *id.* at 576.

¹⁴⁰ *Milliken v. Pratt*, 125 *Mass.* 374 (1878), discussed in Currie, *supra* note 10, at pp. 77-127.

statute,¹⁴¹ the codification of the car owner's vicarious liability¹⁴², the survival of action after the death of a tort victim according to a specific law¹⁴³, and workers compensation acts¹⁴⁴. To be sure, these cases involve vital legal issues. Yet they only concern the spatial reach of *a single statute*. It was natural that under these circumstances theorists and courts started to ascertain and weigh the policies behind these laws.

In the international arena, the question of conflicts is posed in a very different fashion. Here the *whole legal systems* that call for their application are completely different.¹⁴⁵ For instance, the French and Chinese contract law or the Brazilian and Russian tort law might share some features, yet their theoretical principles and institutions radically diverge. It thus makes no sense to research the policy of a single statute to determine whether it does apply to a particular dispute.¹⁴⁶ It would be futile and even ludicrous asking what the "policy" of French contract law is or which "interests" are underlying Russian in contrast to Brazilian tort law. Obviously, there are a great many of them. Such questions are too broad to be answered in any serious way.

To this basic difference between interstate and international cases is added another: In the U.S. there are other devices that avoid conflicting decisions. For instance, the Full

¹⁴¹ Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). See also Dym v. Gordon, 209 N.E.2d 792 (N.Y. 1965).

¹⁴² Ingersoll v. Klein, 262 N.E.2d 593 (Ill. 1970) (refusing to apply Iowa code providing for liability of the car owner).

¹⁴³ Griffith v. United Air Lines, Inc., 203 A.2d 796 (Pa. 1964) (rejecting application of Colorado survival statute that excluded recovery of prospective earnings of decedent by latter's estate).

¹⁴⁴ See the pre-revolution case Alaska Packers' Ass'n v. Industrial Accident Commission of California 34 P.2d 716 (Cal. 1934) (applying California workers compensation act to accident in Alaska), aff'd by 294 U.S. 532 (1935).

¹⁴⁵ This point has not escaped attention in the literature, see e.g. Gerhard Kegel, The Crisis of Conflict of Laws, 112 Collected Courses of The Hague Academy 95, 198-199 (1964-II) (noting that private international law by its structure embraces large groups of private law rules of all states).

¹⁴⁶ See also Juenger, supra note 24, at p. 159 (underlining that interest analysis exacerbates the problem of cutting and splicing together provisions from different jurisdictions).

Faith and Credit clause of the Constitution¹⁴⁷ forces courts to recognize decisions from sister states even if the original court has applied the wrong law from their perspective. There is no equally forceful device that would apply to international cases.

The consequence of these differences between interstate and international conflicts cases is that the challenges posed in both situations are not the same. This can be clearly seen when we examine the effects of the application of a different law by the courts of different states. In interstate conflicts, such diverging positions might result in one court granting a claim which another would not. In the international setting, the potential consequences are much more dramatic. The court of one state might for instance decide that a couple is not married or that X is not the father of the child, while the court of another state might take a different view. Examples have been treated under the name “limping relationships” above.¹⁴⁸ In interstate conflicts, they have hardly been heard of.¹⁴⁹ They are avoided because of the kinship between the Common law systems and the Full Faith and Credit clause.

The result is thus that much bigger problems exist if courts take a diverging view in international cases than if they disagree on the applicable law in interstate cases. This is not to belittle interstate conflicts of laws. The costs that are created for the individuals by the disagreement among American courts as to the solution of conflicts may be

¹⁴⁷ Article VI of the U.S. Constitution.

¹⁴⁸ See supra I B.

¹⁴⁹ An example of limping interstate relationships is provided by same sex marriages, which are recognized by some states but not by others. See Symeon C. Symeonides, *American Private International Law*, Kluwer Law International, Alphen aan den Rhijn, 2008, pp. 237-239, margin no. 513-514 (giving an overview of the movement for and against same sex marriages). The specialty and comparative rareness of this kind of limping relationship – also in light of the Full Faith and Credit Clause discussed infra – is underlined by the fact that the federal legislator had to enact a special statute which exempts states from recognizing same sex marriages that are valid under the law of other states, see the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419, codified as 1 U.S.C. § 7 and 28 U.S.C. § 1738C. It is the first and only statute that releases states from the obligation to enforce laws and judgments of sister states, see Symeonides, *id.*, p. 240, margin no. 519.

tremendous. But the problems that arise in interstate situations, in which quite similar legal systems collide, cannot be compared to those between legal systems that are complete strangers. The challenges are just not the same.

It would be wrong to conclude from the foregoing argument that the new methodology which is suggested in this piece would not be suitable for interstate conflicts.¹⁵⁰ If all courts of the United States would make decisional harmony their primary goal, then the current chaos of American conflicts law could be overcome. There is even good reason to think that this is the only way out of the present muddle: As long as the federal states' courts follow selfish policies of the forum, conflicts between them will hardly disappear. Hence, it is certain that the remedy suggested here for international cases would also be a proper cure for the disease that has befallen U.S. interstate choice of law. But it is just not the main point of this article to suggest a solution for the internal affairs of the United States. The proposition made goes much further. Its success is independent of whether courts in America follow it in interstate cases or not.

F. Examples of Judicial Global Legal Ordering

An appeal is made in this piece that goes out to all judges of the world. It is: "Strive for consistent results, not cacophony." The hope is that courts will be able to sort out the inertia choice-of-law theory is stuck in and which neither legal theory nor legislators have achieved to overcome. The premise that judges need to start from is the simple realization

¹⁵⁰ There have indeed been repeated claims for a separation between interstate and international conflicts. See, e.g., Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 *Minn. L. Rev.* 717 (1957) (pleading for a different treatment of interstate and international conflicts); Ehrenzweig, *supra* note 29, at 19-20 (calling American conflicts law an "unworkable hybrid"); Mathias Reiman, *A New Restatement – For the International Age*, 75 *Ind. L.J.* 575, 584 (2000) (suggesting to draft a new restatement that considers every conflicts case not only in light of domestic scenarios, but of international disputes as well). See also Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 *Ind. L.J.* 403, 411 (2000).

that the world's legal systems are not better or worse, but just different. In fulfilling their task of rendering justice, they should subdue the interests of their forum state to the needs of a global legal order.

Expecting judges to adopt such an internationalist view today might seem little better than fantasizing. Which court has ever consciously and openly dismissed the rules of the forum for their lack of conformity with a global legal order? Whoever would make such a suggestion runs the risk of appearing eccentric.

Yet as unlikely as it might seem to the "realist", there are cases in which courts have taken a stance against the forum law on the basis that it would be counter-productive when seen from a global viewpoint. These were not just any courts, but the supreme courts of the United States and France.

1. United States

In *M/S Bremen and Underweser v. Zapata Off-Shore*¹⁵¹, a German company had agreed to tow a drilling rig belonging to Zapata, a Houston-based company, from Louisiana to Italy. The contract provided that any litigation should be settled by the High Court of Justice in London. However, after a dispute had arisen between the parties, Zapata brought suit against Underweser in Tampa. The Florida courts considered they had jurisdiction to hear the case despite the forum-selection-clause because the latter would be void. To reach that conclusion, the Court of Appeals pointed *inter alia* to another clause of the contract purporting to exculpate Underweser from any liability for damages to the drilling rig.¹⁵² Such a clause was clearly at variance with the public policy of the

¹⁵¹ 407 U.S. 1 (1972).

¹⁵² *In re Unterweser Reederei, GmbH* (sic!), 428 F.2d 888, 895 (C.A.FI. 1975).

(American) forum.¹⁵³ But while it would be unenforceable in an American court, it would at the same time probably have been regarded as valid by the English judges. Thus, the Court of Appeals saw no other option than to declare the forum selection clause invalid in order to safeguard American interests.

The Supreme Court of the United States vacated and remanded. The core of its decision is still worth being reproduced:

“The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”¹⁵⁴

The majority opinion, written by Chief Justice Burger, came to the surprise of many, not the least of Justice Douglas. In his dissent, he stressed that Zapata is a “citizen of this country” and that if it were remitted to the English court, “its substantive rights would be adversely affected”.¹⁵⁵

All of that did little to impress the rest of the court. The overwhelming majority of the Justices chose to base their decision not on the pervasive public policy of the forum, but rather on the needs of global trade and commerce. They came to the conclusion that it would clearly contradict these needs if the forum’s policies would be strictly followed in international cases. Hence, they chose to disregard the forum’s rules.

¹⁵³ *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955).

¹⁵⁴ *M/S Bremen and Unterweser v. Zapata Off-Shore*, 407 U.S. 1, 12 (1972).

¹⁵⁵ 407 U.S. 1, 23 (1972).

The judgment in the Zapata case is one of the prime examples of global legal ordering.¹⁵⁶ The forum's policies, however important they might be, are subordinated to the exigencies of reaching harmonious decisions with other courts. It is clear that a foreign court, for instance the English High Court which had been chosen by the parties, would have considered the forum-selection clause as valid. Its invalidation for idiosyncratic reasons of U.S. law would have produced the kind of chaos and legal limbo that the present approach tries to avoid.

It is vital that Zapata was not an outlier. Later, the Supreme Court repeated the method of global legal ordering in a case that involved a field of law whose policies are most cherished by Americans: antitrust law. In *Mitsubishi*, the Justices upheld the validity of a clause that referred all disputes arising under the contract to arbitration in Japan.¹⁵⁷ They did so in spite of the probability that the arbitrators sitting in Japan would not give effect to U.S. antitrust rules. Again, the court subordinated American policies to the interest in world-wide harmonious decision making.

2. France

Interestingly, the practice of U.S. courts is paralleled by similar developments in France. The most striking examples are to be found in the same area as the *Mitsubishi* decision: the validity of arbitration clauses. In 1966, the *Cour de cassation* had to decide on the following case¹⁵⁸: A French public body had chartered a vessel from the Greek owner *Galakis*. Two months later, it terminated the contract. *Galakis* made use of an arbitration

¹⁵⁶ Others as well consider the decision as one of the most important rendered by the Supreme Court in the area of choice-of-law. See, e.g., the extensive analysis by Juenger, *supra* note 24, at pp.213-220.

¹⁵⁷ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

¹⁵⁸ Cass, 1re Civ., May 2, 1966, *Revue critique de droit international privé* 1967, 553; *Journal du droit international (Clunet)* 1966, 575.

clause provided in the contract and initiated arbitration proceedings in London, in which the French authority did not participate. After the arbitrators had handed down an award in its favour, *Galakis* tried to enforce the award in France. The French public body exhausted all remedies available against enforcement, taking the case up to the highest court in civil matters.

The judges of the *Cour de cassation* had in front of them a clear text on which they could base their decision: Articles 1004 and 83 of the *Code civil* stated expressly that the French state and public bodies could not enter into a valid arbitration clause. Yet in spite of the strong command of its national legislator, the court held the arbitration clause to be valid. It reasoned – in the usual brevity of French decisions – that the prohibition of Article 1004 and 83 *Code civil* is limited to domestic contracts and does not apply to international contracts entered into for the needs and in conformity to the usages in international maritime commerce. In the last part, the same ideas resonate as in the U.S. Supreme Court's decisions in *Zapata* and *Mitsubishi*. The *Cour de cassation* engaged in a similar kind of global legal ordering. Before its decision, practically no French lawyer would have given the provisions of the *Code civil* such a limited scope of application. The court radically broke with the text and the current methodology for interpreting the code. It established effectively a new rule for international cases under which arbitration clauses are presumed to be valid and cannot be attacked on grounds of national law. A similar ruling had been made a couple of years before with regard to the validity of gold clauses in international contracts.¹⁵⁹ What is striking in both cases is that the court is willing to subordinate the interests of its own state, even though clearly expressed, to the

¹⁵⁹ See Cass., Ch. Civ., sect. civ., June 21, 1950, *Messageries maritimes*, *Revue critique de droit international privé* 1950, 609.

needs of international commerce. It is obvious that this kind of reasoning enhances decisional harmony, as foreign courts would also have come to the conclusion that the clauses are valid.

3. Conclusion

The examples cited clearly show that the Supreme courts of the U.S. and France are prepared to make the kind of daring advances that some think they would never do. But they also show something else: Judges do care about justice in international relations, and they are willing to enforce their conception of the just even against express legislative enactments of their own state. What is also striking is that the methodology that has been used is not a classic choice of law, but rather the creation of a new rule of substantive law. This shows that to attain the just result sometimes requires a lot of ingenuity on the part of the court. It is not enough to just disregard the forum rule. Something else has to be put in its place, and this might either be a uniform choice of law or a uniform substantive rule.

Obviously, the cases cited do not establish a new system of choice of law, or a global legal order. It takes more than one swallow, or even two swallows, to make a summer. Yet they can be cited as prime examples in which judges have ventured to challenge the forum's policies based on the needs of justice and harmony in international cases. Other courts should take them as an encouragement to embrace the task of global legal ordering. We need more of this kind of cosmopolitan judicial thinking, and less of the traditional nationalistic bickering.

V. Implications

After the exposition of the theoretical backdrop of the new methodology, let us now examine a little closer its effect in practice. How will a court solve a case in conformity with the new paradigm that is advocated here?

Implication No. 1: Respect the Parties Choice Regardless of The Choice-of-Law Rules of the Forum

The first thing that a court will do is to check whether the parties have agreed to a certain law. Respecting the parties' choice of law is the best way to solve the insecurity as to the law that governs transnational relationships. The reason is simple: In the triangle between parties, the court, and states, the parties are the ones that are most affected by the application of a certain law.

The suggestion to apply the law chosen by the parties is hardly new. It is called party autonomy and is today the most widely accepted principle of conflicts around the world.¹⁶⁰ The difference of the conception presented here to the traditional principle is that under the latter, the court would have to check the validity of the parties' choice following the rules of the forum. Each forum either designates a specific law or sets out specific substantive conditions under which the validity of choice-of-law agreements has

¹⁶⁰ See Symeon C. Symeonides, General Report, in *Private International Law at the End of the 20th Century: Progress or Regress?* 1, 38- 40 (1999) (demonstrating that party autonomy is followed by virtually all major legal systems); Lehmann, *supra* note 74, at pp. 285-390 (showing that party autonomy has become the most important principle in choice of law); Lowenfeld, *supra* note 82, at p. 199 (hailing party autonomy as the "triumph of practical considerations"); Giesela Rühl, Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency, in: Eckart Gottschalk, Ralf Michaels, Giesela Rühl und Jan von Hein (eds.), *Conflict of Laws in a Globalized World*, Cambridge University Press, Cambridge etc., 2007, pp. 153-183 (showing convergence between the U.S. and Europe with regard to the recognition of the parties' choice of law).

to be tested.¹⁶¹ These laws or rules often contain special restrictions for the freedom of the parties choice, for instance in contracts with consumers¹⁶² or cases that touch upon “public policy”¹⁶³. These conditions and restrictions diverge from one country to another. They impair the efficiency of the parties’ choice. Thus, although party autonomy as a principle of domestic law promotes harmonious decision-making much better than any other rule, it does not lead to uniform results.

The approach that is suggested here works in a very different way. It asks courts to follow party autonomy not because it is a national policy, but because it is useful as a tool for global legal ordering. This argument is totally independent of the forum law. As the courts do not have to base the recognition of choice-of-law clauses on a specific national rule, the principle of party autonomy is freed from inconsistent conditions and restrictions of domestic law. It can now fully perform its function of determining the applicable law in a globally uniform way.

Surely party autonomy cannot be absolute. First of all, it needs to be bound to certain prerequisites, the most obvious of course being a sufficient agreement between the parties on the applicable law. Second, it needs to be excluded completely in some areas, for instance with regard to all questions involving the status of a person or third parties. Party autonomy as a principle of global legal ordering will not eliminate these conditions and restrictions. But what is new is that they can now be defined world-wide in the same vein, using only the conditions and restrictions that most of the states recognize. This approach makes party autonomy immune against any parochial limitations by domestic policy-

¹⁶¹ See, e.g., Art. 3(5) of the Rome I Regulation. On the (then draft) provision, see Lehmann, *supra* note 74, at p. 388, note 44.

¹⁶² See U.C.C. §1-301(e) (2004); Unif. Computer Information Transactions Act §109(b)(2) (1999); Restatement (Second) of Conflict of Laws §187 cmt. b (1971); Art. 6 Rome I Regulation.

¹⁶³ See Art. 9 Rome I Regulation.

makers. It can thus play a truly catalytic role for global legal ordering. If everybody accepts choice of law by the parties under the same conditions, there will be a convergence of results.¹⁶⁴

Some authors will not like this elevation of party autonomy because they view the principle with suspicion. For instance, it has been criticized that it would provide individuals with the possibility of a “regulatory lift-off” allowing them to avoid sovereign regulatory concerns and societal needs.¹⁶⁵ In effect, the principle would be a “myth” developed to provide a visible legal basis for “auto-poëtic private ordering”.¹⁶⁶ The various “legal fictions” underlying it would need to be “deconstructed” in order to render economic actors amenable to the governance principles of “accountability” and “transparency”.¹⁶⁷

This criticism ignores that party autonomy today is a reality. Due to its quasi-universal recognition by governments and courts, the possibility for individuals to select the applicable law is no more mythical than taking one’s domicile abroad or choosing a spouse from another country. If one eliminates this misunderstanding, the crucial point that is at the core of the criticism must be taken seriously: Party autonomy indeed presents a serious challenge for the states’ legislative power. If individuals were free to select any law they like and courts would have to respect that selection under any circumstance, the concerns that national laws are designed to protect would be subject to the whim of the parties. That is not what is meant here. Rather, the goal of global legal

¹⁶⁴ It will not go unnoticed that the supreme courts of the United States and France, in the cases discussed supra F, have given prevalence to the parties choice over national policies. Even though the cases decided concerned the choice of the competent tribunal and only indirectly the choice of the applicable law, that is an important corroboration of the value of party autonomy as an accepted principle global legal ordering.

¹⁶⁵ Muir Watt, “Party Autonomy” in international contracts: from the makings of a myth to the requirements of global governance, 6 *European Review of Contract Law* 250, 264 (2010).

¹⁶⁶ Id.

¹⁶⁷ Id.

ordering is a new equilibrium between societal and private interests, one that is established on the global level and not on the national one. Concerns for the common weal should be respected in private law cases as far as they are shared by other nations. What has to be avoided, though, is that every legislator interferes with transnational private relationships, which by definition exceed its borders, for parochial purposes of domestic policy. This statement appears to undermine the regulatory power of the state. It has to be borne in mind, though, that its decision-making power is already factually restrained by the existence of other sovereign countries disposing of their own court system. All that is done here is to reflect this restriction on the legal level. The court deciding over a private dispute is thus liberated from the commands of its own state which forces them to hold the parties for ransom in the global war of different national policies.

***Implication No. 2: Give International Conventions a Paramount Role
Regardless of the Forum's Ratification***

The next advice following from the paradigm of global legal ordering is that courts should always look out for uniform substantive or conflicts rules. If there is an international agreement between the states, it significantly reduces the insecurity as to the applicable law. Thus, the courts should follow it.

Again, this seems common sense. Under the current approaches, judges also have to respect international law. The condition, however, is that the state in which the court is sitting is a party to the treaty; otherwise, it cannot be applied. The methodology that is suggested here again is quite different. The court is advised to follow a treaty even if the

forum state has not signed or ratified it. This suggestion will necessarily puzzle the reader: How can a convention be applied by the court of a state that is not bound by it? Would that not undermine the legislature's grasp on its judicial system?

The explanation again is the function of the court in achieving global justice that has been constantly emphasized here: The judiciary should follow the solution that is prevalent on the international level. That is because an international solution is better than any idiosyncratic rulemaking by national governments. Experience shows that often the signing or ratification of international instruments is inhibited for purely political reasons on the domestic level.¹⁶⁸ The court should not care for them, but rather promote the substantive or conflicts rules that a major number of states agree upon.

As a result of the suggestion made here, the court might find itself in the uncomfortable situation in which it has to apply a treaty although its own administration has refused to sign or ratify it. But that should not bother the judges too much. If need be, they may remind themselves that their primary task is not to fulfill the commands of their legislator, but to do justice to the parties in the individual case.¹⁶⁹ Now it is clear that the application of a solution that has been agreed upon by a number of states provides the parties with much more certainty and predictability as to the results and inhibits the application of eccentric solution by a peculiar national law.

A problem of this approach of course is how many states need to agree on an instrument in order to make it wise for the judge to follow it. This is indeed a hard question to which no clear answer can be given. Numbers as such are not decisive. Sometimes a treaty signed by only three or four states might provide an internationally

¹⁶⁸ See supra D 2.

¹⁶⁹ See supra B 1-3.

workable solution that is acceptable in principle also to other states. On the contrary, under certain conditions, even the ratification of a rather high number of states does not recommend it to others. That is the case, for instance, where all the parties to the treaty are from a peculiar region and the instrument corresponds to the views held there, while in the rest of the world a different opinion prevails. Thus, everything depends on the circumstances. But what should be clear, at least, is that a rule which has been agreed upon by independent states will often contain a solution more in line with the needs of the global order than just a particular national law. For this reason, it is only logical that international law takes a front seat in the search for a global legal order.

Implication No. 3: Compare Conflicts Rules in Order to Find the Suitable One for Global Legal Ordering

If there is neither a choice by the parties nor an international treaty, the court has to choose the applicable law itself. To do so, it should – in line with its function in legal ordering – use standards that are in conformity with global justice. The question is: How can such standards be found?

The quest for universally acceptable conflict rules is not as difficult and hopeless as it might seem at first sight. There is a powerful tool to help the judge in the selection process: comparative choice of law. A comparison of different conflict rules followed around the world will lead the court to follow the selection method that is most in line with the goal of decisional harmony.¹⁷⁰ If every court would follow this precept, eventually the applicable law would be determined in the same way all over the globe. To

¹⁷⁰ Other authors have also argued for a comparative approach to choice of law, see, e.g., Juenger, *supra* note 137 (underlining that the perspective comparison affords could reveal the shortcomings of traditional methodologies, increase the prospects of law reform, and enhance the level of multistate justice).

employ comparative choice of law is thus in line with the Kantian maxim: "Act only according to that maxim whereby you can at the same time will that it should become a universal law".¹⁷¹

Of course, finding out the principles that other countries follow in choice of law seems to be a formidable task for a court that has only limited time and information. But it is by no means impossible. Nor is it necessarily more complicated than applying the sometimes complex and entangled conflicts rules of national law. Given the sources that are available on the internet today, it is not difficult to find out about the choice-of-law systems of the world. There are a number of websites drafted in English and accessible from any point of the globe.¹⁷² Moreover, the transnational networks between courts that have been established over the past years might serve as platforms for information and discussion on choice-of-law issues.¹⁷³ Finally, there is also scientific support. A number of scholars have already engaged in comparative private international law.¹⁷⁴ Their works can be of immense use if put to practical service. At the same time, there is no question that more such comparisons need to be done.

¹⁷¹ Immanuel Kant, *Grounding for the Metaphysics of Morals*, translated by James W. Ellington [1785] (3rd ed., Hackett 1993), p. 30.

¹⁷² See, e.g., the sites of the Global Legal Information Network (GLIN) (www.glin.gov), the World Legal Information Institute (World LII) (<http://www.worldlii.org>), the British and Irish Legal Information Institute (BAILII) (<http://www.bailii.org>) or the Eagle-I gateway (<http://ials.sas.ac.uk/eaglei/eagle-i.htm>) (all pages last visited on October 20, 2010).

¹⁷³ See Ann-Marie Slaughter, *A Global Community of Courts*, 44 *Harv. J. Int'l L.* 191 (2003) (exploring the increasing cooperation and collaboration between national judiciaries); Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004, pp. 94-100 (describing transnational judicial dialogue in the form of negotiation and meetings).

¹⁷⁴ See, e.g., Ernst Rabel, *The Conflict of Laws: A Comparative Study*, 2 ed., 4 vol., University of Michigan, 1958; Ronald Harry Graveson, *Comparative Conflict of Laws*, North Holland Publishers, Amsterdam, New York, 1977; Khalil A. Sfeir, *Droit international privé comparé*, 2 vol., Bruylant, Beyrouth 2005. See also *International Encyclopedia of Comparative Law*, vol. 3 – Private International Law, ed. by Kurt Lipstein (chief ed.), Mohr, Tübingen, 1986 ff.; Bea Verschraegen (ed.), *International Encyclopedia of Laws, Private International Law*, 23 vol., looseleaves, Kluwer Law International Alphen aan den Rijn.

Apart from the practical problems mentioned, which might eventually be overcome, there seems to be a more fundamental, conceptual weakness of the comparative approach suggested here. Very often, conflict of laws rules will diverge and not lead to the same result. That was precisely the reason of limping relationships and other shortcomings that were denounced in the first part.¹⁷⁵ Obviously, if there is no unanimity on the applicable law, a thorny issue arises: How should the judge go about determining the “common rule”? If there is no convergence, how can a global solution be found?

Although it seems unlikely, there is a solution to this problem. In determining the applicable conflicts rule, courts do not have to limit themselves to a pure, computer-style comparison of different conflict rules. In case of divergence, they should go forward and construct a rule that is most suitable for the global legal order. That is part of their special mission of rendering justice in transnational cases. This abstract conception will be illustrated in the following, taking up the examples that were given at the beginning.¹⁷⁶

First, let us reconsider the case of the limping marriage.¹⁷⁷ The problem here was that German conflicts law required the judge to enforce the formal requirements of the domestic substantive law if the marriage was entered into within the territory of Germany.¹⁷⁸ From a brief comparative survey of other choice-of-law rules it results that few other countries have similar provisions.¹⁷⁹ Most of them adopt a more liberal approach: it suffices for the marriage to be valid if *either* the form of the place of

¹⁷⁵ See supra I B.

¹⁷⁶ See supra I B.

¹⁷⁷ See supra I B.

¹⁷⁸ Art. 13(3) 1 Introductory Law to the German Civil Code (EGBGB).

¹⁷⁹ See, e.g., Art. 44(3) Swiss Private International Law Act (providing that the formalities of a marriage taking place in Switzerland are governed by Swiss law); 16(1) Austrian Private International Law Act.

celebration or the national law of one of the future spouses is obeyed.¹⁸⁰ Such an alternative reference rule, as it is called¹⁸¹, leads in more cases to the validity of the marriage and thus achieves a greater consistency of solutions. The contrary rule, which submits all marriages to the formal requirements of the forum regardless of whether they have an international element or not, serves a different end: it aims at treating all marriages celebrated on the country's soil equally. This is a domestic policy issue which is dear to national lawmakers. It largely ignores the needs and specificities of international situations, suggesting that foreigners should just abide by their rules if they want to marry validly. The court that has to decide over the validity of a marriage cannot enforce this rule, but must instead calibrate its decision to the just result. It would be preposterous if it declared two people that have married 20 years ago in a country following the strict rule that they are unmarried. Thus, the strict choice-of-law rule presents itself as unfit for global legal ordering. The alternative reference rule serves that purpose much better.

The second example to be taken up is the search for the father of the child that was described above.¹⁸² As we have seen, conflicts rules all over the world are very divergent in this respect.¹⁸³ Two of the most widespread solutions are the application of the law of the potential parent and the law at the residence of the child. Which one is to be preferred? Once again, a look at the outcomes of applying the rules is helpful: If the law of the potential parent is applied, it might easily happen that one and the same baby has

¹⁸⁰ See Sfeir, *supra* note 17, p. 505, 509 (underlining the facultative character of the rule *locus regit actum* in most laws).

¹⁸¹ See Juenger, *supra* note 3, at pp. 183-184 (describing how alternative reference rules can serve as a tool for teleology in choice of law).

¹⁸² See *supra* I B.

¹⁸³ See *supra* I B.

two or more fathers, because the laws of different state might follow different tests to prove the lineage. This result could be considered as being better than having found no father at all. Some policymakers expressly favor it and even have introduced alternative reference rules that allow establishing parenthood under different laws.¹⁸⁴ However, from a global order perspective, it is not acceptable that the child is supposed to have one father in some countries, while it has another in other parts of the world. It seems better to admit that parenthood cannot be proven in all cases than to grasp for every law that presumes such a link would exist. Alternative reference rules, which have been praised as a general tool for achieving multistate justice,¹⁸⁵ are even worse here for they augment the chaos. Thus, they are no panacea for the differences that effectively exist between national conflicts rules.

The best solution, it seems, is thus to use a criterion which leads to only one law. One such factor is the domicile of the child. If all courts of the world used it as decisive for determining the applicable law, we would end the current muddle of split parenthood. It is true that the criterion has its own weaknesses, for the domicile can be changed over time. If such a change had an influence on parenthood, we would have merely replaced the spatial with a temporal conflict of laws. But it is easily possible to avoid that result by “freezing” the applicable law to the domicile of the child at the time of birth.

Taking up the third example, the applicable law to companies,¹⁸⁶ it seems at first glance that the incorporation theory and the seat theory would be both equally capable of leading to harmonious decisions. If all courts in the world were to follow either of them,

¹⁸⁴ See, e.g., Art. 19(1) Introductory Law to the German Civil Code (EGBGB).

¹⁸⁵ See also Juenger, *supra* note 3, at pp. 195-199 (highlighting alternative reference rules as a simple mechanism that might help judges to find appropriate solutions to choice-of-law problems).

¹⁸⁶ See *supra* I B.

the results achieved would be the same. A closer look, though, reveals that the seat theory has some deficiencies: First of all, it does lead to a serious temporal conflict of laws (French: “*conflit mobile*”) if the seat is transferred from one country to another. The effects can be disastrous, as the company might be considered to be dissolved under some laws or to have lost the privileges of incorporation under others. Thus, the seat theory is hampering the trans-border mobility of companies, something which is fatal in a globalized society. Moreover, it is not sure that the seat would be determined in the same way by all courts. Some may use the place of the head of the corporation, while others might refer to the place of its main factory or distribution centre. What is a “seat” of a company is thus not as easy to determine. As the theory truly hinges upon the criterion, it is unsuitable to achieve true global legal order. Judges should thus discard it, and they increasingly do.¹⁸⁷

The three examples prove that it is not impossible to achieve meaningful results from a comparative choice-of-law analysis. But they have also shown that judges cannot rely on a mere counting of legal systems to arrive at a just solution. They must make a rational choice as to which conflicts rule is best suited to fulfill the idea of harmonious decision-making. This choice is not the same as the one they have to make when applying the local conflict-of-laws rule. It is much more similar to the choice that governments are confronted to when they draft international instruments on uniform conflicts law. In fact, the judge that has to decide a transnational case in the absence of such an instrument should put himself in the shoes of these governments because he is effectively filling a

¹⁸⁷ See, e.g., the judgments by the European Court of Justice (ECJ), *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, case C-212/97, 1999 E.C.R. I-1459; *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, case C-208/00, 2002 E.C.R. I-9919; *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, case C-167/01, 2003 ECR I-10155.

gap which they have left. In doing so, he should evaluate the solutions that are currently prevailing in national conflicts law in light of the needs of the global legal order, which he must help to build.

Implication No. 4: Intermediate Law is Possible

Traditional choice of law presents the judge with an alternative: she has to follow either the law of state A or that of state B. Intermediate solutions, like awarding damages that are in between those foreseen by the two laws, are impossible. The reason has most clearly been expounded by Judge Richard Posner when rejecting the combination of claims governed by different laws in one class action: He said that the jury which would be charged in such a case could follow “no actual law of any jurisdiction”, but would rather have to receive a kind of “Esperanto instruction”.¹⁸⁸ That statement truly reflects the orthodox qualms about combining several laws. From the point of view of domestic choice of law, the applicable legal system can only be that of the forum or that of another state. *Tertium non est datur*.

From the viewpoint of global legal ordering, however, there is nothing heretic or frivolous in admitting that neither the legal system of state A nor state B exclusively governs a certain set of facts that touches both of them. On the contrary, it makes sense to combine the two laws in order to reflect the reality of the global legal system: Often a case exceeds the boundaries of national laws. A selection between them cannot be done by a geographical or another criterion unless it would result in some form of arbitrariness.

¹⁸⁸ In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

Intermediate or “average” law presents a viable solution to this conundrum. This is increasingly recognized.¹⁸⁹

However, this solution has inherent limits. While it works in actions for damages or maintenance, it cannot be followed with regard to questions such as the validity of a marriage or the existence of a company that were discussed before.¹⁹⁰ These “status related” problems cannot be decided by a mathematical average, but only by a clear either-or. Thus, in many cases the distillation of comparative choice-of-law principles will remain unavoidable.

Implication No. 5: Use Global Standards of Justice When Applying Any (Home or Foreign) Law

The classic approach asks the judge to apply the foreign law as it is interpreted in the country of origin.¹⁹¹ He should enquire and construct foreign law in the same manner as the foreign court would do.

In many if not most situations, this is a task that is close to impossible to fulfil. Judges will either not dispose of the necessary information about the foreign practice, or it would be too time-consuming to collect them.¹⁹² Moreover, the foreign law might be based on values that are quite singular and alien to the rest of the world. For these reasons, the judge will often consciously or unconsciously be guided by the principles and standards

¹⁸⁹ In the same vein, Luke McCloud and David Rosenberg, A Solution to the Choice-of-Law Problem of Differing State Laws in Class Actions: Average Law, Harvard John M. Olin Discussion Paper No. 670, 6/2010 (pleading for average law as the applicable law in interstate class actions).

¹⁹⁰ See supra I B and V Implication No. 3.

¹⁹¹ See supra III B.

¹⁹² See supra III C.

that he considers to be of universal validity, such as equality of men and women or the respect of other basic human rights.

For the traditional methodology, any interpretation of the foreign law that is untrue to its actual practice constitutes a technical error.¹⁹³ The question is whether the recourse to universal principles and standards of interpretation should indeed be avoided or whether, on the contrary, the convictions of the judge with regard to the existence of such principles and standards should not have a stronger influence on his interpretation of foreign law.¹⁹⁴ While the latter idea is alien to the orthodox methodology, it is fully in line with the idea that is expounded here. Global legal ordering asks the court to treat foreign law on the same footing as its national law, not worse, but also not better. In a domestic setting it is clear that the judge would not follow the words of the statutes and the decisions of the higher courts by their letter if they contradict fundamental requirements of justice. It is totally unpersuasive why this should change when it comes to the application of foreign law. Here as well, it is necessary for the court to use conscience in order to reach a result.

The argument that questions of substantive justice should play a role when cases with a foreign element are decided has long been made. In particular, American authors were pressing the point.¹⁹⁵ Although they were right in principle, they have committed two mistakes.

¹⁹³ See supra III C.

¹⁹⁴ For a general plea in this direction regarding the application of all types of law, see Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?*, 1 *Journal of International Criminal Justice* 4-12 (2003) (arguing that judges are supposed to do nothing that they cannot justify in principle).

¹⁹⁵ See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 *Harv. L.R.* 187-189 (1933) (arguing that each conflicts analysis should start with an inquiry into the demands of justice in the particular situation); Leflar, supra note 99 (stating that justice between the litigating parties needs to be advanced); Juenger, supra note 3, at pp. 191-232 (arguing for a "substantive law approach" to conflict of laws).

The first mistake was that they have adopted an internal perspective. They took issue with foreign law when it was at variance with the substantive justice requirements of the forum, thus opening the floodgates for more parochialism instead of less. A deviation from the law applicable to a dispute should not be allowed simply because the latter is not in line with the forum's principles, but only if it contradicts global standard of justice.

The second mistake was that the American writers have focused too much on the *selection* of the governing law. They have thereby neglected its *application*. This point, however, is much more important than the first. For the problem that the revolutionists had and many authors have with foreign law is not that it is applicable to a certain case. What is problematic is rather its content. It is because of the result that a case receives under a foreign legal system that the judge's conscience does not allow him to follow it. If that is the case, he should grasp the bull by its horns and correct the unacceptable results by giving a different interpretation of that law, instead of pretending that it would not be applicable to the issue in question.

Now it might be asked how this approach should work in practice. Can the judge really interpret foreign law in conformity with the requirements of global justice, or is he not inevitably bound to the interpretation given by the courts of the country of origin? The leeway that the judge has in the interpretation of foreign law is best illustrated by an extract from Ronald Dworkin's seminal book "Law's Empire".¹⁹⁶ In proving the multifarious meanings of the word "law", Dworkin uses an imaginary judicial system which we disapprove of (it is not too hard to recognize the Nazi system). He describes different attitudes that we can take towards such a system. The first one is a very skeptical and basically consists of our conviction that the practices in this system do not

¹⁹⁶ Dworkin, *supra* note 69, at pp. 105-108.

justify in any way state coercion. We would then recommend a judge to simply ignore the legislation and precedent altogether, as long as he can get away with it.¹⁹⁷ A second method would be to consider the foreign system from the point of view of judge who, unlike us, is in general sympathy with it and counts it as a “flourishing example of law”.¹⁹⁸ We would then have to ask “which interpretation of his country’s legal practices would put them into what we believe would be their least bad light”. Or finally, we could decide to put us fully in the shoes of the foreign judge and interpret “from the point of view of the full set of his political and social convictions”.¹⁹⁹

The classical approach would require the court to adopt the latter attitude. In contrast, global legal ordering paves the way for a less mechanical and more enlightened handling of foreign law, one that respects the diversity of different legal cultures while not sacrificing universal standard of justice. It may very well be that the result reached will not coincide with the interpretation that would statistically most probably have been given by the courts of the country from which the law originates. So be it. In a global legal order, the task of the judge is not to emulate the judiciary of the country from which the law originates. It is to decide transnational cases in a way that is most in conformity with the requirements of harmonious decision-making and substantive justice.

One might object to this approach that a state’s law would be misinterpreted and even perverted by the approach that is recommended here. If the laws of a dictatorship, for instance, would be combined with ideas of equality and protection of minorities, this would lead to a kind of unnatural mongrel that contradicts the legislature’s intentions. Yet this argument ignores that the state which makes its laws available for the global legal

¹⁹⁷ Dworkin, *supra* note 69, at p. 105.

¹⁹⁸ Dworkin, *supra* note 69, at 107.

¹⁹⁹ See Dworkin, *supra* note 69, p. 107.

order acts as a “rule provider”.²⁰⁰ In the global order, national laws are not applied because of the authority of the state that is the author. The latter has therefore no right to the application of its law, even less in a certain interpretation. He is deemed to have released them to a global application. Thus, understanding the legal rules in a way different than the state-author intended cannot violate its privileges.

It might also be objected that the solution advocated here would not further the goal of decisional harmony, as it makes the interpretation of foreign law dependent from the judge’s personal convictions. It is true that when it comes to substantive justice, the views often diverge. There is, however, reason to hope that the convictions of judges about justice do not deviate as much as the laws of the legislators of the world.²⁰¹ They are professionally obliged to decide individual cases impartially, and they are less politically influenced than law-makers. Thus, it seems not unjustified to think that a U.S. and a Chinese judge would come more easily to the same result than Capitol Hill and the People’s Congress in Beijing. Moreover, differences of opinion between judges about how law shall be applied in conformity with substantive justice also appear within one legal system. They do not lead to its crackdown, but have to be tolerated. Indeed, if a majority of foreign courts comes to the conclusion that the law of a certain state is better interpreted in a certain sense, which deviates from the country’s own interpretation, this is as much global harmony that can be brought about as is possible without sacrificing the requirements of justice.

A final objection against this approach is that at least the courts in the state of the dictator will apply their law differently from the foreign courts. Indeed, this point must be

²⁰⁰ See *supra*, D 3.

²⁰¹ For reasons, see *supra* D 2.

granted. But the goal of harmonious decision-making is not sacrosanct, even in the global legal order. It has to give way to the requirements of substantive justice, under the condition that these requirements are shared by a large number of countries. Thus, judges should ensure that their interpretation is in line with values that are as universal as possible before they discard an interpretation that is likely to be given by the courts of the country of origin. In that way, the frictions are limited to the strictly necessary. One might even nourish the hope that the courts of the country of origin, in light of the rejection of their interpretation by other judiciaries, think over their practice and adapt it to that of their foreign counterparts.

As we have seen, none of the objections truly holds. To the contrary, applying global standards has certain advantages: First, foreign law will be applied in a way that is in conformity with the requirements of substantive justice, even beyond those areas which are sensitive to public policy concerns. Second, courts will be spared the onerous task of inquiring how a court from the country of origin would interpret a certain provision, but instead can employ their own mind to come up with a workable solution. Third, the results will be a globally harmonious interpretation as far as it is in possible to bring it into conformity with the requirements of substantive justice. Finally, if an overwhelming majority of courts in the world comes to the conclusion that a state's law is to be interpreted in a certain way in order to be in line with the requirements of justice this might ultimately have repercussions on the courts of the state of origin and could change their attitude. The last point is very idealistic. Yet it shows what a global legal order really means: it is not a one way street in which interpreting and applying the law of a

state is a privilege exclusively entrusted to the courts of the country of origin. Rather, it is a discursive process in which many actors take their view on foreign and their own law.

VI. Where to Go Next

1. A Recipe for Judge-Made Universal Conflict Rules

This article has shown that the way in which the applicable law is currently determined is more than unsatisfactory: It is an ailing system, unfit for the challenges of the globalized society of the 21st century. The differences between the national conflicts systems lead to multifarious inconsistencies and clashes. Perverse effects are produced on the global level, which defy most basic notions of justice.

The fundamental illness that has been identified here is the sticking of the court to the choice-of-law mechanism of their forum. The divergences between these mechanisms are the root cause of the current disorder. Against this background, a new methodology has been proposed that liberates the judge from the commands of the forum state as well as from their own local practices. The judges should no longer obey politically influenced and provincial conflict rules that bear in them the grain of disagreement with other states' judiciaries. Instead, they should follow principles that are universally recognized for the solution of a certain type of case. Thus, the original form of private international law will resuscitate from its grave: Judges will again search for the law that is appropriate to answer a certain question when seen from a global viewpoint instead of following peculiar domestic conceptions of conflict of laws.

The freedom of the judge, it needs to be emphasized, is not unlimited. They are bound by the choice of the parties, by international agreements between states, and by the goal

of providing a solution to conflicts cases that will be acceptable to other nations. Moreover, it has to be stressed that their task of “global legal ordering” concerns only the question of the choice of the applicable law. It does not comprise questions of substantive rules which still remain in the exclusive remit of the legislators and national case law. Thus, the future division of tasks will look like follows: States will supply the rules of the game, while courts, as “multinational decision-makers”, will determine their reach in international situations and seek harmonious solutions with their brethren in other countries. It is suggested that this approach could be worth to be called a “global legal order”.

The position taken here is imbued by a deep distrust of national governments. The justification for this distrust lies in their utter failure in providing globally acceptable choice-of-law rules. Instead of striving for harmonious solutions, they tend to push through their domestic preferences in cases involving parties from other states. Courts in the United States have tried to identify the policies of domestic law and transpose them on the international level, while in the rest of the world different conflicts codes have been adopted that contributed as well to disharmony. It might seem idealistic to hope that the same judges who were embroiled in these disputes could overcome the current muddle. But they are at least to be in a better position than members of governments and national parliaments that are bound to domestic agendas. By their very task to decide the individual case before them in conformity with the requirements of justice, judges are obliged to seek for universal rather than nationalistic choice-of-law principles.

2. The Need for an International Conference of Judges

In order for courts to fulfill their job of global legal ordering, judges need to care about the practices followed in other courts. They have various sources at their disposal to inform them about choice-of-law approaches in other countries.²⁰² More should be done to improve the knowledge of comparative choice of law. But judges also need to get into personal contact with each other. The informal networks they have created so far are helpful, but insufficient. What is needed is a global forum in which magistrates from different countries can converse with each other. Something similar to the Hague conference, UNCITRAL and UNIDROIT should be installed for judges. The EU seems to have understood the importance of the role that judges play in the administration of cross-border justice since it has created a judicial network for European judges in civil and commercial matters.²⁰³ Although it is far from perfect and still fraught with many problems, it sets an example.

In such a platform, judges can cooperate on a variety of issues, not only of choice of law. Many procedural questions need to be addressed, such as practical problems of the notification of claims to foreign defendants, the taking of evidence abroad or the cross-border enforcement of judgments. But choice of law should be a central topic. Members of national tribunals need to discuss the conditions and limits to the parties' selection of the applicable law, about the determination of the applicable rules in the absence of such a selection, the requirements of substantive justice that should inform the interpretation of foreign law, and the latest trends in international law making. It is to be hoped that

²⁰² See *supra* V, implication No. 3.

²⁰³ See its website: www.ec.europa.eu/civiljustice/index_en.htm (last visited November 22, 2010).

through regular consultations, especially among the courts of last instance, a uniform practice of choice of law will eventually be brought about.

The organization of such a forum will need money, time and skill. It is to be hoped that some benevolent government will take up the challenge, as the Netherlands did with the Hague conference. The cost should be split through an international organization, e.g. the United Nations. However, cash strapped as they are, this would also be a good project for some private benefactor who seeks to make his name inseparable from the beginnings of a global legal order.