

# Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws

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## ABSTRACT

*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 of law 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 underlying idea is that conflicts theory has to be recalibrated. Its goal should not be 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, this Article will propose a new normative category, “relatively mandatory rules” and discuss some important implications that the new approach may have for conflict of laws generally.*

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## I. INTRODUCTION

When we think about the conflict of laws, we always think in terms of states and their relations with each other. Using the traditional method, for instance, we are looking for the state which has the closest connection to the situation or in which the case has its “seat.”<sup>1</sup> Under a more modern paradigm, we analyze whether a state has an “interest” in the case before applying its law.<sup>2</sup>

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1. See FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS §§ 346, 360 (Guthrie trans., reprint Rothman 1972) (2d ed. 1880) (stating that in determining the applicable law, one has to search for the seat of the legal relationship; this approach is still prevalent in Europe); see, e.g., TITO BALLARINO, MANUALE BREVE DI DIRITTO INTERNAZIONALE PRIVATO 3 (2002), GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 310-11 (9th ed. 2004); PIERRE MAYER & VINCENT HEUZÉ, DROIT INTERNATIONAL PRIVÉ 83 (8th ed. 2004); JOSÉ CARLOS FERNÁNDEZ

While it is certainly true that conflicts of law arise from the fact that the world is composed of territorial states having separate and differing legal systems,<sup>3</sup> 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 is that choice of law, as every other field of law, ultimately pertains to human relations. It might therefore be preferable to include other factors in the analysis as well.

The idea can be illustrated by the principle of party autonomy. Over the course of the previous decades, the concept has taken over a steadily growing field of the law. More and more, it is recognized that 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 law. The possibility of a choice-of-law clause is mostly considered as a side-issue, or as one that is problematic.<sup>4</sup> Although verbally recognized, party autonomy has always remained a maverick within the edifice of conflicts theory.<sup>5</sup>

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 should private individuals be able to change the outcome? Why are they allowed to deselect even mandatory rules of the otherwise applicable law?<sup>6</sup> Does such an allowance confer legislative power on the parties?

Of course, one can try to dissolve these perplexities with the "killer argument" that the parties are free to choose the applicable

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ROZAS & SIXTO SÁNCHEZ LORENZO, *CURSO DE DERECHO INTERNACIONAL PRIVADO* 399 (2d ed. 1993).

2. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICTS OF LAWS* 190 (1963) (advocating a solution to the choice-of-law problem by examining the interests of the states involved).

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

4. See, e.g., LEA BRILMAYER, *CONFLICT OF LAWS* 241 (1995) (arguing in the context of choice-of-law clauses that "standing by itself, consent may not be adequate."); see also LUTHER MCDUGAL ET AL., *AMERICAN CONFLICT OF LAWS* 505 (2001) (mentioning party autonomy only on page 505 and immediately stressing that it is subject to important limits); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 451 (4th ed. 2001) (stating "party autonomy rules either go too far or not far enough."); LARRY KRAMER, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 329 (1990) (arguing that the parties should be allowed to choose the applicable law only when there is potential for a true conflict, and that even in those cases they should not be allowed to choose any law they like).

5. See WEINTRAUB, *supra* note 4, at 451 (voicing doubts about the results achieved by party autonomy); KRAMER, *supra* note 4, at 330 (asking why a state should delegate to the parties even limited power to resolve conflicts).

6. See *infra* Part II.

law because the states' conflict rules allow them to do so. But this leaves an important question unanswered: *Why* do the states give parties this liberty? Also, the significance of a law that applies as a result of private party choice, rather than authority, is far from clear. Does such a law have a different application, construction or interpretation? What is missing is an exact explanation of party autonomy, both as a matter of policy and 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. First, they will help to clarify the significance of a private choice of law, as well as its extent and effects.<sup>7</sup> Second, such an analysis might also change the way in which we approach the conflict 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.<sup>8</sup>

But let us begin from the start. In this Article, the Author will attempt to demonstrate why current conflict-of-laws theory is unable to account for party autonomy. After outlining the rise of party autonomy in practice (Part II), the Article will examine the different concepts and instruments that are used in today's conflicts theory (Part III). These concepts and instruments are unable to grasp the increasing influence of the parties on the applicable law because each is based on the idea that conflicts of laws are battles between states. In contrast, this Article will propound a theory of conflicts in which the individual takes center stage and which leads to a new category of legal rules: "relatively mandatory rules" (Part IV). Part V will explore some implications of the new approach for the solution of conflicts in practice.

It is equally important to indicate what this Article will not do. The Article will not, at least not primarily, explore the limits to party autonomy. Most writers have focused on those limits to ascertain the nature of party autonomy.<sup>9</sup> There are two problems with this approach: first, the limits to party autonomy are mostly idiosyncratic to every legal system. Focusing on those limits does not facilitate general expositions regarding party autonomy and its importance to conflicts theory. Second, to define party autonomy by its limits is to define a vacuum as being free from atmosphere. Far from being a vacuum, party autonomy is an important legal principle that has its roots in the recognition of individual freedom. Accordingly, the Author will take a different approach and try to explain party

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7. See *infra* Parts II.C, V.A.

8. See *infra* Part V.B.

9. See, e.g., MCDUGAL ET AL., *supra* note 4, at 505 (discussing the limits of party autonomy).

autonomy not as being void from something, but as justified in its own right.

But first, it is important to further explore the problems of today's conflicts theory raised by the freedom of the parties to choose the applicable law.

## II. THE GAP IN CONFLICTS THEORY

### A. *The Growing Acceptance of Party Autonomy*

A revolution has taken place in the conflict of laws. This "revolution" does not refer to the U.S. conflict-of-laws revolution, which dates back to the 1960s and which shifted the focus of analysis from factors such as territory and citizenship to the interests of the states involved.<sup>10</sup> Instead, 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 almost all jurisdictions.<sup>11</sup> Although there have been many precursors to party autonomy,<sup>12</sup> 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 their transaction."<sup>13</sup> The Institute of International Law calls party autonomy "one of the fundamental principles of private international law."<sup>14</sup> More and more states allow parties to cut the "Gordian knot" of conflict of laws by choosing the applicable law themselves.<sup>15</sup> The spectacular rise of party autonomy can also be seen from the development of the Restatement of Conflict of Laws: while the first

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10. See CURRIE, *supra* note 2, at 190 (writing as the main proponent of the U.S. conflict-of-laws revolution).

11. See generally 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).

12. See MAYER & HEUZÉ, *supra* note 1, at 509 (showing that in France, party autonomy dates back as far as the sixteenth century); see also EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 948 (4th ed. 2004) (indicating that some systems have previously applied the principle of party autonomy).

13. RUSSELL J. WEINTRAUB, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984).

14. INSTITUTE OF INTERNATIONAL LAW, *Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities*, 64 II Y.B. 383 (1992).

15. See SYMEONIDES, *supra* note 11, Part I (showing the progression of states allowing parties to choose the applicable law).

Restatement's chapter on contracts did not contain any provision allowing the parties to stipulate the governing law,<sup>16</sup> the corresponding chapter of the second Restatement turned this freedom into a general rule.<sup>17</sup>

The principle of party autonomy is far from being applicable to all fields of the law. Yet, its scope is increasingly extended and it is now applied in areas where it was unthinkable before.<sup>18</sup> For example, party autonomy has historically been resisted with respect to questions related to the status of a person.<sup>19</sup> Under the traditional view, status needs to be determined objectively and therefore the applicable law cannot be changed at will.<sup>20</sup> Today, however, legal systems have allowed private persons to influence the law governing such questions as their name,<sup>21</sup> their capacity to contract,<sup>22</sup> or the applicable matrimonial regime.<sup>23</sup> 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 will.<sup>24</sup> Italy, Québec and Switzerland also allow the testator to choose the applicable law,<sup>25</sup> and a Hague Convention proposes to make this principle an international rule.<sup>26</sup>

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16. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311–331 (1934) (missing a provision allowing parties to choose the governing law).

17. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (using parties' choice of governing law as a general principle).

18. See SYMEONIDES, *supra* note 11, at 56–57 (giving examples of areas of law where party autonomy has not been previously applied).

19. *Id.*

20. *Id.*

21. See, e.g., Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht [IPRG] [Swiss Private International Law Act], Dec. 18, 1987, SR 291, art. 37(2) (allowing individuals to choose the conflict-of-laws rules of their state of nationality to govern their name).

22. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 198(1), 187 (allowing private persons to choose, within certain limits, the law governing their capacity to contract).

23. See, e.g., Bürgerliches Gesetzbuch [German Civil Code], Aug. 18, 1896, RGBl at 195, Annex 1, art. 15(2) (F.R.G.) (amended 1986) (allowing private persons to influence the law governing the matrimonial regime); Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht [IPRG] [Swiss Private International Law Act], Dec. 18, 1987, SR 291, art. 52 (allowing parties to select the law governing the matrimonial regime); see also MAYER & HEUZÉ, *supra* note 1, at 771 (citing French case law according to which the parties can select the applicable matrimonial regime).

24. See UNIF. PROBATE CODE §§ 1-202(18), 2-703 (2004) (providing that the notion “governing instrument” used in the Code includes deeds and wills).

25. Italian Law No. 218 of May 31, 1995, Gazz. Uff., June 3, 1995, art. 46(2); Civil Code of Québec, S.Q., ch. 64, art. 3098(2) (1991); Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht [IPRG] [Swiss Private International Law Act], Dec. 18, 1987, SR 291, arts. 90(2), 91(2).

26. Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 5(1), Aug. 1, 1989, 28 I.L.M. 150.

The will of the individual has also gained significance in another area in which it was historically held to be functionally excluded: tort law.<sup>27</sup> For a long time, it was thought that party autonomy could not play a role in torts.<sup>28</sup> However, in 2007 the European Union adopted a regulation which allows parties to select the law applicable to all non-contractual obligations, including those arising from torts.<sup>29</sup> The selection must be made after the event which gave rise to the damage, but if all parties are pursuing a commercial activity, it can even be made beforehand.<sup>30</sup> In the case of environmental damages, the person that sustained the damage will be allowed to deviate from the normally applicable law and base its claim on the law of the country in which the event giving rise to the damage occurred.<sup>31</sup>

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.<sup>32</sup> More and more, parties are also allowed to explicitly choose the law that will be applied to their dispute.<sup>33</sup> 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, the spouses typically can choose as the law governing their matrimonial regime only the law of the state of which one of them is a citizen or in which both are

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27. See HAROLD L. KORN, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2193 (1990) (explaining that choice of law in tort was formally decided by applying the *lex loci delicti*, or the law of the place of injury).

28. See *id.* at 2195 (observing the old hegemony of the *lex loci delicti* rule).

29. EC Parliament/Council Regulation 864/2007 on the law applicable to non-contractual obligations ("Rome II"), art. 14, 2007 O.J. (L 199) 40–49. The Regulation will apply as of January 11, 2009. *Id.* art. 32.

30. See *id.* art. 14(1)(a)–(b).

31. *Id.* art. 7.

32. See, e.g., Cour de cassation [Cass. 1e civ.] [highest court of ordinary jurisdiction in France], Dec. 4, 1990, *Soc. Coveco et autres c. Soc. Vesoul transports et autre*, 80 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 1991, 558, 559 (holding that though the court below erred in failing to consider Dutch law governing the contract, thus violating the French civil code, French law should still be applied because neither party invoked foreign law in their arguments); 1 DICEY & MORRIS, ON THE CONFLICT OF LAWS 221, ¶ 9-003 (Lawrence Collins ed., 13th ed. 2000) (citing British law); SCOLES ET AL., *supra* note 12, at 953 n.4 (citing American law).

33. See, e.g., Cour de cassation [Cass. 1e civ.] [highest court of ordinary jurisdiction in France], Apr. 19, 1988, *Roho c. Caron et autres*, 78 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 1989, 68, 69 (holding that the application of French law where the parties desired their controversy to be subject to French law was permissible even though the choice contravened an international convention). The condition is that the parties can freely dispose of the rights that are the subject of controversy.

residing.<sup>34</sup> In the case of succession, the choice is mostly limited by the citizenship and the domicile of the deceased.<sup>35</sup>

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 contract law disputes, the classic area in which party autonomy applies.<sup>36</sup> The old rule was that the law chosen by the parties must have some connection to the parties or the case.<sup>37</sup> This rule has been replaced by the principle that parties are allowed to choose the law of a state which has absolutely no relationship whatever to either of them or to the case.<sup>38</sup>

One particularly salient feature of party autonomy is that it allows the parties to deselect even the mandatory rules of a legal system.<sup>39</sup> Accordingly, 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.<sup>40</sup> But one could consider the cases in which the selection of a law contravenes public policy as being outside the scope of freedom of the parties. Within the field of

34. See, e.g., Bürgerliches Gesetzbuch [German Civil Code], Aug. 18, 1896, RGBI at 195, Annex 1, art. 15(2) (amended 1986).

35. Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht, [IPRG] [Swiss Private International Law Act], Dec. 18, 1987, SR 291, arts. 90(2), 91(2); Civil Code of Québec, S.Q., ch. 64, art. 3098(2); Italian Law No. 218 of May 31, 1995, Gazz. Uff., June 3, 1995, art. 46(2). But see UNIF. PROBATE CODE § 2-703 (2004) (failing to provide for such a limit).

36. See generally WILLIAM J. WOODWARD, JR., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697 (2001) (explaining the evolution of the choice-of-law doctrine in contracts).

37. See, e.g., U.C.C. § 1-105 (1989) (providing that the law chosen by the parties must have some connection to the parties or the case, before revision of the U.C.C. in 2001). Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (following the former U.C.C. rule, but only with relation to issues which the party could not have resolved by an explicit provision in their agreement), with *id.* § 187(1) (allowing complete freedom of choice for other issues not covered by § 187(2) of the Restatement). For a discussion of § 187(1), see *infra* text accompanying note 57.

38. See, e.g., U.C.C. § 1-301(c) (2005) (providing a change from the old rule, which is explicitly motivated by “emerging international norms” according to the Summary of Changes); Inter-American Convention on the Law Applicable to International Contracts, art. 7, Mar. 17, 1994, O.A.S.T.S. No. 78, 33 I.L.M. 732; European Convention on the Law Applicable to Contractual Obligations art. 3, June 19, 1980 [hereinafter *Rome Convention*]; draft for an EC Parliament/Council Regulation on the law applicable to contractual obligations [hereinafter *Rome I Regulation draft*], art. 3. For a peculiar field of the law, see also UNIF. COMPUTER INFORMATION TRANSACTIONS ACT (UCITA) § 109(a) (1999) (allowing the parties to choose the law applicable to computer information transactions); on the act and the cited provision, see WILLIAM J. WOODWARD, *supra* note 36 (discussing UCITA and the revision of the U.C.C.).

39. GERHARD KEGEL & KLAUS SCHURIG, *supra* note 1, at 654 (providing examples of the extent of choice by parties); MAYER & HEUZÉ, *supra* note 1, at 516 (same); SCOLES ET AL., *supra* note 12, at 960–61 (same).

40. W. MULLER-FREIENFELS, *Conflicts of Law and Constitutional Law*, 45 U. CHI. L. REV. 589, 611 (1978) (noting policy interests that go into conflict-of-laws decisions).

party autonomy, the will of the individuals is unrestricted by mandatory law.

Another important feature of party autonomy is that within its realm, it trumps all other conflict rules.<sup>41</sup> 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 by the law of the state in which one of the parties has its domicile or seat does not matter as long as the parties have made an explicit choice.<sup>42</sup> 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 determine the law that applies to their own choice-of-law clause.<sup>43</sup> Yet, such freedom is explicitly recognized in European law.<sup>44</sup> This development shows how important party autonomy has become to the legislator. Instead of objectively determining the applicable law in case of doubt regarding the validity of the choice-of-law clause, it defers to the latter and presumes its validity.

In sum, it is no exaggeration to claim that party autonomy has become the most important principle in conflict of laws. This is underscored by the statement in the literature according to which American courts have followed no other provision more than Article 187 of the Second Restatement of Conflict of Laws, which

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41. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (using parties' choice of governing law as a general principle).

42. *Id.*

43. O. KAHN-FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW 196 (1976) (criticizing the logical circle that is created by allowing the parties to choose the law to which they are submitted); see also *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5, 7 n.2 (1st Cir. 1981) (noting that this would be "putting the barge before the tug").

44. Under the Rome Convention, the existence and validity of the choice-of-law clause is determined under the chosen law. ROME CONVENTION, *supra* note 38, arts. 3(4), 8(1). The Rome I Regulation, which will soon replace the Rome Convention, provides for the same rule. ROME I REGULATION DRAFT, *supra* note 38, arts. 3(5), 10(1). The interpretation of the Convention propounded here has widespread support among European authors. See, e.g., MARIO GIULIANO & PAUL LAGARDE, *Report on the Convention on the Law Applicable to Contractual Obligations*, art. 8, 1980 O.J. (C 282) 1 (EC); 1 DICEY & MORRIS, *supra* note 32, at 1222, 1232, ¶¶ 32-077, 32-100, A different interpretation is advocated by SCOLES ET AL., *supra* note 12, at 956 (stating that Article 3(4) refers the question of the validity of the choice-of-law clause to the *lex causae* (i.e., the law that would govern the contract in the absence of a choice-of-law agreement)); SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS 325 (1998) (same). Scoles et al. ignore that Article 3(4) of the Rome Convention renders Article 8(1) applicable, which requires one to purport that the contract, including its choice of law clause, would be valid. This is a typical bootstrap rule.

provides for the liberty of the parties to choose the applicable law.<sup>45</sup> Why then, it may be asked, 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? These questions need to be addressed.

### B. Theoretical Questions

Party autonomy has never been easily accepted on a theoretical level. Joseph H. Beale, the author of the First Restatement of Conflicts, ardently opposed the principle because he believed that allowing the parties to choose the applicable law would give them "permission to do a legislative act."<sup>46</sup> Freedom of choice of law would practically make "a legislative body of any two persons who choose to get together and contract."<sup>47</sup> Consequently, the First Restatement did not include any provision recognizing such freedom.<sup>48</sup> 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."<sup>49</sup> 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.<sup>50</sup> 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,"<sup>51</sup> 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 as 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."<sup>52</sup> One could also cite a famous provision of the French Civil Code which

45. See SYMEONIDES ET AL., *supra* note 44, at 318 (stating that § 187 is followed by more American courts than any other provision of the Restatement (Second)); SCOLES ET AL., *supra* note 12, at 980 (same).

46. 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1080 (1935); see also KAHN-FREUND, *supra* note 43 (taking a similar view).

47. 2 BEALE, *supra* note 46, at 1080.

48. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311-331 (1934).

49. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971).

50. *Id.*

51. See, e.g., KAHN-FREUND, *supra* note 43, at 195 (explaining the concept of autonomy of will with regards to the parties); MAYER & HEUZÉ, *supra* note 1, at 511 (same).

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

recognizes that agreements have a binding force like laws. Article 1134(1) of the French Civil Code reads: “[a]greements lawfully entered into take the place of the law for those who have made them.”<sup>53</sup>

It is interesting to contrast this view with the one of Beale. However, such a discussion would end up in a typical “chicken and egg” problem: what came first, 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.<sup>54</sup> It is clear that the state remains free to restrict this principle, at least in its own courts.<sup>55</sup>

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 continent<sup>56</sup> and has influenced Article 187(1) of the Second Restatement, according to which 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.<sup>57</sup> Under this so-called “incorporation theory,” the rules of law that the parties designate is of no importance. Indeed, they 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 provisions of the Roman Twelve Tables.<sup>58</sup> But this theory downplays the importance of party autonomy too much.<sup>59</sup> Specifically, it does not elucidate why under this principle the parties are free to deviate from

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53. C. CIV. art. 1134(1) (Fr.) (“Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.”). A translation is available at the French Government Official Web Page, <http://www.legifrance.gouv.fr> (follow “Les codes” British Flag hyperlink; then follow “Civil Code” hyperlink; then search Article Number “1134”) (last visited Nov. 29, 2007).

54. See FRIEDRICH K. JUENGER, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 198 (1997) (describing the positivist perspective that the state rather than the parties determines the applicable law).

55. See MATTHIAS LEHMANN, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT’L L. 753, 770–71 (2004) (suggesting that a different view might be taken in an arbitral court).

56. GEORGE MELCHIOR, *DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS* 500 (1932) (arguing that the parties’ choice of a foreign law would have the same effects as an incorporation of any rule by reference); see also KAHN-FREUND, *supra* note 43 (same).

57. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (1971) (stating that the rule provides for incorporation designated by the parties and is not a rule of choice of law).

58. See PIERRE MAYER, *TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION* 44 (Int’l Chamber of Commerce ed., 1993) (providing a provocative remark).

59. See also 1 DICEY & MORRIS, *supra* note 32, at 1226–27, ¶¶ 32-086, -088 (describing the difference between referring to foreign law as a choice of law and incorporating provisions of a foreign law into the contract).

even mandatory rules of the otherwise applicable law. Moreover, it cannot explain why party autonomy is a conflict-of-laws rule at all. For instance, the Second Restatement of 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.”<sup>60</sup> However, if that is true, why is this provision included in a Restatement that, according to its very title, treats the “Conflict of Laws”?

A different opinion 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.<sup>61</sup> 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. The problem, however, is that the approach cannot explain why it is increasingly accepted in legislation that the parties can even choose a legal system that has no connection whatsoever to the dispute.<sup>62</sup> To say that they would “localize” their contract in these cases is a mere fiction.

Finally, a very common theory holds that the principle of party autonomy protects the reasonable expectations of the parties.<sup>63</sup> 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.<sup>64</sup> But the argument is circular: if the parties were not allowed to choose the applicable law, then they could not expect their agreement to be taken into consideration. They would therefore have no “reasonable expectation” that the law chosen by them would be applied. Moreover, predictability could be secured in ways other than by party autonomy. For instance, if courts all over the world adopted the same choice-of-law rules, parties would also be able to predict which law would be

60. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (1971).

61. HENRY BATIFFOL, *Subjectivisme et Objectivisme dans le droit international privé des contrats* [Subjectivism and Objectivism in the Private International Law of Contracts], in I MÉLANGES OFFERTS À JACQUES MAURY 39, 53 (1960).

62. See *supra* note 38.

63. See, e.g., EDITH FRIEDLER, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471 (1989); ROBERT A. LEFLAR, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 283 (1966); 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) OF CONFLICT OF LAWS § 187 cmt. e (stressing the need for predictability); WEINTRAUB, *supra* note 4, at 449 (same).

64. LEFLAR, *supra* note 63, at 282–83 (arguing that a rule permitting parties to select the state whose law is to govern their transaction would protect the justified expectations of the parties).

applied to their dispute. The applicable law would even be more predictable for two reasons. First, choice-of-law clauses are often subject to questions about their validity.<sup>65</sup> Second, the law that objectively applies to the contract could not be trumped in some cases by an agreement between the parties. The theory which nevertheless favors party autonomy as a means to secure predictability is of course based on the experience that states are unable to agree on uniform choice-of-law rules.<sup>66</sup> But it does not provide an explanation why it is easier for states to accept the parties' freedom of choice of law than to agree on universal rules on conflicts. Finally, it is far from clear why the need for predictability should allow the parties to deviate from even mandatory laws.<sup>67</sup> States do not ordinarily allow parties to contract out of their mandatory rules just to make their private relations more stable.<sup>68</sup>

There might be other possible justifications for party autonomy. For instance, one could argue that states would not expect 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 is wrong. Parties have clear preferences for certain laws.<sup>69</sup> For example, it is 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.<sup>70</sup> In international arbitration, the laws of the United Kingdom, Switzerland, and France enjoy notorious popularity.<sup>71</sup> In international maritime and insurance transactions, parties have a tendency to choose English law.<sup>72</sup> Thus, some states necessarily "lose" in the process of individual choice of law, provided that one perceives non-application of their law as a disadvantage.

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65. See FRIEDLER, *supra* note 63, at 472–73 (noting that critics of party autonomy in choice-of-law provisions have raised the issue of validity of the agreement).

66. LEFLAR, *supra* note 63, at 286 (noting that concerns with claims to sovereignty enter into international choice of law).

67. See KRAMER, *supra* note 4, at 330 (arguing that the state has no reason to make the parties' choice broader than the conflicting laws); *see also* WEINTRAUB, *supra* note 4, at 449 (voicing similar doubts).

68. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d (stating that formal contract requirements still apply regardless of choice of law provisions).

69. See LEFLAR, *supra* note 63, at 282–83 (arguing that parties have a critical interest in the law that is applied to their contractual provisions).

70. See, e.g., KIMMO METTÄLÄ, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 INT'L LAW. 219, 222 (1986) (describing choice of law provisions regularly applied to financial transactions).

71. See DAN C. HULEA, *Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective*, 29 BROOK. J. INT'L L. 313, 347 (2003) (describing choice-of-law provisions regularly applied in international arbitration).

72. See 1 DICEY & MORRIS, *supra* note 32, at 1218–19, ¶ 32-063 (noting that English law has gained worldwide acceptance in insurance and maritime contracts).

Consequently, it needs to be explained why states would agree to such a process.

Maybe the states' 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 U.S. case law.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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 wonder with which experienced theorists react to party autonomy reflects the fact that there is something deeply wrong with current conflicts theory; it is simply not able to account for the fundamental principle that is most frequently used to solve conflicts in practice.

### C. Practical Questions

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

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73. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (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.

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 and nevertheless upheld the clause. See *Zapata*, 407 U.S. at 13 n.15 (supporting the validity of choice-of-law clauses). On the application of *Zapata* to choice of law, see also *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (citing *Zapata* for the validity of choice-of-law clauses); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993) (same); *Bison Pulp & Paper Ltd. v. M/V Pergamos*, No. 89 Civ. 1392, 1995 WL 880775 (S.D.N.Y. Nov. 29, 1995) (same).

74. See discussion *supra* Part II.A.

75. GERHARD KEGEL, *INTERNATIONALES PRIVATRECHT* 208 (1st ed. 1960) (calling party autonomy a "stopgap solution" to the conflict-of-laws problem); see also KEGEL & SCHURIG, *supra* note 1, at 653 (same).

First, the scope of the choice of law: does it also include the mandatory rules of the chosen law? 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 presumed to have excluded the mandatory rules or not?

There are no easy answers to these questions. An old theory held that the chosen law applies *in toto*, including its mandatory provisions.<sup>76</sup> Yet, one may have an uncomfortable feeling if, for instance, Swiss antitrust law should apply to a sales contract between a U.S. company and a German company simply because the parties chose to submit their agreement to the law of Switzerland. This uncomfortable feeling stems from the fact that mandatory law is normally 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 did not need to include the mandatory rules of the chosen law, they could avoid mandatory rules altogether.

A related question 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 need to choose a legal system of a particular state. One could also imagine that they would be able to write a sort of self-sufficing contract, a “contract without a law,”<sup>77</sup> or that they could resort to some rules not made by the state, like a “new law merchant” or *lex mercatoria*.<sup>78</sup>

Another question is what happens if the parties choose a law under which their contract, or part of it, is invalid.<sup>79</sup> Since the

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76. See KEGEL & SCHURIG, *supra* note 1, at 155; ANTON K. SCHNYDER, WIRTSCHAFTSKOLLISIONSRECHT 248–55 (1990). *But see* SCHNYDER, *id.*, at 255–60 (criticizing this approach).

77. See MAYER & HEUZÉ, *supra* note 1, at 514 (citing the French theory of the “contrat sans loi”).

78. From the rich literature on the subject, *see*, for example, KLAUS P. BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1998); BERTHOLD GOLDMAN, 9 FRONTIÈRES DU DROIT ET LEX MERCATORIA, ARCHIVES DE LA PHILOSOPHIE DU DROIT 177 (1964); FILLIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA, 1992; CLIVE M. SCHMITTHOFF, *International Business Law: A New Law Merchant*, in 2 CURRENT LAW & SOCIAL PROBLEMS 128–53 (1961); URSULA STEIN, LEX MERCATORIA—REALITÄT UND THEORIE (1994); FRIEDRICH K. JUENGER, *Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133 (2000).

79. 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 (D.C. Cir. 1992) (invalidating a clause in a cruise ticket under the Italian law whose applicability was stipulated in the ticket); *Moyer v. Citicorp Homeowners Inc.*, 799 F.2d 1445, 1451–52 (11th Cir. 1986) (invalidating an interest rate clause under a usury law of Georgia because Georgia law had been chosen);

invalidity of a contract is always based on mandatory law, this question is related to the first. However, it is not identical to the first question because not 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 the parties' 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 chosen law applies only to the extent that it upholds the contract.<sup>80</sup> 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 the intended contract, and sometimes renders the contract valid irrespective of any mandatory rules of law.<sup>81</sup>

A further question raised by party autonomy is whether the parties can split up the applicable law: are they allowed to 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*.<sup>82</sup> 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 either to the law of state A, or 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 and it will be chosen at a later point in time.<sup>83</sup> The validity of these clauses is subject to serious doubt, for the later choice may create considerable problems in interpreting and constructing the agreement. Moreover, an alternative or floating choice-of-law clause leaves unanswered the

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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).

80. This is the so-called rule of validation. See *infra* note 247.

81. See WEINTRAUB, *supra* note 4 (stating "party autonomy rules either go too far or not far enough."); see *infra* Part V.A (providing a discussion of this statement).

82. See 1 DICEY & MORRIS, *supra* note 32, at 1211-14, ¶¶ 32-046 to 32-052 (discussing the problem of splitting, or carving up, the applicable law); WILLIS L.M. REESE, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973) (discussing *dépeçage* in general).

83. See 1 DICEY & MORRIS, *supra* note 32, at 1225-26, ¶ 32-084 (discussing clauses that leave the applicable law open until a later point in time); SCOLES ET AL., *supra* note 12, at 951-52 (same).

question of which law is applicable at the time the agreement is made.<sup>84</sup>

A final question concerns the “petrification” or “freeze” of the applicable law: does the chosen law apply as it was when the parties entered into the choice-of-law clause, or do later changes affect the law’s application?<sup>85</sup> The problem is especially relevant with regard to contracts between private individuals and states, so called “state contracts”. In such contracts, stabilization clauses have been inserted to prevent the effects of a unilateral change of the applicable rules by the state party.<sup>86</sup> Problems can also arise in private or commercial relationships, however.<sup>87</sup> The solution seems to depend on the rationale for applying the chosen law—do we apply it because it is a choice made by the parties, or because it properly falls under the authority of the rule maker?

Current conflicts theories leave us with no answers to these questions; only with a robust theory of party autonomy can we hope to find a solution. Accordingly, this Article will not try to devise any easy answers to the specified problems. Instead, it will analyze why current theories have such difficulty in addressing the questions raised here. What 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, it is necessary to go back to the very basics of conflicts. We will see that the problems raised are all the product of a particular attitude towards choice of law, one that focuses exclusively on conflicts between states and not on conflicts between private parties.

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84. See, e.g., *Armar Shipping Co. Ltd. v. Caisse Algérienne d’Assurance et de Reassurance*, [1981] 1 W.L.R. 207, 216 (Eng.) (“[T]here must be a proper law of any contract—a governing law—at the time of the making of the contract.”).

85. See, e.g., 1 DICEY & MORRIS, *supra* note 32, at 1227, ¶ 32-088 (discussing the “freeze” of the applicable law).

86. See GEORGES R. DELAUME, *The Myth of the Lex Mercatoria and State Contracts*, in *LEX MERCATORIA AND ARBITRATION* 77, 94–96 (Thomas E. Carbonneau ed., 1990) (explaining the use of stabilization clauses); WOLFGANG PETER, *ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS* 214–30 (1995) (same); WOLFGANG PETER, *Stabilization Clauses in State Contracts*, *INT’L BUS. L.J.* 875–91 (1998) (same).

87. See, e.g., HEINER BRAUN, *Protecting Foreign Investments in the Palestinian Autonomous Territories*, in *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW* 321, 329 (Amos Shapira & Mala Tabory eds., 1999) (explaining private parties’ use of freezing clauses in contracts).

### III. A CRITIQUE OF THE STATE-CENTERED PERSPECTIVE OF CONFLICTS THEORY

#### A. *The Notion of Conflict of Laws*

All conflict theories share a common characteristic: they are built around the notion of the state.<sup>88</sup> This tendency is reflected in the name of the field. Indeed, the expression “conflict of laws” creates the impression of a struggle or battle between different states over the application of their laws. It has been rightly called a “war like expression.”<sup>89</sup> Finding rules for “conflicts” seems similar to the attempt to solve controversies between states peacefully.<sup>90</sup> Governmental interest analysis has tried to appease the tension between rule makers by eliminating “false conflicts.”<sup>91</sup> However, a number of “true conflicts” remain in which the battle is fought even harder; what counts in those cases, like in war, is only the allegiance to one or the other power.<sup>92</sup>

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 the world: “private international law.”<sup>93</sup> The notion reminds us of international law. *Inter-national* law, by its very concept, deals only with relationships between states, although there is a modern trend to include private actors as well.<sup>94</sup>

88. See, e.g., DELAUME, *supra* note 86, at 94–96 (advocating different theories that center around the role of the state); PETER, *supra* note 86, at 875–91 (same); SYMEONIDES, *supra* note 11, Part I (same).

89. See 2 BEALE, *supra* note 46, at 15 (citing COMTE DE VAREILLES-SOMMIERE, *LA SYNTHÈSE DU DROIT INTERNATIONAL PRIVÉ* (1897)).

90. French authors have often described the object of conflict of laws as “conflicts de souveraineté” or conflicts of sovereignty. See, e.g., ANTOINE PILLET, *PRINCIPES DE DROIT INTERNATIONAL PRIVÉ* 67 (1903). The same author 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).

91. See CURRIE, *supra* note 2, at 107, 163, 189 (discussing cases involving “no real problem” because all potentially applicable systems lead to the same result); see also BRAINERD CURRIE, *Comments on Babcock v. Jackson—A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242 (1963) (suggesting that instead of the false problems the real problems should be addressed).

92. 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).

93. Also known as “Derecho internacional privado,” “Droit international privé,” “Internationales Privatrecht,” “Diritto internazionale privato,” or “Mishpat Ben-Leumi Pratee.”

94. On the role of the private individual as a subject of international law, see *infra* note 195. See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004) (“A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”).

It is also sometimes called public international law, in order to distinguish it from private international law.<sup>95</sup> 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 often been followed.<sup>96</sup> Joseph Story, who subscribed to the term “private international law,”<sup>97</sup> made “sovereignty” of the state over a territory the premise of his conflicts theory.<sup>98</sup> He started 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.<sup>99</sup> Savigny also agreed with the assumption that no state can require the recognition of its law beyond its boundaries.<sup>100</sup> But because he thought it would afford little help to solve the problem of a conflict between different legal systems, he based his theory instead on an “international common law of nations having intercourse with one another.”<sup>101</sup>

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 are considered to be more important than private relations and therefore are superposed to them.<sup>102</sup> Although it is recognized today that international law and conflict of laws are fundamentally different disciplines,<sup>103</sup> the term “private international law” is more than a simple misnomer. “Name exacts thought,” one could paraphrase Currie.<sup>104</sup> Given the

95. See, e.g., SCOLES ET AL., *supra* note 12, at 2 (“In contrast, public-law disputes of an international character, such as those between sovereign countries or other international-law persons, fall within the scope of the ‘law of nations’ or ‘Public International Law.’”).

96. See 1 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 6–7 (H. Lauterpacht ed., 8th ed. 1995) (arguing that private international law is connected to public international law).

97. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 9 (1st ed. 1834).

98. *Id.* §§ 18–19, 21.

99. *Id.* §§ 7–8.

100. SAVIGNY, *supra* note 1, § 348.

101. *Id.* Although Savigny is rightly credited to have marked the “Copernican” turn from the conflicts between sovereigns toward the “community of law,” his ideas are heavily influenced by concepts taken from public international law. See, e.g., FERNÁNDEZ ROZAS & SÁNCHEZ LORENZO, *supra* note 1, at 44–45. 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, thereby following a typical internationalist approach. See SAVIGNY, *supra* note 1, ch. 1 (discussing local limits to the authority of legal rules).

102. See, e.g., MARCEL CALEB, *LE PRINCIPE DE L'AUTONOMIE DE LA VOLONTÉ EN DROIT INTERNATIONAL PRIVÉ* 55 (1926) (arguing that every conflict of laws is paralleled by a conflict of sovereignty).

103. 2 BEALE, *supra* note 46, at 14; JAN KROPHOLLER, *INTERNATIONALES PRIVATRECHT* 7 (5th ed. 2004).

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

parallel nomenclature, one does not need to wonder why many attempts have been made in history to transfer the concepts from international law to conflict of laws.<sup>105</sup> Still, most of the literature employs terms such as “state territory,” “state interests,” and “rights” in order to deal with private relations that exceed the boundaries of one state.<sup>106</sup>

Now, you might ask, what is wrong with that? Does not the very question of conflicts arise only because we have to choose between different legal regimes?<sup>107</sup> And are not states the authors of these regimes? Hence, does it not follow that the applicable law must necessarily be determined by linking the case to one or another of these states?

These objections are of course not unfounded. Indeed, it is helpful, and in many areas necessary, to consider which state is the author of a rule in order 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 know in which territory it applies. 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 private individuals 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. Thus, the very notion of “conflict of laws” prevents us to see why parties may select the applicable law. Only if we overcome the state-centered perspective, we will be able to embrace party autonomy.

### B. *When do Conflicts Arise?*

The idea that conflict of laws is a battle between states over the application of their laws has another ramification. This ramification is the modern trend in the conflicts literature that extends the field to all sorts of questions. Conflicts of laws are seen as arising everywhere, not only in private law, but in public law and criminal law as well. Increasingly, authors work in new fields, such as conflict

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105. See, e.g., ANTOINE PILLET, I TRAITÉ PRATIQUE DE DROIT INTERNATIONAL PRIVÉ 21 (1923); 1 ERNST ZITELMANN, INTERNATIONALES PRIVATRECHT 71 (1897). 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-SOMMIERES, LA COMPÉTENCE INTERNATIONALE DE L’ÉTAT EN MATIÈRE DE DROIT PRIVÉ (1997).

106. See *infra* Part III.D.

107. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971) (“The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state. . .”).

of criminal laws or conflict of administrative laws.<sup>108</sup> These “discoveries” are a direct consequence of the conception of conflict of laws as a battle between states. If one adopts this idea, conflicts can indeed not be limited to private law, because there is no reason why states should not fight about the application of their public and criminal law as well. Accordingly, the subject of conflict of laws is a universal problem. Every single case in the world would be preceded by the question: which law should be applied?

Of course, one cannot deny that such a view of conflict of laws is possible. But one must fear that it loses sight of the peculiarity of private international law. Conflict of laws in the traditional sense concerns only very specific circumstances. It applies when the parties to a dispute are private individuals, and when they are litigating over private law questions.<sup>109</sup>

To understand 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 such as the SEC, the court has no choice which law it will apply.<sup>110</sup> It always has to follow the law of its own state.<sup>111</sup> Similarly, a criminal court is not free to choose the applicable law.<sup>112</sup> It has to enforce the law of a certain state, its own state.<sup>113</sup> A constitutional court also has no choice but to apply the constitution of the state by which it was established.<sup>114</sup>

Of course, a foreign element can be involved in those cases as well. For instance, under the active personality principle, states can pursue crimes committed by their citizens in other states.<sup>115</sup> 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 (i.e., the state where the crime was committed) might also have an interest in applying their law to the case. Moreover, some legal systems specifically require the judge to take account of the

108. See, e.g., CARLOS ALBERTO ALCORTA, *I PRINCIPIOS DE DERECHO PENAL INTERNACIONAL* (1931); DIETRICH OEHLER, *INTERNATIONALES STRAFRECHT* (2d ed. 1983); EDWARD S. STIMSON, *CONFLICT OF CRIMINAL LAWS* (1936); 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) (discussing conflicts of public law regulations). Probably the earliest attempt to formulate conflict rules for administrative laws was completed by Karl Neumeyer. See KARL NEUMEYER, *INTERNATIONALES VERWALTUNGSRECHT* (1910).

109. See SCOLES ET AL., *supra* note 12, at 2 (underlining that the word “private” in “private international law” signifies that only private-law disputes fall within the scope of conflict of laws).

110. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 311–331 (1934) (missing a provision allowing parties to choose the governing law).

111. *Id.*

112. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) (failing to address conflict of laws with respect to criminal cases).

113. *Id.* (failing to address conflict of laws with respect to criminal cases).

114. *Id.* (failing to address conflict of laws with respect to state constitutions).

115. See, e.g., OEHLER, *supra* note 108, at 70–71.

punishability or the sanction provided under foreign law when determining the sentence.

In reality, legal regimes overlap in many areas and the scope of application of a particular national law is an issue that arises frequently.<sup>116</sup> But the typical conflicts question is different. It is not a question of how far we should extend our own law or whether we should take other laws into consideration. Rather, it is a question of whether the judge should apply the law of state X or state Y in the first place.

This is a totally different perspective. In private law situations a “choice of law” is possible, a term that has therefore been used to designate the whole field of conflict of laws.<sup>117</sup> A “choice” over the applicable law exists only in private law situations, for two kinds of persons: the parties, or a judge. The freedom to choose the applicable law is typical for private law, because when a private dispute presents foreign elements, it is conceivable to apply a law other than the law of the forum. In contrast, questions of the applicable legal system are rarely relevant in the context of public and criminal law.

The peculiarity of the private law situation is further illuminated by another term used to describe the problem of conflict of laws, the “transient cause of action.” A transient cause of action is one that may be prosecuted anywhere and any court can examine it, provided its conditions for jurisdiction are fulfilled.<sup>118</sup> 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.<sup>119</sup> Paradigmatic examples of local causes of actions are crimes and claims of a public-law nature. The transient cause of action, on the other hand, is a typical private law claim. It may be subjected to the same law irrespective of the tribunal that is deciding on it. Indeed, the application of the same law independently of the competent tribunal is a major, if not *the* major goal of conflict-of-laws theory. One way to ensure it is to follow the principle of party autonomy.

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116. 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. Yet, this view is defended by some authors. *See, e.g.,* VAREILLE-SOMMIÈRES, *supra* note 105, at 19-107 (claiming that the subject of conflict of laws would be to determine the frontiers between different national laws, i.e. conflict of laws would be a “Grenzrecht”).

117. *See, e.g.,* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (spec. ed. 2005) (using the term “choice of law” as the title of a book on conflict of laws).

118. CURRIE, *supra* note 2, at 316; *see also* Slater v. Mexican Nat’l Ry. Co., 194 U.S. 120, 126 (1904) (using the expression “the theory of foreign suit”).

119. *See* CURRIE, *supra* note 2, at 312 (“[B]ecause of the history and forms of the common law, there are certain actions that are safely brought only in a particular locality. These are called local actions . . .”).

### C. *Why Do We Apply Foreign Law?*

The foregoing raises the problem why judges and parties have a choice over the applicable law in private law cases. By phrasing the question in a slightly different way, the question becomes one that is often discussed in conflicts theory: Why do we apply foreign law?

The proponents of the battle-of-states theory can give an easy answer to this question is: because the legislature says so. For them, the judge of state A applies the law of state B only if the legislator of state A has told him or her to do so. In the legal war between nations, the legislator defines both the power and the limits of its judges' ability to apply foreign law. This view is in line with positivism, which sees law as a command by the lawgiver.<sup>120</sup> If a judge is an organ of the state—and there seems to be no doubt about that—he or she can apply foreign law only because the lawgiver has said 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-laws rules.

The positivist view can, of course, hardly be attacked from the normative viewpoint. However, 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.<sup>121</sup> The starting point of modern conflict of laws seems to have been a comment to the *Codex Iustiniani* by the Glossator Bartolus.<sup>122</sup> Through writers like Savigny and Story, the application of foreign law became a basic tenet of judicial practice.<sup>123</sup> In contrast, conflict of laws has never been an area of legislative hyper-activity.<sup>124</sup> Indeed, legislation and choice of law have often been described in “antithetical terms.”<sup>125</sup> Even in countries which tend to codify every

120. See, e.g., JOHN AUSTIN, *Lectures on Jurisprudence: The Philosophy of Law* 15 (1875).

121. See SCOLES ET AL., *supra* note 12, at 18 (stating that the first American cases cited Ulrich Huber's ideas on comity and Joseph Story's *Commentaries on the Conflict of Laws*).

122. JUENGER, *supra* note 117, at 11; SCOLES ET AL., *supra* note 12, at 10. Yet, there is also evidence for much earlier conflicts solutions. See JUENGER, *supra* note 117, at 10 (citing examples from Greek Antiquity); SCOLES ET AL., *supra* note 12, at 9 (same).

123. SCOLES ET AL., *supra* note 12, at 16–19.

124. ROBERT A. LEFLAR, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 951 (1977).

125. SYMEON C. SYMEONIDES, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 79 (2001); see also CURRIE, *supra* note 2, at 84 (“Most likely, the reply would be that such questions belong to the realm of conflict of laws, and are for the courts to determine. . . . It simply means, in this case, that the legislature has not thought about the matter, and does not want to think about it.”).

area of the law, conflicts situations are often not exhaustively regulated.<sup>126</sup>

But regardless of whether it is the judge or the legislator that is responsible for the application of foreign law, one fundamental problem remains: why does one state apply the law of another at all? Two answers have routinely been given.

The first is comity of nations: foreign law is applied for purposes of “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, a view to which both Story and Savigny subscribed.<sup>127</sup> In this regard, they relied on the opinion of the Dutch Jurist Ulrich Huber.<sup>128</sup> Huber 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.<sup>129</sup> 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.<sup>130</sup> Moreover, it underlies requirements of reciprocity in the application of foreign law, the recognition of foreign judgments,<sup>131</sup> and also such modern approaches as the governmental interest analysis.<sup>132</sup>

Again, this view superimposes state-relations over private relationships. What counts is only the gesture towards the other sovereign. While we are not bound to apply another state’s law, we

126. See, for instance, French law.

127. See SAVIGNY, *supra* note 1, § 348; STORY, *supra* note 977, § 38.

128. ULRICH HUBER, *DE CONFLICTU LEGUM IN DIVERSIS IMPERIIS*, reprinted in SAVIGNY, *supra* note 1, app. IV. Huber, in turn, could draw on the work of PAUL VOET, *DE STATUIS EORUMQUE CONCURSU*, sec. IV cap. II no. 17, reprinted in SAVIGNY, *supra* note 1, app. III, who also used the term “comity” (*mores comiter*).

129. The first and the third of Huber’s three maxims are translated in *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 (1797).

130. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“The extent 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.’”); *Huntington v. Atrill*, 146 U.S. 657, 669 (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.”); *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 173 (N.Y. 1975) (“Laws of foreign governments have extraterritorial jurisdiction only by comity.”).

131. 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 judgments, 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, 92–93 (2005). However, requirements of reciprocity are generally in retreat. See *id.* (noting that negative reciprocity is much more common now and that the National Conference of Commissioners on Uniform State Laws drafted legislation to reduce requirements of reciprocity).

132. See CURRIE, *supra* note 2, at 184 (“Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none.”).

do it for the sake of good relations with the other country. We want to have “peace” with the others, therefore we respect their legal system.

But is the relationship with other states really the reason why we apply its law? There are certainly areas where concern for bilateral relations and cooperation with other states influences the choice-of-law process. One example is when a court applies the provisions of another state on public policy issues. This situation is special because it touches upon basic interests of the foreign state that necessitate such a policy weighing.<sup>133</sup> However, it has been argued that a state would take a considerable interest in other private cases as well, as exemplified by the fact that states sometimes file *amicus curiae* briefs in private litigation.<sup>134</sup> Indeed, one may think of only one interest that a foreign state might have in such cases: an interest in having one of its citizens prevail. Precisely for that reason we should ask ourselves whether it is wise to pay deference to the state’s demand for the application of its law. Should the law not be something more neutral or more independent of the rule maker? How can we accept that a legislator takes the side of one party in litigation? Paradoxically, in many cases it is exactly the special interest of a state in the outcome of litigation that should lead us to disregard its plea for application of its law.

Another way to justify the application of another state’s law is to think of foreign law as fact. This view was mainly developed in procedural law because in many countries the judge informs himself about foreign law as he would about questions of fact.<sup>135</sup> However, this approach also has an effect on the choice of the applicable law itself. The theory of vested rights is based on the idea that rights are facts that are created in other countries and therefore have to be respected as such by the forum.<sup>136</sup> The theory has influenced both

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133. See ROME CONVENTION, *supra* note 38, art. 7(1) (“In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”); Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht [IPRG] [Swiss Private International Law Act], Dec. 18, 1987, SR 291, art. 19 (allowing the application of foreign mandatory law if required by the interests of one party that are worthy of protection and outweigh the interests of the other side).

134. See SYMEONIDES, *supra* note 12525, at 21–22 (pointing to the possibility for a state to file an *amicus* brief in a private-law dispute using the example of *Hartford Fire Insurance Co. v. California* (citation omitted)).

135. 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. See *Zivilprozeßordnung* [German civil procedure statute], Jan. 30, 1877, RGBI 83, § 293; 1 DICEY & MORRIS, *supra* note 32, at 227, ¶ 9-002 (indicating that the method is used in England).

136. See *Slater v. Mexican Nat’l Ry. Co.*, 194 U.S. 120, 126 (1904) (granting a claim brought under Mexican law on the theory that “although the act complained of

the interpretation and the application of foreign law. For instance, it is often said that foreign law must be applied as it is interpreted in the system of origin.<sup>137</sup> According to this view, the judge should behave exactly the same way in which a judge of the other state would behave.<sup>138</sup> The goal is to reach the same result regardless of where the transient cause of action is adjudicated.

Although it may not be as obvious, this view is also influenced by considerations of international relations. To understand how, it is important to consider the notion of a “state” in international law. It is a commonplace in international law doctrine that we will not inquire into the legitimacy of a state for purposes of recognizing the state.<sup>139</sup> For a state to exist, it is sufficient (1) that a government is ruling effectively over a certain territory and a people, and (2) that the government has at least the capacity to engage in relations with other states.<sup>140</sup> This theory has spread into conflict-of-laws because we accept the foreign law (within the limits of public policy) as it effectively governs a state’s territory and its people without considering the character of the regime that enacted it.<sup>141</sup>

The advantage of the theory is that it frees the choice-of-law question from politics. It disregards 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

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.”); JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 105 (1916). On the theory of vested rights, *see also* *infra* note 143 and accompanying text.

137. *See, e.g.*, *Hughes Electronics Corp. v. Citibank Delaware*, 120 Cal. App. 4th 251, 263–65 (Cal. Ct. App. 2004) (paying deference to the attitude of the New York Court of Appeals in applying New York law).

138. *See, e.g.*, *KEGEL & SCHURIG*, *supra* note 1, at 506 (noting that case law of another state has to be followed to the same extent by the court as it would have been followed by the courts of the other state).

139. *See infra* note 140 and accompanying text.

140. *See* RESTATEMENT (THIRD) OF 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*, for example, ANTONIO SANCHEZ DE BUSTAMENTE Y SIRVEN, I DERECHO INTERNACIONAL PUBLICO 154–55 (1933). For the second view, *see*, for example, I OPPENHEIM, *supra* note 96, at 125. 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. *Id.* at 127; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 (1987).

141. For instance, U.S. courts have traditionally withstood any attempt to inquire into the legitimacy of acts of other governments in conflicts situations, even if it was a hostile regime. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (on Cuban expropriations); *Bernstein v. Van Heyghen Frères S.A.*, 163 F.2d 246, 248–49 (2d Cir. 1947) (on a company transfer forced by Nazi officials).

regulatory function. It says how things should be, not how they are. It is therefore wrong to suppose that a court following foreign law in a specific case is merely taking a foreign fact into consideration that already exists in the other state; rather, the court is applying that law. If a state renders a decision based on foreign law, it follows the same intellectual process that it would if it were applying its own law. No decision is so easy as to avoid any question of interpretation; it would therefore be naïve to expect that a state could just look into the other legal system to obtain a mechanical answer. The judge that applies a foreign law always has to interpret rules and regulations as well as 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? The best answer comes from the often criticized author of the First Restatement, Joseph Beale. Beale stressed the need for continuity of the law.<sup>142</sup> 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—at least in the free world—not bound by state frontiers; 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 trans-border transactions, a legal dispute may be brought before a court that is located outside of the state where the all or some facts take place. Accordingly, it would contravene the interest of justice if the court did not recognize the legal relationship created or only considered the case under its laws.

It is thus not exclusively, and not even primarily, the foreign state or our interest in having good relations with it that makes us apply its law. Rather, it is the goal of doing justice, which is the ultimate aim of every legal proceeding. The term “justice” is certainly very blurry. It is used in this context to shift the focus from the states and their relations to the individuals who have a stake in the legal proceedings. Beale coined the term “vested rights” to capture the position of the private litigants.<sup>143</sup> This was an unfortunate metaphor because it portrays legal positions as facts occurring in one state and suggests that the other state has no choice but to recognize them.<sup>144</sup> However, the idea of vested rights was a reaction to the equally extreme “comity theory” that leaves the application of foreign law to the discretion of the state.<sup>145</sup> According to the latter theory, no

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142. 2 BEALE, *supra* note 46, at 46.

143. BEALE, *supra* note 13636, at 159; *see also* 2 BEALE, *supra* note 46, at 307.

144. In *Slater v. Mexican 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 supra* note 136.

145. *See supra* notes 127–13030 and accompanying text.

state would be obligated to recognize what has happened in another state.<sup>146</sup> In contrast, Beale's theory does not pose the application of foreign law as a matter of absolute discretion. What Beale was omitting, though, was to give a *legal* explanation for that result.

The real reason why a judge should apply the law of another state is to do justice to private citizens. This rationale also clarifies why private parties can renounce the application of a certain state's legal system and instead opt for another: *volenti non fit iniuria*.<sup>147</sup> Additionally, it 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 adhere 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.

#### D. Which Law Do We Apply?

The central question of conflicts theory is how to determine the applicable law. Several different methods have been developed to solve this quandary. In fact, there is not enough space in this Article to treat them all, but most of the methods used to determine the applicable law share a common characteristic: they are state-centered. This feature explains why the varying methods are unable to give party autonomy the role it deserves. A short overview over conflict theories will illustrate the problem.

Using the traditional method to solve conflicts, the judge has to apply the law of the state to which the legal relationship belongs or in which it has its "seat".<sup>148</sup> The functioning of this theory can be described as jurisdiction-selecting:<sup>149</sup> for every legal relationship there is a state which is competent. Private disputes are attributed to the jurisdiction of that state. The task of conflict of laws is thus to "discover" the right state. Of course this is not so easy because conflicts cases by definition have connections to different countries. The traditional method reacts to this issue by splitting up the legal relationship into a number of partial questions.<sup>150</sup> For instance, in a

146. See *supra* note 12929 and accompanying text.

147. "A person it is not wronged by that to which he or she consents." BLACK'S LAW DICTIONARY (8th ed. 2004).

148. See SAVIGNY, *supra* note 1.

149. See DAVID F. CAVERS, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933) ("... a court faithful to the conventional approach will turn in search of a conflicts of laws rule to determine the *jurisdiction* whose law should govern the question at issue.").

150. See, e.g., SYMEONIDES, *supra* note 12525, at 18 ("Rather than focusing on the conflicting laws and trying to ascertain their intended spatial reach, Savigny focused on categories of disputes or 'legal relationships,' and then sought to identify the

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 must be recognized by all other states. Since the applicable law is determined with universal validity, authors also speak of a “multilateral” approach to conflicts.<sup>151</sup> The parallel to public international law is clear: the methodology resembles the approach taken in international conventions such as the Peace of Westphalia or the Congress of Vienna, because the existence of different states is recognized and competences are attributed.<sup>152</sup> But what this multilateral approach cannot explain is why the parties 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 dispute?<sup>153</sup> The classic choice-of-law methodology is totally incompatible with such private freedom, which is why traditional theorists have been bewildered by the growing recognition of party autonomy.<sup>154</sup>

In contrast to the multilateral method of classic conflict theory, governmental interest analysis prefers a “unilateral” approach. It starts from the assumption that each state pursues interests in its lawmaking.<sup>155</sup> In a case where only the interests of one state are concerned, there is no conflict or a “false conflict,” and the law of the interested state has to be applied.<sup>156</sup> 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.<sup>157</sup> It is claimed that this theory is more realistic than the traditional one, but again, the theory is exclusively built around the idea of state relations. The issue of conflicts becomes the subject of a power game between states fighting for their interests. Of course, it is true that “states’ interests” are

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state in which each relationship had its ‘seat,’ or in whose legislative jurisdiction it ‘belonged.’”).

151. *Id.*

152. See DANA MICHAEL HOLLYWOOD, *It Takes a Village . . . or At Least a Region: Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions*, 19 FLA. J. INT’L L. 75, 80–81 (2007) (describing the Peace of Westphalia).

153. See *supra* Part II.A.

154. See *supra* Part II.B.

155. See CURRIE, *supra* note 2, at 189.

The court should then inquire whether the relationship of the forum state to the case at bar . . . is such as to bring the case within the scope of the state’s governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.

156. *Id.* at 107, 163, 189.

157. *Id.* at 119.

more often than not interests of individuals that are protected by the state.<sup>158</sup> Even the parties' interest in enforcing contractual agreements can be apprehended as an interest of the state in this sense.<sup>159</sup> However, does a court really care for the interests of a foreign state when it, for example, 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 conflicts between states. Yet, more and more, states themselves are paying deference to the individuals' choice of law. This embarrasses interest analysis: why can the result of the power game between states be changed by a simple agreement between private parties? How may all-important state preferences for certain interests be trumped by ordinary individuals? Interest analysis 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, which are 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 the applicable rule for each, and finally in the case of a conflict, to apply the law of the "jurisdiction predominantly concerned."<sup>160</sup> If there is irreducible conflict between several concerned jurisdictions, they suggest a policy-weighting, which 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.<sup>161</sup> This theory is completely focused on the state; it leaves no room for the individual and its freedom to choose the applicable law.

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158. See *id.* at 85 (describing legislators' weighing of different constituents' interests before deciding upon a state policy).

159. See, e.g., *Bernkrant v. Fowler*, 55 Cal. 2d 588, 594–95 (Cal. 1961) ("We have no doubt that California's interest in protecting estates being probated here from false claims based on alleged oral contracts to make wills is constitutionally sufficient to justify the Legislature's making our statute of frauds applicable to all such contracts sought to be enforced against such estates.").

160. See ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76–77 (1965).

161. *Id.* at 376–92.

Weintraub's consequence-based approach equally focuses on the conflict between states.<sup>162</sup> Under this approach, it is necessary to analyze whether the policies pursued by a state are "real" and then to examine justifications for the policies in light of the consequences that may be experienced by the state while pursuing them.<sup>163</sup> Weintraub includes the interests of the parties only as a last reference by checking whether the application of a particular state's law would be "fair" to the individuals involved.<sup>164</sup> This equity determination should be made in relation to the number of contacts the parties have with the state whose law requires application.<sup>165</sup> But Weintraub ignores that the application of a state's law may be "fair" even if there are no contacts to that state simply because the parties have chosen to submit to the state's law.

Similarly, of the five choice-influencing considerations developed by Leflar, three concern the state or state relations.<sup>166</sup> 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.<sup>167</sup> However, his overall opinion is that predictability is not "the major consideration" and that other arguments have to be applied in many cases.<sup>168</sup> Although Leflar's famous "better law" consideration<sup>169</sup> is designed to achieve "justice," he assumed this could be done only on a case by case basis. Accordingly, he closed his eyes to the possibility of doing justice to the parties by applying general principles like party autonomy.

In turn, the rights-based approach of Lea Brilmayer transfers models from political theory and constitutional law to conflict of laws.<sup>170</sup> This approach is especially state-centered because it views the choice-of-law problem as residing in the relation between the individual litigant and the judge.<sup>171</sup> The litigant should have a "right" that a certain law is applied or not applied, which is directed against the state and its organs, rather than against the other

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162. RUSSELL J. WEINTRAUB, *An Approach to Choice of Law that Focuses on Consequences*, 56 ALB. L. REV. 701 (1993).

163. *Id.* at 705–10.

164. *Id.* at 711.

165. *Id.*

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

167. *Id.* at 283.

168. *Id.* at 285.

169. *Id.* at 296.

170. LEA BRILMAYER, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989).

171. *Id.*

party.<sup>172</sup> Although Brilmayer mentions consent as a justification for the application of a certain law, she thinks it is relevant only in the relationship between the litigant and the state.<sup>173</sup> However, in agreeing to a choice-of-law clause, a litigant provides his or her consent to the other party rather than to the state. Indeed, if the consent is induced by fraud, the agreement is invalidated independently of whether the state is involved in the fraud or did know of it. Furthermore, Brilmayer neglects that private choice of law is relevant in contexts other than dispute resolution in state courts, like arbitration or simple contract fulfillment. The chosen law applies because the parties have agreed to it, regardless of whether a judge intervenes or not. Hence, party autonomy has importance first and foremost in the horizontal relationship between the parties, not in the relationship between the state and the individual. The judge that applies the law chosen by the parties does not “coerce” one party, but simply gives force to the parties’ agreement.

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.<sup>174</sup> Nevertheless, he has serious doubts about this canon and only advances it “tentatively”.<sup>175</sup> He submits party autonomy to the condition that there must be a “potential for true conflict”, but even under such circumstances, parties may only choose a normally applicable law.<sup>176</sup> This Article has already demonstrated that modern legislation has largely bypassed this restriction.<sup>177</sup> Kramer justifies the limitation by arguing that a state has no reason to forgo the application of its law other than to accommodate the applicable law of another state.<sup>178</sup> Significantly, the idea that a state could also want to accommodate the parties does not play a role in his theory.

From the foregoing, it has become clear 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 competencies? How can their intentions be more important than the states’ interests in a

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172. *Id.* 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).”).

173. *Id.* at 1298.

174. KRAMER, *supra* note 4, at 329.

175. *Id.*

176. *Id.*

177. *See supra* Part II.A.

178. KRAMER, *supra* note 4, at 329.

large field of the law? This puzzle has never been resolved because all conflict theories are based on the same mistaken foundation: they focus on international relations and treat the individual as a mere pawn in a battle between states.

#### IV. A THEORETICAL JUSTIFICATION FOR PARTY AUTONOMY

##### A. *Individuals 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 for the application of their respective laws. It is important to move beyond that idea and instead think about when and why conflict problems start in the first place: conflicts of laws begin with a dispute between individuals.

In order to elaborate this idea, we need to reconsider the classic view of choice of law. It can be summarized as follows: every single event in the world is governed by a certain legal system. This legal system can be determined objectively. The problem, of course, is that there may be different legal systems demanding their application. From the classic viewpoint, the result is a competition between states. The applicable law must be decided from an inter-national perspective, by delimiting the respective sphere of the competencies of the different legislators. Since laws govern situations objectively, there is no way that the will of the parties could influence the outcome. Individuals are submitted to the law, and they do not have a say in when and where it applies. Giving private persons the power to select the applicable law would mean that they could choose the rules to which they are submitted. That seems counterintuitive. For any lawyer that takes the primacy of the law over the individual's will seriously, it is plain to see that the applicable law cannot be determined by a private decision.

In contrast to this classic view, this Article suggests a counter-concept that is able to account for party autonomy. It relies on the following propositions: the origin of the conflicts problem is not a battle between states, but lies instead in the private sphere. Typically, the question of the applicable law arises with regard to private situations such as contractual negotiations or litigations. If state actors are in any way involved, very different questions are raised that are solved in a distinct fashion.<sup>179</sup> That means that conflict of laws in the traditional sense, and the sense that this

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179. See the examples taken from criminal and public law *supra* Part III.B.

Article addresses, exist primarily between private individuals.<sup>180</sup> It is the individuals who will feel the consequences of the application of a particular law, and it is their interests that are most directly concerned by the outcome of the dispute. If we consider the issue of conflicts in this way, it is only natural that the parties can choose the applicable law. They must be able to fashion their relationship the way they like. Only a very legalistic and state-centered perspective can assert that conflicts of laws should not be influenced by individuals. Such an approach assumes that the scope of application of national laws is fixed and that there is no room for private decision-making. However, the problem of today's world is that there are a number of laws that demand their application. From a legal perspective, too many contradictory rules with equal right to be followed create a void. Thus, we are back in a state of nature, or more precisely, in a "modern state of nature," where there is no objectively applicable law – paradoxically because of an abundance of law. In this context, the parties regain their residual power to regulate their relationships.<sup>181</sup> Party autonomy means nothing more than that people can take care of their own affairs.

That does not amount to saying that the parties would enthrone their will as a source of law, as the above mentioned provision of the French Civil Code suggests.<sup>182</sup> The concept advanced here has nothing to do with creating a private law, and it does not collide with the state's monopoly to legislate. Party autonomy refers to the power of the individual to choose between different national laws, but that choice has to be made among existing laws. Additionally, the theory does not consider the possibility of choosing an a-national law, a kind of "new law merchant" or *lex mercatoria*.<sup>183</sup> The rules that can be chosen under party autonomy are, in the first place,<sup>184</sup> only laws that are made by states. Through party autonomy, private individuals do not regain the power of self-legislation, only the power to adopt the appropriate existing legislation.

The main argument made here is that the outcome of conflict-of-laws issues mainly concern individuals, not states. The states themselves have understood this point better than theory. That is why they have allowed individuals to choose the applicable law in many cases. This has not caused them any theoretical headaches. On the contrary, it is totally in line with the purpose of the conflicts

180. For the sake of clarity and brevity, the Author is leaving aside the case in which a state behaves like a private individual. What can be said, though, is that if a state enters into a choice-of-law clause with a private person, the agreement would have to be treated along the same lines as one between private individuals.

181. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 3–9 (1974) (discussing regulation in the absence of a state).

182. See *supra* note 53.

183. See *supra* note 78.

184. For an extension, see *infra* Part V.A.

mechanism from the practical perspective. As we have seen, the application of another state's law is a pragmatic solution that serves primarily the interests of the individuals involved.<sup>185</sup> Only the application of another state's mandatory rules of law can be considered as a favor to another state and therefore is subject to a policy weighing.<sup>186</sup> 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 to favor the parties or one party involved in the dispute. Since the whole application of a foreign law is designed to serve the interests of individuals, there is no reason why they should not be able to decide themselves on the applicable legal regime. Nonetheless, from a doctrinal perspective, this requires a major paradigm shift. Party autonomy can only be justified if one ignores the state relations that have so far been the focus of the classic theory. One needs to accept 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 predicting the outcome of the choice-of-law process so as 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.<sup>187</sup> 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.<sup>188</sup> The crucial question is why the state allows private individuals to disregard the otherwise

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185. See *supra* Part III.C.

186. See *supra* note 13333 and accompanying text. However, it has to be noted that the provision of Swiss law cited there does not allow the application of foreign mandatory rules on the grounds that the state that enacted them has a particular interest in the case. Instead, the Swiss provision refers exclusively to the interest of one of the parties involved. Thus, even the application of mandatory rules of another state can be justified by the interests of the individual.

187. 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). For the contrasting view that economic analysis justifies contract law by considerations of efficiency, see, for example, 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 such as family law. For an overview of the philosophical foundations of contract law, see JOSEPH M. PERILLO & JOHN D. CALAMARI, *CALAMARI AND PERILLO ON CONTRACTS* 6–12 (5th ed. 2003).

188. See *supra* note 39 and accompanying text.

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 so and to instead give the parties the liberty to choose which justice fits their relation best.<sup>189</sup> By adopting a rule of party autonomy the state makes the choice-of-law process independent of international relations and lays it in the hands of private parties. No longer will state interests or state preferences for certain policies determine the applicable law. Instead, it is the parties themselves that decide which law is to be followed. 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 decades,<sup>190</sup> there remain many areas in which states exclude the parties' freedom to choose the applicable law. Interestingly, the field of contract law in which party autonomy is most universally restricted is consumer law.<sup>191</sup> In consumer law, 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: cases in which the states take a predominant interest. A classic example is antitrust law. In this field, the interests of the community at large supersede the interests of the parties to a transaction. 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.<sup>192</sup> In the area in which party autonomy is excluded, the legislator gives clear commands to the judge which law to apply. The judge's role resembles here less to that of an arbitrator committed to the idea of justice, and more to that of an administrative 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 with suspicion.<sup>193</sup>

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189. See *supra* note 73.

190. See *supra* Part I.A.

191. See U.C.C. § 1-301(e) (2004); ROME CONVENTION, *supra* note 38, art. 5; ROME I REGULATION DRAFT, *supra* note 38, art. 6; see also UNIF. COMPUTER INFORMATION TRANSACTIONS ACT § 109(b)(2) (1999); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971).

192. See *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 637 n.19 (1985) (noting that the Court would not accept the circumvention of U.S. antitrust law by a combined choice-of-forum and choice-of-law clause).

193. See the famous axiom that "The Courts of no country execute the penal laws of another." *Huntington v. Attrill*, 146 U.S. 657, 666 (1892); *The Antelope*, 23

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.<sup>194</sup> 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 do not like a law, they are allowed to exclude it by a simple sentence. From this, it can be reasonably concluded that the state itself considers the public interests served by the law to be secondary to the goal of accommodating the parties bound in a conflict of laws. Underlying this attitude is the realization that in such disputes, the most important variable is the individual and his or her needs and expectations. Any parochial considerations based on state interests have to stand behind.

### B. *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 place in the conflicts system than it was thought before. The individual is recognized as an actor in choice of law, and his or her 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.<sup>195</sup> But conflict of laws differs from international law. While the latter acknowledges the existence of a person with individual rights, the former focuses on the person's freedom to choose the applicable legal regime.

This freedom is a necessary expression of individual autonomy. In fact, the word "autonomy" in Greek translates to the phrase "to give oneself a law."<sup>196</sup> By adopting the principle of party autonomy, the legislator –consciously or unconsciously– recognizes the

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U.S. (10 Wheat.) 66, 123 (1825). *See also* Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (indicating hesitations in applying foreign tax law).

194. *See supra* note 13434 and accompanying text.

195. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 65 (6TH ED. 2003); PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 147–49 (2d ed. 1993); KNUT IPSSEN, VÖLKERRECHT 95–96 (5TH ED. 2004); HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27–47 (1973).

196. MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 148 (3d ed. 1993).

fundamental principle of private autonomy in choice of law.<sup>197</sup> No longer is choice of law an abstract, “value-free” discipline, as it was often described in the literature.<sup>198</sup> Instead, it is acknowledged that one of the goals of the conflicts-of-law process is to serve the individual.<sup>199</sup> The person, as an autonomous being with its own preferences, is put at the center of choice of law. This is in line with the goal of all law from an individualistic perspective, according to which the purpose of legal rules should be oriented towards the individual, not the state. For philosophical support, one could cite authors like Kant,<sup>200</sup> Hayek,<sup>201</sup> or Nozick.<sup>202</sup> Party autonomy can also be justified from a Rawlsian perspective, because choice-of-law clauses adopted at the time of the conclusion of a contract resemble the agreement on the applicable rules under the veil of ignorance.<sup>203</sup>

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’ laws will also often restrict party autonomy significantly.<sup>204</sup> Even in western states, we have numerous exceptions to the liberty of the individual to choose the applicable law.<sup>205</sup>

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197. See, e.g., FRIED, *supra* note 187 (discussing freedom as the basis of contract law).

198. See JUENGER, *supra* note 11717, at 185.

199. This position was far from being accepted in the old literature on choice of law. For an early criticism of individualism in conflicts of laws, see HENRI BATIFFOL, *ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ* 70–77 (1956) (arguing that because an individualist conception of law is inherently subjective, such a conception subverts the purpose of law, particularly in the context of conflict of laws).

200. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

201. 1 FRIEDRICH AUGUST HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973).

202. NOZICK, *supra* note 181.

203. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 136–41 (new ed. 2005).

204. Many states put restrictions on foreign investment. See Jessica Zoe Renwald, *Foreign Investment Law in the People’s Republic of China, What to Expect From Enterprise Establishment to Dispute Resolution*, 16 *IND. INT’L & COMP. L. REV.* 453, 461–466 (discussing restrictions and establishment procedures for foreign investment in China); Van v. Mejia, *The Modern Foreign Investment Laws of the Philippines*, 17 *TEMP. INT’L & COMP. L.J.* 467, 484 (2003) (discussing a negative list for foreign investment in the Philippines); Matias F. Travieso-Diaz, *Foreign Investment in Cuba: Prospects and Perils*, 35 *GEO. WASH. INT’L L. REV.* 903, 908–09 (2003) (mentioning restrictions and impediments to foreign direct investment in Cuba).

205. See *supra* Part I.

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 a legislator from doing 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 state's continuing power to restrict it. Yet, it remains that party autonomy is the most universally recognized conflict-of-laws principle.<sup>206</sup> It is this acceptance in national law that gives the principle its particular thrust.

### C. *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 such as public international law, where a third kind of law has been discussed under the heading "soft law."<sup>207</sup> In conflicts, due to the recognition of party autonomy, we can find other kinds of legal rules. While these rules cannot be deviated from in a national context, they are subject to the parties' choice from an international perspective. Significantly, they are different from rules of international public policy, which are always binding and whose application cannot be circumvented by a choice-of-law provision.<sup>208</sup> The distinction between these two types of rules is explicitly recognized in European law.<sup>209</sup> The distinction has also found its way into U.S. legislation.<sup>210</sup> Rules that cannot be deviated from in a

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206. See *supra* Part II.A.

207. See, e.g., ULRICH FASTENRATH, *Relative Normativity in International Law*, 4 EUR. J. INT'L LAW 305 (1993); JOSEPH GOLD, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983); see also COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

208. See *supra* notes 191191–193.

209. Cf. ROME CONVENTION, *supra* note 38, arts. 3(3), 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. See also ROME I REGULATION DRAFT, *supra* note 38, art. 9 (using the term "overriding mandatory provisions", and requiring that the respect for them must be "regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation").

210. See U.C.C. § 1-301(f) (2004) (introducing the notion of a "fundamental" policy of a state as the only limit to party autonomy); *id.* § 1-301(f) cmt. 6 (distinguishing between legal rules that are mandatory in national law and laws that

national case but that may be opted out of at the international level may be referred to as “relatively mandatory.” They are “relatively” mandatory because they are absolutely binding from the internal point of view, but can be deviated from at the outer level. To better understand relatively mandatory rules, it may be useful to consider them by analogy to the human system of language.

One can describe language as a system of symbols through which persons can communicate.<sup>211</sup> Each language contains a number of phonological, morphological, semantic, and syntactic rules.<sup>212</sup> These rules determine how the sounds can be put together, how words can be made from morphemes, how meaning can be expressed through words, and how words can be combined to create sentences.<sup>213</sup> 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.

The parallel between law and language is underscored by another point. Consider how languages are employed. Generally, they apply within a particular territory. Within their territorial delimitation, languages resemble the law according to the traditional theory that is based on the notion of territorial sovereignty.<sup>214</sup> However, territory and the use of a language do not completely overlap. Nor is there complete overlap between territory and the applicability of a certain law, if one is taking account of the parties’ ability to choose the legal system.

There are a number of other fascinating similarities between law and language, such as the possibility to choose a “neutral” law or language and the striking preference for Anglo-American law and the English language in international commerce.<sup>215</sup> What is important here is that law and language 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 you are in the system.

cannot be deviated from through a choice of law); *see also* SCOLES ET AL., *supra* note 12, at 961–63.

211. JOHN LYONS, *INTRODUCTION TO THEORETICAL LINGUISTICS* 50 (1969); BRUCE L. PEARSON, *INTRODUCTION TO LINGUISTIC CONCEPTS* 4 (1997); EDGAR STURTEVANT, *A DEFINITION OF LANGUAGE*, IN: *PERSPECTIVES ON LANGUAGE* 5 (John A. Rycenga & Joseph Schwartz eds., 1963). *See generally* FERDINAND DE SAUSSURE, *COURS DE LINGUISTIQUE GÉNÉRALE* 23-27 (Charles Bally & Albert Sechehaye eds., Payot 1955) (1916) (defining “language” generally).

212. PEARSON, *supra* note 21111.

213. *Id.* at 9–12; LYONS, *supra* note 21111, at 50.

214. *See supra* Part III.D (discussing the traditional conflicts theory).

215. *Id.*

However, whether you use one or the other system is up to a private, individually made choice, which is not restricted by any connections to your location. Law and language can therefore both be referred to as relatively mandatory systems.

As a basic characteristic of relatively mandatory rules, it has already been suggested that they are optional from an outer perspective. From this characteristic, another crucial feature can be derived: the choice of relatively mandatory rules has no connection whatsoever to the power of the rules' drafter. The classic viewpoint, which treats conflict of laws as a battle between states, logically leads to the consequence that the state's power extends to contracts which have been submitted to its law.<sup>216</sup> However, in reality, 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 considered in the figurative sense to be the “author” of the Italian language—does not get any authority over a communication simply by the fact that the participants talk Italian. Similarly, the parties' choice of Italian law does not give the Italian state an authority over those parties that the state did not have before. The authority of the rulemaker is thus not affected by a private choice of its rules. Party autonomy does not mean to assign a case to the authority of the state that has enacted the rules, but rather to use the rules without extending the state's authority. Where private choice works, the international distribution of competencies between the states is left untouched.<sup>217</sup> This is just a more complicated way of saying that party autonomy is not the deciding factor in a battle between states over their respective competencies. Yet, the point made has important consequences for the practical application of party autonomy, which will be demonstrated later.<sup>218</sup>

#### D. *The Condition for Party Autonomy*

Party autonomy, like every rule, has its restrictions. As said from the outset, this Article does not focus on the limits that are drawn to the principle by public policy.<sup>219</sup> Those limits exist, and most of them are defined by each state in its own, peculiar way. There is, however, a fundamental condition that is necessary in order for party autonomy to apply, which is the same all over the world: the case must have the potential of being subject to the laws of more than

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216. See, e.g., CALEB, *supra* note 1022, at 56 (arguing that to say a national law is applicable to a legal relationship would equal a determination of the sphere of the sovereign that has enacted the law).

217. See *infra* Part V.

218. *Id.*

219. See *supra* Part I.

one state.<sup>220</sup> If there is no choice-of-laws dimension, parties are not allowed to discard the mandatory law of their jurisdiction.<sup>221</sup> They are, of course, free to incorporate the law of another state into their agreement.<sup>222</sup> However, such a choice does not implicate a conflicts rule; instead, it is a pure case of freedom of contract under national law.<sup>223</sup>

Thus, before applying the rule of party autonomy, one must first ask whether two legal systems are potentially applicable to the problem. Now one may ask whether this inquiry implicitly legitimizes the state-centered view of conflicts (i.e., that every conflicts problem arises from a battle between states over the application of their respective legal rules).<sup>224</sup> The answer is that party autonomy is, indeed, based on the divergence between 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.

An additional concern may be: when is a case sufficiently international to justify party autonomy? This is an important question. As a starting point, it may be helpful to think of a purely domestic case. One might identify a case as purely domestic because it does not have contacts to any other state. But are there really any 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 drafted on a computer that was manufactured in China or Malaysia.<sup>225</sup> For this reason alone, we would not call the sale an “international transaction.” There is a contact to another jurisdiction—we just do not consider it an important one. What this hypothetical exemplifies is that almost all cases in the world have links to more than one state.<sup>226</sup> 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 we

220. See *infra* note 227 and accompanying text.

221. A counterexample seems to be the UCITA, which allows parties to choose foreign law also in “domestic” transactions. UNIF. COMPUTER INFORMATION TRANSACTIONS ACT § 109 (1999); see WOODWARD, *supra* note 36, at 738. However, the computer information transactions covered by UCITA are characterized by the fact that they have no situs. UNIF. COMPUTER INFORMATION TRANSACTIONS ACT § 109. 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.

222. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971). For a discussion of the provision, see *supra* note 57 and accompanying text.

223. See *supra* note 57 and accompanying text.

224. See *supra* Part III.

225. For similar examples used in the literature, see FERNÁNDEZ ROZAS & SÁNCHEZ LORENZO, *supra* note 1, at 49–50.

226. *Id.*

would seriously think about applying the law of state A or B.<sup>227</sup> It follows that the question of when a choice-of-law question is raised cannot be answered with absolute certainty. It depends on how one values 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. However, party autonomy shares this insecurity with the whole discipline of conflicts. There is simply no precise criterion to determine when there is a “conflict of laws.”<sup>228</sup> We can live with this problem, because we intuitively know in most cases whether there is a conflict or not. In the borderline cases, each legal system must decide whether the insecurity about the applicable law is significant enough to raise the issue of 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. 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 a solution 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.

In principle, there is no limit to the individual’s power to choose the applicable law as long as the relevant questions merely concern the individual and do not implicate any third parties. The earlier discussion of the growing extension of party autonomy in national laws supports this assertion.<sup>229</sup> There is therefore no reason, at least not on the theoretical level, to exclude areas such as tort law or unjust enrichment from the ambit of party autonomy. There is also no reason to exclude the formation of the contract itself from the possibility of private choice of law.<sup>230</sup> At first glance, it may seem circular to allow the parties to agree on the rules under which their agreement is to come into existence. In reality, however, there is no such contradiction. Since there is usually no single law that could demand its application on the validity of the agreement, it makes sense to allow the choice of rules under which such validity is to be determined. There are too many nuts, bolts, and screws that the parties could not have foreseen and that should be resolved under a law that they have chosen. Choice of law may even concern the

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227. See *supra* Part II.B.

228. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) (referring to events and transactions “that may have a significant relationship to more than one state”, but leaving open when this is the case).

229. See *supra* Part II.A.

230. See *supra* note 44 and accompanying text.

question whether there was an agreement at all, as long as the choice of law is supported by a minimum of mutual consent.<sup>231</sup> The same could be said with regard to other rules of contract formation such as the parole evidence rule.<sup>232</sup> They all are part of a certain national law. Because there is no national law that would be objectively applicable, one can select and deselect these rules.

Since the question of contract formation can be governed by the chosen law, one could even submit the capacity of the parties to contract to the chosen law. This is the solution of the Second Restatement.<sup>233</sup> It is true that this seems like pulling bootstraps, since the capacity is itself a condition for a valid contract. But even in Europe, where issues of capacity are generally determined by referring to the law of nationality or habitual residence, there are attenuations. The Rome Convention restricts the claim of incapacity if both parties have been in one country and one party could not be aware of the incapacitation of the other at the time of the conclusion of the contract.<sup>234</sup> There is no reason why a different result should ensue if the parties are in different countries but choose a legal system under which both have capacity. It makes no sense to require one party to move physically to another country in order to be able to enter into a valid contract.

Finally, there are some rules in every legal system that we consider as so basic that it seems unthinkable they could be deselected by a private decision. Among these rules is, for instance, the prohibition of fraud.<sup>235</sup> However, because this rule is based on public policy, it is not treated here.<sup>236</sup> Nonetheless, can the selection of a law itself amount to fraud? Certainly one could imagine such situations. Think for instance of a British company using a standard form contract with respect to a U.S. consumer that contains a fine print clause purporting to render the law of Burkina Faso applicable. The question arises under which law the validity of such a clause must be tested. Preliminarily, one could look at the chosen law itself, i.e., the law of Burkina Faso. It is more than likely that it will contain a prohibition of fraud. If this were not the case, or if the prohibition could not be construed in a way that corresponds to the minimum standard of fair contract rules, then one could refer as a last resort to general principles of law. The maxim *fraus omnia*

231. In European conflict of laws, this minimum of consent is ensured by allowing one party to invoke the law of its habitual residence. ROME CONVENTION, *supra* note 38, arts. 3(4), 8(2). *See also* ROME I REGULATION DRAFT, *supra* note 38, arts. 3(5), 10(2).

232. *See generally* PERILLO & CALAMARI, *supra* note 187, at §§ 3.1 to 3.8.

233. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 198(1), 187.

234. *Cf.* ROME CONVENTION, *supra* note 38, art. 11. *See also* ROME I REGULATION DRAFT, *supra* note 38, art. 13.

235. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 4.11–4.15 (2004).

236. *See supra* Part I.

*corruptit* applies, of course, also with regard to choice-of-law agreements.<sup>237</sup> This is nothing special, but just the consequence of the normal rules for contracts. We should not forget that the choice-of-law clause itself is a contract and therefore subject to the general principles of contract formation.

## V. PRACTICAL EFFECTS OF THE NEW PARADIGM

### A. *Effects on the Validity and the Reach of Choice-of-Law Clauses*

Where does the new paradigm lead with regard to the practical questions mentioned above?<sup>238</sup> 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 can simply provide answers to all the relevant 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 of whether the mandatory rules of the chosen law apply.<sup>239</sup> From the perspective of the individual, it is wrong to assume that by choosing a certain legal system, all of the mandatory rules of the chosen law automatically apply as well. It would be akin to suggesting that by choosing to speak Chinese, a person submits himself to all commands of the Chinese Government. Party autonomy does not change the authority of the rule makers.<sup>240</sup> Therefore, a choice of law does not have the consequence of completely submitting one to the chosen legal system. The implication of the theory of relatively mandatory rules<sup>241</sup> is that the parties may use foreign law as a source for construing and interpreting their agreement, without submitting themselves to the legal regime of the state that is the author of the rules.

The second question was whether the parties should be free to refer to some system of law that is not state-made.<sup>242</sup> 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.<sup>243</sup> But by dropping the idea that party autonomy is meant to resolve a conflict between states, it becomes understandable why the parties should

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237. See FARNSWORTH, *supra* note 235 (discussing the effects of fraud on the validity of the contract in general).

238. See *supra* Part II.C.

239. See *supra* Part II.C.

240. See *supra* Part IV.C.

241. See *supra* Part IV.C.

242. See *supra* Part II.C.

243. See KRAMER, *supra* note 4.

also be able to choose rules that have not been enacted by a state. To employ the parallel to language: the parties could also create their own private language and choose to use it as a code in which they communicate. Indeed, the possibility of choosing a-national rules of law to govern a dispute or contract has been recognized by international legal texts.<sup>244</sup> It does not mean that parties would be allowed to completely free themselves from state-law since public policy rules would of course remain 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 religious law if it contains provisions on contract law.<sup>245</sup> 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 into a contract (in good faith) is that your agreement is binding.<sup>246</sup> This result is so important that some authors have summarized it under a special name: the "Basic Rule of Validation."<sup>247</sup> Weintraub suggests that this Rule is even more important than party autonomy.<sup>248</sup> However, this would be to "put

244. For instance, Article the UNCITRAL Model Law on International Commercial Arbitration speaks of "rules of law" that the parties can choose. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 28(1)1, June 21, 1985, 24 I.L.M. 1302. 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.

245. The English Court of Appeal expressed a different opinion in *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others*, [2004] 1 W.L.R. 1784 (Eng.), which held a choice of Sharia law and English law combined to be meaningless and void. *Id.* Yet, if Sharia law indeed did not provide any rule concerning the validity of a contract—which is open to doubt—, 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.

246. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971) ("The parties can be assumed to have intended that the provisions of the contract would be binding upon them.").

247. See ALBERT A. EHRENZWEIG, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959) (discussing the "basic rule of validation"); ALBERT A. EHRENZWEIG, *Contracts in the Conflict of Laws—Part One: Validity*, 59 COLUM. L. REV. 973, 975 (1959) (same); WEINTRAUB, *supra* note 4, at 449–52 (discussing validation).

248. See WEINTRAUB *supra* note 4.

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 of laws means to attribute competencies to states. If one disassociates 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 that system’s invalidating provisions. As in choice of language, the private conception of choice of 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 both preferred the same interpretation, 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.<sup>249</sup> The same principle 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 apply different legal rules across various sections of 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 related question. But if one 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<sup>250</sup> suggests the same result: in conversations or in poems, sometimes expressions from different languages are employed; in a similar vein, parties can use rules of different legal systems to apply to their contract. This solution has been recognized by legislation.<sup>251</sup> However, a limit to *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.

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249. See JOSEPH WARREN, *Interpretation of Wills: Recent Developments*, 49 HARV. L. REV. 689, 699 (1936).

250. See *supra* Part IV.C.

251. ROME CONVENTION, *supra* note 38, art. 3(1)3. See also ROME I REGULATION DRAFT, *supra* note 38, art. 3(1)3.

The fifth question was whether the parties can agree on an alternative or floating choice-of-law clause.<sup>252</sup> The focus on the individual suggests that they can. Yet, the parallel to language creates some doubts: obviously you cannot draft a document and leave open the language in which it is written. However, you could write a text in a language that has two very similar versions, like Serbo-Croatian, and subsequently determine 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 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.<sup>253</sup> From the viewpoint of individual autonomy and in line with what has been said earlier with regard to the validity of the contract,<sup>254</sup> 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 and interpretation, without submitting themselves to the authority of the rule maker. Abstracting the rule of law from its drafter, as has been suggested here,<sup>255</sup> 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. Like language, law is a living animal. Parties should not normally 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, a specific clause to that effect is necessary. Without it, the chosen law applies as it is at the time of the judgment.<sup>256</sup>

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252. See *supra* Part II.C.

253. See *supra* Part II.C.

254. See *supra* text accompanying note 23030.

255. See *supra* Part IV.C.

256. See also *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 822 n.2 (6th Cir. 1977).

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

Although the new paradigm has been developed for party autonomy, it could also have an effect on how we deal with conflicts of laws in general. In the large majority of cases, the parties do not choose the applicable law. This is the classic area of conflict-of-laws theory, and the one that arguably raises the most problems in practice. The question is how this field should be dealt with: should it be viewed from the parties' perspective or from the perspective of the states involved?

The traditional answer has been the latter. Absent of any choice by the parties, theories look for "connecting factors" to states, states' "interests," the "predominantly concerned jurisdiction," and so on.<sup>257</sup> 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 one can consider cases in which the parties have not agreed on the applicable law—and in which public policy does not prevent them from doing so—as an area of "possible choice of law". Instead of deciding those cases weighing the different states' contacts or interests, we could also look at them from the viewpoint of the individuals who are able to choose the applicable law. 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 take center stage.

The justification for such a different approach lies in the fact that the states themselves have allowed the parties to choose the applicable law. By doing so, they have implicitly recognized that in certain areas of the law the convenience and needs of the individuals are more important than the jurisdiction, interests, or policies of the state. States have subordinated their other policies to the idea of the autonomy of the parties. Only in the field of public policy are states overriding a choice of law by the parties because of 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 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 because it would force the judge into a complicated and futile investigation of the parties' hypothetical intentions.<sup>258</sup> This result would indeed be the most

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257. See *supra* Part III.D.

258. The Restatement and the Rome Convention both reject hypothetical choice of law. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 cmt. a (1971); GIULIANO & LAGARDE, *supra* note 44, art. 3, cmt. 3.

undesirable. It is hard to determine the will of the parties if they have not expressed it themselves.<sup>259</sup> Such a method would necessarily substitute the parties' intentions by what the judge thinks they would prefer. That is not what is proposed here.

Instead, what is meant is that the shift to the parties gives the judge more liberty in deciding on the applicable law than if he were to 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. Questions he could ask would be: In what law does it make sense to address the litigants? Is there a particular law that fits them best? If they are both from the same state, one could justify the application of the law of that state because both parties know that law well and can identify with it. 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.<sup>260</sup>

The result is, of course, not new: it is the same decision Judge Fuld of the New York Court of Appeals reached in the famous case *Babcock v. Jackson*.<sup>261</sup> The difference is that Judge Fuld relied on governmental interest analysis to reach the result,<sup>262</sup> while another method is suggested here. The reason for the application of the law of the common domicile is not the interests of a state concerned, but the interest of the parties to which the law of their domicile is well-known and fitting. The advantage of such justification is that it liberates the analysis from more abstract ideas of state interests. What the interests of the state of New York are in a private litigation between two of its residents over a car accident in Ontario is a matter that is quite difficult to decide. Yet it is quite easy to see that it is in the interest of two residents of New York that the law of their common domicile is applied to a dispute between them. The method suggested here replaces the fight on the interstate level with a bottom-down approach that focuses on the interests of the individuals involved in a case.

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259. The Article does not address cases in which a reasonable argument could be made for an implicit choice of law. One case in which such an argument could have been brought forward is the famous decision in *Milliken v. Pratt*, 125 Mass. 374 (Mass. 1878). Because the defendant in this case wanted to enter into a binding contract but could not do so under the law of her home state, it made sense to assume that she implicitly agreed to the law of the other party under which the contract was valid. *Id.* See *supra* note 24747 and accompanying text (discussing the rule of validation). Public policy did not exclude such a choice. See *Milliken*, 125 Mass. 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).

260. See *supra* Part IV.C (drawing the parallel between law and language).

261. *Babcock v. Jackson*, 191 N.E.2d 279, 289 (N.Y. 1963).

262. *Id.*

This method can equally explain the result of the decision in *Dym v. Gordon*.<sup>263</sup> In this case, both parties were residing in New York, but had teamed up to go as summer students to Colorado.<sup>264</sup> Since they lived together in Colorado and their whole personal relationship was based on their being together in that state, 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.<sup>265</sup> As an argument as to why New York law was not applicable, he stressed that it would be a law the parties in “no sense had adopted.”<sup>266</sup> But he gave no indication why the intentions of the parties or their “adoption” of a law was to be considered under governmental interest analysis, the standard he used.<sup>267</sup> 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 his own doctrine.<sup>268</sup> In reality, Burke relied not on states’ interests, but on those of the parties. This can also be seen from his telling argument that the application of Colorado law would not be “unfair” or “fortuitous.”<sup>269</sup> Unfair or fortuitous to whom? The application of the law of one state cannot be “unfair” to another. What Judge Burke meant is that the parties could have considered it “unfair” or “fortuitous” if the court had not applied the law of Colorado. Thus, it was the individuals’ interests that governed the choice of law.

The limited space of this Article does not allow analysis of all possible conflict cases under the new paradigm. It is likely that the results will often be similar or identical to those that have been reached under the influence of the U.S. conflict-of-laws revolution. The difference is that the focus on the individual provides a consistent theoretical framework for the results that the revolutionists sought. Arguments such as “fairness,” “fortuitousness,” or justice for the individual become the central concern of conflicts theory and no longer have to be cloaked under alleged state interests. Even more, the new approach can also solve the cases which interest analysis does not provide for: if no state has an interest in the application of its laws, governmental interest analysis does not yield

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263. *Dym v. Gordon*, 262 N.Y.S.2d 463, 475 (N.Y. 1965).

264. *Id.*

265. *Id.* at 467.

266. *Id.*

267. *Id.*

268. *Id.* at 470 (Fuld, J., dissenting).

269. *Id.* at 467.

any solution.<sup>270</sup> But the individualist approach suggested here shows why in these cases a law has to be applied: because it is in the interest of the parties of the case. Hence, the focus on the parties may also lead the way to find the applicable law in cases in which no state has an interest.

A final advantage is the flexibility of the approach, which can be demonstrated by using a hypothetical example slightly deviating from the fact pattern of *Babcock v. Jackson*<sup>271</sup>: suppose that a German tourist 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*,<sup>272</sup> which excludes any damages, is still part of Ontario law, and that German and Spanish law allow for compensation, but under each law a different amount of damages would have to be granted to the victim. Using the new paradigm to solve this case, it is easy to explain why Ontario law should not apply, even though the parties do not come from the same state as they did in *Babcock*. The reason is that it would not be appropriate for the judge to communicate with the German and the Spaniard using 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 deviates from the setting in *Babcock*, would not matter. We could take into consideration such facts as the common European culture of the parties, which binds them closer to each other than to Ontario. Such considerations are totally banned under any of the other conflicts theories, which focus on the authority of the rulemaker, not on the needs and interests of the parties.

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

Of course, policy issues are not totally excluded from the conflicts realm. There might be political considerations 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 for 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

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270. See CURRIE, *supra* note 2, at 152–53 (discussing the case where no state has an interest in the application of its laws).

271. *Babcock v. Jackson*, 191 N.E.2d 279, 281–82 (N.Y. 1963).

272. *Id.* at 283.

even be superseded by them. The inclusion of considerations regarding the parties is not meant as a “one-size-fits-all” solution for each and every conflicts case, but rather as a general reminder that we should focus more on the individual, and less on the state as the drafter 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 recognized more and more 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: the standard theories view conflict-of-laws 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 private individuals would be able to influence the relations between states, their competencies and interests, and why they could 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 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 sole boundaries of mandatory state interests expressed through 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 example, it could impact our interpretation of cases in which the parties have not agreed on the applicable law but in which public policy would not have prevented them from doing so. Instead of approaching the conflict from the point of view of states’ policy, we could look at it from the perspective of the individuals who can choose the applicable law. Considerations related to the parties would no longer be a mere maverick of conflicts theory, but become a central idea.

Another result of this study is a new normative category: relatively mandatory rules of law. The Article has compared legal 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 choice of law.

Finally, it is important to emphasize that the Article does not consider 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. Moreover, they have intensively been debated by others. The goal of this Article is to establish that, outside of these problems, another field of conflict of laws exists: it is the field of individual liberty.