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Civilian Statutes and Judicial Discretion

Symeon C. Symeonides

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INTRODUCTION: THE PERENNIAL TENSION AND THE QUEST FOR AN EQUILIBRIUM

René David, the famous French comparatist, once said that "[t]here is and will always be in all countries a contradiction between two requirements of justice: the law must be certain and predictable on one hand, it must be flexible and adaptable to circumstances on the other hand."[1]

Indeed, the tension between the need for legal certainty and predictability on the one hand, and the need for flexible, equitable, and individualized solutions on the other is as old as law itself. Aristotle described this tension more than 23 centuries ago when he spoke of the role of equity as a necessary corrective of positive law.[2] Twenty centuries

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* Alex L. Parks Distinguished Chair in Law and Dean Emeritus, Willamette University; Formerly Judge Albert Tate Professor of Law, Paul M. Hebert Law Center, Louisiana State University; LL.B. (Priv. L), LL.B. (Pub. L.), LL.M., S.J.D., LL.D. (h.c.), Ph.D. (h.c.). This Essay is dedicated to Professor Alain A. Levasseur, with brotherly affection and admiration for his impeccable integrity, his humanity, his four decades of civil-law teaching, his scholarship, and his leadership in preserving and promoting the cause of the civil law in Louisiana.

1. RENÉ DAVID, ENGLISH LAW AND FRENCH LAW 24 (1980).

2. *See* ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, at 4-7, *in* 2 The Ethics of Aristotle 140–41 (Alexander Grant ed., Longmans, Green & Co. 2d rev. ed. 1866) (c. 384 B.C.E.) ("[T]he law always speaks in general terms, yet in many cases it is impossible to speak in terms that are both general and correct at the same time. In those cases, then, in which it is necessary to speak in general terms but not possible to do so correctly, the law provides for the majority of cases, with full awareness of the deficiency of its provisions. Thus, when the law pronounces a general rule and thereafter a case arises that is not covered by the general rule, then it is proper, where the legislator's pronouncement is defective because of its over-simplicity, to rectify the defect by deciding in the same way as the legislator would have decided . . . had he been cognizant of the case. . . . This is in essence the nature of the equitable (*epieikes*): A corrective of the law when law is defective due to its generality. In fact, this is why it is impossible to legislate about certain matters and why it becomes necessary to address them through [ad hoc] Resolutions. Undefinable matters cannot be regulated by definite rules." (Author's translation)). Unless otherwise noted, all translations are the Author's.

later, two French legal philosophers took opposing positions. Rousseau spoke of the legislator's inability to foresee changing circumstances, noting that "[a] thousand cases against which the legislator has made no provision may present themselves."[3] In contrast, Montesquieu thought that judges should be no more than "the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor."[4] Although speaking in a different context, Voltaire apparently agreed with Rousseau when he wrote the inimitable: "Uncertainty is an uncomfortable position, but certainty is an absurd one."[5]

The common assumption is that civil law systems aim for certainty, but common law systems aim for flexibility. Although this Essay is limited to civil law systems, both systems face the same tension between these two competing yet necessary goals, and both strive for the optimum equilibrium in light of their own needs and values. Naturally, this equilibrium differs not only from system to system, but also from subject to subject and from time to time. What may be the "right" equilibrium for one subject or period is not necessarily so for another. Thus, the quest for the golden mean is universal and perpetual.

This quest surfaces at several junctures in the architecture, methodology, and operation of a legal system, including: (1) its statutory design, (2) the degree of discretion the legal system allows judges, and (3) more generally, the reciprocal relationship between the legislature and the judiciary.

The *Code Napoléon* provides an early example of the legislature's ambivalence toward the judiciary. Article 5 provides that "[j]udges are forbidden to pronounce decisions by way of general and regulative

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In sources published in non-western languages, the English translation is from a translation into another western language.

3. *See* JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT bk. IV, ch. VI, at 98–99 (G.D.H. Cole trans., J.M. Dent & Sons 1923) (1762) ("The inflexibility of the laws, which prevents them from adapting themselves to circumstances, may, in certain cases, render them disastrous . . . The order and slowness of the forms they enjoin require a space of time which circumstances sometimes withhold. A thousand cases against which the legislator has made no provision may present themselves, and it is a highly necessary part of foresight to be conscious that everything cannot be foreseen.").

4. 1 MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

5. Letter from Voltaire to Frederick II of Prussia (Nov. 28, 1770), *in* 12 OEUVRES COMPLÈTES DE VOLTAIRE 703 (1817). The phrase quoted in the text is the most common translation of Voltaire's phrase "Le doute n'est pas une condition agréable, mais la certitude est absurde."

dispositions on causes which are submitted to them."[6] Echoing Montesquieu's prescription, this article reflects the political realities of the pre-revolutionary period, which was marked by the abuses of the *ancien* regime's courts—the infamous *Parlements*. Article 5 was intended to ensure that the unelected judges would not directly or indirectly engage in judicial lawmaking through their jurisprudence. The Code, however, also provides in Article 4 that "[t]he judge who refuses to judge, under pretext of the silence, obscurity or insufficiency of the law, may be subject to prosecution for denial of justice."[7] Article 4 is susceptible to different interpretations, including one to the effect that—like Article 5—the drafters directed the article against a specific pre-revolution judicial practice. The better view, however, is that Article 4, far from proclaiming that the Code is gapless, recognizes the existence of lacunae and requires the judge to fill them through deduction from the Code's general principles and reasoning by analogy.

In this sense, Article 4 points away from Montesquieu's vision of a passive judiciary and toward Rousseau's pragmatic understanding of the legislature's predictive abilities. Apparently, the Code's drafters shared this understanding when they wrote that for the *legislateur* "to anticipate everything is a goal impossible of attainment."[8] Consequently, the legislator's role is "to set, by taking a broad approach, the general propositions of the law, [and] to establish principles which will be fertile in application. . . . It is for the judge and the jurist, imbued with the general spirit of the laws to direct their application."[9]

In the intervening centuries, the French judiciary gradually and creatively asserted itself and has assumed a much more important role in shaping French law than Article 4 contemplated. Today, the jurisprudence of the *Cour de Cassation* is much more important than the Code's drafters envisioned. Most French judges do not consider themselves as the mere

6. CODE CIVIL [C. CIV.] art. 5 (1804) (Fr.) (Author's translation).

7. *Id.* art. 4.

8. Portalis et al., *Texte du discours préliminaire*, *in* 1 LOCRÉ, LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE, 251, 255 (1827) (Author's translation).

9. *Id.* (Author's translation).

mouthpieces of the legislature,[10] even if they continue pretending to write in that fashion.[11]

In the meantime, the establishment and growth of the European Court of Justice and its increasingly expanding role in shaping European Union law has dramatically transformed the continental legal landscape by altering the previously established hierarchy of sources of law and elevating the role of judicial precedent.[12] Thus, the question today is no longer whether judges may act to fill statutory lacunae, but rather whether and to what extent judges may *deviate* from the statutory text.

This Essay discusses this question in a limited context by examining recent statutes in which the legislature itself *authorizes* such a deviation. The context is further limited to one particular legal field, which happens to be the Author's specialty—private international law ("PIL") or conflict of laws—and more specifically, the Essay focuses on PIL codifications enacted in the last 50 years. Part I enumerates the various grants of legislatively authorized discretion in these codifications. Part II then focuses on the most explicit of those grants—"escape clauses." The Essay concludes by attempting to draw some conclusions about the evolving relationship between legislators and judges and the modern art and science of codification.

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10. For an excellent portrayal of the actual role played today by the French judiciary in the French legal system, see Mitchel de S.-O.-I'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995); *see also* JOHN P. DAWSON, THE ORACLES OF THE LAW 263–431 (1968); ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM 97–126, 215–45, 1127–60 (2d ed. 1977); Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 INT'L REV. L. & ECON. 519 (2006).

11. As one contemporary French judge put it, "[t]he American judge is somehow expected to judge, really to judge. In France, the Code is supposed to have *already* judged." Lasser, *supra* note 10, at 1326 (quoting Interview with Jean-Frangois Lyotard, Council Member at the Collège Int'l de Philosophic, in New Haven, Conn. (Jan. 1992)).

12. For discussion of the role of this Court in EU law, see MARC JACOB, PRECEDENTS AND CASE-BASED REASONING IN THE EUROPEAN COURT OF JUSTICE: UNFINISHED BUSINESS (2014); THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW (Allan Rosas, Egils Levits & Yves Bot eds., 2013); JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (Mark Dawson, Bruno De Witte & Elise Muir eds., 2013); JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE (Maurice Adams et al. eds., 2013); ELINA PAUNIO, LEGAL CERTAINTY IN MULTILINGUAL EU LAW (2013).

I. LEGISLATIVELY AUTHORIZED JUDICIAL DISCRETION

During the last 50 years, we have witnessed an unprecedented degree of legislative activity in PIL: the enactment of 94 PIL codifications or re-codifications, in 84 countries on all continents. These codifications are discussed in detail in another publication.[13] The vast majority of them exhibit a non-antagonistic relationship between the legislature and the judiciary, evidenced by several express legislative grants of discretion to judges. These grants appear in several shapes and forms, including the following:

> (1) [T]he use of escape clauses authorizing courts to deviate from the codification's choice-of-law rules in appropriate circumstances;
> (2) the use (either in choice-of-law rules or in escapes clauses) of composite or "soft" connecting factors, such as the "closest connection" or "strongest connection," namely, factors that do not depend on the location of a single contact but rather on multiple factors and circumstances to be evaluated by the court in the light of each particular case;[14] or
> (3) the use of malleable "approaches" or similar formulae that do not directly designate the applicable law, but instead provide a list of factors the court must consider in choosing that law. In some codifications, these formulae are followed by presumptive rules designating the ordinarily applicable law in specified situations, while in other codifications the formulae play a residual role for cases not covered by specific choice-of-law rules.[15]

Because of the space limitations of this *Review*, this Essay discusses only the first of these grants, the legislatively authorized judicial escapes. Before doing so, however, providing a brief explanation of choice-of-law rules and their component parts may be useful for readers unfamiliar with PIL.

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13. *See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014) [hereinafter SYMEONIDES, CODIFYING CHOICE OF LAW].

14. *See id.* at 176–89.

15. *See id.* at 204–08. The Louisiana and Oregon codifications, both drafted by this Author, employ such an approach but combined with rules. For discussion of this combination, see Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?*, 83 TUL. L. REV. 1041, 1049–58, 1065–66 (2009); Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 1032–44 (2009).

A choice-of-law rule is one that designates the state whose law will govern a case that has pertinent contacts with more than one state. A typical choice-of-law rule points to the state that has a certain connection with the case, such as the place of the tort, the conclusion of a contract, or the domicile of the parties. This connection is referred to as a "connecting factor." One of the most ubiquitous connecting factors in recent PIL codifications is the "closest connection." Rather than *a priori* designating the state of the applicable law, these codifications authorize courts to consider all pertinent contacts and factors, and identify the state of the "closest connection" on a case-by-case basis.[16]

II. ESCAPE CLAUSES

As Aristotle recognized so many centuries ago, any pre-formulated rule—no matter how carefully or wisely drafted—may, "due to its generality" or because of its specificity, produce results contrary to the purpose for which the rule was designed.[17] In the words of Peter Hay, this outcome "is a natural consequence of the difference between *law making* and *law application*."[18]

With some notable exceptions,[19] most modern legislatures seem fully aware of the inherent limitations in their ability to anticipate everything. In recent years, those who have codified choice-of-law provisions have recognized these limitations and have taken the previously unprecedented step of expressly granting judges the authority to adjust—or avoid altogether—the application of a rule when the circumstances of the individual case so dictate. In addition to traditional escapes, such as *ordre public* (public policy exception) or *fraude à la loi* (evasion of law), this grant of authority takes the form of escape clauses attached to the rules.

Escape clauses can be divided into two categories: (1) general escapes, which generally apply to all (or most) choice-of-law rules in a comprehensive choice-of-law codification;[20] and (2) specific escapes, which generally are attached to a particular choice-of-law rule, or small group of rules, so as to provide an exception to that rule or rules.[21]

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16. For detailed discussion of the role of the closest connection in recent PIL codifications, see SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 13, 176–88.

17. ARISTOTLE, *supra* note 2, at 140–41.

18. Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law*, 226 RECUEIL DES COURS 281, 291 (1991).

19. *See, e.g.*, CÓDIGO CIVIL [C.C.] arts. 8–12 (Spain).

20. *See infra* Part II.A.

21. *See infra* Part II.B.

Although most of these escapes are based on the principle of the "closer connection," some of them are based on other factors.[22]

A. General Escapes

Article 15 of the Swiss Federal Act on Private International Law is one of the oldest examples of a general escape, and is perhaps the clearest. The article provides that the law that any of the codification's rules designate as applicable is "by way of exception" not to be applied if, "from the totality of the circumstances, it is manifest that the particular case has only a very slight connection to that law and has a much closer relationship to another law."[23] This escape has served as a model for similar escapes in some other PIL codifications.

Article 19 of the Belgian Code of Private International Law contains a two-pronged escape.[24] That article provides that the law that the codification designates as applicable should not be applied if "it manifestly appears from the totality of the circumstances" that the matter has "only a very slight connection" with the state of the designated law but is "very closely connected" to another state.[25] In that case, the law of the latter state governs.[26] The article also provides guidance for the judicial deployment of the escape. In applying this escape, the court should give due consideration to "the need of predictability of the applicable law" and "the circumstance that the relevant legal relationship was validly established in accordance with the private international law of the States with which the legal relationship was connected when it was created."[27]

In a similar vein, Article 8 of Book 10 of the Dutch Civil Code provides a general exception from Dutch statutory choice-of-law rules based on the presumption of a "close connection." The exception provides that the law which that type of rule designates as applicable must "exceptionally" not be applied "if, given all circumstances, the presumed close connection hardly exists and there exists a much closer connection to another law."[28] Similar general escapes, with slight variations in

22. *See infra* Part II.B.2.

23. BUNDESGESETZ ÜBER DAS INTENATIONALE PRIVATRECHT [IPRG], LOI FÉDERALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP] [FEDERAL CODE ON PRIVATE INTERNATIONAL LAW (CPIL)] Dec. 18, 1987, art. 15 (Switz.) (Author's Translation).

24. CODE DE DROIT INTERNATIONAL PRIVÉ [C.INT.PRIV.] art. 19 (Belg.).

25. *Id.*

26. *Id.*

27. *Id.* art. 19(2) (Author's translation).

28. BURGERLIJK WETBOEK [BW] bk. 10, art. 8 (Neth.) (Author's translation).

phraseology, exist in other codifications, including those of Argentina, the Former Yugoslav Republic of Macedonia ("FYROM"), South Korea, Lithuania, Quebec, Serbia, Slovenia, and Ukraine.[29]

Article 1 of the Austrian codification provides a subtler escape, at least potentially. The first paragraph states the operating principle of the entire codification by providing that "[f]actual situations with foreign contacts shall be judged . . . according to the legal order to which the strongest connection exists."[30] The second paragraph provides that the codification's choice-of-law rules "shall be considered as expressions of this principle."[31] This paragraph can be interpreted in two different ways. The first interpretation is that this provision is no more than a gap-filler to only be employed only in cases for which the codification does not designate the applicable law.[32] The second and more logical interpretation is that this provision is a genuine—albeit oblique—general escape from all of the codification's rules. This general escape would authorize the court to deviate from a particular rule if the court determines that, in the circumstances of a particular case, the rule would lead to a result that is inconsistent with the general principle of the strongest connection. Austrian court decisions support both of these interpretations.[33]

Article 2 of the Bulgarian Private International Law Code is similar but arguably more capable of functioning as a general escape. Paragraph 1 of the article provides that the law of the state that has the closest connection with the legal relation at stake governs the multistate relationships, and that the codification's choice-of-law rules "express this principle."[34] Paragraph 2 then states that, if one cannot determine the

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29. For citations and discussion, see SYMEONIDES, CODIFYING CHOICE OF Law, *supra* note 13, at 192–94.

30. BUNDESGESETZ VOM 15. JUNI 1978 ÜBER DAS INTERNATIONALE PRIVATRECHT [IPR-GESETZ] [FEDERAL STATUTE OF 1978 ON PRIVATE INTERNATIONAL LAW] BUNDESGESETZBLATT [BGBL] No. 304/1978, § 1 (Austria) (Author's translation).

31. *Id.*

32. Other codifications contain provisions that function as gap-fillers. For example, Article 26 of the Tunisian codification provides that if the codification does not provide a rule for a particular situation, the judge will designate the applicable law by an objective determination of the connecting factor relevant to the legal category. CODE DE DROIT INTERNATIONAL PRIVÉ [C.D.I.P.] [CODE OF PRIVATE INTERNATIONAL LAW] art. 26 (Tunis.). Article 1253(2) of the Armenian Civil Code provides that if the codification does not provide a choice-of-law rule for a particular subject, the court should apply "the law most closely connected" with that subject. ARM. CIVIL CODE art. 1253(2).

33. *See* SYMEONIDES, CODIFYING CHOICE OF Law, *supra* note 13, at 194 & n.144.

34. BULG. PRIVATE INTERNATIONAL LAW CODE art. 2(1).

governing law through those rules, "the law of the State with which the relationship has the closest connection by virtue of other criteria shall apply."[35] The fact that Paragraph 2 expressly addresses the gap-filling function of the closest-connection principle would render the reference to the same principle in Paragraph 1 superfluous, unless that reference was intended to serve as an authorization for an escape when the state designated by a choice-of-law rule turns out *not* to have the closest connection in the particular case.

Article 2 of the Chinese PIL codification and Article 1003 of the Burkina Faso Code of Persons and Family[36] have the same capacity to function as general escapes. The Chinese article provides that the law governing a multistate civil relationship "shall have the closest connection" with such relationship, and if the codification does not provide for a particular relationship, "the law of the country that has the closest connection with [that] relationship . . . shall be applied."[37]

B. Specific Escapes

Specific escapes, which are escapes that qualify fewer than all of the choice-of-law rules of a particular codification, are much more numerous than general escapes. This fact is not surprising; after all, the need for legal certainty varies from one area of the law to another. For this reason, the adoption of escape clauses encounters less resistance in some areas of the law, such as torts, than in other areas, such as property, thus making the adoption of specific escapes more palatable to legislators who are less trusting of judges.

1. Escapes Based on the "Closer Connection"

The majority of specific escape clauses are unsurprisingly based on the principle of the "closer connection" ("proximity principle") because

35. *Id.* art. 2(2).

36. Article 1003 of the Burkina Faso codification provides that multistate legal relationships are governed by the law that has the "strongest connection" and that the codification's choice-of-law rules are "considered as the expression of [this] general principle." CODE DES PERSONNES ET DE LA FAMILLE [CODE OF PERSONS AND FAMILY] art. 1003 (Burk. Faso). The same article also provides that, in case of gap or insufficiency in those rules, the judge should be "inspired" by, and draw from, this principle. *Id.*

37. Law of the Application of Law for Foreign-Related Civil Relations (adopted at the 17th session of the Standing Committee of the 11th National People's Congress on October 28, 2010), art. 2 (2011) (China).

most of the escapes accompany choice-of-law rules that themselves are based on the principle of closest connection. The typical escape provides that, if the state whose law is designated as applicable by a particular choice-of-law rule, based on the closest connection, turns out to have an attenuated connection, and another state has a manifestly much closer connection, the law of the latter state shall govern.

Escape clauses based on this principle can be found in the Rome Convention and now the Rome I Regulation for contracts, and the Rome II Regulation for torts. Article 4(5) of the Rome Convention provided that the presumptive rules of that article "shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected" with a country other than the country designated by those rules.[38] Article 4(3) of Rome I contains the same escape in slightly tighter language.[39] That article provides that if it is "clear from all the circumstances of the case" that a contract that does not contain a choice-of-law clause is "manifestly more closely connected" with a country other than that indicated by the preceding paragraphs of that article, the law of that other country shall apply.[40]

Rome II contains similar escapes in its general rule of Article 4,[41] as well as in the articles dealing with products liability,[42] unfair competition cases in which the competition exclusively affects the interests of a specific competitor,[43] unjust enrichment,[44] *negotiorum gestio*,[45] and *culpa in contrahendo*.[46] The escapes provide that, if it is "clear from all the circumstances of the case" that the tort is "manifestly more closely connected"

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38. Convention 80/934, on the Laws Applicable to Conventional Obligations, art. 4(5), 1980 O.J. (L 266) 1, 3 (EC). Also, article 6(2) provided that, in the absence of an effective choice of law by the parties, employment contracts in which the employee does not habitually carry out his work in any one country are to be governed by the law of the country in which the place of business through which he was engaged is situated, "unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country." *Id.* art. 6(2).

39. Regulation 593/2008, on the Law Applicable to Contractual Obligations (Rome I), art. 4(3), 2008 O.J. (L 177) 6, 11.

40. *Id.* A similar escape is found in articles 5(3) (contracts of carriage), *id.* art. 5(3), at 11, 7(2) (insurance contracts), *id.* art. 7(2), at 12, and 8(4) (individual employment contracts), *id.* art. 8(4), at 13.

41. Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), art. 4, 2007 O.J. (L 199) 40, 44.

42. *Id.* art. 5, at 44.

43. *Id.* art. 6(2), at 44.

44. *Id.* art. 10, at 45.

45. *Id.* art. 11, at 45.

46. *Id.* art. 12, at 45.

with a country other than the one whose law is designated as applicable by the above articles, then the law of that country governs.[47] The escapes are now available in the 27 European Union countries in which Rome I and Rome II are in force, whether or not those countries have similar escapes in their own codifications.[48]

Outside the European Union, escapes similar to those of the Rome Convention or Rome I can be found in the Hague Sales Convention[49] and the codifications of Albania, Argentina, Serbia, Taiwan, and Turkey.[50] For torts, escapes similar to those of Rome II can be found in the codifications of Albania, Macedonia, Japan, Serbia, Taiwan, and Turkey.[51]

In the area of successions, specific escapes based on the closer connection are found in the E.U. Successions Regulation,[52] the Hague Convention on the Law Applicable to Estates,[53] the Finnish Inheritance Code,[54] and the Burkina

47. *See* articles cited *supra* notes 41–46. Articles 4 and 5 state that a "manifestly more closely connected" with another country "might" be based on a pre-existing relationship between the parties, such as a contract, that is "closely connected with the tort/delict in question." *Id.* arts. 4, 5, at 40, 44.

48. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 13, 196 & n.153 (2014).

49. Convention on the Law Applicable to Contracts for the International Sale of Goods art. 8(3), Dec. 22, 1986, 24 I.L.M. 1575 (1985).

50. SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 13, at 196–97 & n.155.

51. *Id.* at 197 & n.156.

52. Regulation 650/2012, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, art. 21, 2012 O.J. (L 201) 107, 120 (providing that, unless the decedent had chosen another law (article 22), the succession is governed by the law of the state of the decedent's last habitual residence). However, if the decedent was "manifestly more closely connected" with another state, the law of the latter state governs. *Id.*

53. Convention on the Law Applicable to the Estates of Deceased Persons art. 3, Aug. 1, 1989, 28 I.L.M. 146 (1989) (providing that, "in exceptional circumstances," the principle of the closest connection may lead to the application of a law other than the one designated by the Convention). This convention is not yet in force.

54. *See* PERINTÖKAARI [INHERITANCE CODE] ch. 26, § 5(3) (Fin.) (providing that although the law of the decedent's nationality governs in certain cases, that law will be displaced by the law of another state with which the decedent had "an essentially closer connection . . . taking all circumstances into account" (Ministry of Justice, Fin., unofficial translation)).

Faso codification.[55] In other areas, escapes based on the closer connection are found in the provisions of the German codification dealing with property[56] and the provisions of the Polish codification dealing with goods in transit.[57] The Hague conventions dealing with maintenance[58] and the protection of children[59] and adults[60] also employ similar (and indeed more

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55. *See* CODE DES PERSONNES ET DE LA FAMILLE [CODE OF PERSONS AND FAMILY] art. 1043 (Burk. Faso) (providing that the law of the decedent's last domicile displaces the otherwise applicable national law if the decedent had a closer connection with the domiciliary state).

56. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] art. 46 (Juliana Mörsdorf-Schulte trans., 2015) (Ger.), https://www.gesetze-im-internet.de /englisch_bgbeg/englisch_bgbeg.html [https://perma.cc/5DA7-F9VB] ("If there is a substantially closer connection with the law of a country other than that which would apply under articles 43 and 45, then that law shall apply.").

57. *See* Private International Law Act (Feb. 4, 2011), 2011 O.J., no. 80, arts. 43 (Pol.) (providing that rights in goods in transit are governed by the law of the state of dispatch, unless another state has a closer connection, in which case the latter law applies).

58. *See* Protocol on the Law Applicable to Maintenance Obligations art. 5, Nov. 23, 2007, *available at* http:// www.hcch.net/index_en.php?act=conventions .text&cid=133 [https://perma.cc/G4KC-7TMC] (providing that the court may deviate from the otherwise applicable law if one of the parties objects and "the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage"). This protocol has been ratified by the European Union. *See Status Table: Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, HCCH (Sept. 9, 2014), https://www.hcch.net/en/instruments/conventions/status-table/?cid=133 [https://per ma.cc/G4KC-7TMC] [hereinafter *Status Table*].

59. *See* Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children art. 15(2), Oct. 19, 1996, 35 I.L.M. 1391 (1996) (providing that, "in so far as the protection of the person or the property of the child requires," a court may "exceptionally apply or take into consideration" the law of a state other than that of the otherwise applicable law if the other state has a "substantial connection" with "the situation"). This convention is in force in 43 countries. *See Status Table*, *supra* note 58.

60. *See* Convention on the International Protection of Adults art. 13(2), Jan. 13, 2000, 39 I.L.M. 7 (2000) (providing that, "in so far as the protection of the person or the property of the adult requires," a court may "exceptionally apply or take into consideration" the law of a state other than that of the otherwise applicable law if the other state has a "substantial connection" with "the situation"). This convention is in force in eight countries. *See Status Table: Convention of 13 January 2000 on the International Protection of Adults*, HCCH (Dec. 8, 2015), https://www.hcch.net/en/instruments/conventions/status-table/?cid=71 [https://perma.cc/2J4P-KXL5].

malleable) escapes. These escapes authorize courts to deviate from the otherwise applicable law and apply the law of another state that has a "substantial connection" with the case.

2. Escapes Based on Other Factors

Some codifications contain escapes based on factors other than the closer connection, and one of them, the Russian, authorizes an exception from those of its articles that are based on that factor. Article 1213 of the Russian codification provides that contracts that do not contain an effective choice-of-law clause are governed by the law of the country with which the contract is "most closely connected."[61] The article then provides several rules presumptively identifying the most closely connected country.[62] Each of these rules, however, is accompanied by the phrase "unless it otherwise follows from a statute, the terms or the nature of the contract, or *the totality of the circumstances of the case*."[63]

Article 10 of the Slovak PIL codification begins by stating that contracts that do not contain an effective choice-of-law clause are governed by the law whose application is "in keeping with a reasonable regulation of the respective relation," and then designates that law for various types of contracts through seven different paragraphs.[64] These paragraphs, however, are introduced with the phrases "as a rule" or "generally," thus allowing courts to deviate from those rules in appropriate cases.[65] In a similar fashion, Article 20 of the Croatian codification introduces 20 rules designating the applicable law for various contracts with the phrase "if . . . special circumstances of the case do not refer to another law,"[66] thus allowing courts to deviate from these rules if the circumstances of the case so warrant.

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61. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 1213 (Russ.) (Author's translation).

62. *Id.*

63. *Id.* art. 1211(1) (emphasis added). Articles 1203, 1213, 1217, and 1222 contain similar escapes for cases involving, respectively, certain foreign juridical persons, immovable property contracts, unilateral juridical acts, and unfair competition. *Id.* arts. 1203, 1213, 1217, 1222.

64. Act No. 97 of 4 December 1963 on Private International Law and Rules of International Procedure art. 10. (Slovk.).

65. *Id.* (alternative translation).

66. Zakon o preuzimanju Zakona o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima [Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States in Certain Matters], N.N. [Official Gazette of the Republic of Croatia] No. 53/1991, art. 20 (1991) (Croat.).

Article 9 of the Dutch codification provides a general, *renvoi*-type escape from its rules to protect certain rights acquired under foreign law. Based on the "doctrine of the accomplished fact," Article 9 provides that when a foreign law that is applicable under the choice-of-law rules of an involved foreign state attributes certain consequences to a particular fact, a Dutch court may attribute the same consequences in deviation from its own choice-of-law rules. The Dutch courts may only make this attribution, however, if failure to do so would constitute "an unacceptable violation of the parties' legitimate expectations or of legal certainty."[67]

Article 3547 of the Louisiana Civil Code provides an escape from all of the codification's articles dealing with tort conflicts in Articles 3543 through 3546. Article 3547 provides that the law applicable under these articles shall not apply if, "from the totality of the circumstances of an exceptional case," it is "clearly evident"[68] under the principles of Article 3542—the general article for tort conflicts—that the policies of another state would be "more seriously impaired if its law were not applied to the particular issue."[69] In that situation, the law of the latter state applies.[70]

The Puerto Rico draft code contains several escapes, including one for tort conflicts modeled after the Louisiana escape. The escape provides that, when the code's rules for tort conflicts would produce a result "clearly contrary to the objectives" of Article 39, which articulates the code's general approach for tort conflicts, the applicable law should be selected under the approach of Article 39.[71] For contract conflicts, the draft code provides a general approach in Article 30, followed by presumptive rules for certain types of contracts in Article 31.[72] The latter article also provides, however, that a party may prevent the application of the law designated by these presumptive rules by demonstrating that, with regard to the issue in

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67. BURGERLIJK WETBOEK [BW] bk. 10, art. 9 (Neth.) (Author's translation).

68. The word "clearly" and the tautology it produces ("clearly evident") was inserted at the insistence of legislators who wanted to further tighten the escape.

69. LA. CIV. CODE art. 3547 (2015).

70. *Id.* For discussion of the history and meaning of this article by its drafter, see Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 684–96 (1992). For subsequent application, see Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises"*, 54 LA. L. REV. 497 (1994). For a critique, see Russel J. Weintraub, *The Contributions of Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 AM. J. COMP. L. 511 (1990).

71. A BILL FOR THE CODIFICATION OF PUERTO RICAN PRIVATE INTERNATIONAL LAW art. 39 (2002) [hereinafter PUERTO RICO DRAFT CODIFICATION] (submitted to Commisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico, by Symeon C. Symeonides on May 25, 2002) (on file with Author).

72. *Id.* arts. 30, 31.

question, another state has a "manifestly more significant connection to the parties and the transaction in accordance with the principles of Article 30."[73] The draft code contains additional escape clauses, based on similar or other factors, in its titles dealing with domicile,[74] marriage,[75] matrimonial property regimes,[76] and child custody.[77]

CONCLUSION

This Essay discusses the role of statutory escape clauses authorizing judges to deviate from certain statutory rules. These escapes officially grant courts a wide-ranging and, in many cases, open-ended discretion to a degree that until recently would have been unthinkable in civil law countries.

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73. *Id.* art. 31. For discussion by the codification's drafter, see Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Puerto Rico Projet*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 419, 424–34 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002); Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413 (1990).

74. Article 4(c) provides a general exception from all the code's rules that call for the application of the law of a person's domicile. The exception provides that, when a person's connection to the state of his domicile is "attenuated" and his connections to another state are "significantly stronger and more pertinent to the particular issue," that person may be treated as a domiciliary of the latter state for the purposes of that issue, "provided such treatment is appropriate" under the principles of the code's general article (Article 2). PUERTO RICO DRAFT CODIFICATION, *supra* note 71, art. 4(c).

75. With regard to marriage, Article 11 provides that the starting point is the law of the state of the marriage or the state of the first matrimonial domicile. *Id.* at 11. If the marriage was valid in either of those states, the marriage is considered valid, unless it violates a "strong" public policy of the state that, under the general article for status, has a "substantially more significant connection" to the parties and the dispute. *Id.* If the marriage was not valid in either of the two states, the marriage may nevertheless be considered valid "if it would be so considered in another state" that, under the general article, has a "more significant connection" to the parties and the dispute. *Id.*

76. For matrimonial regimes, Article 24 provides that if the law applicable upon termination of the regime would result in unfairly depriving one spouse of protection accorded by the law previously governing the regime, the court may make "appropriate exceptions or adjustments in order to accord that spouse substantially equivalent protection." *Id.* art. 24.

77. For child custody cases, Article 20 calls for the application of forum law, unless under the general article for issues of status, another state has "a more significant connection" to the child and the dispute and the application of the law of that state would "serve the best interest of the child." *Id.* art. 20.

Although covering only one field of law—PIL—this Essay supports some general conclusions about the current status of the art and science of codification and the evolving relationship between the legislature and the judiciary.[78]

The art and science of codification and statutory drafting has advanced significantly since the time of Montesquieu or, for that matter, the *Code Napoléon.* Despite contrary arguments in common-law countries, codification need not petrify the law, nor render it unduly inflexible for exceptional cases. Codification does not necessarily outlaw judicial discretion. Modern PIL codifications employ various tools such as soft connecting factors and escape clauses that inject controlled dosages of flexibility, and thus help attain an equilibrium between certainty and flexibility.

To be sure, one may question whether this equilibrium is the "right" one in every case. For example, this Author has criticized some of the escape clauses discussed here as not providing enough flexibility because they are phrased in such a way as to be employable only in the most extreme cases. This Author has also criticized the fact that these escapes are phrased not in terms of issues and policies, but rather in terms that are either (a) too holistic—meaning geared to the whole case rather than to aspects or issues of the case, or (b) too geographic—such as the "closer" connection.[79] In contrast, a German author, while praising the "refinement . . . and sophistication" of recent PIL codifications, lamented the losses in certainty and foreseeability and warned of the "dangers of . . . over-flexibility."[80]

Certainly, this is a matter on which reasonable minds can differ. Gains in flexibility will always produce corresponding losses in certainty, and vice versa, and questions will always exist on whether the losses outweigh the gains. The quest for the "right" equilibrium between certainty and flexibility is as perpetual as the tension Aristotle identified 23 centuries ago. What is new, however, is that legislators and judges are no longer antagonists in this quest.

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78. As noted earlier, the tension between certainty and flexibility is present in all legal fields, although the relative intensity of these needs differs from field to field, as does the optimum equilibrium between them.

79. *See* SYMEONIDES, CODIFYING CHOICE OF Law, *supra* note 13, at 201–04; Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1773–82 (2008).

80. Michael Martinek, *The Seven Pillars of Wisdom in Private International Law – The German and the Swiss Experience with the Codification of Conflicts Law Rules*, SAARBRÜCKER BIBLIOTHEK (2001), http://archiv.jura.uni-saarland.de/projekte/Bibliothek2/text.php?id=221 [perma.cc/JQ88-FN4H].