

## Introduction

### Euroscepticism and multiculturalism

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#### 1. Conference on Euroscepticism and multiculturalism

This issue of the Utrecht Law Review is based on the second Utrecht University International Legal Research Conference on Euroscepticism and Multiculturalism, which was held on 7 December 2009. The aim of this conference was to shed some light on the ongoing discussion on the relation between Euroscepticism, multiculturalism or pluralism in the EU, and the influence of the European Union. This yearly conference is organised by students of the Utrecht University Legal Research Master's course. This two-year international honours Master's programme gives selected students the opportunity to participate in research projects, to set up their own research network and to prepare for both Ph.D. research and legal practice.

In contemporary Europe many discussions are concentrated on the question of to what extent Europe should interfere with national policies, decisions or legislation. The European Union as a political entity struggles to achieve a common identity for its citizens. The balance between the development of a European identity and national identities and cultures has not yet been crystallised. The difficulty of the further enhancement of a European identity reflects upon questions on the future of the EU.

After the rejection of the European Constitution the position and status of the European Union have been subject to continuing debate by politicians, scholars as well as by the European citizens. Both Europhilia and Euroscepticism seem to have increased over the last few years and, at a political level, the two camps have become even more polarised. This development clearly provides for a proper discussion topic. What is the influence of Euroscepticism on the functioning

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of the European Union? Does it frustrate European decision-making? Does it hamper the European harmonisation and integration projects? Or can both go hand in hand? These questions are important in view of the further development of the European Union and in view of the Lisbon Treaty that entered into force almost one year ago.

The ratification of the Treaty of Lisbon was completed after several ups and downs. A number of Member States have placed question marks against the potential effects of the new Treaty that, in fact, was considered to be almost equal to the European Constitution, which had been rejected for its strong European 'nationalistic' characteristics.<sup>1</sup> Different perceptions of how the Union should be shaped as well as of the further process of European integration are crucial in the debate on the EU's future. Multiculturalism is directly linked to various forms of Euro-scepticism. Often, multiculturalism and cultural diversity are considered to lie at the heart of the Eurosceptic feelings of scholars, politicians and citizens.

## 2. Terminology alert: two polymorphous concepts

The concepts of multiculturalism and Euroscepticism are perceived in the specific light of the conference's framework. In order to give a more general overview of these two concepts we will now first describe the layout of the conference. During the conference, different views on the two concepts were presented in three sessions. The first session concentrated on human rights or, more specifically the freedom of religion, in relation to multiculturalism. In this session Titia Loenen provided an analysis of how the European Court of Human Rights approaches violations of freedom of religion.<sup>2</sup> The main question discussed was whether the Court develops European standards or supports nationalist tendencies. Veit Bader continued this session by stressing the tension between individual and associational freedoms of religion.<sup>3</sup> A detailed account of his approach forms part of his contribution. Anat Scolnicov concluded this first session by illustrating, with reference to the situation in the UK, how difficult it is to define 'religion' for the purpose of religious freedom.<sup>4</sup>

The second session concerned national identity, constitutional values and Euroscepticism. This second session was opened by Antal Örkény, who introduced a sociological approach to the debate on the harmony or dissonance between European identity and national attachment.<sup>5</sup> He defended the position that many states still adhere to an old-fashioned identity. In particular, Örkény focused on the question of what will happen with national identity in a transnational or supranational political environment. These identity problems open up a sociological perspective as to how notions of personal identity differ from a group or collective social entity. Örkény tried to show that there is a cognitive framework of group identity-building. These are constructed social identities made by selected people. Leonard Besselink continued this session with the subject of constitutional identity before and after the Lisbon Treaty.<sup>6</sup> He argued that the emphasis on national values is a sign of Euroscepticism, which in its turn might imply a rejection of multiculturalism. It challenges other member states' political, legal and cultural order. Gavin Barrett ended this session with an analysis of the concept of Irish identity, Irish constitutional

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1 This is clearly illustrated by the Constitution's introduction of a European flag as well as a European 'national' anthem.

2 Titia Loenen is Professor of Legal Theory at Utrecht University School of Law.

3 Veit Bader is Professor Emeritus of Sociology and Professor Emeritus of Social and Political Philosophy at the University of Amsterdam.

4 Anat Scolnicov is the Director of studies and a Lecturer in Law at Lucy Cavendish College, Cambridge University.

5 Antal Örkény is Professor of sociology at the Eötvös Loránd University, Budapest.

6 Leonard Besselink is Professor of European Constitutional law at Utrecht University School of Law.

values and Euroscepticism in the process of ratifying the Treaty of Lisbon.<sup>7</sup> Barrett started his presentation by describing the two referendums held in Ireland on the ratification of the Lisbon Treaty. A second referendum was needed to have the new treaty adopted. The different outcome of these two referendums can be explained, in Barrett's opinion, by economic factors and the legal guarantees offered. A common thought during the second referendum was that the European Union would offer a 'safe haven' against the 'economic storm'. The legal guarantees included, for example, the political promise that the Commission would continue to include a national of each member state. They indicate the impact on Irish popular opinion by Eurosceptic campaigners in the first referendum and demonstrate something about issues of identity and constitutional values and how they differ in Ireland and Europe.

Lastly, cultural identity, multiculturalism and the regulation of private law in Europe formed the starting point in the third section. Ruth Sefton-Green delivered a presentation on the question whether multiculturalism in the EU clashes with the harmonisation of private law among the Member States.<sup>8</sup> The problems of harmonising private law values will also be reiterated in her contribution. Jan Smits already provided a foretaste of his contribution in this issue by giving examples of what it actually means to have a choice of private law systems.<sup>9</sup> The final speaker at the conference was Esin Örucü.<sup>10</sup> Örucü spoke about the relationship between state law and diverse socio-cultures. This is also the subject of her contribution to this issue.

### ***Euroscepticism***

As this issue constitutes a series of contributions in relation to the notion of 'Euroscepticism', it is important to continuously bear in mind the background of the authors as well as the focus point of the arguments discussed. The concept of Euroscepticism can be viewed from various angles.<sup>11</sup> A distinction should be made between, on the one hand, Euroscepticism by – in principle – pro-Europeans who are sceptical about the method and tools of European integration, and, on the other, anti-Europeans who are sceptical with regard to Europeanisation and the process of European integration in general.<sup>12</sup> Traditionally, Euroscepticism is the phenomenon that opposes European integration through the Europeanisation of policies, legislation and politics.<sup>13</sup> A 'diversity-related' Euroscepticism is based on the notion that by Europeanisation cultural diversity and national identities are distorted. This distortion cannot be justified by the economic and social benefits or political cooperation resulting from Europeanisation. Furthermore, European cooperation is undesirable because law and politics are culturally bound and should not be intertwined with other cultures, since the interpretation of norms, laws and other

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7 Gavin Barrett is a Barrister, senior lecturer and Director of Doctoral Studies in the School of Law at University College Dublin.

8 Ruth Sefton-Green is a Reader in comparative private law at the Université Paris 1 (Panthéon-Sorbonne) and is attached to the comparative law research centre UMR de droit comparé de Paris.

9 Jan Smits is Professor of European Private Law at Maastricht University and is the Academic Director of the Maastricht European Private Law Institute (M-EPLI).

10 Esin Örucü is a member of the Emeritus Staff of the School of Law of the University of Glasgow, and holds the status of Honorary Research Fellow.

11 It is important to determine the background of Eurosceptics as it can influence their perspective. See for instance R. Harmsen & M. Spiering, 'Euroscepticism and the revolution of European political debate', in R. Harmsen & M. Spiering (eds.), *Euroscepticism: Party Politics, National Identity and European Integration*, 2004, pp. 13-35. P. Taggart & A. Szczerbiak, *Opposing Europe? The comparative party politics of Euroscepticism*, 2008. C. Gifford, *The making of Eurosceptic Britain*, 2008, pp. 5-6. It is clear that in this respect this contribution is connected to the right-wing concept of Euroscepticism.

12 This is comparable to what Taggart and Szczerbiak refer to as *soft Euroscepticism* and respectively *hard Euroscepticism*. See P. Taggart & A. Szczerbiak, 'Introduction: opposing Europe? The politics of Euroscepticism in Europe', in P. Taggart & A. Szczerbiak, *Opposing Europe? The comparative party politics of Euroscepticism*, 2008, pp. 1-15, at pp. 7-8.

13 As introduced by the British around the 1980s. M. Spiering, 'British Euroscepticism', in R. Harmsen & M. Spiering (eds.), *Euroscepticism: Party Politics, National Identity and European Integration*, 2004, pp. 127-149.

values would not be the same in another culture and would therefore be totally misunderstood or misapplied.<sup>14</sup>

During the 2009 Conference the term Euroscepticism was approached in a particularly broad sense, in order to show the wide variety in starting points and perspectives on the term in relation to the functioning and the future of the European Union and its working methods. As the topic of the conference concerned 'Euroscepticism and multiculturalism', it was the concept of multiculturalism that served as a boundary or reference point in the discussions on Euroscepticism. The same is true for this Special Issue: in their contributions, our speakers elaborate on various aspects of Eurosceptic arguments in relation to multiculturalism in the European Union. However, the following question remains (and this must now be addressed): what should be understood by 'multiculturalism'?

### ***Multiculturalism***

Multiculturalism is usually perceived as the societal situation in which multiple cultures coexist in a single society. Furthermore, it is assumed that the various cultures mutually influence one another. Whether this is true within a national society or European society is not relevant. The difficulty concerning this term lies in the 'culture' part: what is culture? Strictly speaking, a variety of cultures can be found within a country's boundaries. In relation to multiculturalism it seems that also nationality is an important indicator to measure a country's multicultural status. In addition, religion and language are important aspects of a multicultural society.

At any rate, the concept concerns the coexistence of multiple ethnic cultures. Sometimes, cultural pluralism is used as a synonym. The term as such is devoid of a normative value; it denotes a factual situation which can lead to discussions on whether a multicultural society is desirable or not.<sup>15</sup> Furthermore, the concept reflects the tensions between cultural diversity and national identity, the latter being a related, but at the same time separate, concept. It would be going beyond the scope of this Introduction to delve any deeper into the discussions on multiculturalism. Rather, we wish to emphasise that the term should be handled with caution and should in principle be approached in objective terms.

As the contributions are by different scholars, it should be emphasised that the reader should be continuously aware of the polymorphous concepts in order to properly understand the various authors' perspectives. It is this sensitivity of the two concepts of Euroscepticism and multiculturalism that made the Conference an exciting event with rich discussions. Below, a concise overview of the content of this Issue's contributions is provided.

### **3. Overview of the issue's contributions**

Veit Bader addresses the problem of the constitutional status of 'secularism'. In the discussion before his presentation at the conference Bader emphasised that there is a difference between soft cases and hard cases when it comes to violations under the Convention. Soft cases such as the Muslim headscarf issue are only symbolic and pragmatic. Hard cases are those cases where there is a violation of basic needs or core basic rights. Hard cases are really important for discussing

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14 This 'cultural constraints argument' is often used in matters concerning European family law. For an interesting perspective from both sides see M.A. Antokolskaia, 'Family law and national culture. Arguing against the cultural constraints argument', in K. Boele-Woelki (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, 2009, pp. 37-51, and P. Legrand, 'A Diabolical Idea', in A.S. Hartkamp et al. (eds.), *Towards a European Civil Code*, 2004, or P. Legrand, 'Against a European Civil Code', 1997 *The Modern Law Review* 60, pp. 44-63.

15 And it certainly has led to discussions and rejections. See for instance P. Cliteur, *De filosofie van mensenrechten*, 1999. See also P. Scheffer, 'Het multiculturele drama', *NRC Handelsblad*, 29 January 2000. Available at: <<http://retro.nrc.nl/W2/Lab/Multicultureel/scheffer.html>>.

the freedom of religion. The tensions which Bader addresses are not a nationalistic interpretation or European interpretation, but rather what all courts should do. Bader begins his article by describing three positions on constitutional secularism. The first position he describes tries to overcome the absence of ‘secularism’ in most liberal-democratic constitutions by developing a more robust theory of constitutional secularism. The second develops theories of ‘alternative secularisms’. The third position argues that we should drop secularism as a ‘cacophonous’ concept from our constitutional and legal language and replace it with liberal-democratic constitutionalism. The third position is the one advocated by Bader.

Bader starts by providing an introduction to selected Court Rulings in the context of Turkey and India. He continues by giving an analytical taxonomy of twelve different meanings of ‘secularism’ based on a comparative study of Turkish and Indian Supreme Court cases on secularism, and he demonstrates that they are incompatible with each other and with the hard core of liberal-democratic constitutions. Next, he criticizes the respective rulings in the Turkish and Indian context. Particularly in ‘militant democracies’, the appeal to a principle of ‘secularism’ turns out to be inimical to liberal and democratic ‘constitutional essentials’. He ends with making some normative recommendations on the role of constitutional review and judicial activism by defending his own minimalist conception of a liberal-democratic constitutionalism.

Leonard Besselink provides an analysis of how the notion of ‘national identity’ has been reformulated as the legal concept of ‘constitutional identity’ and poses the question of how the constitutional recognition of Member States’ idiosyncrasies has matured. After providing a brief overview of the history of how the EU has dealt with national identity in relation to supranationality, he analyses what can be understood by ‘national identity’ in the wording of the Treaties. Then, Besselink discusses how, from the Treaty of Maastricht to the Lisbon Treaty, the EU has moved away from supranationality. Besselink argues that nowadays it seems that the Union is based on mutuality between the EU institutions and those of the Member States, rather than on the supranationality of the Union as such. Particularly with regard to constitutional arrangements, including constitutional identity, the Union, and particularly the European Court of Justice, seems to adopt a more distant stance, thereby referring to the constitutional values of the Member States rather than deciding for itself what those constitutional values entail. In relation to this, Besselink refers to a so-called ‘constitutional dialogue’ between the ECJ and the national courts. Multiculturalism and value pluralism are important components of this dialogue.

Irene Aronstein has adopted a different approach to the tension between European integration and the preservation of cultural diversity and national identity. Departing from Article 3(3) and Article 4(2) TFEU, she generally analyses the changes brought about by Lisbon in the context of cultural diversity-related Euroscepticism. With an eye on the Lisbon Treaty’s renewed competences and procedures: will the EU indeed respect cultural diversity and national identity? Aronstein starts by assessing what the term ‘diversity’ comprises. Furthermore, she discusses the manner in which the European Union’s potential ideals are reflected in the Union’s recent initiatives and activities. Via an exposé of the competences and the procedures of the Lisbon Treaty she arrives at a normative standpoint concerning the question of to what extent the Lisbon Treaty’s promises concerning diversity and national identity should be regarded as true promises or whether they are merely window-dressing.

During the last couple of decades many European initiatives have been taken within the field of private law. As European private law is still in its infancy and is subject to sensitive debates on its desirability and feasibility, this subtopic gained widespread attention during the conference. Firstly, Ruth Sefton-Green elaborates upon the difficulties in harmonising values in private law against the background of a multicultural European Union. In her analysis, Sefton-

Green clearly exposes the relationship as well as the tension between multiculturalism and harmonisation. Thereby, she particularly focuses on English and French law. The Unfair Terms Directive serves as an important example in Sefton-Green's analysis. Whilst this Directive aims at harmonisation and convergence, it is an example of how European legislation sometimes leads to the opposite: divergence. This is where Euroscepticism and its counterpart – Europhilia – come in. If multicultural Europe appears not to be susceptible to harmonisation in every field, how should the Union's harmonisation project be judged in the light of diversity-related Euroscepticism? The different forms of harmonisation seem to be crucial in this respect. In her conclusion, Sefton-Green provides several suggestions as to how multiculturalism should be approached in relation to the harmonisation of private law.

Jan Smits then explains that one of the fundamental aspects of Euroscepticism and Europhilia is a particular view of how citizens' interests are represented. He argues that this particular view should be replaced with an alternative view: one adapted to European integration. Citizens' interests and wishes under a wide variety of party autonomy are the core of the alternative view. Particularly in private law, the interests of citizens come to the surface most clearly. Under the alternative view, private parties should be able to choose – to limited extent – the legal regime which is applicable. With three examples Smits shows how citizens can choose the regime that is considered to be the best solution for them. One of the consequences of citizens choosing regimes is that it results in legal tourism. This legal tourism leads to the question whether Euroscepticism that is based on the view of how citizens' interests are represented has not become outdated. In relation to this, Smits argues that exactly the possibility to choose is a method to overcome national legal cultures. With regard to 'essential laws', Smits states that a fundamental discussion is needed in order to determine the national laws which cannot be subject to an opt-out. Finally, it is thus the state that determines the limits to the proposed party autonomy.

Finally, Esin Örüçü addresses the relationship between law and pluralism. The nation state provides the source of law which may or may not allow competing sources of law to exist. This legitimiser of sources of law offers a predominantly monolithic, centralised, territorial top-down model of law. Örüçü concludes that in the Western tradition a stronger version of legal pluralism, in which levels of law of equal value co-exist in the same territorial or social space as overlapping orders, with the same status as state law and independent thereof is not favoured. Multiculturalism must be viewed and assessed within these contexts. She gives two examples within the field of family law of the encounters between diverse cultures and official laws and the demands of cultural pluralism to be reflected in legal pluralism. Turkish Family Law and the General Principles on divorce and maintenance created by the Commission on European Family Law are both used to describe the relation between the legal and the cultural sphere.

#### **4. Concluding remarks**

During the conference many interesting viewpoints were shared in the interactive discussions between the speakers and the audience. We sincerely hope that this Special Issue will reflect the interesting aspects of such a timely topic. As to the question whether the European project is and will remain subject to the various forms of Euroscepticism related to cultural diversity is something that only the future can show. In addition, one could argue that it constitutes a rhetorical question. The 'ever closer Union' is and will always be subject to various forms of Euroscepticism following from different cultures, irrespective of the increasing convergence of Member States in various fields. After all, the challenge is to find a proper balance between the

ever-changing components of cultural differences and national identities, and the supremacy of the EU. With this Special Issue we hope to contribute to the debate on Euroscepticism, multiculturalism and the future of the European Union.