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Beyond Euroscepticism: on the choice of legal regimes as empowerment of citizens

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1. Introduction

It is well known that the process of Europeanisation is met with great enthusiasm by some and with intense scepticism by others. Ever since the start of the European integration process, Europhiles and Eurosceptics alike have fanatically pleaded their case, leading at times to vigorous debates about the very nature of the European project.¹ This contribution does not attempt to revisit, let alone revitalise, this debate as such; instead, it seeks to demonstrate that both Euroscepticism and Europhilia are based on a particular view of how citizens' interests are represented. This contribution subsequently argues that this view should be replaced with a different type of thinking about ensuring citizens' participation in the European integration process. In this alternative view, the possibility of citizens choosing legal regimes other than their 'own' (and States being explicit about the limits of exercising such an enhanced party autonomy) is seen as a method of empowering citizens in fields that matter to them the most. Typically, these fields relate to (but are not limited to) what is known as 'private law', the law that deals with how private parties can shape their own private, professional and business lives.

This contribution is structured as follows. Section 1 starts off with an explanation of Euroscepticism and its relationship with harmonisation in the field of private law. Section 2 will show that both Euroscepticism and Europhilia are based on outdated ideas about the role of the citizen in shaping the law. This view of citizens taking responsibility for what they consider to be important is elaborated in Sections 3 and 4. Section 3 provides some examples of fields where people are able to choose other legal regimes. Section 4 contains a more normative analysis of such 'legal tourism', claiming that allowing citizens to choose another nation's legal regime is

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1 For a concise overview of the challenges that the 'European project' faces: O. Cramme (ed.), *Rescuing the European Project: EU Legitimacy, Governance and Security*, 2009.

a method of empowerment. The limits of such empowerment (and hence of ‘multiculturalism’) are discussed in Section 5.

2. Euroscepticism and legal integration

The term Euroscepticism does not have one single usage. Sometimes, the term is used to refer to the lack of enthusiasm about the increasing powers of the European Union that exists especially in the British public debate. Others adopt a more broad definition and consider Euroscepticism as a synonym for any negative view of the process of Europeanisation, including the criticism of specific EU policies, opposing EU enlargement and the fear that European integration endangers the pursuit of ‘social justice’.² In this paper, the term Euroscepticism is used to refer to the States’ fear of losing sovereignty and the consequences this has for the legitimacy of decisions that directly touch upon the rights and obligations of citizens: Eurosceptics are typically worried about the diminution of national autonomy and the leaking away of the national parliaments’ power as democratic law-making institutions.³ This leads to the fear of a European bureaucratic super-state that may decide upon numerous issues that affect its citizens in an undemocratic manner.

In the debate about European private law, we find one specific application of such Euroscepticism. This is the view that the harmonisation of private law within the European Union is not something to be desired because it would deny the existence of different preferences by citizens as to how the law should read. In this view, existing differences among jurisdictions are explained by reference to citizens making different choices through their national parliaments or by reference to diverging national ‘legal cultures.’⁴ Related to this is the more extreme view that such differences not only make harmonisation undesirable, but even *impossible*.⁵

The point to recognise is that Euroscepticism, in any of the above varieties, presupposes a specific view of the relationship between the European Union and its citizens. Eurosceptics tend to think of the European Union as a super-state that unilaterally decides what is ‘best’ for its citizens and does so in an undemocratic way. This denies the fact that not only do other (non-participatory and non-majoritarian) forms of representation exist through national parliaments,⁶ but it also assumes that citizens are monolithically governed by one set of rules that is imposed upon them by some political entity. Although this is true for some parts of the law, it certainly is not so for extensive parts of private law, where citizens have, in fact, the possibility to choose their own rules. It will be shown in the next section that such possibilities are in fact abundant, which makes Eurosceptics’ assumptions largely baseless when it comes to things that citizens tend to value most: the ability to shape their relationships with other citizens. Put differently, Eurosceptics fail to recognise that citizens’ interests are not necessarily represented through the State institutions.

2 R. Harmsen & M. Spiering, ‘Introduction: Euroscepticism and the Evolution of European political debate’, in R. Harmsen & M. Spiering (eds.), *Euroscepticism: Party Politics, National Identity and European Integration*, 2005, pp. 13 et seq. On the conceptual difficulties involved in using the term, see A. Szerbiak & P. Taggart, ‘Theorising Party-Based Euroscepticism: Problems of Definition, Measurement and Causality’, *Sussex European Institute (SEI) Working paper* 69, p. 6.

3 See G. Drewry, ‘The Jurisprudence of British Euroscepticism: A strange banquet of fish and vegetables’, 2007 *Utrecht Law Review*, no. 2, <www.utrechtlawreview.org>, URN:NBN:NL:UI:10-1-101068, pp. 104 et seq.

4 See e.g. A. Ogus, ‘The Economic Approach: Competition between Legal Systems’, in E. Örucü & D. Nelken (eds.), *Comparative Law: A Handbook*, 2007, pp. 155 et seq.

5 See in particular P. Legrand, ‘European Legal Systems Are Not Converging’, 1996 *ICLQ*, no. 1, pp. 52 et seq.

6 See on these other methods in the field of European private law: J.M. Smits, ‘Democracy and (European) Private Law: A Functional Approach’, 2009 *European Journal of Legal Studies*, pp. 26 et seq.

It should be emphasised that the undetermined view of the relationship between the European Union and its citizens troubles not only Eurosceptics, but Europhiles as well. Europhiles, those who favour far-reaching European competences in the field of private law (and argue, e.g., in favour of a European Civil Code), also fail to recognise that citizens' interests are often much better represented by leaving it to them to decide which jurisdiction they like best rather than by adopting a binding European Code with only weak parliamentary input. In this sense, the present discussion⁷ on how to increase the 'democratic' input in the process of drafting a Common Frame of Reference for European Private Law (DCFR)⁸ is fundamentally misinformed: the question is not how to increase the legitimacy of a set of rules that is not binding upon the citizens anyway, but how to take *existing* legal regimes as the starting point for a reasoned choice by citizens.

3. On citizens choosing legal regimes

The previous section revealed that Eurosceptics seem to have an overly narrow view of the role that citizens can play in shaping their own rights. It is now time to substantiate this statement. In the following, several examples are given of people choosing their own legal regime. These examples are taken from three widely divergent fields: the law of contract, family law and citizenship.⁹ This is not to suggest that there are no other fields where a choice of different legal regimes is possible, but the goal of this contribution is not to give a complete overview.¹⁰

The first example is taken from the field of contract law. In this field, parties have enhanced possibilities to choose other contract law regimes rather than those of their own State. Within the European Union, Article 3 of the recent Rome I Regulation¹¹ reaffirms this freedom of the parties to select the law which is applicable to their contract if that contract has some international aspect to it. Thus, parties can opt for a contract law other than the law of their place of residence or of their nationality without physically moving to the other jurisdiction. Empirical evidence shows that commercial parties quite often opt for a foreign jurisdiction to be applicable to their contract: more than four out of ten companies select, at least occasionally, another legal system than the one applicable to them by default.¹²

The second example relates to family law, more specifically concerning same-sex marriage. If two same-sex partners are not satisfied with their own national law because it does not allow them to marry, they can decide to wed in a country where same-sex marriage is allowed. At the moment, the possibility to do so is fairly limited as a result of many countries limiting marriage to citizens having the nationality of that specific country or to people actually living there. Two exceptions to this common pattern are Canada and Mexico City. They both allow a same-sex marriage for not only their nationals or inhabitants, but also for foreigners. One important difference with the example of contract law is that parties in this scenario actually have to travel to the foreign jurisdiction in order to become married. Again, there is some empirical evidence

7 See in particular Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', 2004 *European Law Journal*, pp. 653 et seq.

8 C. Von Bar & E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, 2009.

9 I have previously used these examples in J.M. Smits, *Rechtstoerisme: Burgerlijk Wetboek en Grondwet voorbij de Staat*, inaugural lecture, Tilburg University, 2010 (in Dutch).

10 Leaving aside the difficulties of giving such an overview as traditional thinking in private international law does not take party autonomy as a starting point.

11 EC Regulation 593/2008 on the law applicable to contractual obligations, OJ L 177/6.

12 S. Vogenauer & S. Weatherill, 'The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate', in S. Vogenauer & S. Weatherill, *The Harmonisation of European Contract Law*, 2006, p. 121.

which clearly shows that parties are increasingly willing to engage in this *wedding tourism*. Thus, Canadian statistics show that more than half of the marriages concluded in Canada among people of the same sex are in fact among foreigners not living in Canada.¹³

The third and final example does not concern private law, but a topic of constitutional law, namely nationality. Although it is true that nationality is a topic that is only susceptible to party choice under exceptional circumstances, there has always been some level of bargaining with regard to this as well. An important example of this is where athletes change their nationality in order to participate in international sporting events. A famous case from the 1990s concerns the Dutch speedskater Bart Veldkamp, who decided to become a Belgian national in order to participate in the European and world skating championships. Although Veldkamp was a world-class speedskater, he was not good enough to compete for the Netherlands: the Dutch team typically consisted of three participants who would usually all finish in the top five in any international tournament. In order to be able to participate, Veldkamp opted to adopt Belgian nationality without physically moving to Belgium and without actually integrating into Belgian society. Apart from the Veldkamp case, there are many other examples of athletes opting for a nationality other than the one they were born with.

All three examples are indicative of people choosing a different legal system than their own for only one aspect of their lives, whether it be for business, exercising a profession or for some aspect of their personal life. Apparently, these people are not happy with the entire package of the law of their residence or nationality and therefore decide to ‘opt out’ of one or more specific aspects of their legal system. Such ‘legal tourism’ has come to play an increasingly important role within the European Union and on a global scale, undoubtedly also encouraged by countries that wish to attract foreign parties to choose their legal system as the applicable law. This has not gone unnoticed in European and American academic circles.¹⁴ In my view, the most important aspect of this phenomenon is that, based on the present rules of private international law, citizens are able to opt out of the rules that apply to them by default because of their nationality or their place of residence. In this sense, citizens can play an important role in choosing the legal regime they want to be governed by: it allows them to have their preferences satisfied in a different way rather than through the traditional method of representation by a parliament.

It is clear that this phenomenon raises important questions of a theoretical and practical nature. One such question is the following: what are the consequences of this legal tourism for the relationship between the national State, its citizens, its territory and the law? Another question is what does one think of this development: is it wrong or should it be encouraged and, if so, how? These questions cannot be discussed at length in this contribution;¹⁵ as we saw before, the aim of the above overview is only to show that in important fields of life, citizens are already capable of choosing legal systems which they prefer. There are certainly limits to such a choice, primarily caused by the reluctance of national States to recognise a choice of a foreign law, but it cannot be denied that legal tourism is alive and well and even growing in its importance. This puts into perspective the Eurosceptics’ view of a European super-state deciding all by itself what is best for the European citizens. But it should also make us realise that choosing foreign legal

13 See the marriage statistics of Statistics Canada, available at <www.statcan.gc.ca> and K. Harris, ‘Same-sex marriage drawing foreigners’, *CNews*, 18 January 2007.

14 See in particular E.A. O’Hara & L.E. Ribstein, *The Law Market*, 2009 and H. Eidenmüller, ‘Recht als Produkt’, 2009 *JuristenZeitung*, pp. 641 et seq.

15 They will be discussed in a future publication on ‘legal tourism.’

regimes is an important method to overcome national legal cultures. This is elaborated in the next section.

4. Party choice as the empowerment of citizens and as challenging the importance of national legal cultures

The previous section provided evidence for the view that citizens are in fact able to opt out of their 'own' legal system in cases where they are dissatisfied therewith. This phenomenon seems to be at odds with the traditional way in which we look at law. One could reason that if law is made through a democratic process, citizens should accept the solution of the majority and should therefore not be able to shop elsewhere for their law. In my view, however, it would be very wrong if this would be the prevailing reaction of States to citizens choosing other legal regimes. The most important reason for this is that in today's world the question of what is fair and just necessarily receives different answers from different people, even amongst the people that live in the same country. Even if Parliament, after long deliberation, comes up with a 'best' national solution (often in the form of a compromise), many people will still disagree with that solution. The truth is that there is no longer one ideal social arrangement; in its place, we only have competing views of what is right.

If we accept this analysis, would it not be much better then – at least for certain topics – to leave the choice for the desired solution with the citizens themselves and allow them to choose a different solution adopted by another country? It was Charles Tiebout who laid the foundations for this view of people not voting through parliaments, but voting with their feet.¹⁶ This idea has lost nothing of its importance since it was first proposed. It may be incompatible with the contractarian approach of the social contract that has been so influential over the last few centuries, but I am not alone in claiming that in times of internationalisation, the idea of a hypothetical contract between the State and its citizens, allowing only one possible outcome out of many, is no longer adequate. This is one specific application of a more general idea put forward by the economist and philosopher Amartya Sen, who rightly claims that there is not one choice that is best for everyone, but only an inescapable plurality of competing principles. This means for the field of the philosophy of law that 'a theory of justice must have something to say about the choices that are actually on offer.'¹⁷ This line of reasoning allows us to think in terms of alternatives. To have the possibility to opt for another jurisdiction, rather than sticking with the law applicable by default, is a practical way of putting such a theory of justice into action (even though Sen himself does not relate the philosophical idea to increased possibilities for party choice). This turns choice of law into a method of empowering citizens. If the catchword 'empowerment' also refers to enabling individuals to choose an alternative out of a range of options – as the academic literature indeed suggests¹⁸ – then legal tourism is a form of legal empowerment. This is true even though, today, the essential prerequisite of offering citizens sufficient information about the available options is often not met.

There is still another important consequence of allowing enhanced party choice for parts of foreign jurisdictions. At present, the discussion on the harmonisation of private law is almost

16 C. Tiebout, 'A Pure Theory of Local Expenditures', 1956 *Journal of Political Economy* 64, no. 5, pp. 416-424.

17 A. Sen, *The Idea of Justice*, 2009, p. 106.

18 The term 'empowerment' is often used in work on law and development, but is not limited to that field. The term refers to any social process that helps people gain control over their own lives by giving them the power to act on issues they define as important. Some aspect of comparison among options is vital to this definition. See N. Page, 'Empowerment: What is it?', 1999 *Journal of Extension*, no. 5 and A. Sen, *The Idea of Justice*, 2009, pp. 15 et seq.

invariably based on the idea that one needs a convergence of divergent *national* cultures. But cultures are not necessarily national. The mere fact that people feel the need to choose a specific *cultural segment* that cuts across national borders (such as opting into the contract or marriage regime of their liking) indicates that they do not primarily associate themselves with a national culture, but with societal groups like those of consumers, businesspeople or homosexuals. Sen claims:

‘[W]e see ourselves as members of a variety of groups – we belong to all of them. A person’s citizenship, residence, geographic origin, gender, class, politics, profession, employment, food habits, sport interests, taste in music, social commitments, etc. make us members of a variety of groups.’¹⁹

Allowing citizens to choose only a particular *segment* of a foreign jurisdiction (and not for that jurisdiction as a whole) effectively transforms culture into a divisible entity. According to this view, people should not be associated with a certain (national, religious or other) tradition, but rather should be understood as persons with many affiliations. Which affiliation they value most is something they can and ought to decide for themselves.²⁰

5. Finally: the need to be explicit about the limits of a choice of law

My plea in this contribution is that increasing the internationalisation of society forces us to think about law in a fundamentally different way than we traditionally do. Our focus should shift from national legal cultures to transnational cultural segments, *i.e.* parts of culture that cut across national borders and that are based on common preferences of groups of people. This can greatly enhance the participation of citizens in the European integration process: citizens will be empowered to choose the rules they like best in a certain area without the need to opt into an entire jurisdiction. This does not mean that there are no relevant differences between the fields mentioned in this contribution (contract, marriage and nationality), but the point is that in my view these differences are merely gradual: large parts of law can be seen as a product.²¹

An essential part of this approach is that the limits of recognising a choice for a foreign legal system are clear. At present, these limits are often not very clear: States do not usually take into account the possibility that their citizens would choose the law of another country and they therefore have no clear rules on when such a choice should be recognised. Most jurisdictions would consider this as a matter of when a choice would interfere with national public policy, but this is a vague concept that is usually not elaborated in much detail.²² Furthermore, in the political discussion about multiculturalism, the prevailing opinion among politicians also seems to be that people should only be governed by the rules of one country and that the choice of immigrants for a new country should entail *all* aspects of that country’s legal system. This is not only at odds with the prevailing law in all European Member States, which as we saw before would be undesirable. What we do need, however, is a fundamental discussion about what we consider as essential laws that cannot be opted out of if one is either a national or a resident of a certain

19 A. Sen, *Identity and Violence: The Illusion of Destiny*, 2006, pp. 4-5.

20 See A. Sen, *Identity and Violence: The Illusion of Destiny*, 2006, p. 150.

21 The way in which also nationality is suited to a more fragmented approach is shown by Bruno Frey. See e.g. B.S. Frey & R. Eichenberger, *The New Democratic Federalism for Europe*, 1999 and V. Bader, *Complex Citizenship and Legitimacy in Compound Polities: The EU as Example*, Eurosphere Working paper 2008-05.

22 Compare E.A. O’Hara & L.E. Ribstein, *The Law Market*, 2009, p. 62: ‘What is a “fundamental policy”? That’s anyone’s guess.’

country.²³ Once the States establish the limits of exercising party autonomy, the rest is a matter of tolerance towards difference: a State then still deciding whether to reject or condone the practice of people choosing a foreign law in a certain area is effectively saying that only the solution of the majority in that State is acceptable. It was made abundantly clear in the above that such a reaction is not only ill-conceived, but is fundamentally flawed.

23 See E.A. O'Hara & L.E. Ribstein, *The Law Market*, 2009, p. 62 on, what they call, 'super-mandatory laws.'