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A Radical View of Legal Pluralism

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I. INTRODUCTION

ANYONE READING THE most recent writings on Europeanisation of the traditional fields of law can come to only one conclusion: pluralism is everywhere. This is particularly true of constitutional law[1]; but in criminal law and private law as well it is increasingly being emphasised that the law is no longer set by a number of hierarchically-ordered authorities exercising systematically distributed powers over citizens residing on one territory. Instead, it is argued that different, equally valid claims to legal authority have come to exist, leading to different bodies of law that partly overlap and conflict with each other in governing the same acts and actors.[2] This spectacular rise of the use of the concept of pluralism beyond the field in which it was originally developed (namely, legal anthropology)[3] leads to various questions.

In this chapter, I should like to address two of these questions.[4] The first obvious question is to what extent (European) private law is in fact characterised by pluralism. In the debate about constitutional pluralism, it is usually emphasised that the existence of competing and overlapping authorities is a relatively new

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[1] A recent overview is provided by D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 326–65.

[2] Cf R Michaels, 'Global Legal Pluralism' [2009] *Annual Review of Law and Social Science* 5, 14.1–14.20, G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443; and PS Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155, at 1192: conflicting rules occupy the same social field.

[3] Cf J Griffiths, 'What is legal pluralism?' (1986) 1 *Journal of Legal Pluralism* 24; S Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719.

[4] A third question is how to deal with ('manage') existing legal pluralism. This is addressed in JM Smits, 'Plurality of Sources in European Private Law, or: How to Live With Legal Diversity?' in R Brownsword, H Micklitz, L Niglia and S Weatherill (eds), *The Foundations of European Private Law* (Hart Publishing, 2011) 323–35.

thing: much of the discussion in this field only started with the Maastricht decision of the German Constitutional Court in 1993.[5] The question is whether pluralism is an equally recent phenomenon in private law and, if not, why it is that in this field more and more attention is being devoted to it. I shall claim in section II. that much of what private law scholars qualify as signs of increasing pluralism is in essence nothing more than a shift in perspective: this pluralism was there before, but it was often not recognised as such because of the focus on State law alone.

The second question is a normative one: to what extent can legal pluralism be accepted, or should it even be encouraged? For reasons that will become apparent in the remainder of this contribution, I propose a *radical* view of legal pluralism in European private law. This view is based on the idea that people are never necessarily governed by the law of one State or by the norms of one societal group, but are instead allowed to opt out of their 'own' set of norms. This puts legal pluralism in a different perspective. While an argument that is often used against legal pluralism is that it may endanger the interests of a party being trapped in its own community, the radical view of pluralism laid down in this chapter avoids this problem: it allows a party to *opt out* of one community and to *opt in* to another. This view of law as (at least to a large extent) a matter of choice is elaborated in section III.

II. LEGAL PLURALISM: A MATTER OF PERSPECTIVE

The first question is to what extent private law is at present pluralist in the sense described above, that is, characterised by different claims to legal authority that exist at the same time on one territory, leading to different bodies of law that partly overlap and conflict with each other.[6] It is usually assumed that there are two main reasons why such pluralism would exist.

First, legal norms increasingly flow from different 'official' sources. While – at least in the common narrative – law used to be primarily produced by national parliaments and courts, rules are now also made by the EU institutions, supranational organisations, and other authoritative and institutionalised entities such as the WTO, the IMF or the Basel Committee on Banking Supervision.[7] The mere fact that these rules flow from different sources does in itself not lead to a pluralism of norms, but the often different rationales behind the rules do make it problematic to place them in a broader coherent scheme[8]: the pluralism

[5] 89 BVerfGE 155 (1993).

[6] Cf W Twining, *Globalisation and Legal Theory* (Butterworths, 2000) 83: legal pluralism as 'legal systems, networks or orders co-existing in the same geographical space'.

[7] See for more details Smits, above n 4; and JM Smits, 'The Complexity of Transnational Law' (2011) *Isaidat Law Review* 1, Special Issue 3, Article 9.

[8] See recently eg C Schmid, *Die Instrumentalisierung des Privatrechts durch die europäische Union* (Nomos, 2010); and C Schmid, *The ECJ as a Constitutional and a Private Law Court: A Methodological Comparison* (2006) ZERP Diskussionspapier 4, 8ff.

of sources also leads to a pluralism of legal systems and norms.[9] If different 'lawgivers' deal with different parts of private law, this means that an overall responsibility for coherence and unity no longer lies with one overarching institution.[10] This becomes particularly clear in private law, where the coherence of the system has always been important. This may mean that pluralism works out in a different way in constitutional law than in private law: as the former emphasises the problem of attribution and distribution of power, the latter is more concerned with issues of system and coherence.

Secondly, and more in line with the traditional understanding of legal pluralism, behaviour of private actors is increasingly governed by non-official norms that exist next to State law and formal European and international law.[11] The age-old *lex mercatoria*[12] is joined by a *lex sportiva* and a *codex alimentarius*, by codes of conduct on social responsibility and by many other types of self-regulation.[13] These economic and functional normative systems stand next to the customary and religious systems with which legal pluralism has always been associated. It is well known that religion is also the area where the most obvious conflicts between State law and non-official laws exist, such as in the cases of treatment of women, child marriage, arranged marriage, divorce rights, inheritance and punishment based on religious norms.[14]

There is general agreement that these two phenomena account for much of the existing legal pluralism. However, what needs clarification is not only to what extent this is 'real' legal pluralism as described above, but also whether these phenomena are fundamentally new. An affirmative answer to the first question would mean that the hierarchy among the various norms is no longer clear, and that multiple communities setting norms all legitimately exercise authority over the same acts or actors. This situation supposedly exists in European constitutional law, where different authorities may legitimately compete on the same territory or about the same relationship without a higher authority deciding the conflict once and for all.[15] However, it is less clear that

[9] D Halberstam, 'Systems pluralism and institutional pluralism in constitutional law: rethinking national, supranational, and global governance' *Michigan Law Working Paper Series* 2011, at 229, distinguishes between pluralism of systems, of actors, of sources and of norms.

[10] See on this, eg, C Joerges, 'Interactive Adjudication in the Europeanisation Process? A Demanding Perspective and a Modest Example' (2000) 8 *European Review of Private Law* 1; O Remien, 'Einheit, Mehrstufigheit und Flexibilität im europäischen Privat- und Wirtschaftsrecht' (1998) 62 *RabelsZ* 627; and MW Hesselink, 'The Structure of the New European Private Law' (2002) 6.4 *Electronic Journal of Comparative Law* 1.

[11] BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375 at 397ff presents six systems of normative ordering.

[12] See LE Trakman, 'The Twenty-First Century Law Merchant' (2011) 48 *American Business Law Journal* 775.

[13] See, instead of many others, F Cafaggi, *Reframing Self-Regulation in European Private Law* (Kluwer Law International, 2006) and R Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447.

[14] Cf Tamanaha, above n 11, 407.

[15] See M Avbelj and J Komárek, 'Four Visions of Constitutional Pluralism' (2008) 4 *European Constitutional Law Review* 524 at 524.

this situation exists in private law too. Here, the relationship between the various types of norms is usually much clearer[16]: the question is not so much who has the final authority in establishing the rights and obligations of private actors (the official rules are considered to prevail over non-official norms and the hierarchy of European over national rules is also virtually undisputed), but rather how much freedom should be given to non-State actors in deciding their own affairs. The real debate in European private law is therefore about the freedom that private actors have in deviating from their own State law (a question that is dealt with in section III. below).

The second important point is whether the two phenomena discussed above really merit a new 'pluralist perspective' on private law. It may be that the amount of European, international and non-State law has increased, but is it not true that such rules have been around for a long time already? It is in any event clear that before the great codifications of private law, there was a concurrence of many different legal systems, ranging from local laws and canon law to Roman and mercantile law.[17] And it needs little explanation that different sets of functional and religious norms also coexisted with official rules in the nineteenth and twentieth centuries. The primary reason for the greater attention paid to legal pluralism therefore seems to be that these 'other' norms have become more visible as a result of the increasing migration of people and internationalisation of law. Tamanaha rightly emphasises that we now have more pluralism simply because we adopt a different perspective.[18] As soon as we stop looking for law in the obvious places (the official national institutions), and even adjust our definition of what counts as law,[19] it is inevitable that we find many more norms (and conflicts among them) than we assumed existed. In this sense, pluralism is 'produced'.

This does not mean that we should downplay the importance of present-day legal pluralism: the shift of perspective away from the national State as the main producer of law is much needed if we want to grasp the importance of other rule-making communities. However, this *description* from a different perspective does not say much about the extent to which pluralism should be accepted at the *normative* level. This question is discussed in the next section.

[16] For a different view: F Cafaggi, 'Introduction' in F Cafaggi (ed), *The Institutional Framework of European Private Law* (Oxford University Press, 2006) 6: '[T]he phenomenon of multi-level law-making . . . has reduced the ability to solve conflict through hierarchy.'

[17] See in more detail the contribution of Nils Jansen in ch 6 of this book; and P Oestmann, 'Rechtsvielfalt' in N Jansen and P Oestmann (eds), *Gewohnheit, Gebot, Gesetz: Normativität in Geschichte und Gegenwart: eine Einführung* (Mohr Siebeck, 2011).

[18] Tamanaha, above n 11, 389.

[19] Namely, from law as rules given by the authoritative institutions to law as rules being accepted in social practice.

III. LEGAL PLURALISM AND PRIVATE CHOICE

A. Introduction

The above discussion has shown what is at the core of legal pluralism: the existence of different norm-generating communities that partly conflict and overlap. People can feel affiliated with these communities and hence feel bound by their norms.[20] The crucial question is to what extent people are in fact *allowed* to follow the 'laws' of these communities instead of the 'default' laws of their own State. The importance of this question is obvious: if people could contract, marry, divorce, inherit or treat others in accordance with their own private norms, State law would become obsolete. Hence, the question is to what extent divergence of norms on the territory of a State is to be tolerated.

Different 'solutions' have been proposed to deal with this tension between State law and rules of other norm-generating communities. They range from establishing a 'neutral' State guaranteeing overlapping consensus,[21] to identification of group rights (consociationalism),[22] to democratic liberalism.[23] The problem is, however, that these theories, at least implicitly, assume that an individual is in principle 'trapped' in his or her own community and is not able to 'escape' it. Put differently: existing theories about pluralism do not problematise the capacity of an individual itself to act and make choices.[24] In the remainder of this section I shall show why this is wrong and why we are in need of a radical overhaul of prevailing views about legal pluralism.

B. The pluralism of justice

Although legal pluralism (and its political companion in the form of multiculturalism) is not always seen as positive, its very existence does make clear that people can have widely diverging views of what is just. And indeed, despite the Universal Declaration of Human Rights of 1948, we must doubt whether a

[20] Cf in particular the work of Amartya Sen, eg *Identity and Violence; the Illusion of Destiny* (Norton, 2006) 4–5: '[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.'

[21] Cf J Rawls, *Political Liberalism* (Columbia University Press, 1993).

[22] Cf A Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press, 1977).

[23] See R Bellamy, 'Dealing with Difference: Four Models of Pluralist Politics' (2000) 53 *Parliamentary Affairs* 198.

[24] Cf Michaels in his characterisation of my view in ch 7 of this volume, section IV.: '[L]egal pluralism . . . does not allow for individual agency.'

universal idea of justice really exists.[25] John Rawls, who did not see how his theory of justice could ever apply beyond the limits of a national society, denied this for the international level,[26] but it is also contested, in Europe, by authors like Jürgen Habermas.[27] The *Leyla Sahin* decision of the European Court of Human Rights,[28] about the use of head-scarves, may be the best-known application of this truth, in that it denied the existence of a uniform European conception of 'protection of the rights of others' and of 'public order'. In my view, legal pluralism makes clear that the same is true at the national level: despite the possibility of national democratic decision-making, views of what is just will continue to differ.[29]

This reading of legal pluralism is the final blow for the idea that there is, or that there should be, within one territory, a permanent homogeneous population (a 'people') governed by only one law. Van Gerven and Lierman[30] capture this well by indicating how the Nation State has made place for a 'Citizen State', which they describe as a State of citizens and inhabitants who are equal no matter whence they come. They deserve the protection of the law, regardless of whether they are a national of the country in which they reside or not. In such a society, there is no need to *assimilate* (meaning that individuals or cultural groups would lose their own identity); instead, the State recognises the distinctness of each citizen. Put differently: the citizen does not have to accept the collective cultural identity of the State because it is not in all circumstances the 'legitimate embodiment of shared community values'.[31] The State merely recognises and enforces what should be shared by everyone as common minimum norms, not shaping people to *become* Dutch, Finnish or whatever other nationality.[32]

This disconnection of norms governing people's behaviour and the law of the State finds its best-known application in the field of private international law. Private actors, such as citizens and firms, are increasingly able to choose the applicable law and the court of their liking.[33] The result is that law becomes

[25] Cf H Stacy, 'International Human Rights in a Fragmenting World' in A Sajo (ed), *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff, 2004).

[26] J Rawls, *The Law of Peoples* (Harvard University Press, 2001).

[27] J Habermas, *The Divided West* (Polity, 2006). See for counter-voices the various contributions to TW Pogge, *Global Justice* (Blackwell, 2001).

[28] *Leyla Sahin v Turkey* [2004] ECHR 299.

[29] See in more detail JM Smits, 'Redefining Normative Legal Science: Towards an Argumentative Discipline' in M Kamminga *et al* (eds), *Methods of Human Rights Research* (Intersentia, 2009); and JM Smits, *Mind and Method of the Legal Scholar* (Edward Elgar, 2012).

[30] W Van Gerven and S Lierman, *Algemeen Deel: Veertig jaar later* (Kluwer, 2010) 41 ff (in Dutch), with reference to JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003) 7–23.

[31] Cf A Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) 294–95.

[32] Van Gerven and Lierman, above n 30, 44, citing N MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999) and Art 1 of the Treaty on European Union, referring to 'an ever closer Union among the *peoples* of Europe' (emphasis added).

[33] Cf M Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 *Vanderbilt Journal of Transnational Law* 381; Mills,

more and more a matter of choice, leading to different laws being applicable on the territory of one State: Dutch law can today be found throughout the world, just as we can find German, Swedish and Italian law within The Netherlands. There is no longer one law for one territory. Interestingly, this was also the case before the great codifications of the nineteenth century, when an individual often took his own law with him when he travelled through Europe. These personal laws were applicable *because of* one's identity: 'foreign' litigants were judged in accordance with their own religious or commercial norms, or in line with some other status (like that of a student, a member of a guild or the gentry).[34] Famous is the saying that often, when five men were walking together, each of them would own a different law.[35] The obvious problem with this was of course that no escape was possible from the status one had. This injustice for the great majority of citizens led to a radical overhaul with the rise of the Westphalian Nation State: the organisation of laws on the basis of territory. But something went missing in the process: the idea that personal laws may not be that bad, as long as it is the deliberate choice of a party to have them apply.

This insight provides the key to how to deal with legal pluralism in today's society too – unlike the case of private international law – when it comes to non-State norms. While prevailing theories of legal pluralism emphasise that to belong to numerous communities is a matter of necessity (someone is both an Englishman and a Muslim), that is in my view an *opportunity*[36]: it allows citizens to choose or reject a certain tradition, with all the norms that belong to it. The main reason why other norm-generating communities than the State are looked at with suspicion is that the individual rights of members of the minority may be infringed upon. In a traditional view of legal pluralism, in which citizens are trapped in their own tradition, this is indeed problematic. But if legal pluralism is seen as giving citizens a *choice* among different communities competing with each other in their efforts to apply a certain set of norms to various actors,[37] this provides them with an enormous potential to shape their lives the way that they want. They would be able to invoke the rules they prefer, regardless of whether these are produced by their 'own' State, by other States, by local communities or by international human rights treaties.

This view provides a fresh perspective on legal pluralism. The realisation that views about what is just in today's society necessarily differ should prevent the State from deciding what is best for all of its citizens. Instead the State should allow its citizens to opt in to the norms they prefer, and opt out of the norms they dislike. This does not mean that no limits exist to this enhanced party

above n 31, 291; EO O'Hara and LE Ribstein, *The Law Market* (Oxford University Press, 2009); and JM Smits, 'Optional Law: A Plea for Multiple Choice in Private Law' (2010) 17 *Maastricht Journal of European and Comparative Law* 347.

[34] Berman, above n 2, 1205.

[35] Quoted by FW Maitland, 'A Prologue to the History of English Law' (1898) 14 *Law Quarterly Review*, 13, at 23.

[36] Taken from the characterisation of my view by Michaels, ch 7 in this volume, section IV.

[37] Cf Berman, above n 2, 1236.

choice (see section III.C. below), but they cannot be based on some idea of one shared nationality by which everyone has to abide through assimilation. In this perspective, wearing a headscarf or a burka is not a matter of force exercised within one's own community, nor a violation of State values: it is an individual choice that a citizen can make.

C. The potential and limits of party choice

The approach set out in the above may be qualified as a radical view of legal pluralism: citizens are – at least in principle – able to choose the rules of the jurisdiction (or local community) they prefer, but are also able to opt out of these rules. In this subsection, this view is elaborated by considering how it relates to present private international law and what its limits are.

Present private international law is not easily reconciled with the view of legal pluralism defended in the previous section: it usually recognises party choice only in situations that have an international aspect to them, or in case of a specific European regime.[38] The Rome I Regulation,[39] for example, allows party choice only in the case of an international contract, thus still separating 'the parochial, closely regulated world of the domestic . . . economy from the area of freedom where, beyond national . . . frontiers, state policies relax their grip'.[40] However, a forceful argument may be made against this traditional approach. In today's globalising world, people increasingly travel across borders to obtain in another country the legal status they want. If they contract, marry or divorce in accordance with the laws of another State, the private international law of their State of residence will often accept the foreign law as valid: it is rare that this would be considered as a violation of the national public order of the State where the citizen resides. This is an anomaly that is increasingly disturbing in today's globalising world, because these same citizens cannot obtain the same legal status by staying at home. In other words: those who *physically* travel to another country and opt in to the norms of the other jurisdiction are treated differently from those who are not able or willing to do so.[41] In my view, there is no longer a good reason for this distinction.[42] One might even argue that it violates the equal treatment of people: the law puts those who can afford to travel in a better position than those who cannot.

The solution to this problem is as radical as it is simple. Within the EU, we have done away with borders for the *physical* movement of people, but are lagging behind in eliminating these same borders for the movement of *law*. To

[38] Cf the Proposal for a Common European Sales Law, COM (2011) 635 final.

[39] Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6.

[40] H Muir Watt, '"Party Autonomy" in international contracts: from the making of a myth to the requirements of global governance' (2010) 6 *European Review of Contract Law* 251 at 261.

[41] The ever-increasing use of the Internet makes the argument even stronger.

[42] Cf Mills, above n 31, 245, with many references to literature showing that it is increasingly arbitrary to connect a law on basis of territoriality.

eliminate the requirements of territoriality and internationality in private international law[43] is the next logical step in this European integration process.[44] However, this would not be enough: citizens ideally should also be able to profit from the richness of non-European views of what is just. Only in that way it is possible for them to benefit fully from a market for laws.[45]

This does not mean that party choice has no limits. In the remainder of this section, three of these limits are discussed. They deal with the role of mandatory law, with the factual possibility for citizens to choose, and lastly with the question of the relationship between State laws and the rules of a customary, religious or functional nature that are usually associated with legal pluralism.

First, it is important to clarify what is the role of mandatory law in a radical view of legal pluralism. The whole point of the argument made in the discussion above is that it would be wrong to make a distinction between national mandatory law and public policy ('*ordre public*') as defined in private international law. At present, the first concept has a broader meaning than the second one, which is usually seen as referring to what are considered the fundamental values of the national legal order that cannot be made inapplicable by choice of a foreign law. In my view, the limits of legal pluralism should be set by these 'super-mandatory laws'.[46] This calls for a much more explicit discussion at the national level of what exactly counts as being not in conformity with public policy.[47] At present, this is often not very clear, because legislatures usually do not take into account the possibility that citizens would choose (part of) the law of another country.[48] Once States are explicit about the limits of exercising party autonomy, the rest is a matter of tolerance for difference: a State then still rejecting or condoning 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 clear above that such a reaction would be fundamentally flawed.

Secondly, it is clear that the success of the view defended in this contribution stands or falls with the *actual* possibility to opt out of one's own jurisdiction or

[43] O'Hara and Ribstein, above n 33, 4, make the same argument more in general: the 'mobility of people, assets, and transactions makes deciding which laws to apply to a legal problem increasingly arbitrary'.

[44] Note how this view differs from the common reaction to diversity of laws, namely, to plead for harmonisation (which means reconciling conflicting norms). However, to plead for harmonised laws is arguably an extension of the old concepts of territorial governance and sovereignty to a territory (the EU) that is not fit for it.

[45] Cf JM Smits, *Private Law 2.0: on the Role of Private Actors in a Post-National Society* (HiiL and Eleven International Publishing, 2011). See, for a similar argument in favour of a general principle of party autonomy in international family law (at the expense of nationality and residence), MV Polak, 'Onbegrip en onbehagen' in *Ex libris Hans Nieuwenhuis* (Kluwer, 2009) 227 at 236 (in Dutch).

[46] See O'Hara & Ribstein, above n 33, 62. This means that so-called 'relatively mandatory rules' (Lehmann, above n 33, 419ff) do not exist.

[47] See Smits, above n 4, 334.

[48] Cf O'Hara & Ribstein, above n 33, 62: 'What is a "fundamental policy"? That's anyone's guess.'

community: citizens should have a real possibility to choose. In particular, if people are entrenched in their own community, this can be difficult,[49] and the threat of social sanctions will often prevent them from opting out in the first place. There is no easy solution to this problem, and the best approach is probably to provide citizens with as much information as possible on the available options. Thus, an individual immigrant does have the freedom to remain loyal to parts of his culture (such as modes of religious worship or clothing), but he should be able to compare his own values with the prevalent patterns of behaviour in its new country and make a conscious decision about which norms he prefers.[50] The State has a big role to play in ensuring that people are able to make such a choice. In so far as people cannot make well-informed decisions about the norms they prefer, they should be protected against others trying to force minority norms upon them. This goes in the direction of making a strong argument against male circumcision or female genital cutting at a young age, but also in favour of allowing people to choose their own norms out of a variety of options once they are able consciously to make such a choice.[51] Multiculturalism is not the model that suits this desire best as it treats all religions or cultures on a similar footing, and the State would thus not be able to act against those religious or cultural norms that infringe upon rights of a party not able to opt out of its own community. Only a religiously neutral State (of which the French *laïcité* is the prime example) can probably sufficiently guarantee the interests of these weaker parties. This means that there is, in principle,[52] nothing wrong with girls wearing a Catholic cross, an Islamic headscarf or Jewish tichel, as long as this is not a decision that is forced upon them by their family members, priest, imam or rabbi.[53]

Thirdly, there is the question about the relationship between State law and rules of a customary, religious or functional nature. If my reasoning on the basis of private international law in the above suggests that foreign State law is on an equal footing with the norms usually associated with legal pluralism, that suggestion is wrong. The fundamental difference is that if a State recognises other States as having law-making powers, this does not weaken that State's position but instead strengthens it: private international law allows States to constitute each other mutually as lawmakers.[54] However, if a State would accept a choice for non-State law as equally valid, this would mean that it downgrades its own position to being just another lawmaker. It would no longer be able to decide conflicts between itself and other norm-generating communities; the result is

[49] For a telling story of how difficult this can be, see Ayaan Hirsi Ali, *Infidel* (Free Press, 2007).

[50] Cf on the importance of comparison, Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009), 15ff.

[51] Cf Polak, above n 45, 235ff.

[52] The obvious exception is the use of manifestly religious signs by State officials while at work.

[53] It should be noted that in Islam, the age at which girls are supposed to start wearing the hijab is at puberty, when they become responsible and accountable for their behaviour.

[54] R Michaels, 'The Re-*state*-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 *The Wayne Law Review* 1209 at 1248.

that the 'real' legal pluralism mentioned in section II. would emerge. This is why, also in my view of radical pluralism, the State remains responsible for indicating the limits of choice for other jurisdictions or norms of communities.

IV. CONCLUSIONS

Two conclusions follow from the above. The first is that pluralism in private law is mainly the result of a shift in perspective: if we no longer see law as flowing only from the official sources, it is evident that we have to take many more rules into account than we did before, and that these rules are likely to conflict with each other. In this sense, legal pluralism only *describes* law in a different way. The second conclusion is that, from the *normative* viewpoint, legal pluralism is to be encouraged. The main reason for this is that today's society is characterised by a wide range of views of what is regarded as just. While it was possible to find an acceptable compromise among different views in the Nation State (characterised by a permanent homogeneous population), this is no longer the case in the present-day Citizen State. This State is populated by people who not only diverge in their views of what is just, but who can also travel elsewhere to obtain the laws they prefer. A radical view of legal pluralism entails that if they can obtain these laws elsewhere, nothing should stand in their way of obtaining them at home as well – within the wide limits set by public policy. While an important argument against legal pluralism is that the interests of weaker parties are endangered because they are trapped in their own community, this view allows us to reverse this point: pluralism also allows parties to opt *out* of the community they dislike and to opt *in* to the one they prefer. This is in my view the logical consequence of what is needed in a globalising society: to take legal pluralism seriously.