

European Private Law and Democracy: a Misunderstood Relationship

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In Honour of Anthony Ogus

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and
Frank Stephen

EUROPEAN PRIVATE LAW AND DEMOCRACY: A MISUNDERSTOOD RELATIONSHIP

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1. Introduction

An important part of Anthony Ogus' stimulating scholarship deals with the topic of legal convergence.¹ His writings are a wonderful source of inspiration for anyone who is searching for a theoretical framework to understand present efforts to Europeanize private law. This short contribution deals with a question that has come to play an important role in the debate about European private law: the purported lack of democratic input in drafting rules in this area. It is of course well known that the Europeanization process prompts the need for new forms of legitimacy,² but this debate has received new impetus in the area of private law with the efforts to produce a so-called Draft Common Frame of Reference (DCFR). An important strand of scholarship claims that this DCFR is too much the product of legal scholars, where it should be the work of politicians and in particular of parliaments. This supposedly leads to a lack of democratic legitimacy of private law. In the background is the more general question of the exact relationship between private law and (national) democracy. I will argue that the relationship between European private law and democracy is often misunderstood and that in this respect criticism on the DCFR is not justified – although I have heavily criticised the DCFR myself for various other reasons.³

2. Europeanization and private law: a democratic deficit?

It seems appropriate to start with a brief sketch of the background to the present debate. As is well known, the (now) European Union has been active in the core

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¹ Cf. Ogus 2007; Garoupa & Ogus 2006; Ogus 2002; Ogus 1999.

² See, among others, Curtin 1997.

³ My critical assessment of the DCFR can be found in Smits 2008b and in Smits 2008a.

areas of private law since the 1980's, leading to an *acquis* of approximately 20 directives.⁴ This *acquis* has been criticised for various reasons. One is that the various directives often contradict each other, another is that the *acquis* is only a fragmentary set of rules. It is also not clear why the European legislator does not cover all topics related to the internal market, making the *acquis* quite arbitrary.⁵ These deficiencies prompted the European Commission to start a debate about the future of European private law. Three 'communications'⁶ finally led to the Commission's decision to draft a 'common frame of reference.' This will provide definitions of legal terms, fundamental principles and model rules and can be used as a 'toolbox'⁷ for the European legislator, as a source of inspiration for the ECJ and national courts, and as an optional code for contracting parties that want to make the CFR the law applicable to their contract. In December 2007, a draft for this Common Frame of Reference (DCFR) was presented to the European Commission.⁸

Whatever the fate of the DCFR will be – the European Commission recently indicated it will aim primarily for a less ambitious revision of eight important directives⁹ – it has prompted an interesting debate about the legitimacy of the present text. It was drafted by legal scholars united in the *Study Group on a European Civil Code* and in the *Research Group on the Existing EC Private Law* (the so-called '*acquis*-group')¹⁰ and is in this respect a typical example of *Professorenrecht*. This is also acknowledged by the drafters, who presented their text as an 'academic CFR', a scholarly product that is not politically legitimised and that at its best could form the basis for a 'political CFR' to be drafted by the European Commission. But it is difficult to deny that, in drafting the DCFR, many relevant choices were made. In a recent thesis, Bas van Zelst sketches the objections against this working method:¹¹

'This seems worrying from two different angles. First of all, the scholars that are involved in the drafting of the DCFR lack democratic legitimacy. The group represents neither all of the populations of the Member States, nor their political convictions. Secondly, it is questionable whether professors should be vested with the translation of social-political reality into legislation. In a democratic society, this would seem to principally be the task of the (democratically legitimised) legislature (...).'

Other authors, most of them united in yet another group, namely the *Study Group on Social Justice in European Private Law*,¹² also hold the view that Europeanization of private law should take place in a more democratic way. This would not only be true for the DCFR, but for any attempt to create a European private law. These

⁴ All directives can be found in *Ars Aequi Wetseditie* 2006.

⁵ See, with many details, Smits 2006, p. 55 *et seq.*

⁶ European Commission 2001; European Commission 2003; European Commission 2004.

⁷ European Commission 2004, p. 14.

⁸ Von Bar, Clive & Schulte-Nölke 2008.

⁹ European Commission 2007. Also see Second progress report on the CFR of 25 July 2007, COM (2007) 447.

¹⁰ These are the two most important groups in the *Joint Network on European Private Law*, a so-called *network of excellence* financed by the European Commission.

¹¹ Van Zelst 2008, p. 244-245.

¹² See notably Hesselink 2004; Hesselink 2006; Grundmann 2005, p. 184; Study Group on Social Justice 2004, p. 653 *et seq.*; Mattei 2003, p. 107 *et seq.*

authors are clearly influenced by the Critical Legal Studies view that all law (including private law) is politics.¹³ If private law shapes the distribution of wealth in a modern society, creating a future European private law is primarily a *political* process: the rules of contract law that account for the right mix between the free market and social justice should therefore be determined in a democratic way. Only consulting 'stakeholders' and legal practice in drafting new European rules – as the European Commission proposes – is then not enough: instead, the European Parliament and national legislators have to be involved.¹⁴

The question that interests us in this contribution is whether private law and democracy are really related in the way described in the above. The importance of this question is paramount: if Van Zelst and the Study Group on Social Justice are right, it means that private law can only come about in a democratic decision process. I believe this view is mistaken. The three reasons for this are set out in the next three sections.

3. Realising 'democracy' through jurisdictional competition

The first reason why (private) law does not need a democratic basis in decisions of a parliament is that there is often another and better way to establish preferences of citizens. The reference is, of course, to the theory of jurisdictional competition developed by the American author Charles Tiebout (1924-1968).¹⁵ When parties have freedom of choice as to the applicable legal regime (as is already the case in large parts of company and contract law), they will choose the regime they like best. This view has come to play an important role in the present debate about European private law: authors favouring legal diversity over forms of centralist lawmaking invariably invoke the argument of jurisdictional competition. In the Netherlands, this line of thinking is typically associated with (former) scholars of the Maastricht Faculty of Law¹⁶ – even to such an extent that mention was made of a 'Romantic Law School of Maastricht'.¹⁷

What is sometimes forgotten with respect to this argument is that Tiebout invented jurisdictional competition as an alternative to allocating local public goods by a political decision process. He showed¹⁸ that preferences of citizens need not be established in a democratic process, but can also be established by allowing citizens to choose for a regime they like. For Tiebout, these were households choosing to live in a particular community, but it is clear that also a choice of a particular legal regime, without a party moving physically, is an alternative to voting with one's feet.

It is quite clear that there are limits to establishing preferences by jurisdictional competition. One limit is when it comes to law regarded as mandatory by a state.

¹³ Cf. Kennedy 1976, p. 1685 and Kennedy 2002, p. 7.

¹⁴ Cf. Study Group on Social Justice 2004, p. 669.

¹⁵ Tiebout 1956.

¹⁶ See in particular Faure & Hartlief 2003, p. 170 *et seq.*, Smits 2000 and, of course, Anthony Ogus himself.

¹⁷ Nieuwenhuis 2003, p. 61 *et seq.*

¹⁸ As a reaction to in particular Samuelson 1954, who had claimed that an efficient level of public goods cannot be produced.

Another one – as economists have made very clear – is that the opportunity of ‘exit’ is not enough to create an efficient level of regulation. On the one hand, this is the case because local governments (or states) do not, unlike commercial entities, go out of business and can thus continue to offer inefficient legal regimes. This means that some democratic control mechanism for the suppliers of law is still needed. On the other hand, it was argued that one also needs an element of ‘voice’:¹⁹ if one is dissatisfied with a jurisdiction, one need not necessarily leave it. One can also try to influence the political decision makers to improve that jurisdiction. Such ‘exit’ and ‘voice’ interact: if there is more opportunity for criticism, parties are less likely to leave their jurisdiction. Likewise, if exit is easy, voice will be used less.²⁰

But even if these restrictions are accepted, jurisdictional competition remains an important alternative to centralist lawmaking in the area of contracts (the backbone of the DCFR). This means that the ‘democracy thesis’ of the authors mentioned in the previous section is based on a view of lawmaking that is not necessarily the only one conceivable. In particular in the area of contract law, jurisdictional competition may be a much better way to achieve ‘democratic’ input than traditional democratic decision making by States. This does mean, however, that we have to abandon the idea of only one legitimate group responsible for lawmaking. Too often, only nation-states are seen as legitimate democratic lawmakers. But in an increasingly globalising and interconnected world, there is no necessary relationship between the nation-state and the legitimacy of law. The number of legal regimes need not be the same as the number of nation-states.²¹

4. Democratic input: the experience of optional instruments

The second reason why the ‘democracy thesis’ may be wrong is that it adopts a very traditional view of what constitutes democratic input. It suggests that the input of parliaments should be given in the drafting process and not at some later stage. This is clearly in line with the view that all law is politics and changing of the law therefore requires political decisions. However, this view is clearly contradicted by our experience with the drafting of civil codes.

First, even mandatory national civil codes were often drafted without much input of parliaments. True, the final decision about the enactment of a code is taken by national parliaments (and when it would come to the introduction of a binding European Civil Code, this should also be the case), but in drafting the code, the relevant decisions are usually made by the drafters themselves.²² This makes sense because of the often highly detailed and technical questions involved in the drafting process. Only when it comes to politically sensitive issues (such as the establishment of the proper level of consumer protection), parliaments should be involved. An important exception to this working method was the procedure followed when the

¹⁹ Hirschman 1970. Cf. Fennell 2001.

²⁰ Fennell 2001.

²¹ Cf. Fischer-Lescano & Teubner 2004.

²² Also see Van den Berg 2007, who shows how the French *Code Civil*, the Austrian *Allgemeines Bürgerliches Gesetzbuch*, the Prussian *Allgemeines Landrecht* and the *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* came into place.

new Dutch Civil Code was put into place. Immediately after the start of the drafting process, a list of questions about key issues was put before Dutch parliament. However, in so far as these questions involved matters of the code's structure and other typically scholarly issues, I do not see how any input of parliament can be helpful. Thus, the question whether a general action for unjust enrichment should be part of the Code is not a question to be decided by parliament.

But there is a more important point. Present efforts to Europeanize private law – and in particular the work on the DCFR – will not lead to rules binding in the same way as we are familiar with at the national level. The DCFR will only be a source of inspiration for the European legislator and courts or provide rules for an optional contract code. This implies that the legitimacy of the rules need not be found in a traditional democratic decision process. This is confirmed by the success of various optional instruments that came into place without any input of parliament in the stage of drafting. Instead, the input consisted of a parliamentary decision to adopt an already *existing* instrument drafted by legal experts. The two most important examples of such instruments in the field of uniform law are the *Uniform Commercial Code* (UCC) and the *Convention on the International Sale of Goods* (CISG). In both cases, the only democratic input consisted of the individual American state parliaments adopting the UCC and of the national parliaments adopting the CISG. If there is anything we can learn from this experience, it is that parliaments do not need to be involved in drafting a successful optional instrument.²³

5. Private law: design or organism?

There is still a third reason why (European) private law does not always need to be legitimised in a democratic way. Compared to the two arguments discussed above, this reason refers to a more general understanding of private law and is therefore the most ambitious claim this contribution makes. If private law is made subordinate to democratic decision making, it is a means to a (political) end.²⁴ It is the view of private law as a matter of conscious *design* by some legislator. Again, there is an alternative: one can also look at private law as the result of a long process of trial and error, of spontaneous development towards the standards a community prefers. Looked at in this way, private law is much more independent from State institutions. I believe this understanding of private law is more in line with how it has developed over the ages (also in the civil law world²⁵), providing this area of the law with its own rationality independent from any public aim.²⁶

If we thus understand private law more as an *organism* than as a product of explicit design, it becomes clear why democratic input in this area of law can only have a limited impact. The *Machbarkeit* ('makeability') of the law of contracts, tort and property is limited and a view in which private law is seen as an instrument to

²³ The opposite view of Van Zelst 2008 does not seem to be supported by the materials he presents.

²⁴ Cf. Tamanaha 2006.

²⁵ See for a different view the famous article by Glaeser & Shleifer 2001.

²⁶ Hayek 1973-1979; Weinrib 1995, p. 6.

change the existing distribution of power and riches,²⁷ should be looked at with suspicion. It would mean that private law serves distributive justice, a view defended before by Anthony Kronman.²⁸ The most important objection against it is that distributive justice requires a political decision to choose, out of all possible distributions of wealth, one that best establishes the desired collective social, economic or political goal. If private law is thus made part of establishing distributive justice, it is made subordinate to this goal; if it is not reached, it fails. In my view, it is not the State that is to decide *ex ante* what a just private law requires. At its best, the result can be corrected *ex post*.²⁹ Moreover, redistribution of welfare through (in particular) contract law is doomed to failure because future contracting parties are not likely to contract with 'weaker' parties if they would run the risk of avoidance of their contract. This is also the message of Charles Fried:³⁰

'Redistribution is not a burden to be borne in a random, ad hoc way by those who happen to cross paths with persons poorer than themselves. Such a conception, heart-warmingly spontaneous though it may be, would in the end undermine our ability to plan and to live our lives as we choose.'

This is not to say that democratic input is never useful. In a recent paper Nuno Garoupa and Anthony Ogus³¹ distinguish between interventionist law (such as regulatory law and those aspects of private law that protect parties assumed to be weaker, such as consumers and employees) and facilitative law (such as large parts of contract and company law). They argue that here is no expectation that competition between national legal systems will lead to convergence in areas where intervention is frequent. In interventionist law, preferences as to the levels of intervention vary between countries.³² Building upon this analysis, we can assume that (national) democratic input is useful precisely in case of interventionist law. In facilitative law, preferences are better revealed by jurisdictional competition.

6. Concluding remarks

This brief contribution showed that the relationship between private law and democracy is not as straightforward as is sometimes assumed. Legitimacy of private law cannot only be established through the national democratic institutions, but also in other ways. The Draft Common Frame of Reference for a European private law is an important example of this: as a non-binding instrument, it need not fulfil the same requirements as binding law. But also private law in the more traditional sense does not always have to be legitimised at the State level: the democratic functions of law can sometimes be provided by others than the State. Under what circumstances this is allowed merits further study, as are many other aspects touched upon above. If these aspects are looked at in more detail – as I hope to do in

²⁷ Cf. Study Group on Social Justice 2004, p. 653 *et seq.*

²⁸ Kronman 1980, p. 472 *et seq.*

²⁹ Cf. Weinrib 1995, p. 211 *et seq.*

³⁰ Fried 1981, p. 106.

³¹ Garoupa & Ogus 2006.

³² Garoupa & Ogus 2006, p. 341-342.

the coming years - there is little doubt that Anthony Ogus' writings will continue to be a wonderful source of inspiration.

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