Legal engineering in an age of globalisation

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Legal Engineering in an Age of Globalisation: Is There a Future for Jurisdictional Competition?**

1. Introduction

The term globalisation is often used as a fashionable buzzword, in particular to describe the growing dominance of the Western – not to say American – liberal market economy or even the internationalisation of society in general (sometimes referred to as a 'McDonaldisation' of life).[1] A more neutral definition of globalisation would emphasise the aspect of 'deterritorialisation': thanks to better technical facilities (including the internet) and better means of transportation, activities of people are increasingly independent of geographical location.[2] The consequences of this globalisation for the more traditional areas of law (such as private law and constitutional law) have not yet been fully thought through,[3] although there is a clear need to do this.

This contribution looks at one specific consequence of increasing globalisation for the law: it investigates to what extent 'legal engineering' (a term that shall be defined in the following section) is affected by globalisation. I will argue that, in an age of globalisation, legal engineering can no longer take place within national institutions but should primarily come about through jurisdictional competition. This view presupposes a particular definition of legal engineering (section 2). Section 3 goes on to ask whether the traditional view of legal engineering can still

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1 This is the type of globalisation that is often criticised. See in particular HERTZ N., *The Silent Takeover: Global Capitalism and the Death of Democracy*, London, William Heinemann, 2001 and KLEIN N., *No Logo*, New York, Picador, 2000.

2 Cf. HALLIDAY T. and OSINSKY P., "Globalization of Law", 32 *Annu. Rev. Sociol.* (2006), p 447: 'the worldwide progression of transnational legal structures and discourses along the dimensions of extensity, intensity, velocity, and impact.'

3 See, however, TWINING W., *Globalisation and Legal Theory*, London, 2000.

be the same in times of increasing globalisation (and Europeanisation). To put it in the now popular terminology: how to engage in legal engineering 'beyond the State'[4]? Section 4 tries to provide an answer by suggesting that jurisdictional competition can play an important role in legal engineering and that the role of this method should become even more important than it is at the moment. This contribution thus builds upon previous work[5] in which the benefits of jurisdictional competition were highlighted.

2. What is Legal Engineering?

The term 'legal engineering' does not have a fixed meaning. One possible interpretation is to consider legal engineering as the creation of legal structures that fulfil particular functional and practical purposes.[6] It thus refers to the activity of lawyers that seek to find the best legal solution to a particular problem. Legal engineering then often comes down to applied comparative law: the inconsistencies and loopholes of legal systems are exploited to provide perfectly legal benefits for the client.[7]

My own understanding of legal engineering is different. It does not refer to creative lawyering to serve the interests of clients, but to dealing with specific social problems by society as a whole. As social engineering refers to our ability to engineer a social process (to change society), legal engineering refers to such social engineering *through law*. Where society can change by sheer power (as a dictator can do) or by the charisma of one person (Gandhi being the obvious example), legal engineering does it by way of drafting and applying rules used to 'plan, build, direct, guide, manage, or work on systems to maintain and improve our daily lives.'[8]

This type of legal engineering has become very common. It is generally agreed upon that the law can be used as an instrument of social change, even to such an extent that we no longer question that this should be the case.[9] Many legislative efforts are directed towards changing the behaviour of people or organisations. The

[4] See MICHAELS R. and JANSEN J., "Private Law Beyond the State? Europeanization, Globalization, Privatization", 54 *American Journal of Comparative Law* (2006), pp. 843 ff., JANSEN N. and MICHAELS R., "Private Law and the State", *RabelsZ* 71 (2007), pp. 345 ff. and the special issue of the 56 *American Journal of Comparative Law* (2008), pp. 527 ff.

[5] See in particular SMITS J.M., "European Private Law: A Plea for a Spontaneous Legal Order", in: D.M. Curtin et al, *European Integration and Law*, Antwerp-Oxford, Intersentia, 2006, pp. 55 ff.

[6] See CASHIN RITAINE E., "Legal Engineering in Comparative Law – An Introduction", in: E. Cashin Ritaine, L. Franck and S. Lalani (eds.), *Legal Engineering and Comparative Law*, tome 1, Genève, Schulthess, 2008, pp. 9 ff., at 9.

[7] JEANNERET-DRUCKMAN K., "Legal Engineering in the United States Legal System", in: E. Cashin Ritaine, L. Franck and S. Lalani (eds.), *Legal Engineering and Comparative Law*, tome 1, Genève, Schulthess, 2008, p. 167.

[8] See CASHIN RITAINE E., *supra*, note 6, p. 13.

[9] See TAMANAHA B., *Law as a Means to an End*, Cambridge, 2006.

interesting question is when such social legal engineering (through law or otherwise) is found to be legitimate. The term 'engineering' carries a negative connotation and reminds us of George Orwell's *1984* or of Aldous Huxley's *Brave New World*. This is one of the reasons why Friedrich Hayek opposed to any attempts to 'engineer' (plan and coordinate) society.[10] And one may be inclined to say this criticism is not without reason: legal engineering implies that *others* decide what is best for the citizen. This can only be allowed if there has been a democratic decision process before any 'engineering' legislation was put into place. In other words: the preferences of the citizens are given effect through democracy. At the national level, this democratic decision process can ensure that law is legitimately used as a means to a political end. But this also raises the question about how legal engineering should come about in the global context, where parliamentary input is not possible. As Caruso writes: 'Private law in domestic *fora* needs no further source of legitimacy than the codes or statutes in which it is enshrined.'[11] But as soon as we leave the comforts of domestic law, we have to find new modes of legitimacy.[12]

3. Legal Engineering Beyond the Nation-State

Can we adopt the same type of legal engineering in present society, which is characterised by increasing Europeanisation and globalisation? What if we want to engage in legal engineering *beyond* the nation-State? It is obvious that there is a clear need for such engineering: there are only a few issues in contemporary society that do *not* have a transnational aspect. The well-known examples are those problems that can only be properly solved at the international level (such as cross-border pollution or any other case where interstate externalities exist), but also in many other cases it is not immediately clear why regulation should take place at the national level and not at another one (such as the local, European or supranational level or even by way of private regulation). Such 'multilevel governance' calls for the finding of new modes of legitimacy.[13]

Two specific problems exist with making law beyond the nation-State. The first problem is the lack of democratic legitimacy itself: at the European, supranational or private level, we cannot have the input of parliaments in the same way as we have it at the national level. The discussion about the Draft Common Frame of Reference

[10] HAYEK F., *Law, Legislation and Liberty*, Chicago, University of Chicago Press, 1973-1979; *The Fatal Conceit*, Routledge, London, 1988.

[11] CARUSO D., "Private Law and State-Making in the Age of Globalization", 39 *New York University Journal of International Law and Politics* (2006), p. 59.

[12] This is of course a well-known theme. See *e.g.* CURTIN D., *Postnational Democracy: the European Union in Search of a Political Philosophy*, Deventer, Kluwer, 1997.

[13] See *e.g.* CAFAGGI F. & MUIR-WATT H. (eds.), *Making European Private Law: Governance Design*, Cheltenham, Edward Elgar, 2008.

(DCFR) for a European Private Law[14] is a clear example of this: the DCFR was drafted by legal scholars and is often seen as a typical example of *Professorenrecht*. At the same time it is difficult to deny that, when drafting the DCFR, many relevant choices were made. This is often seen as worrisome because the scholars involved in the drafting process do not represent the European population nor its political convictions. Some argue it would therefore be better to leave the task of translating socio-political goals into legislation to the democratically legitimised legislature.[15] But instead of concluding that *therefore* national parliaments should be more involved in the drafting of European legislation, I am in favour of finding viable *alternatives* for democratic decision making in order to give the necessary legitimacy to laws that do not emanate from the national legislatures.[16]

The second problem with legal engineering beyond the nation-State is that, compared to the *national* level, it is even more difficult to establish what the effects of a rule will be. If the law is used to reach a certain goal (say: less traffic accidents or better protection of the consumer), we often do not know whether a proposed rule will 'work.' This problem exists already at the national level (although here the national legislature and national courts are presumed to know their own national legal culture and thus have better insight into the effects of their work), but it is even more important at the supranational level. Even in Europe, there is not one European legal culture, meaning we are often in the dark about the possible effects of a harmonising rule in the national context. Our traditional way of looking at law, which is very much based on how we perceive law at the national level, then falls short of predicting the future effects of a rule.

This means we are in a vacuum when it comes to legal engineering beyond the traditional national boundaries, or even the making of law in general. To quote the ambitious wording of the German sociologist Ulrich Beck: 'Increasing transnationalisation should lead to a 'reconceptualisation of law within a new cosmopolitan framework' to avoid that our discipline becomes 'a museum of antiquated ideas.'[17] Can we turn this ambitious wording into practical action?

[14] VON BAR C., CLIVE E. & SCHULTE-NÖLKE H. (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*, Outline Edition, München, Sellier, 2009.

[15] VAN ZELST B., *The Politics of European Sales Law*, PhD-thesis University of Amsterdam 2008, p. 240 ff., building upon STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, "Social Justice in European Contract Law: a Manifesto", 10 *European Law Journal* (2004), pp. 653 ff. and HESSELINK M., "The Ideal of Codification and the Dynamics of Europeanization: The Dutch Experience", in: S. Vogenauer & S. Weatherill (eds.), *The Harmonisation of European Contract Law*, Oxford, Oxford University Press, 2006, pp. 39 ff.

[16] See SMITS J.M., "European Private Law and Democracy: a Misunderstood Relationship", in: M. Faure and F. Stephen (eds.), *Essays in the Law and Economics of Regulation in Honour of Anthony Ogus*, Oxford, Intersentia, 2008, pp. 49 ff.

[17] BECK U., "Toward a New Critical Theory with a Cosmopolitan Intent", 10 *Constellations* (2003), 458.

4. Jurisdictional Competition and Legal Engineering

This section looks into the question of whether there is an alternative to legitimising legal engineering through national democratic decision processes. How should socially desirable goals be achieved, if not by centralist democratic law-making? I believe that the starting point has to be that, in a globalising world, the role of private parties needs to be much more important than in the traditional nation-State. My theoretical framework is, again,[18] that of jurisdictional competition as originally developed by Charles Tiebout.[19] Tiebout describes the needs of firms and consumers in terms of differing preferences. If diverse legal systems compete with each other, more preferences are satisfied: consumers and firms can choose the legal system which, in their view, protects their interests best. If the law differs, parties can leave a jurisdiction which they do not like (and thus 'vote with their feet'). The introduction of uniform law would reduce this exit-opportunity and would lead to less preferences being satisfied.

It should be clear how this theory relates to legal engineering. Jurisdictional competition is a strong argument in favour of individual States pursuing their own public policies. If we cannot agree on, *e.g.*, a European level of consumer protection,[20] it is best to leave this area to the individual member-States. This is a well-known argument against a European, or other supranational legislator, setting rules in a centralist way. There are two specific reasons why this should not be the case.

First, jurisdictional competition allows us to learn from other jurisdictions whether a proposed rule works or not. Put differently: the diversity of legal systems is advantageous in that the innovation of existing law is much easier. Looking at other countries' solutions to legal problems shows whether or not these solutions function well. In this way, States are indeed 'experimenting laboratories':[21] an experiment elsewhere can be an enlightening or frightening example.[22] Thus, the recognition of same sex-marriage by The Netherlands has been – and still is – an

[18] See already SMITS J.M., "A European Private Law as a Mixed Legal System", 5 *Maastricht Journal of European and Comparative Law* (1998), pp. 328-340.

[19] TIEBOUT C., "A Pure Theory of Local Expenditures", *Journal of Political Economy* 64 (1956), p. 416 ff. Also see OGUS A., "Competition between National Legal Systems: a Contribution of Economic Analysis to Comparative Law", 48 *International and Comparative Law Quarterly* (1999), p. 405 ff.

[20] A renewed discussion about this question has emerged since the European Commission published its Proposal for a Directive on Consumer Rights (8 October 2008), COM (2008) 614 final, proposing to create maximum harmonisation in the field of consumer law.

[21] BRANDEIS L., in: New State Ice Co. v. Liebmann, 285 U.S. 262: 'To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'

[22] HAYEK F.A., "Der Wettbewerb als Entdeckungsverfahren", *Kieler Vorträge N.S.* 56, Kiel, 1968.

example to other countries. If European legislation had disallowed gay marriages, The Netherlands would not have been able to recognise gay marriage and no example would have been set of how to successfully incorporate this institution into existing family law. With harmonisation of family law at the European level, gay marriage would probably not have been introduced.

Second, there is an even more important reason why allowing jurisdictional competition is useful in legal engineering: it is an *alternative* for democratic legitimacy. We do not need parliaments to find out what citizens prefer. Preferences can also be established by allowing citizens or firms to choose the legal regime – not necessarily their own legal regime – that they like most. This makes that regime legitimate because it is chosen by the parties. In law, people often do not even have to move physically because they can often make a choice for a specific legal regime while staying in their own country. At least in contract law and company law, such a choice is often possible.

One way to give such legal engineering beyond the national level practical meaning is by creating several sets of optional codes. Parties (be they private parties or national States) can opt in to such codes when they consider these to be in line with the policy they want to adopt. An example from the field of contract law is, again, the Draft Common Frame of Reference (DCFR): as we saw before, some authors argue that this text is not legitimate because it is not the product of any democratic legislator. I am also critical about the DCFR,[23] but not for this reason. If the DCFR would ever become an optional instrument, it will receive its legitimacy from the fact that parties (or member States) *choose* it as the applicable law. This is a type of direct democracy that legitimises law in a much better way than a national parliament could legitimise it.

The gist of this argument is that we need a radical overhaul of the idea that we can only pursue public goals in a centralist way, thus through parliaments, and that citizens are necessarily governed by the rules of the country in which they reside. In a globalising world, the role of the citizens in deciding by which rules they are governed should be much more important: they should be able to 'opt in' to the set of rules they like best. There are limits to this approach – in which law is seen as a commodity – but even in cases where the law has to be interventionist[24] (like in the case of regulatory law and rules that protect weaker parties such as consumers and employees), some freedom to choose an applicable regime beyond a set minimum-level should be possible.

5. Conclusion

[23] See *e.g.* SMITS J.M., "The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward", *European Review of Contract Law* 4 (2008), pp. 270 ff.

[24] Cf. GAROUPA N. & OGUS A., "A Strategic Interpretation of Legal Transplants", 35 *Journal of Legal Studies* (2006), pp. 339 ff.

The above sketches the contours of an approach towards legal engineering in which jurisdictional competition is used as an alternative for democratic decision making by parliaments. Despite the fact that this approach cannot be used at all times, there is a much greater future for legal engineering through jurisdictional competition than usually thought. In a globalising world, jurisdictional competition is an important way to ascertain the preferences of citizens that cannot be established in another way.