

Globalisation and Regulation: (Where) do they Meet?

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Abstract

Globalisation is the new buzz word in legal education, but nobody really seems to know what 'global law' entails and to what extent legal practice is waiting for global lawyers. What is needed is a better understanding of how globalisation affects the market for legal practitioners. Does the current law school curriculum meet the demands of legal practice in the 21st century? The argument in this contribution is that this is not the case. The law school curriculum is still dominated by the role model of the judge and the advocate, whereas the rise of the regulatory state has hardly led to serious curriculum changes. One of the changes that is necessary is the introduction of courses in legislation and regulation, at the bachelor level, to teach students what it means to translate policy goals into legal rules. This would not only serve the demands of legal practice, but also open up the law school programme to new theories and methodologies of legal research.

Keywords

legislation; regulation; legal practice; regulatory state

1. Introduction

Writing this story in the hills of Fiesole, overlooking the Duomo of Firenze built between 1296 and 1472, anticipating the possible effects of globalisation on law and legislation seems virtually impossible. After all, who could have imagined during those days that in 2012 we would discuss the emergence of a 'global law'? Even the thought that in 1976 the doors of the Badia Fiesolana would be opened for the first generation of students of the newly established European University Institute in the field of 'European law' would have sounded awkward at the time.¹

¹ The term University Institute instead of just European University was chosen because the member states did not want to put the EUI on the same level as the national universities,

As such the idea of having a harmonised system of laws across the borders of the nation state was, however, something quite familiar to the medieval Italian lawyer. From the 11th century onwards, the renaissance of Roman law had spread its wings from Bologna to other Italian universities and from there on to universities in most European countries. Around the year 1500 getting a law degree meant that one needed to study Roman law, next to perhaps local law and/or canonical law. It did not matter whether one studied in Italy, Germany, France or the Netherlands. Everywhere, Roman law dominated the study of law. There was even a lingua franca in law, which was not English though, but Latin.² Transnational law, therefore, is not a new phenomenon, although the globalisation of markets and services was still far away back then.

A bright Florentine lawyer, such as Niccolò Machiavelli, would probably have had more questions about the sort of practice future students of the EUI or the global law bachelor in Tilburg are aiming for. As we know from his famous 'Il Principe', which is often considered to be the first work in modern political philosophy, in which the effective truth is taken to be more important than any abstract ideal, Machiavelli was a legal realist *avant la lettre*. He would probably have asked: who will want to hire these lawyers? I think that would have been, and still is, a good question.

For EUI students, we know the answer. Many of them get a position in academia somewhere in Europe, others will receive a job at one of the EU institutions (EC, ECJ, agencies et cetera) and a lot of them also end up as EU law specialists in the public administration of the member states. The reason they usually succeed in finding a job, not only has to do with the fact that a degree from the EUI is a post-graduate degree, which implies that one already has a law degree from one of the member states, but EUI students have something extra. By the time they graduate, the intertwinement of EU-law and national law has become second nature to them. Apart from that they will have developed their language skills (English and Italian are inadmissible) and acquired an international network. This gives them an advantage on the job market.

which was also why the EUI did not receive regular students but only post-graduates. What the member states did not realise, however, was that exactly these features would turn the EUI into a prestigious fore post in the area of European law research.

² As Bruno de Witte has shown this is a huge contrast with the situation today where even in the field of European law there is no unified, cross national community of scholars, not in the last place because of language differences. See Bruno de Witte, 'European Law: A Unified 'Academic Discipline?' (2008) EUI Working Papers RSCAS no 34.

For the graduates of a global law bachelor it is much harder to predict where they will end up. Inspired by Machiavelli I am a bit worried that global law will remain an abstract ideal, which legal practice can do without. Does that mean that I do not believe in the forces of globalisation? Of course not. Everyone can see, almost on a daily basis, how international financial markets have gained power over national governments, how institutions of the European Union (EU) have acquired powers to strike down or rewrite national legislation, while international tribunals have acquired power over transnational trade and commerce (WTO/Nafta), and a whole range of other areas varying from maritime law to peace and security, whereas both national and international higher courts increasingly engage in judicial dialogues across jurisdictions.

The latter does not, however, imply that we need global law. As Paul Berman has argued, globalisation can, and probably will, go in different directions.³ Some states may try to seal themselves off from outside influence (e.g. China's censuring of the Internet use of its citizens), either by retreating from the rest of the world and becoming more insular or by falling back on territorially based jurisdiction or choice-of-law rules. Others may call for far-reaching harmonisation, more supranational governing bodies or the creation of 'world law'.

Somewhere in the middle there will be people and organisations arguing in favour of procedural mechanisms to deal with global legal pluralism. Which way we will go in the Netherlands is still hard to tell. One thing I am pretty sure about, however, is that national law is not going to disappear for a long while. History shows that successful legal regimes have always been built on diversity, on metis and phronesis, and on a bottom up capacity to adapt to changing circumstances.⁴ Moreover, we should not underestimate the power of language differences, cultural identity and history. Hence, it would be foolish to do away with national or European law in any global law school curriculum.

In my view, globalisation implies that teaching the next generation of students to 'think like a lawyer' presupposes more and other qualities than in the past.⁵ What it essentially requires is the incorporation of a meta-perspective. What futures students will need, more than past generations,

³ Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012).

⁴ James C Scott, *Seeing it Like a State: How Certain Schemes to Improve the Human Condition have Failed* (Yale University Press 1998).

⁵ See for example Harry Arthurs, 'Law and Learning in an Era of Globalization' (2009) 10 *German Law Journal* 629.

is to be able to understand the 'laws of law-making': the various theories and methods underlying regulation, adjudication and governance. This in combination with a familiarity of an increasing plurality of legal sources (national/international; hard law/soft law; private/public) and a healthy amount of content-based legal knowledge about different legal systems.

2. Legislation and Regulation: The Stepchildren of Legal Education

Tilburg law school could make a difference if it succeeds in combining and translating two of its strengths in the field of research to legal education, namely the expertise and past performance in legislation & regulation and the experience with a variety of legal research methods ranging from comparative research to law and economics and socio-legal and empirical legal research.

But why legislation and regulation, one might ask. Is the fact that Tilburg's law faculty happens to have past performance in these fields a good reason to bet on these features in the battle to overcome the challenges of globalisation? The answer is yes and no. No because globalisation also requires substantive training in other areas, such as an introduction to the most important legal systems of the world, knowledge about international trade and finance, European and international law et cetera. Yes because legislation and regulation are underdeveloped topics in the law school curricula in most law schools in the world of today.

In the overwhelming majority of both European and U.S. law schools the role model of the judiciary is still dominant. Learning to think like a lawyer currently means learning to think like a judge. Since the heydays of Roman law we have been teaching students to apply the law to cases. The model for doing this in a very systematic way is in the U.S. even called the 'case method', which was introduced around 1870 by Christopher Columbus Langdell, the famous former Dean of Harvard Law School, who literally changed the way law was (and still is) being taught in American law schools.⁶ What is interesting though is that another Harvard Law School Dean, Elena Kagan, who has now become a Supreme Court judge, also introduced an important and much debated curriculum reform at Harvard in 2006.⁷ She motivated the move away from the Langdellian model,

⁶ See Edward Rubin, 'What's Wrong with Langdell's Method and What to do About it?' (2007) 60(2) *Vanderbilt Law Review* 609.

⁷ Elena Kagan, *The Harvard Law School Revisited*, Green Bag, (2008) 475-481 <http://www.greenbag.org/v11n4/v11n4_kagan.pdf> accessed 28 July 2012.

which has been so successful at Harvard for so long by arguing: ‘From the beginning of law school, students should learn to locate what they are learning about public and private law in the United States within the context of a larger universe - global networks of economic regulation and private ordering, public systems created through multilateral relations among states, and different and widely varying legal cultures and systems.’⁸

Introducing a course on legislation and regulation (better known as ‘LegReg’) was one of the major changes, next to the introduction of comparative law methods and complex problem solving. The LegReg course: ‘considers the justifications for modern regulation, the structure of the modern administrative state, the incentives that influence the behaviour of the various actors, and the legal rules that help to structure the relationships among Congress, the agencies, and the courts.’⁹

Now, what has puzzled me ever since 2006 when the curriculum change at Harvard was first introduced, followed by other law schools,¹⁰ is: how is it possible that a top law school in the U.S., which has never been accused of being too progressive, in a common law country with a strong and long tradition of judicial law-making, is capable of understanding that globalisation and the rise of ‘the regulatory’ state are so strongly intertwined, whereas most European law faculties apparently still fail to see this? Or if they don’t fail to see it, why have especially civil law countries, with a tradition of legislative law-making, not introduced obligatory courses on legislation and regulation in their bachelor curricula? I think there are a number of possible reasons: 1) legislation and regulation are considered to be matters of politics and policy-making that lawyers better not engage in 2) we think that most law students end up in law firms or working in or for the judiciary 3) we believe that what lawyers should do is apply the law, which does not necessarily presuppose knowledge about how laws and regulations are being made and 4) learning how to create statutes and regulations requires a firm knowledge about non-doctrinal legal methods.

Without going into too much detail I think the first three assumptions are wrong and only the fourth one is correct, but not fatal.

Of course legislation and regulation have a strong political dimension, but so has judicial law-making, especially in the case of decisions by the

⁸ See: CNS News (2012) <<http://cnsnews.com/news/article/harvard-law-dean-kagan-did-not-require-study-us-constitutional-law-did-require-study>> accessed 28 July 2012.

⁹ Harvard Law School, News (2012) <http://www.law.harvard.edu/current/careers/ocs/employers/about-our-students/the-new-1l-curriculum.html> accessed 20 July 2012.

¹⁰ Ethan J Leib, ‘Adding Legislation Courses to the First-Year Curriculum, *Journal of Legal Education*’ (2008) 58(2) *Journal of Legal Education* 166.

highest/constitutional courts. Apart from that, regulation also has features that are closely linked to fact finding, effectiveness and efficiency where decisions need to be even more evidence-based than judicial decisions in individual cases. Furthermore, I don't have all the job market figures at hand but for the situation in the Netherlands I know for sure that the majority of law students do not end up in a law firm or in the judiciary. The biggest employer by far for lawyers is the government.¹¹ I would not be surprised if the same applies elsewhere, since the tremendous growth of law-making by the administration is certainly not unique for the Netherlands. Most of the rule-making both in Europe and the U.S. has been outsourced by parliaments to executive bodies, private regulators (e.g. standardisation bodies) and specialised agencies.

From that perspective it is absurd that we do have a successful Academy of Legislation in The Hague with hundreds of applicants each year, but one that is staffed by the government instead of being part of our universities where legislation and regulation are still absent apart from a handful of courses on the master level. Apparently, there is a market for legislative drafters and regulators, but universities avoid the competition. Why? Even at the European level we see organisations, such as EIPA (European Institute of Public Administration) taking a large part of the market for the professional training of EU lawyers. Law schools with aspirations to meet the needs of globalisation should not let that happen.

The fourth reason mentioned above of why law schools both in Europe and in the US have overlooked legislation and regulation in their education programmes has to do with the fact that designing rules and regulations requires more and other research methods than judicial law-making. In particular the translation from policy plans to legal rules involves knowledge of public administration (policy design), evaluation methods (*ex ante* and *ex post*), law and economics (cost and benefits of regulations/risk analysis), comparative law methodology (how do other regimes deal with similar problems?), sociology of law (consideration of alternative modes of regulation, such as self-regulation/co-regulation and for instance compliance issues), law and psychology (behaviour modification) and so on. Presented like this, the development of LegReg seems a mission impossible but it so happens that our faculty has expertise in most of these domains in the field of research. Therefore, the main challenge would be to bring this

¹¹ See for the facts and figures, Menno Bouwes, De vorming van de wetgevingsjurist, in: Hedi Schouten (red), *De opleiding van wetgevingsjuristen en wetgevingsonderzoekers in vergelijkend perspectief* (Wolf Legal Publishers 2011).

knowledge together and translate it to legal education. Not an easy task but certainly not impossible for those who believe in the solidarity of our faculty staff.

3. A Proposal for a LegReg Course in Tilburg

Would this LegReg course not be very nation-state oriented instead of answering the needs of a globalised legal practice, one might ask? I think this does not have to be the case, especially if LegReg will concentrate on theories and methods of law-making instead of on topics like statutory interpretation, institutions and competences. Therefore, I believe the emphasis should lie on the preparatory phase of the rule-making process because that is where most of the action is. There, one will need to think about the problem definition, about what causes the problem, about regulatory alternatives, about respecting higher law and legal principles, about compliance and enforcement issues et cetera.

For a large part these issues arise in every legal regime and as long as the topics/problems that are chosen to illustrate the choices that need to be made in the regulatory process appeal to a broad and international audience such a course could be a success. Having given such courses abroad in different places for different audiences (practitioners and students) I believe it is certainly doable. In my view a LegReg course should, however, go beyond *ex cathedra* teaching and needs to include clinical work (drafting practice, internships, policy research) that will only make the course more interesting to students, since they will have to get more involved, in the meanwhile, developing both their research skills and their ability to cooperate with others in complex problem solving.

These are exactly the things that are still missing in the regular curriculum, which we are currently trying to solve by upgrading the academic level of the regular bachelor curriculum. For a LegReg course as such we do not need a separate 'global law bachelor'. What we could do instead is offering the same course both in English and in Dutch. Technically, this is manageable, but of course doing it on the Harvard level of sophistication would require that we put our heads and talents together and invest serious time and energy in developing course materials, assignments and new ways of examination. These could even be tested first if we are afraid, like they initially were at Harvard, that the students will not appreciate the course.

What might give us hope is that at Harvard the LegReg course has proven to be the most popular new course in the first year. Although I realise that

Tilburg University is not Harvard, I have no doubt this can be done. My colleague Edward Rubin, the former Dean of Vanderbilt and strong adherent of curriculum reform in U.S. law schools, who was in Tilburg last September to speak about the role of legislation in legal education, has convinced me of the fact that we should be able to do it even better than most law schools in the U.S. This is due to our longer tradition with legislative law-making and also due to the fact that our legislative and regulatory policy is better developed and has already been heavily tested by the forces of globalisation through the exposure to European law. Moving from Europeanisation to globalisation is a much smaller step than what was needed to be taken in the U.S., where looking to developments in the rest of the legal world was, until recently, not well-developed. So perhaps, Tilburg could actually become the Harvard of the Low Countries in the field of legislation and regulation. Who would not want that?